THE
ONTARIO WEEKLY REPORTER

VOL. 24 TORONTO, JUNE 5, 1913 NO. 13

MASTER-IN-CHAMBERS. MAY 22ND, 1913.

DAVISON v. THOMPSON.

4 O. W. N. 1337.

Pleading—Statement of Defence—Motion to Strike out Paragraphs —Enforcement of Rights of Stranger to Action Sought.

MASTER-IN-CHAMBERS struck out certain paragraphs of a statement of defence which sought to enforce a right claimed on behalf of a stranger to the action.

Motion by plaintiff to strike out paragraphs 7, 11, and 12, of the statement of defence as filed, as embarrassing.

J. T. White, for plaintiff.

W. Middleton Hall, for defendant.

CARTWRIGHT, K.C., MASTER-IN-CHAMBERS:—In this action plaintiff asks for the return of certain bonds deposited with the defendant as security for a payment by him of $10,000 for a half share in a contemplated venture, which bonds were to be returned on a division of profits of such joint venture, which plaintiff alleges has been made. This division apparently is not denied.

The statement of defence alleges that this $10,000 was only a loan to plaintiff and that the bonds were deposited as security for same. This loan, it is said, was made by one Charlton, who thereupon became entitled to the bonds, and defendant disclaims any interest in them—paragraph 7. In paragraph 11, defendant submits that the bonds should be delivered to him as agent for Charlton, and in paragraph 12 defendant counterclaims for payment of $6,000 and interest to Charlton or to himself as Charlton's agent. It is not shewn how this $6,000 is arrived at.

There does not seem anything objectionable in paragraph 7, as it informs plaintiff of defendant's contention. But the other two paragraphs cannot stand. There is no way in which the relief asked for in them can be granted to Charlton, who is not a party to the action. If defendant has a power of attorney he could bring an action in Charlton's name, or if he had an assignment of the cause of action he could sue in that capacity. Here, however, he does not set up either position. On the contrary, he asserts that Charlton is the person entitled to the bonds and the one against whom plaintiff should proceed to recover them. Since the argument his counsel has produced a telegram from Charlton, dated 19th inst., in which he speaks of these as "my bonds" and asks to have them sent to him. These paragraphs, 11 and 12, will therefore be struck out or amended with leave to defendant to amend in a week, as he may be advised—and plaintiff to have further time to reply if desired.

The costs of this motion will be to plaintiff in the cause.

HON. MR. JUSTICE KELLY. MAY 22ND, 1913.

COLE v. RACINE.

4 O. W. N. 1327.

Assignments and Preferences Act—Chattel Mortgage—Knowledge of Insolvency on Part of Mortgagee—Evidence—Intention to Defraud—Defective affidavit of Execution—Necessity for Precision—Absence of Date—Costs.

KELLY, J., set aside a chattel mortgage upon certain stock-in-trade of an insolvent at the instance of the assignee for the benefit of creditors holding that the evidence established that at the date it was given it was known to the mortgagee that the mortgagor was insolvent and that the same was being given in fraud of the other creditors of the mortgagor, and that the mortgage was void upon the further ground that the affidavit of the attesting witness was fatally defective in that it stated that the mortgage was executed "on Tuesday, the 9th day of January one thousand nine hundred and . . ."

Action by plaintiff as assignee of the estate of Alfred St. Laurent, an insolvent, to set aside as fraudulent against creditors a chattel mortgage made by Arthur St. Laurent to defendant on January 2nd, 1912.

When the chattel mortgage was made Arthur St. Laurent carried on business as a retail merchant in Ottawa.

On March 12th, 1912, he by bill of sale, transferred his business to his brother Alfred St. Laurent, who, on June 26th, 1912, made an assignment to plaintiff for the general benefit of his creditors.

A. E. Fripp, K.C., for plaintiff.

J. V. Vincent, K.C., for defendant.

HON. MR. JUSTICE KELLY:—After the evidence has been taken at the trial, Arthur St. Laurent also executed to plaintiff an assignment for the general benefit of his creditors, and plaintiff as such assignee, on December 7th, 1912, commenced another action against Arthur St. Laurent similar to this action. The two actions were then consolidated, and defendant was given time and opportunity to adduce further evidence, and on February 8th, 1913, the matter again came before me, but no further evidence was submitted.

On its face the chattel mortgage was made to secure a debt of the mortgagor already incurred, and the mortgage does not purport to be made on any other consideration, or even to have given an extension of time for payment.

As far back as the beginning of February, 1911, the mortgagor was indebted to the defendant to an amount considerably in excess of $5,000, and on the evidence adduced for defendant, at no time afterwards was that indebtedness less than it was in February, 1911. At the end of 1911, it was considerably more. In December, 1911, defendant's representative at Ottawa interviewed the debtor and his brother Alfred, who acted as manager of the business, and asked for payment or security, and was told that the debtor had no money and could make no payment, and that the debtor was then insolvent.

It is true that defendant's representative denies that it was stated to him that the debtor was insolvent, but I feel bound to accept the testimony of the debtor and his brother on that point, especially in view of the somewhat peculiar circumstances surrounding the making of the chattel mortgage, and the occurrences leading up to it.

Defendant's representative, Bissonette, in denying knowledge or notice of the debtor's insolvent condition in December, 1911, says that the debtor or his brother then told him that the debtor's stock-in-trade or assets amounted to $12,000 and though he was pressing for payment and knew of the debtor's inability to make any payment, and knew, too,

that the indebtedness to defendant, which was in February, 1911, about $5,400, had considerably increased in the meantime, it is not easy to give much weight to his statement that he did not ascertain the amount of the liabilities, from which, taken in conjunction with the stated value of the assets, he would have learned the true financial condition of the debtor. If we are to believe him, he did not even make enquiries about the liabilities, and I am not, under these circumstances, apart from anything else, prepared to accept his evidence that he did not know that the mortgagor was insolvent. I have no doubt that he did know, and that the mortgagor and his brother also knew, and that the mortgage was made with that knowledge and for the very purpose of securing the defendant for the debt due him and thus defeating or prejudicing the rights of other creditors.

In that view of the case, I do not think it necessary to discuss what was said by the mortgagor and his brother about the alleged bargain that defendant was to advance such cash as would be necessary from time to time to satisfy other creditors, and assist in keeping the business running for a year. The two cash advances, amounting altogether to $950, made by defendant soon after the making of the chattel mortgage, might indicate some such bargain, but I do not need to pass upon that. If, however, such a bargain were made and did exist, defendant did not live up to it. It is denied, however, on defendant's behalf that any such agreement was entered into.

Something was said, too, that would indicate a desire or intention to keep the other creditors quiet for a time after the making of the mortgage. The evidence on that point was not denied. That, in itself, helps to shew an intent to give defendant a preference. To my mind, therefore, the chattel mortgage is void as against the other creditors of the mortgagor.

On another ground also the mortgage is void. Clause (a) of section 5 of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. ch. 65, requires that the affidavit of the attesting witness, which is to be registered with the chattel mortgage, shall, amongst other things, state the date of the execution of the mortgage.

Section 7 provides that if the mortgage and affidavits (that is, the affidavits of the attesting witness and the affidavit of *bona fides* by the mortgagee), are not registered as

by the Act required, the mortgage shall be absolutely null and void as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for valuable consideration.

The affidavit of the attesting witness filed with this mortgage sets forth that it was executed "on Tuesday, the 9th day of January, one thousand nine hundred and . This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal omission, and such a non-compliance with the requirements of the Act as renders the mortgage void.

For the above reasons, apart from any others that were urged, the mortgage should be set aside, and the mortgaged assets held by the assignee freed therefrom. If any of the goods and chattels covered by the mortgage or the proceeds thereof have been received and not accounted for by defendant, they must be accounted for and the proceeds thereof paid to the plaintiff, and there will be a reference to the Local Master at Ottawa to ascertain the amount if the parties cannot agree.

The proceeds of the sale of the mortgage assets which have been paid into Court, pending action, will be paid out to the plaintiff.

In view of the circumstances, particularly of the insolvency of the mortgagor at the time the mortgage was made, and of the bill of sale later on made by Arthur to Alfred, who was and had been manager of Arthur's business and had full knowledge of its financial condition, the net proceeds of the mortgaged assets will be applied, first towards payment of the claim of Arthur's creditors, and then towards those of Alfred's creditors.

Owing to the form in which the first action was brought, I think that, instead of costs being awarded against him, the defendant should be paid out of the estate his costs down to the consolidation of the two actions; plaintiff also to be entitled to costs of action out of the estate. Costs of the reference are reserved until after the Master's report.

MASTER-IN-CHAMBERS. MAY 20TH, 1913.

KENNEDY v. KENNEDY.

4 O. W. N. 1336.

Lis Pendens—Order to Vacate—Terms—Payment of Proceeds into Court—Expedition of Trial.

MASTER-IN-CHAMBERS made an order providing for the vacation, in part, of a certificate of *lis pendens* and for the sale of the lands covered thereby, provided the money were paid into Court to abide the result of the action.

Motion to vacate certificate of *lis pendens,* in part, and to expedite trial.

O. H. King, for motion.

E. D. Armour, K.C., for plaintiff, contra.

CARTWRIGHT, K.C., MASTER-IN-CHAMBERS:—The lands in question are wholly unimproved and at the present time must be more or less of a speculative value.

The action is by a judgment creditor to set aside the transfer made by defendant to his wife—on the ground that same was fraudulent and designed to defeat and delay the realization of the plaintiff's judgment.

It is clearly for the interest of the plaintiff as much as for that of the defendants that the action should proceed with expedition, and that no chance of a sale in the present condition of activity in the real estate market should be lost.

This view is emphasized by plaintiff's counsel, and he has offered and still is ready and willing to allow any sales to be made if the purchase-money is paid into Court or retained by the defendant's solicitors to abide the result of this action. This seems to be a fair and reasonable arrangement and one which it is in the interest of both parties to carry out. It will give the defendants all that the Court could properly require the plaintiff to accept.

The statement of claim having been delivered on the 25th of April, there is no reason why the action should not be tried some time next month.

If there is any delay the defendants can set it down.

The motion is therefore dismissed with costs in the cause.

MASTER-IN-CHAMBERS. MAY 20TH, 1913.

STAUFFER v. LONDON & WESTERN.

4 O. W. N. 1336.

Costs—Security for—Next Friend—Return to Jurisdiction after Long Absence—Expressed Intention to Remain—Dower Action —Place of Trial—Change of—Con. Rule 529 (c.)

MASTER-IN-CHAMBERS *held*, that where the next friend of the plaintiff, a person of unsound mind not so found, was her son who had returned to Ontario after an absence of 21 years and who expressed his intention to remain here during his mother's life, security for costs could not be ordered against him.

Gagne v. *C. P. R.*, 3 O. W. R. 624, followed.

In an action to recover dower in land in the county of Bruce, the venue has been laid at Toronto.

The plaintiff sues by a next friend as being herself a person of unsound mind not so found by inquisition. The defendants move (1) to change the venue to Walkerton, and (2) for security on ground of next friend as not being resident in Ontario, nor having property in the province.

W. Proudfoot, K.C., for defendant company.

Stanley Beatty (Kilmer & Co.), for defendant Geddes.

C. M. Garvey, for plaintiff.

CARTWRIGHT, K.C., MASTER:—C. Rule 529 (c) applies and no ground is shewn for having a trial elsewhere than at Walkerton.

As to security for costs. The next friend is the plaintiff's son. He has been cross-examined and says he intends to remain here during his mother's life—though for the past 21 years he has been in the western provinces. He is now living with his mother in Toronto. I think he comes within the protection of the judgment in *Gagne* v. *C. P. R.*, 3 O. W. R. 624. That was a case where it was the plaintiff's own action. Here perhaps the remarks in *Scott* v. *Niagara Navigation Co.*, 15 P. R., at p. 411, may have some application. But I think the facts of this case are so similar to those in *Gagne* v. *C. P. R.*, *supra*. The next friend is a labouring man and unmarried. It was only right and natural that he should return to his aged mother on hearing of his father's death last December and resolve to stay here as long as she lives to look after her.

Order accordingly. Costs in the cause.

MASTER-IN-CHAMBERS. MAY 26TH, 1913.

EASTERN CONSTRUCTION CO. v. J. D. McARTHUR CO.

4 O. W. N.

Pleading—Statement of Claim—Order for Particulars.

MASTER-IN-CHAMBERS ordered particulars of certain claims made by plaintiffs in an action for amounts alleged due plaintiffs as railway contractors.

Motion by defendant company for particulars of certain portions of the statement of claim.

A. M. Stewart, for defendant company.

F. Aylesworth, for plaintiff.

CARTWRIGHT, K.C., MASTER-IN-CHAMBERS:—The plaintiff company was a sub-contractor of the defendant company in respect of work on the Transcontinental Railway Co.

The work was done between March, 1907, and July, 1911. The plaintiff company makes 4 claims in paragraphs 12, 13, 14, and 15, of their statement of claim, as follows:—

1. For an unascertained sum for extras done after November, 1909, as to which an account is asked and payment of same when it has been ascertained.

2. For $142,735, with interest from 31st July, 1911, the balance due of a hold-back of 10 per cent. on the whole work.

3. Overcharges on beef bought by defendant company and turned over to plaintiff company at 1½c a lb. more than agreed on, and for alleged injury by fire not chargeable to plaintiff company.

4. Payment of $118,963.92, with interest at 5 per cent., from 30th September, 1909. Alleged balance due to plaintiff company up to that on progress estimates under the contract.

Before pleading, the defendant company has moved for particulars of claims 1, 2, and 3, and as to agreement under claim 3.

There does not seem to be any reason why these particulars cannot be given. No affidavit is put in in answer to the motion.

(1) Although no details are given of claim 1, these must surely be in the possession or knowledge of the plaintiff company who did the work for which it asks to be paid.

(2) There should be no difficulty in shewing the defendant company how the exact amount of $142,735, which is the second claim, is arrived at. The figures on which it is based must be in the plaintiff company's possession—as also the details of the third claim.

Particulars should be given within two weeks from service of order as far as possible. If for any reason they cannot be now given in full they can be supplemented later.

The defendant company will have 10 days thereafter to plead and the costs of this motion will be to defendant in the cause.

MASTER-IN-CHAMBERS. MAY 26TH, 1913.

BAUGHART BROS. v. MILLER BROS.

4 O. W. N.

Trial—Place of—Motion to Change—Balance of Convenience.

MASTER-IN-CHAMBERS refused to change the venue of an action from London to Cayuga where there was no balance of convenience to justify the change.

Motion by defendants to transfer an action for goods sold and delivered to defendants at Jarvis in county Haldimand, bought by plaintiffs, who reside in London, to the County Court of Haldimand.

E. C. Cattanach, for motion.

F. Aylesworth, contra.

CARTWRIGHT, K.C., MASTER:—The defendants swear to 5 witnesses including themselves all resident at Jarvis, which is 13 miles distant from Cayuga. The plaintiffs swear to a similar number, so that there is no preponderance. The defendants give neither names of their 3 witnesses nor state what they are expected to prove. The plaintiffs state who their witnesses will be.

It is to be observed that the defendants and their witnesses will have to go from home in any case. It is self-evident that the cost of 5 persons going east from Jarvis to

Cayuga and 5 others going from London to Cayuga would be greater than that of 5 going west from Jarvis to London, where the plaintiffs and their witnesses reside.

The motion must be dismissed with costs in the cause. It is always open to the trial Judge, on an application by defendants, to deal with the costs of witnesses as suggested in *McArthur* v. *M. C. R.*, 15 P. R. 77.

HON. SIR G. FALCONBRIDGE, C.J.K.B. MAY 26TH, 1913.

SHAW v. TACKABERRY.

4 O. W. N.

Executors and Administrators—Action to Set Aside Sale—Release—Estoppel—Accounts—Failure to Appeal from Order as to—Costs.

FALCONBRIDGE, C.J.K.B., dismissed an action for an accounting in respect of plaintiff's deceased husband's estate and to set aside a sale of certain real estate, holding plaintiff estopped by her acts from maintaining the action.

Action for a declaration that defendant Martha A. Russell be declared a trustee for defendant J. W. Tackaberry, in regard to certain lands in question in this action, and that both defendants be declared liable to account to plaintiff for *mesne* profits thereof and for an account.

H. D. Smith, and McNiven, for plaintiff.

O. L. Lewis, K.C., for defendant Tackaberry.

S. B. Arnold, for defendant Russell.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—As to the attack which the plaintiff makes on the sale of the real estate in the village of Merlin, she is out of Court, by reason of a release (Exhibit 20), which she gave to the executors, and wherein she granted to them all her estate, right, title, or interest, whether by way of dower or otherwise in said lands.

As regards that branch of her case in which she attacks the adjudication by the County Judge of the claim of defendant Tackaberry against the estate, it is to be observed in the first place that she was represented by counsel when the learned Judge assumed to hear and determine the matter. His order or judgment stands unappealed from, and it is

a purely academic question. Even if the contention of the plaintiff should prevail, the unpaid claims of the creditors of the estate would more than absorb the whole amount available for distribution, and the plaintiff accordingly has personally no interest in the action.

No authority has been cited to the effect that the merely sentimental interest which the plaintiff might have in her late husband's creditors getting as much as possible out of the estate would form a basis or foundation for this action.

The plaintiff therefore fails as to both grounds of her action. The transaction which she impeaches with reference to the real estate was a most improper one. I do not find specifically that it was a fraudulent one, but it bears many of the earmarks of fraud.

Under all the circumstances, while I dismiss the action, I do so without costs. Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. MAY 23RD, 1913.

PRESSICK v. CORDOVA MINES LIMITED.

4 O. W. N. 1334.

Negligence—Master and Servant—Fatal Accidents Act—Fall Down Uncovered "Winze" of Mine—Statutory Duty—Contributory Negligence—Finding of Jury—No Evidence to Support—Rejection of Finding by Trial Judge.

LATCHFORD, J., in an action for the death of one of the defendant's employees, killed by a fall down a "winze" in defendants' mine, through their alleged negligence, refused to accept a verdict of contributory negligence, holding that there was no evidence to support it, and entered judgment for the plaintiff for $1,750 damages and costs.

Action under the Fatal Accidents Act for damages for death of plaintiff's husband killed by a fall into a "winze" in defendants' mine while tightening a nut upon a drilling machine, through the alleged negligence of defendants, his employers.

F. D. Kerr, for plaintiff.

M. K. Cowan, K.C., and A. G. Ross, for defendants.

HON. MR. JUSTICE LATCHFORD:—But for the finding of contributory negligence, the plaintiff would be entitled to recover. Where a statute imposes a duty on an employer

and one for whose benefit that duty is imposed is injured by failure to perform it, the authorities are clear that *prima facie*, and if there be nothing to the contrary, a right of action arises.

But that *prima facie* right disappears when a finding of contributory negligence is properly reached. If there was any evidence to warrant the conclusion at which the jury arrived in regard to the negligence of the plaintiff's late husband, I should, I think, in the present state of the law, be obliged to dismiss the action notwithstanding the negligence of the defendants in not covering the dangerous winze or "glory hole," and in failing to supply Pressick with a proper wrench. But there is, in my opinion, no evidence whatever, to support the particular and only finding of the jury that Pressick was negligent in not using with more care the defective wrench given him by the defendants with knowledge that he would have to use it in a place dangerous because of their neglect. The tightening and loosening of the swing nut required the exercise of great force. The nut had to be unscrewed every time the drill was set for a new hole. The machine might have been more safely placed for the loosening of the nut if the valve had not been on the side on which it was at the time of the accident. This was the contributory negligence which the defendants sought to prove Pressick guilty of. By their verdict the jury shew that they rejected this contention and accepted the evidence that the drill was properly placed. It it had been turned into the position suggested by defendants as the only proper one, the peril resulting from a slip in tightening the nut would have been the same as would have existed in loosening the nut with the drill in the position it actually occupied. The jury found none of the grounds of contributory negligence sought to be established by the defendants, but evoked by some obscure process of reasoning a ground which is in my opinion unsupported by any evidence. Entertaining this opinion, I reject their finding and direct that judgment be entered for the plaintiff for the damages found by the jury, $1,750.

There was, I may add, evidence to warrant a verdict for a much larger sum. The plaintiff is also entitled to her costs. Stay of thirty days.

MASTER-IN-CHAMBERS. MAY 23RD, 1913.

ARMSTRONG v. ARMSTRONG.

4 O. W. N. 1340.

Trial—Postponement of—Absence of Necessary and Material Witness —Custody of Child—Jurisdiction as to Terms—Costs.

MASTER-IN-CHAMBERS granted a postponement of a trial upon the ground of the absence in Europe of a necessary and material witness for the defence, in spite of plaintiff's objections.

The defendant moves for leave to amend statement of defence and to postpone trial on the ground of the absence in Europe of her daughter who is sworn to be a necessary and material witness in her behalf.

W. G. Thurston, K.C., for the motion.

J. W. McCullough, contra.

There is no objection to the amendment asked for—but the postponement was strongly opposed. The reason of this was that the relations of the plaintiff and defendant who are husband and wife are such that they make as he says "a continual living together almost unbearable."

His counsel stated it as his firm conviction that unless the parties separated it was by no means unlikely that one of them might lose his or her life at the hands of the other in a fit of passion. No doubt such a condition of affairs might justify unusual remedies. But it is to be observed that the plaintiff is a commercial traveller and as such is absent from the city nearly all the time.

One great point in dispute is as to the custody of the young boy who is the only offspring of the marriage. Both parents are anxious to have the custody of this child—and Mr. McCullough was willing on plaintiff's behalf to consent to the postponement if plaintiff was given the custody meantime. This however I have no power to direct or to impose as a term of postponement to which defendant seems to be entitled—and the trial must be postponed until the first week of the Non-jury Sittings after vacation. If there is no probability of the return of the witness by that time her evidence should be taken on commission if the plaintiff so requires. But it would be more satisfactory to have her evidence as to the conduct and habits of the plaintiff given at

the trial. The witness is the step-daughter of the plaintiff. At present engaged as a trained nurse in attendance on a patient. She cannot be expected to give this up and break her engagement to expedite the trial. She is clearly not in any way under the defendant's control.

The order will issue as above with costs in the cause. See *Maclean* v. *James Bay Railway Co.*, 5 O. W. R. 495.

MASTER-IN-CHAMBERS. MAY 23RD, 1913.

RE FERGUSON AND HILL—PURSE v. FERGUSON.

4 O. W. N. 1339.

Mortgage—Power of Sale—Surplus Proceeds—Payment into Court by Mortgagee—Application by Execution Creditor for Payment out —Payment to Sheriff—Costs.

MASTER-IN-CHAMBERS, *held*, that the balance of the proceeds of a sale under the power of sale in a mortgage, paid into Court by the mortgagee, should not be paid out to an execution creditor, but should be paid to the sheriff to be applied by him as the Creditors' Relief Act directs.

Campbell v. *Croil*, 8 O. W. R. 67, followed.

Motion by an execution creditor for payment out of Court of certain moneys paid in by a mortgagee, being the balance of the proceeds of a sale under a power of sale in the mortgage.

R. E. Segsworth, for Purse, the applicant.

A. E. Knox, for the Home Bank.

CARTWRIGHT, K.C., MASTER-IN-CHAMBERS: — Hill, the mortgagee, sold under the power of sale in a mortgage from Ferguson, and on 18th April, the surplus, after such sale was paid into Court, being $550.38.

There are certain execution creditors of the mortgagor one of whom has executed against the mortgagor alone, and there are three other executions in the sheriff's hands, one against the mortgagor and his wife, and the other two against them and another party.

One of these execution creditors has moved to have this money paid out to them, as their rights may appear. This, I think, cannot be done. An order must go as in *Campbell* v. *Croil*, 8 O. W. R. 67, for payment to sheriff of Toronto,

and be deemed to be money levied under executions against the Fergusons, and be dealt with by him as the Creditors' Relief Act directs.

As this motion was necessary, the costs of the applicant and of those appearing on the motion, may be added to their claims.

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

RE CANADIAN FIBRE WOOD AND MANUFACTURING CO. LTD.

4 O. W. N.

Company—Winding-up—Rival Petitions — That of Creditor Preferred over that of Shareholder — Leave to Amend Defective Affidavit—Leave Given to File Extra-Provincial License—Stay of Order.

FALCONBRIDGE, C.J.K.B., where there were rival petitions for the winding-up of a company gave preference to that of a creditor which was first in point of time over that of a shareholder and permitted a correction to be made in the affidavit in support of their petition and if necessary an extra-provincial license to be filed by them as it was alleged that they were a foreign corporation.

Petition by creditor and rival petition by shareholder for the winding-up of a company.

G. Wilkie, for Price Brothers Co. and other creditors (petitioners).

J. M. McEvoy, for McKenzie (secretary).

G. B. Balfour, for the company.

Wallbridge, for Mrs. Millons, shareholder and petitioner.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The winding-up, if it has to proceed, ought to take place under the R. S. C. and not under the assignment for benefit of creditors, for obvious reasons.

Then who should have the carriage of the proceedings? The Price Bros. Company's petition is prior in point of time —it is alleged by a trick, but of that I have no knowledge.

It is better that a creditor should have the conduct of the matter than a shareholder. I must assume that the liquidator will investigate the matters alleged by petitioner Millons, in the interests of creditors, and in accordance with his duty.

There is a type-writer's slip in the affidavit proving the Price Bros. Company's defendant—reading Price Brown & Co. Ltd. instead of Price Bros. Co. Ltd. But the earlier part of sec. 2 of G. B. Ball's affidavit verifies the petition, and I give leave to these petitioners to file an amended affidavit *nunc pro tunc.*

It is said that the Price Bros. Company is a foreign corporation. I see nothing in the material on the subject, and have been dealing with them as a local corporation. If necessary I give them leave to file license to do business here. Order will go for winding-up. N. L. Martin is named as interim liquidator. Usual reference to Master to name permanent liquidator, etc.

This order will be stayed for a reasonable time to allow of calling of meeting of shareholders. Two days' notice of its renewal may be given by any party having a *locus standi.*

MASTER-IN-CHAMBERS. MAY 23RD, 1913.

WIDELL CO. & JOHNSON v. FOLEY BROS.

4 O. W. N. 1338.

Action — Authority to Bring — Repudiation by Member of Alleged Partnership—Foreign Corporation—Stay of Proceedings—Terms —Costs.

MASTER-IN-CHAMBERS stayed an action brought by an alleged partnership where one of the alleged partners, a foreign corporation, disclaimed all responsibility for the action and claimed that the partnership had terminated, without prejudice to the remaining partner's rights to proceed with the action in another form.

Barrie Public School Board v. *Barrie*, 19 P. R. 33, referred to.

The defendants move for an order striking out the name of the plaintiffs and staying all proceedings.

R. McKay, K.C., for the motion.

G. S. Hodgson, for the plaintiffs.

CARTWRIGHT, K.C., MASTER-IN-CHAMBERS:—The action as endorsed on the writ is by "a partnership of whom one partner, the Widell Co., is a corporation having its head office in Mankato in the State of Minnesota, one of the United States of America, and the other partner, Frank W. Johnson, resides at the city of Toronto." The partnership, it would seem, has terminated.

The motion is on grounds similar to that in the case of *Barrie Public School Board* v. *Town of Barrie,* 19 P. R. 33, where all the authorities are cited. It is supported by an affidavit of the solicitor for the defendants, to which are annexed, as exhibits, copies of a letter and telegram from the Widell Co., sent before action to plaintiffs' solicitors, disclaiming any right of action against the defendants and notifying them that Johnson had no authority to represent the Widell Co. and Johnson partnership, for the purpose of bringing such action. The writ was issued on 18th April, the letter above mentioned being dated 7th April, and the telegram the following day.

No affidavit has been put in by the plaintiffs and there has not been any cross-examination on the affidavit in support of the motion.

It seems, therefore, that the motion is entitled to prevail —leaving the plaintiff Johnson to proceed as pointed out in *Whitehead* v. *Hughes,* 2 Cr. & M. 318, and in the very recent case of *Seal & Edgelow* v. *Kingston,* [1908], A. C. 579. As the Widell Co. is a foreign corporation, there may be some difficulty in carrying the suit to a successful or any conclusion if that company is unwilling to assist either by accepting indemnity now or at any further stage. This, however, can be left for the consideration of the plaintiff Johnson.

On the existing material the order should go as asked, staying the action until the consent of the Widell Co. is obtained. If this is not given the plaintiff Johnson must take such steps as he may be advised to enforce this alleged claim of the partnership.

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

HON. MR. JUSTICE MIDDLETON. MAY 28TH, 1913.

SAUERMAN v. E. M. F. CO.

4 O. W. N.

Contract—Construction of—Purchase Price—Part Payment in Kind —Return of—Settlement of Judgment.

MIDDLETON, J., *held,* upon the settlement of the judgment herein (24 O. W. R. 415), that a return of the purchase price would include a return of an old car taken as part payment therefor.

On the settlement of the judgment herein, 24 O. W. R. 415, a question was raised as to the amount to be recovered.

J. L. Counsell, for plaintiff.

W. A. Logie, for defendant.

HON. MR. JUSTICE MIDDLETON:—The agreement of 13th June, 1912, speaks of "the sum heretofore paid" by the plaintiff to the defendants. An old Ford automobile was accepted by the defendant company at $300—on account of the price—and they contend that the agreement of settlement meant that in the event of the E. M. F. car being pronounced unsatisfactory, they were to refund only the cash paid. This seems to me to be too narrow a construction to place on the agreement. The old car was accepted as equivalent to a payment of $300, and if the defendants' car proved "unsatisfactory" they were to keep it and refund the whole price. I have not to consider what is fair, as defendants contend, but only to ascertain what was agreed.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 29TH, 1913.

PATTERSON v. TOWNSHIP OF ALDBOROUGH.

4 O. W. N.

Municipal Corporations — Highway— Non-repair—Findings of Trial Judge—No Reasons Assigned for—Appeal—New Trial—Evidence —Contributory Negligence.

SUP. CT. ONT. (2nd. Appellate Division), set aside a verdict for plaintiff for $300 damages alleged to have been sustained by non-repair of a highway and directed a new trial, where the evidence seemed to shew plaintiff guilty of contributory negligence, and the trial Judge had given no reasons for his findings.

Remarks as to the advisability of trial Judges assigning reasons for their findings.

Appeal from a judgment of HON. MR. JUSTICE MAGEE, dated 4th June, 1910, directing judgment to be entered for plaintiffs as against defendants, for $300 and costs of action.

The plaintiff alleged in his statement of claim that the defendant corporation in connection with the construction of a new bridge on a public highway had dug an excavation across the travelled portion of the road and negligently failed to provide a sufficient guard or barrier, or light or other warning, to prevent persons lawfully using the road from

falling into the excavation. In consequence he says that he, with his horse and buggy, fell into the excavation and he was injured.

The defendants in their statement of defence, say that in the performance of their statutory duty to keep the highway in repair, it was necessary to replace a wooden culvert and in consequence to make the excavation in question, and that in order that travel on the highway might not be stopped the defendants constructed another sufficient and safe driveway for travel at the side of the excavation. They also say that they erected a proper guard or barrier across the travelled portion on either side of the excavation. They further plead that the injuries complained of by the plaintiff were the result of his own negligence and he could have avoided them by the exercise of reasonable and ordinary care.

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

St. C. Leitch, for defendants, appellants.

Shaw, for plaintiff, respondent.

HON. MR. JUSTICE SUTHERLAND:—A perusal of the evidence leads me to the conclusion that the disposition of the case is unsatisfactory, and I am disposed to think that the proper course is to send it back for a new trial. The learned trial Judge has given no reasons which might afford a guide to us upon the appeal.

It is true that in the case of the trial of an action by a Judge without a jury, "when a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons." *Lodge Holes Colliery Co. Ltd.* v. *Mayor of Wednesbury*, [1908] A. C. 323, at 326.

It has, however, been frequently pointed out how desirable it is for a trial Judge to give the reasons on which he bases his judgment. "If the Judge simply disbelieved McFarquhar his so finding would have been of assistance to us." Sir Glenholme Falconbridge, C.J.K.B., in *Gurofski* v.

Harris (1896), 27 O. R. at p. 203. See also *MacGregor* v. *Sully*, 31 O. R. 535, at p. 539.

"The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at." Riddell, J., in *Re St. David's Mountain Spring Water Co., Landlord, and Lahey, Tenant*, 23 O. W. R. 12, at p. 14.

In this case one is at a loss to know just in what way the evidence impressed the trial Judge. While one hesitates in propsing to send back a case for rehearing to express an opinion upon the evidence taken at the first trial, it is perhaps necessary, where no reasons have been assigned, in support of the judgment, to indicate from the written evidence one's reasons for so determining.

One can scarcely read the evidence of the plaintiff without coming to the conclusion that it would be very unsafe to act upon this unsupported testimony on the material facts.

There is also a considerable amount of what looks like reliable evidence given on the part of the defendants to the effect that a reasonable barrier had been erected by them at a suitable distance from the trench and that it was in position just before the accident.

There is the evidence also of one witness to the effect that the plaintiff admitted when it was suggested to him that something must have been wrong with the mare before she would go over the pole put up by the defendants as an obstruction, that she could not help it as she was going at lightning speed.

It is true the plaintiff denied this, but we are left to conjecture which of the two the trial Judge believed. "Where a case tried by a Judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the Judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong." (Per Lord Esher, M.R., and Lopes, L.J) in *Colonial Securities Trust Co.* v. *Massey and others* (1896), 1 Q. B. D. 38.

"The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is

sensible of the great advantage he has had in seeing and hearing them." *Coghlan* v. *Cumberland* (1898), 1 Ch. D. 704, at 705.

Speaking for myself, a perusal of the written testimony would have led me to the conclusion that the defendants had reasonably protected the trench in question by a guard, and the accident was occasioned by the negligence of the plaintiff.

Under these circumstances it was most desirable, if not actually necessary, to have the benefit of the views of the trial Judge as to the evidence, and the weight to be attached to it. The defendant against whom judgment has gone upon undisputed facts and upon evidence which seems unsatisfactory to support it, is placed in an awkward position in supporting an appeal without having the opportunity to examine and criticize before an Appellate Court the reasons on which the trial Judge has based his judgment.

One hesitates to altogether reverse the decision of the trial Judge on questions of fact.

I think the proper course to be taken is to direct a new trial, costs throughout to abide the event.

HON. SIR WM. MULOCK, C.J.Exch., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 29TH, 1913.

SCOBIE v. WALLACE.

4 O. W. N.

Vendor and Purchaser — Rescission of Contract — Sale of Lots in "Glenelm Park," Regina, Sask.—Fraud and Misrepresentation—Liability of Principal for Fraud of Agent.

LENNOX, J. (24 O. W. R. 130; 4 O. W. N. 881), rescinded a contract for the purchase of certain lots in "Glenelm Park," Regina, Sask., and ordered a return of the moneys paid thereon, on the ground of fraud and misrepresentation as to the location of such lots.

SUP. CT. ONT. (Second Appellate Division), dismissed appeal from above judgment with costs.

Appeal from the judgment of LENNOX, J. (24 O. W. R. 130) in an action brought to cancel an agreement dated

24th July, 1912, between the plaintiff, a real estate agent of Ottawa, and the defendant a farmer, whereby the defendant agreed to purchase certain lots near the city of Regina, Saskatchewan, for $3,675, upon which was paid, at the time of signing the agreement, $1,225, the balance payable in six and twelve months.

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

G. F. Henderson, K.C., for defendant, appellant.

A. E. Fripp, K.C., for plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—The trial Judge found that the plaintiff was induced to sign the agreement in question by representation and statements made to him by the defendant's agent, Michael Bergin:—

"(a) That the lots he was purchasing were 'in side' lots in the city of Regina.

(b) That they were within one and a half miles of the city post office.

(c) That the city was actually built up as far out as these lots."

(d) That Bergin had recently visited Regina and could be depended upon to give reliable information.

(e) That the plaintiff entered into this agreement relying upon the truth of these representations as the agent knew; and

(f) That they were false and were knowingly and fraudulently made."

The question at issue is purely one of fact. A perusal of the evidence satisfied me that it amply supports the findings of the trial Judge, and there is no reason, so far as I can see, for this Court to interfere.

The appeal should be dismissed with costs.

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

MASTER-IN-CHAMBERS. MAY 29TH, 1913.

FRITZ v. JELFS AND GREEN.

4 O. W. N.

Pleading—Statement of Defence—Action for Assault and Forcible Ejectment from Premises—Defence of Police Constable—Alleged Instructions from Superior—Plaintiff Alleged to have been Drunk and Disorderly—Failure of Motion.

MASTER-IN-CHAMBERS in an action against a police officer for forcibly ejecting plaintiff from certain premises without authority, refused to strike out of the statement of defence an allegation that defendant was acting *bona fide* under the instructions of his superior officer and that plaintiff was at the time drunk and disorderly.

The facts of this case appear in the report of a former motion in 24 O. W. N. 610.

The defendant Green is one of the two constables there stated to "have forcibly ejected the plaintiff and put his goods and chattels on the street."

This defendant Green has put in a statement of defence, which alleges in the 3rd and 4th paragraphs that all he did was on instructions from his superior officer, to go to plaintiff's residence, and that when he got there he saw the plaintiff "*acting in a drunken and disorderly manner,*" and that he did nothing more than was his duty.

The plaintiff moves to strike out all paragraph three and especially the words in italics, as being likely to prejudice the jury against him.

L. E. Awrey (Hamilton), for motion.

G. H. Sedgewick, contra.

It is at all times difficult to strike out part of a pleading—see *Bristol* v. *Kennedy,* 4 O. W. N. 337, 23 O. W. R. 685.

It is especially undesirable to interfere with a statement of defence. See *Stratford Gas Co.* v. *Gordon,* 14 P. R. 407. The conduct of the plaintiff on the occasion complained of would seem to be very material to the defence, if it can be proved. In any case it must be left to the trial Judge to say if evidence can be given on this matter. The plaintiff so far from being in any way put at a disadvantage by the statement of defence is now made aware exactly of what this defendant relies on to escape liability.

In 5th paragraph by an obvious error defendant asks to have the action dismissed as against him without costs. If necessary this should be amended.

The motion will then be dismissed with costs in the cause.

2ND APPELLATE DIVISION. MAY 29TH, 1913.

SCULLY v. RYCKMAN.

4 O. W. N. .

Moneys Lent—Action to Recover—Betting Transactions—Illegality—Evidence—Receipt—Appeal—Finding of Judge on Facts.

LENNOX, J. (24 O. W. R. 221; 4 O. W. N. 850), gave judgment for plaintiff for $2,000 and interest and costs in an action for $2,250, moneys alleged to have been lent to defendant, which defendant denied had been so lent.

SUP. CT. ONT. (2nd Appellate Division), CLUTE, J., *dissenting*, dismissed appeal from above judgment with costs.

Per CLUTE, J.:—The verdict for plaintiff should be reduced to $1,000.

Appeal by defendant from the judgment of LENNOX, J., in favour of the plaintiff for $2,000, money found to have been loaned by the plaintiff to the defendant on the 28th of September, 1908.

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

I. F. Hellmuth, K.C., and C. C. Robinson, for defendant (appellant).

J. P. MacGregor, for plaintiff (respondent).

HON. SIR WM. MULOCK, C.J.EX.:—The plaintiff is a professional bookmaker, carrying on operations on race tracks in Canada and the United States; and the parties had for some years, under the plaintiff's management, been engaged in racing ventures on joint account, during which considerable sums of money in respect of their gambling transactions passed between them. The $2,000 in question is said by the plaintiff to have been a loan in actual money, advanced by him to the defendant on the 28th of September, 1908. The

defendant denies that the transaction was one of that nature, his explanation of the payment to him of the $2,000 being, that on the 30th of August, 1907, he sent to the plaintiff his cheque for $1,000 to be used in bookmaking on joint account; and that the $2,000 in question, was money which had accrued to him out of that joint venture.

The plaintiff admits having received the $1,000, but says it was lost, whereby the defendant ceased to have any claim upon him in respect thereof.

The defendant says that whether the $1,000 was lost or not, the plaintiff, by the terms of his contract with the defendant, was bound to repay the amount to him in any event.

The evidence between the parties is conflicting. If what Scully swore to at the trial is true, then he is entitled to judgment for the $2,000. If what Ryckman has sworn to is true, he is entitled to have the action dismissed.

The learned trial Judge before whom the two parties were examined, says: "It is enough for me that upon the main question the evidence, the manner in which it was given, and the surrounding circumstances, force the clear conviction upon my mind that the plaintiff is telling the truth when he swears that he loaned the defendant $2,000 on the 28th of September, 1908, and that at that time, whether truthfully, or merely as a means of obtaining a share of money which he swears had been made through timely information given the plaintiff, the defendant obtained this money by representing himself as being hard-pressed."

If at the time of this loan the plaintiff were a debtor to the defendant in respect of the $1,000, one would have expected the defendant to have had that sum taken into consideration in connection with the $2,000 loan, and to have in some way referred to it, in his receipt for the $2,000.

The defendant, admitting the receipt of the $2,000 from the plaintiff, the onus is upon him to discharge his *prima facie* liability in respect thereof. His account in explanation of the payment of the $2,000 is summarized in the judgment of the learned trial Judge in the following words: "The defendant's account of the payment of the $2,000, and the giving of the receipt, is that two days afterwards, that is, on the 28th, he went to the plaintiff's bedroom in the King Edward Hotel (originally he said in the presence of his brother), the plaintiff counted out and gave him, from a large amount of money which the plaintiff had in his room,

the $2,000 in question as a dividend upon the defendant's investment of $1,000, and offered him $1,000 more. The defendant says he then insisted upon giving the plaintiff the receipt in question, as otherwise, the $1,000 would, perhaps, be enforced against the plaintiff; and to this end he sent out and procured the printed form used, but he did not at any time make any entry of the receipt of the $2,000. He says he did not accept the additional $1,000 as that would have paid him in full and put out of the bookmaking profits. I cannot see this as he was, on his own story, then entitled to $3,600, or two-fifths of $9,000, in dividends alone. However, in any case, I regret to say that I cannot accept the defendant's recollection upon that point."

I am unable to discover any circumstances in this case that warrant an Appellate Court in disregarding the learned trial Judge's findings as to the credibility of the two parties, and, therefore, he rejecting the defendant's version of the transaction, we are bound by such finding.

It was, however, pressed upon us during the argument that there were circumstances outside of the evidence of the two parties which either fully corroborated the defendant's story, or entitled him at least to credit on account of the plaintiff's claim for the $1,000. These circumstances are as follows; the defendant sent the $1,000 cheque to the plaintiff in a letter worded as follows:

"Toronto, 30th August, 1907.

"Dear Mr. Scully:—As promised last night, I enclose marked cheque for $1,000 loaned to you.

"Yours faithfully, E. B. Ryckman."

On his examination the defendant qualified that statement in the letter by saying that the $1,000 transaction "was a loan on conditions. Scully said 'I will repay back that $1,000 in any event,' but he says 'I need it to go on, and I will pay back that to you.' And then he told me that he would count me in on whatever proposition that amounted to on his capital." And further on the defendant is asked this question: "You say this $2,000 was a payment to you, either a dividend or a repayment? A. I say it was a dividend, a dividend."

Then further:

"Q. You regarded it as a payment back of the $1,000 because you said, you gave him a receipt?

A. Yes, so that the $1,000 could not be claimed from him.

Q. So that you regarded it not only as a dividend but as a repayment?

A. I did not think about that."

It is clear from the defendant's evidence that his letter of the 30th of August, 1907, does not accurately describe the $1,000 transaction. Scully says that on receiving that letter he declined to make use of the money, and so telegraphed the defendant. That telegram has not been produced, but Scully's evidence is that the $1,000 was used on joint account, and lost; and he denies having guaranteed its repayment.

The learned trial Judge accepts Scully's testimony.

Further it was urged before us that shortly before the institution of this action, Scully had had an interview with the defendant, and had followed up that interview by sending him a letter of the 4th of June, 1912, enclosing a copy of the defendant's letter of the 30th of August, 1907, and of the receipt of the 28th of September, 1908. And it was urged that his action in sending the copy of the letter of the 30th of August, 1907, along with the receipt for the $2,000, was a practical admission that it had a connection with the plaintiff's claim in this action. That, however, does not appear to me to be a justifiable deduction. If Scully is to be believed, his action in sending the copies of the letter and receipt to the defendant was in compliance with the defendant's request.

Further, it was urged that the plaintiff at this period, June, 1912, regarded the defendant as indebted to him only to the extent of $1,250, viz., $1,000 balance of the $2,000, after crediting the $1,000 and the $250 in respect of markers; and we are asked to infer that such was the case because of a letter written by W. R. Smyth to the defendant, bearing date the 4th of June, 1912, claiming $1,250.

Scully's evidence is that he had always maintained that his claim amounted to $2,250, and that he so instructed his solicitor, Mr. Boland. Mr. Boland for some reason hesitated to bring this action, and instructed Mr. W. R. Smyth. The plaintiff had no communication with Mr. Smyth, who apparently fell into the mistake of assuming from a perusal of the defendant's letter that the $1,000 mentioned in it was then owing by the plaintiff to the defendant.

There is no evidence that the plaintiff ever instructed either Mr. Boland or Mr. Smyth to claim $1,250 only; and against his sworn testimony that he gave no instructions

whatever to Mr. Smyth, and that his instructions to Mr. Boland were to claim the $2,250, it would, I think, be mere guess-work, and not an inference properly deducible from proved facts, to assume that Scully authorized the claim at $1,250 only.

After careful perusal and re-perusal of the evidence and exhibits, I find myself unable to discover any circumstances, documentary or otherwise, in the case entitling an Appellate Court to disregard the trial Judge's findings as to the credibility of the respective parties, and therefore see no ground for disturbing his judgment and think this appeal should be dismissed with costs.

HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE RIDDELL:—This is an appeal from the judgment of Mr. Justice Lennox after a trial before him at Toronto without a jury, whereby the defendant was held liable for the sum of $2,000—a further claim for $250 was abandoned at the trial.

That the sum of $2,000 passed from the plaintiff to the defendant is wholly beyond question and the sole question on this appeal is whether it was a loan or not. There were, indeed, many questions dealt with in the careful and exhaustive arguments, but these were collateral as bearing upon the credit to be attached to the parties and the probability of their conflicting stories.

The plaintiff says that the defendant borrowed $2,000 from him and pressed the receipt so much spoken of, upon him; the defendant says, that being in a joint venture on race-tracks with the plaintiff, and the plaintiff owing him for his share of gains made in race-track gambling, some $3,600, he received the sum of $2,000 on account but declined to accept a further sum of $1,000 at the time.

Much evidence was given at the trial, and we heard evidence on two days before this Court.

There are curious features in the story of each party, and some inconsistencies or apparent inconsistencies; but I cannot find anything to induce me to hold that the learned trial Judge was wrong in giving effect to the testimony of the plaintiff rather than to that of the defendant. It cannot be necessary once more to state the principles upon which an Appellate Court proceeds on a conflict of testimony where the trial Judge has seen the witnesses.

I am of opinion that the appeal should be dismissed, and with costs.

HON. MR. JUSTICE SUTHERLAND:—During the argument, I was disposed to attach considerable weight to the argument on behalf of the appellant, that in any event the claim herein should be reduced by $1,000.

A careful perusal of the evidence and documents, and a consideration of the findings of the trial Judge, have led me to think otherwise.

I agree that the appeal should be dismissed with costs.

HON. MR. JUSTICE CLUTE:—The plaintiff's claim is for $2,000, money loaned on the 28th September, 1908, and a further sum of $250 alleged to be paid by the plaintiff for the defendant at his request.

The defence is a denial of the plaintiff's claim. The trial Judge found in favour of the plaintiff on the first item, and in favour of the defendant on the second item, and directed judgment to be entered for the plaintiff for $2,000 and interest.

This is an appeal by the defendant, the plaintiff not appealing in respect of the $250. The trial Judge has accepted the evidence of the plaintiff as against the defendant, and if the result rested alone upon the credibility given to the respective parties, I should feel bound by the finding, but the documentary evidence is such that I feel compelled to recognize in it a weight that overbears the finding of the trial Judge to the extent of $1,000.

On the 30th August, 1907, the defendant had advanced to the plaintiff $1,000, to be used in the plaintiff's interest in bookmaking on the race-track. The defendant says it was a conditional loan; the plaintiff says it was a partnership transaction, and not a loan.

It is admitted, on both sides, that there were certain losses and certain gains in betting on the turf, and on the 28th September, 1908, the plaintiff handed over to the defendant $2,000, the defendant giving a receipt therefor to the plaintiff. The plaintiff swears this was money lent; the defendant that it was part of the gains from betting on the turf. The plaintiff says the $1,000 was lost; the defendant that it was left in the plaintiff's hands for further transactions.

In December, 1909, the defendant endorsed plaintiff's note for $1,000. This was paid by the plaintiff, and a couple of weeks thereafter the defendant again endorsed the plaintiff's note for $2,500. This was also paid by the plaintiff.

There was much evidence pro. and con. as to what took place when the last note was discounted on the 16th April, 1910, and whether or not the defendant was present. Further evidence was admitted before this Court, by consent of both parties, which clearly shewed that the defendant was in New York at the time the note was discounted.

It was quite clear that the defendant had sent a telegram from New York becoming responsible for the note, which evidently he afterwards endorsed, probably having agreed to do so before he went to New York.

In the view I take of the evidence, I do not think it very material, nor do I think it surprising, that there should be discrepancies in the evidence, of both parties, as to what took place at that time. I have mentioned it as it seems to have been regarded as very important by both parties; on the part of the defendant as tending to shew that the plaintiff had sworn falsely in stating that he was present at the bank when the note was discounted, and on the part of the plaintiff, urging that it was improbable that the defendant would have sent the telegram agreeing to endorse for Scully a note for $2,500, unless he was personally interested.

There is not sufficient weight, in either of these views, in my opinion, to decide the question of credibility.

The defendant swears that on the 30th May, 1912, the plaintiff asked him to loan him some money or to endorse for him and that defendant had told plaintiff that as he was through with the race-tracks since 1909, it was not fair to ask him; that then the plaintiff said: "Why you owe me a thousand dollars." "I said: 'Owe you a thousand dollars?' He said 'yes.' I said, 'You get right out of this office.' He said, 'I have your promissory note.' I says, 'You have not got my promissory note and no other man has got my promissory note.' He says, 'I have got it over at the hotel; I will go and get it:' I says, 'All right, if you have my promissory note, it will be paid,' knowing well he had not; and he left my office and telephoned me later on the same day, the 30th May, and said, 'Look here, I am going to shew you up; I don't think I will take these papers over to your office. I will take them to my solicitor.' I said, 'All right, take them to your solicitor.'"

Scully's version of this interview is, that he called on Ryckman about the first of April over the phone and then at his office, and Ryckman told him he was sorry he was not able to cancel that debt of his. Took Scully's address and told him he would hear from him in a few days. Not hearing from him, "Then what next?" A. "It went along then till about the middle of June. I went into Mr. Ryckman's office, and I said, 'Mr. Ryckman, I have not heard from you,' and he says 'No;' I says, 'I have lost that case against the Jockey Club and I have to find some other way of making my living, and I want to get my affairs straightened up and I would like if you would give me that $2,250 you owe me,' and Ryckman says, 'What $2,250?' I says, 'The two thousand dollars that you borrowed from me in 1908, and $250 that you owe me besides on commission;' and he says, 'I never got no money from you in 1908; never borrowed no money from you.' I says, 'You do not remember giving me a receipt for $2,000?' He says, 'No.' I says, 'I have got the receipt.' 'Where is it?' I says, 'Over in the Canadian Bank of Commerce safety deposit box.' He says, 'Go over and get it.' He says, 'Have you got any letters?' I says, 'I think I have got a letter or two.' He says, 'You might bring those too.' I went out and I says, 'it is funny; that man is acting awful queer. I had better not take that receipt over to the office,' and I called him up over the 'phone and told Mr. Ryckman I would send him a copy of the receipt and the letter as he requested."

Scully is clearly mistaken as to the date, as will appear from his letter of the 4th of June.

The first question is, did Scully demand $1,000 at the first interview, or did he demand $2,250? His letter and the documents referred to by him are as follows:—

Toronto, Ont., June 4th, 1912.

Mr. E. B. Ryckman,
Toronto, Ontario.

Sir:—I am enclosing copy of letter and receipt, which I spoke to you about the other day. There is also due me $250 since May, 1908, a commission I placed for you. Kindly remit the whole amount with interest. If I don't hear from you by the 6th, I will place this matter in my attorney's hands.

Yours very truly,
Jack Scully.

The following are the receipt and letter enclosed:—

"Hotel Mossop,
Toronto.

Toronto, 28 Sept., 1908.

Received from J. Scully two thousand.....xx/00 dollars.
$2,000.

(Sgd.) E. B. Ryckman.

Ryckman, Kerr & MacInnes,
Barristers, Solicitors, Notaries, Etc.,
Canada Life Bldg.

Toronto, Aug. 30, 1907.

PERSONAL.

Mr. J. Scully,
Windsor Hotel,
Montreal, P.Q.

Dear Mr. Scully:—

As promised last night I enclose marked cheque for $1,000 loan to you.

(Sgd.) E. B. Ryckman.

It should be noticed that Scully says that Ryckman asked him if he had any letters, and when he said he had a letter or two, Ryckman said to bring those too. Now in Scully's letter he says that he is enclosing a letter and a receipt which he spoke to Ryckman about and he says, "there is also due $250, etc." What other sum does the "also" refer to? He has just said that he is enclosing letter and receipt. The receipt is for $2,000, signed by Ryckman. The letter enclosed is by Ryckman stating that he encloses a marked cheque for $1,000. It seems to me obvious that the sum which Scully claimed, in addition to the $250, was $1,000.

There was no reason for enclosing the letter referring to the $1,000 loan except to indicate the balance due. According to Scully's evidence this $1,000 was settled for and disposed of, having been lost in their joint enterprise. And yet, on this occasion, when at arm's length with the defendant, he sent that along as one of the documents shewing the indebtedness and refers to it as the document which he had mentioned when talking to Ryckman. I take this to be a clear indication of a claim under Scully's hand of $1,250 and no more.

As he threatened he would, he placed the claim in the hands of his solicitor. Mr. Boland apparently could not attend to the matter at once and he placed his instructions in the hands of W. R. Smyth, who on the 13th of June wrote the following letter to Ryckman:—

Wm. R. Smyth,
Barrister, &c.,
Toronto.

June 13th, 1912.

E. B. Ryckman, Esq., K.C.,
Sterling Bank Chambers,
Toronto.

Re Jack Scully.

Dear Sir,—Mr. Jack Scully has instructed me to collect from you the sum of $1,250, being made up of the sum of $1,000, the balance due upon a certain promissory note, dated 28th day of September, 1908, payable to the order of J. Scully, in the sum of $2,000, made by you, and the sum of $250, being the amount of a marker made by Scully, at and upon your request. Will you be good enough to let me hear from you as you know Mr. Scully needs the money at the present time, being unable to carry on his business as a bookmaker.

Yours truly,
Wm. R. Smyth.

In this letter he claims $1,000 as the balance due upon a certain promissory note, dated the 28th September, 1908, payable to the order of J. Scully, in the sum of $1,000. Ryckman, it will be remembered, in his evidence, says that Scully said that he had his promissory note. Scully denies it. How does it happen that Scully's solicitor also calls it a promissory note, unless Scully told him so? Mr. Smyth was called by consent of both parties and examined before the Court. He says that at the time the letter was written he had not seen Scully, but received his instructions from Mr. Boland. To my mind that does not alter the effect of this evidence as bearing upon the question of the claim. Doubtless he saw Mr. Boland first but Mr. Boland gave instructions to Smyth. Where did Mr. Boland get the idea of the claim of $1,000, which is the balance due, except from the plaintiff?

I find the above documents to agree so completely with the statement of the defendant as to what occurred when Scully made his demand and to be so entirely inconsistent with the plaintiff's statement that I feel compelled to give effect to the documents rather than to the plaintiff's evidence, and to accept defendant's evidence that Scully's claim at the time he made the demand for the settlement, was for $1,000 plus the commission.

I am not unmindful of the rule that "when a finding of facts rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. *Lodge Holes Colliery* v. *Wednesbury*, [1908] A. C. 326.

But as was said in *Coghlan* v. *Cumberland*, [1898] 1 Ch. 705; "There may obviously be other circumstances quite apart from manner and demeanor, which may shew whether a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Such "circumstances" I think these documents afford to lead to the conclusion that the most that Scully claimed to be due from the defendant, prior to the issue of the writ, was $1,000 plus $250 for commissions.

Resting my judgment accordingly upon the documents I think the plaintiff's claim should be reduced by $1,000.

As to the balance of the $2,000, the receipt is of a very ambiguous nature. It is in such form as one might expect to be given in a betting transaction, and although my confidence in Scully's evidence as against the defendant is much shaken, by reason of his claim for $2,000 instead of $1,000 balance, and his denial that he had ever claimed $1,000 balance, yet there is not sufficient documentary or other independent evidence to enable me, having regard to the findings of the trial Judge, to find in favour of the defendant with respect to the remaining $1,000.

I would vary the judgment by reducing it to $1,000 and give no costs of appeal.

MASTER-IN-CHAMBERS. MAY 29TH, 1913.

PHILLIPS v. LAWSON.

4 O. W. N.

Pleading — Contract made with Agent of Undisclosed Principal— Election—Necessity of — Discovery of New Material — Amendment—Costs.

MASTER-IN-CHAMBERS, *held*, that a plaintiff suing upon a contract made with an agent for an undisclosed principal must elect in his statement of claim whether he wishes to proceed against the agent or the principal, for he cannot proceed against both.

Smithhurst v. *Mitchell*, 1 E. & E. 382, referred to.

That where, since pleading, defendants had discovered additional information which they desired to plead, they should be permitted to amend.

Motion by defendants (other than A.B.) for leave to amend their statements of defence on the ground that A.B. was absent from the province when their statements of defence were delivered, and that since his return he has given them certain information of which they desire to avail themselves. The motion also asked that plaintiff may be required to elect against which of the four defendants he will proceed or to strike out the name of defendant J.B., or for such other order as may seem best.

C. A. Moss, for the motion.

J. P. MacGregor, contra.

CARTWRIGHT, K.C., MASTER:—The facts of this case appear in part in a previous report in 23 O. W. R. 965.

There is no doubt that defendants should be allowed to amend so as to set up all defences on which they intend to rely. Owing to the absence of their co-defendant, who was the active member of the firm and who signed his co-defendant Lawson's name to the agreement set out in the statement of claim, the facts as he understood them were unknown to the others. As plaintiff served a jury notice the action cannot be tried until after vacation and Mr. Moss is willing that proceedings should go on in vacation if plaintiff so desires.

The other branch of defendants' motion was supported by reference to Anson on Contracts (12th ed.) 382, 383, and *Smethurst* v. *Mitchell* (1859), 1 E. & E. 622.

These authorities shew that "where an agent acts on behalf of a principal whose existence he does not disclose, the other contracting party is entitled to elect whether he will treat principal or agent as the party with whom he dealt." Anson supra, p. 383.

In *Smethurst's Case* it was said by Hill, J., p. 630: "All the cases establish that a vendor selling to the agent of an undisclosed principal must elect to sue the principal within a reasonable time after he discovers him."

Crompton, J., at p. 631, says: "The election to sue an undisclosed principal must be made within a reasonable time after he is discovered." It was argued by Mr. McGregor that there was here no case for election. His view was that the plaintiff was only suing in respect of one bargain; that he was doubtful against whom his proper remedy was to be taken: He relied on *Tate* v. *Natural Gas Co.*, 18 P. R. 82. But that case is different in its facts. There is here no uncertainty as to the party liable. Both are liable if a definite bargain was made to buy the land in question. But this not a joint but a separate liability, and the plaintiff must declare against which one he is proceeding and all such amendments as result therefrom must be made, though nothing was said on this point in the notice of motion. On the argument it was pointed out by Mr. Moss that the 8th clause of the prayer for relief asks "in the alternative for damages against the defendant firm and the defendant A.B. for breach of warranty of authority to make the said agreement for purchase for and on behalf of the said syndicate." But that there is nothing in the statement of claim to support this. This seems true. As the defendants have all pleaded they were either not embarrassed by the statement of claim or were not able to deal with it effectively in the absence of A.B. In his statement of defence delivered on 13th inst. in paragraph 13, he (A.B.) seems to have had this claim in mind when he said that he "gave no warranty of any sort in connection with his signature of the name of the defendant T. W. Lawson." The present notice of motion was served on the same day as that statement of defence was delivered.

The case is one of some complexity and a very considerable sum is in question. This makes it desirable for all parties that the pleadings should be made as definite and correct as possible. In view of the fact that the cause was

begun in August last, and of all that has taken place since, it seems fair while granting the motion to impose the usual term as to costs so far as applicable.

No amendment should be made of the statements of defence until the statement of claim has been amended. The statements of defence of the defendants other than A. B. were delivered in October last and there have been examinations for discovery had since. Plaintiff can if so advised plead as in *Bennett* v. *McIlwraith* (1896), 2 Q. B. 464. The defendants should amend within a week afterwards—and all costs lost or occasioned by this order should under the special circumstances be to the plaintiff in the cause. Pleadings and other proceedings may be had in vacation at the will of either party.

HON. MR. JUSTICE BRITTON. MAY 28TH, 1913.

EMMONS v. DYMOND.

4 O. W. N.

County Courts—Removal of Action to Supreme Court of Ontario—10 Edw. VII., c. 30, ss. 22, s.-s. 3, 5 and 6, 23 and 29—"Fit to be Tried in the High Court"—Meaning of.

BRITTON, J., dismissed an application to transfer an action from the County Court of Middlesex to the Supreme Court of Ontario, upon the ground that no sufficient reason therefor had been shewn.

Re Aaron Erb. No. 2, 16 O. L. R. 597; *Hill* v. *Telford*, 12 O. W. R. 1056, referred to.

Application by defendant for removal of the case from County Court of the county of Middlesex to the Supreme Court of Ontario.

E. C. Cattanach, for defendant.

R. U. McPherson, for plaintiff.

HON. MR. JUSTICE BRITTON:—"The County Courts Act," 10 Edw. VII. ch. 30 (1910), is the Act now in force. Sec. 22, sub-secs. 3, 5, and 6 and sec. 23 make provision for the transfer of cases from the County Court to the Supreme Court of Ontario, where the facts are as stated in these sections and sub-sections.

Section 29 governs as to what cases and on what conditions causes may be removed—where the sec. 22 and subsecs. and sec. 23 do not apply.

This application must be considered as made under sec. 29. The words "fit to be tried in the High Court" mean, I think, that ought to be tried in the High Court, rather than in the County Court, and I cannot say that a reason for transfer or for *certiorari* has been shewn: See *Re Aaron Erb, No. 2*, 16 O. L. R. 597; *Hill* v. *Telford*, 12 O. W. R. 1056.

The motion will be dismissed, costs in the cause. This will be without prejudice to any order the County Judge may make as to any amendment—or as to the trial or any matter in the disposition of the case by him.

2ND APPELLATE DIVISION. MAY 29TH, 1913.

SHEARDOWN v. GOOD.

4 O. W. N.

Vendor and Purchaser — Specific Performance — Alleged Right to Withdraw—Exercise of Same—Fraud—Equitable Jurisdiction.

LATCHFORD, J., dismissed action for the specific performance of an agreement to sell certain lands, upon the ground that it was a term of the agreement that defendant should be permitted to withdraw within ten days from the same, which right she exercised.

SUP. CT. ONT. (2nd Appellate Division), dismissed appeal with costs.

Appeal by plaintiff from judgment of HON. MR. JUSTICE LATCHFORD dismissing an action by the assignee of a purchaser against the vendor, for specific performance of a written agreement for the sale of land in Richmond Hill, Ont. The unwilling vendor asserted as a defence that a term was to be included in the writing permitting her to recede from the bargain within ten days and that by written notice within that time she did withdraw.

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

C. W. Plaxton, for plaintiff, appellant.

No one contra.

HON. MR. JUSTICE SUTHERLAND:—The learned trial Judge has found that the vendor understood from the real estate agents, who acted for her and for the purchaser respectively, that such a clause was to be embodied in the document which she signed. He credited her testimony where it conflicted with theirs, and came to the conclusion "that there was not that fairness and equality" between them and her "which should exist to warrant the Court in decreeing specific performance." The omission of the term referred to was in effect a fraud perpetrated upon the vendor. The document should be read and construed as though it contained it.

The exercise of jurisdiction in such cases is a matter of judicial discretion and "much regard is shewn to the conduct of the parties." *Lamaire* v. *Dixon*, L. R. 6 H. L. 423; *Coventry* v. *MacLean*, 22 O. R. at p. 9.

In view of the findings of the trial Judge, I think the judgment cannot be disturbed, and that the appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE LENNOX. MAY 13TH, 1913.

LARCHER v. TOWN OF SUDBURY.

4 O. W. N. 1289.

Way—Highway—Dedication—Evidence — Acceptance—Registration of Plan not Shewing Highway—Consent of Council to—Estoppel —Inadvertence—Object of Action of Council—Lack of Knowledge of Facts—Land Titles Act R. S. O. 1897 c. 138, ss. 26, 109, 110—Municipal Act 1903, c. 19, ss. 29, 630, 632.

LENNOX, J., *held*, that an inadvertent consent by a town council to the registration of a plan which did not shew a public highway which actually existed did not estop the corporation from claiming the highway in question, as the facts were not brought to the attention of the council and the consent was given for a different object, and that in any case a public highway could not be closed without complying with the statutory formalities.

Action against defendants, the municipal corporation of the town of Sudbury, for alleged trespass to land claimed by plaintiff, but asserted by defendants to be part of a highway.

Auguste Lemieux, K.C., for plaintiff.

Geo. E. Buchanan, for defendants.

HON. MR. JUSTICE LENNOX:—The land in dispute in this action is part of the west half of lot 4 in the 4th concession of the township of McKim in the District of Nipissing. This half lot, 160 acres, was patented to Samuel Robillard on the 19th of May, 1893, and is now within the limits of the town of Sudbury. Robillard was in rightful possession as locatee from 1887 or 1888 and made his final payment to the Crown on the 15th of April, 1893. A man named Lavoie contributed one-half of the purchase money and it is said that he got one-half of the 160 acres. Before the patent Robillard determined to subdivide and in selling to Edward Dubreuel and Edward Dubreuel, junior, he agreed to open a public road, where the road in dispute is now, connecting what is now Murray street with the portion of said half lot lying north and east of the Junction Creek. Thereupon the Dubreuels entered into possession of their respective parcels, the road was opened, a bridge built by Robillard and Edward Dubreuel the younger, and the elder Dubreuel, as owner of the land now owned by the plaintiff, defined the limit of the roadway and of his own land, as the same is now contended for by the defendants, by erecting a brush fence between his property and the roadway as it was then recognized by all parties interested, from near the south-easterly corner of the bridge and curving south-westerly until it intersected the westerly boundary of Murray street as it now is. It has been satisfactorily established that this brush fence was replaced by a better one and this again by a post and wire fence; all built by Dubreuel the elder. These posts are there yet, and they marked an undisputed easterly boundary of the defendants' alleged highway until the plaintiff attempted to extend his boundary westward by building a fence along the eastern side of Murray street and cutting off access to the road and bridge in question. This road and the road beyond the bridge was laid out and formed and a connecting bridge built just where the present bridge stands, fully a quarter of a century ago.

The plot of land owned by Dubreuel the elder became the property of Mr. J. H. Clary. He subdivided and filed a plan. That portion of it affecting the issues in this action are lots 6, 8, 7 and 9 now owned by the plaintiff. This plan shewed no road except Murray street touching upon or crossing these lots. It bears this certificate: "Sudbury, July 20th, 1906. The council of the town of Sudbury, three-quarters

of the members thereof being present, hereby resolve that we hereby approve of this plan." This bears the corporate seal and is signed by the mayor and clerk. Murray street, the only street shewn, is less than 66 feet wide. Upon this endorsement the plaintiff practically rests his case and the effect if it has to be determined in this action. Before dealing with this point, however, it will be necessary, or at all events, convenient to refer to other facts established by the evidence and to consider and determine whether or not, prior to the endorsement of this certificate, the roadway in question had become "a common and public highway."

I have come to the conclusion upon the evidence that both Robillard and his grantee clearly intended to dedicate the road in question as a public highway and recognized and treated it as a highway, by doing statute labour upon it and otherwise, for a number of years. It is true that the bridge and the first fence may have been built before the patent issued, as in *Beveridge* v. *Creelman,* 42 U. C. R. 29, and *Rae* v. *Trim,* 27 Grant 374; but here there was a continuous offer until it was accepted and acted upon by the township of McKim, as I shall refer to. Although not a complete dedication at the time, perhaps, the owner was bound by his acts both before and after the issue of the patent as held in the two cases above quoted. As a matter of fact, however, neither the patentee nor the adjoining owner did anything at any time except in recognition and furtherance of the dedication.

The bridge built by Robillard and young Dubreuel was carried away by a freshet. Xavier Pilon tells what happened then. This was probably about 1889. He bought 6 acres alongside of Agnes street extending westerly to or near the continuation of the road in question and he had no way to get out. He petitioned the council of McKim. The council advertised for tenders. He tendered, but Dennis Lavoie was below him and got the building of the bridge at $175 and Lavoie and Dubreuel, junior, built it. Pilon says he was pathmaster that year and ploughed and scraped the road at both ends of the bridge and did road work right along south to Pembroke street, and that old man Dubreuel did his statute labour on the disputed road for years. Distinguishing between the road and the bridge Robillard says that the township took over the road definitely in 1891 and the minutes of council bear this out. On the 6th of May, 1891, they appointed a special committee to report as to

rebuilding the road near the bridge. There was a special meeting for consideration of the report on the 13th of May and it was then resolved to do the work by "statute labour tax," and that it be done "under the supervision of Robillard as pathmaster for that section where the road is used." The minutes of 27th August, 1891, contain a resolution to call for tenders for a bridge—said to be another bridge upon the road in question. The minutes of October 8th, 1891, record the appointment of Xavier Pilon to oversee the expenditure of the poll tax in the part of the township where he resides and give acknowledgments, etc.

The town of Sudbury succeeded to the rights and obligations of the township when this territory became a part of the town. When that happened has not been shewn—but it was evidently before 6th August, 1896. From that date the town records shew occasional expenditures on road and bridge amounting to about $380.

The evidence of Nathaniel Bailey, who was in charge of streets in 1896-7 and 8, shews that every year work was done from Pembroke street to John's farm. That owing to overflows they had always to make repairs and fill up at each end of the bridge.

John Frawley, Lawrence O'Connor and Robert Martin shew general supervision and repair of the road and bridge for several years.

I am clearly of opinion then that on the 20th of July, 1896, when the certificate approving of plan M. 59 was endorsed, the disputed land—the road in question—had become and was a common and public highway of and within the town of Sudbury.

I dealt with the question of gates at the trial. The only reliable evidence was as to gates north of the bridge, and so north of the land in question. If the evidence was pointed to the question of dedication it fails, as the evidence of intent and dedication is clear and it is not suggested that Robillard or his grantees maintained or sanctioned a gate, and Robillard's evidence is clearly the other way. There never was any interruption of user and time does not run and obstructions do not count as against the Crown. Now as to the question of the effect of the alleged approval by the council. Does this act effect a conveyance or surrender of the highway or estop the municipality? Clearly not. As to estoppel, I am still of the opinion, expressed at the trial, that there may

be cases in which this doctrine will grip and hold an individual clothed with absolute power and yet not bind a municipal corporation to the act or neglect of its statutory agent. In the latter the question must be met: "What were the powers conferred upon the council?" But aside from this there are no equities in support of it. The evidence shews that the council, if it was the act of council, simply blundered. It is shewn, too, that Mr. Clary, for whom the plan was made and filed, never intended that it should touch or interfere with the highway and did not know in fact that the subdivision embraced land covered by the highway. These are not perhaps determining points in themselves. But they are secondary considerations when enquiring as to the vital points connected with a plaintiff invoking estoppel.

The action is without merits. The roadway was an open travelled and conspicuous highway—visible to everybody. The plaintiff knew of it, saw it, enquired about it, and knew that the defendants claimed it before he bought. He saw the boundary fence and must be taken to have known that what he bought outside that line of posts was not land but a law suit, with its precarious results. I cannot give judgment for the plaintiff upon the ground of estoppel. It was not shewn that the plaintiff as a matter of fact knew about this plan at all, but being filed he has perhaps a right to say he had legal notice of it. Take it in this way and what had he the right to conclude? That the street not being shewn upon the plan was surrendered or closed? I don't think so. Sudbury registrations are under the Land Titles Act. Under section 26 of the Act in force at the filing of this plan, R. S. O. ch. 138, and under section 24 of the present Act, all registered lands, without any notice thereof upon the registry, are to be taken to be subject to "any public highway, any right of way, water-courses, and right of water and other easements," subsisting in reference thereto, And in 1906, under the Revised Statute, sec. 109, it was not necessary, or it is now under the Land Titles Act of 1911, section 105, that the plan should shew "all roads, streets, . . . or other marked topographical features within the limits of the land so subdivided." In fact, as a matter of law at that time and under that Act, subject to one exception only, the land owner without consulting the council could file any plan he liked. The exception is to be found in section 110 of R. S. O. ch. 138, and section 630 of the Muni-

cipal Act, which prevent the establishment of a street or highway of less than 66 feet in width without the consent of the council "by a three-fourths vote of the members thereof." The conucil therefore only spoke as to the width of Murray and consented to its being only 50 feet. They had jurisdiction to sign for that purpose, and only for that purpose; and that is what they did approve of in fact, as shewn by the reference to "three-fourths" of the members in the certificate itself. Anything beyond this would be *ultra vires*. The result is obvious. The plaintiff had a right to infer the council's approval of the narrow street, and buying upon the faith af this, he has the right to rely upon this road as a highway and outlet. Estoppel should aid him to this extent, and no further.

Is there any other way of putting it for the plaintiff? I think not, but there is a stronger way of putting it for the defendants, and this because there are statutory methods provided by which alone highways can cease to be highways. This highway remains the property of the town until closed or disposed of under the provisions of the Municipal Act. The rights of persons interested to be heard and the requirements as to notice by posters and publication in a newspaper and provision for a substituted road, and compensation in some cases must all be accorded and strictly complied with before a highway can be legally stopped up, altered, diverted, sold, or disposed by the municipal council. Consolidated Municipal Act, 1903, ch. 19, secs. 629, 632. Cases collected in Biggar's Municipal Manual, pages 352-3. The council could not, therefore, by the casual and equivocal act referred to deprive the corporation and the public of this valuable and necessary highway for the benefit of a man buying with his eyes open. The council, however, have not been blameless and the municipality is therefore not entitled to costs.

There will be judgment dismissing the action without costs.