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CARTWRIGHT, MASTER. MAY 9TH, 1903.

CHAMBERS.

PRETTY v. LAMBTON LOAN CO.

Venue—Change of—County Court—Preponderance of Convenience—Special Circumstances—Apportionment of Costs.

Motion by defendants to change venue in an action in the County Court of York from Toronto to Sarnia, and to transfer the action to the County Court of Lambton.

C. A. Moss, for defendants.

John MacGregor, for plaintiff.

THE MASTER.—Plaintiff alleges that defendants have been overpaid $150 and seeks to recover that amount. The prayer for relief is, that defendants may be ordered to furnish a true statement of all moneys received by them on account of a mortgage for $350 on certain lands purchased by plaintiff and assumed by her, and may be ordered to repay the $150. The statement of defence simply denies the allegations of plaintiff and puts her to strict proof thereof.

Defendants' affidavits state that the cause of action (if any) arose in the county of Lambton, where both parties resided at the time; that all the witnesses on both sides reside in that county; that defendants will require seven or eight witnesses; but what they are expected to prove is not stated.

Plaintiff's affidavits state that she is over 80 years of age, and wholly unable either to go herself to Sarnia, or, by reason of poverty, to employ counsel at that place or pay witness fees. Plaintiff admits execution of the mortgage and her liability to pay it. . . .

I need only refer to Mr. Alexander MacGregor's very useful article in 38 C. L. J. p. 433, where all the decisions, reported and unreported, are collected and analyzed. [Reference to Davis v. Murray, 9 P. R. 222, 227; Campbell v.

Doherty, 18 P. R. 243; Standard Drain Pipe Co. v. Town of Fort William, 17 P. R. 404; Berlin Piano Co. v. Truaisch, 15 P. R. at p. 70.] . . .

The sole issue is, has there been any overpayment as alleged by plaintiff, or was there a settlement made in 1898? Why defendants refuse to furnish plaintiff's solicitor with a copy of what must be a very short account in their ledger, I do not understand. The production of this statement even now might very possibly put an end to the action. So far as I can see, only one witness would be required on this head—the account. Then, as to the alleged settlement, it appears it was made on behalf of plaintiff by the gentleman who is now the solicitor for defendants. It is stated that he paid to defendants what was due, as he thought, on the admitted mortgage, and paid the balance on plaintiff's order to another solicitor. Of these facts these two gentlemen would be the only necessary witnesses.

In face of plaintiff's affidavits, the statements as to age and poverty not being denied, I cannot see my way to granting defendants' motion. I do not find any such preponderance as would satisfy the rule laid down by the Court of Appeal in Campbell v. Doherty. The refusal of their motion will perhaps induce defendants to comply with the very reasonable request of plaintiff's solicitor; and in this way the action may come to an end before trial—a result highly beneficial to all concerned. However that may be, I think I must dismiss the motion, leaving the trial Judge to apply the principle of McArthur v. Michigan Central R. W. Co., 15 P. R. 78, and making the costs of this motion costs in the cause to plaintiff.

MEREDITH, C.J. MAY 11TH, 1903.

CHAMBERS.

DESERONTO IRON CO. v. RATHBUN CO.

Third Parties—Indemnity—Trial of Issues—Discovery—Directions.

An appeal by the Standard Chemical Co., third parties, from order of Master in Chambers (ante 414) giving directions for trial of questions raised.

J. Bicknell, K.C., for appellants.

E. D. Armour, K.C., for defendants.

J. H. Moss, for plaintiffs.

MEREDITH, C.J., varied the order by allowing the third parties to take part in the trial, and directing that they should have notice of all proceedings. Costs reserved.

BRITTON, J. MAY 11TH, 1903.

CHAMBERS.

RE TAGGART v. BENNETT.

County Court Appeal—Right of Appeal — Final Order — Refusal to Vary Minutes of Judgment—Duty of Judge to Certify Proceedings even where Appeal does not Lie—Set-off of Costs.

Motion by plaintiff for a mandamus to compel the Judge of the County Court of Middlesex to certify the proceedings in this case, pursuant to sec. 55 of the County Courts Act, so as to permit an appeal to a Divisional Court against an order of the Judge dismissing an application to vary the minutes of the judgment in this action.

W. H. Bartram, London, for plaintiff.

E. W. M. Flock, London, for the Judge.

BRITTON, J., held that the proposed appeal would not lie, the order not being a final order within the meaning of sec. 52 of the County Courts Act. Blakey v. Latham, 43 Ch. D. 23, London and Canadian L. and A. Co. v. Morris, 19 S. C. R. 442, McPherson v. Wilson, 13 P. R. 339, O'Donnell v. Guinane, 28 O. R. 389, Fisken v. Stewart, 17 C. L. T. Occ. N. 82, Hunter v. Hunter, 18 C. L. T. Occ. N. 114, and Hastings v. Ernest, 7 U. C. R. 520, referred to. Semble, that the fact that there is no appeal from this order is no reason why the County Court Judge should not certify the papers. Whether an appeal lies or not, is a question for the Court appealed to. The Judge's duty is ministerial, and the certificate should as a rule be given on request. But in this case plaintiff does not desire the mandamus, if the order cannot be successfully appealed against. Semble, also, that the setting off of costs (which was the thing objected to by the motion to vary the minutes) is no part of what is ordinarily understood as settling minutes of judgment.

Motion for mandamus dismissed without costs.

BRITTON, J. MAY 11TH, 1903.

WEEKLY COURT.

RE ONTARIO POWER CO. OF NIAGARA FALLS.

Constitutional Law—Powers of Dominion Parliament—Expropriation of Lands—Use of Water Power—Local Work—General Advantage of Canada—Statutory Declaration—Company.

Motion by the company for order for possession of certain lands which they desired to expropriate for the construction

of their canal and hydraulic tunnel. The owner of the lands had commenced an action for an injunction restraining the company from proceeding with pending proceedings for expropriation; and had given notice of motion for an interlocutory injunction. By consent the present motion was treated as a motion for judgment in that action. A Chambers motion by the company for leave to pay the amount awarded for these lands, less the costs of arbitration and award, was also (by consent) heard with the other motion.

W. Cassels, K.C., and F. W. Hill, Niagara Falls, for the company.

H. S. Osler, K.C., for William Henson, the land owner, contended that the company's charter, being by Dominion legislation, could give no right to expropriate private property, because the work authorized was a local work coming under sec. 92 of the B. N. A. Act, and it had not been declared by the Parliament of Canada to be for the general advantage of Canada, as provided by clause 10 (c).

The Minister of Justice for Canada and the Attorney-General for Ontario were notified, but were not represented.

BRITTON, J.—The company were incorporated by 50 & 51 Vict. ch. 120 (D.) The preamble to the Act is as follows: "Whereas it is desirable, for the general advantage of Canada, that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland rivers, with the object of promoting manufacturing industries and inducing the establishment of manufactures in Canada, and other businesses," etc. . . .

Is it necessary, considering the object of the Act, the subject matter dealt with, and how the corporate powers are to be exercised, that there should be the express declaration by the Parliament of Canada that the works are for the general advantage of Canada? I do not think it is.

1. This Act authorizes the company to contract with any bridge company to carry wires for electric light or other purposes and to connect them with the wires of any company in the United States. That brings the work under exception (a) of cl. 10 of sec. 92 of the B. N. A. Act. That section withdraws from Provincial legislative power any local work or undertaking extending beyond the limits of the Province.

2. This Act deals with navigable rivers. The works, as stated in the Act, may interfere with the navigation of the Welland river. Navigation is specially reserved by sec. 91 of the B. N. A. Act for Dominion legislation.

3. This company, to do the work contemplated, must have power to deal with "public property" of the Dominion: sec. 91, sub-sec. 1.

By sec. 108 of the B. N. A. Act, the public works in the Provinces in the 3rd schedule shall be the property of Canada, and in this 3rd schedule are canals and lands and waters connected therewith, and rivers. . . .

But the Welland river is not only under the control of the Dominion as a "river," and as a "navigable river," but by C. S. C. ch. 28, sec. 10, sched. A., this river is made . . . public property.

If the Dominion Parliament has authority to grant the powers claimed, it is a case of "over-lapping powers," and Mr. Lefroy's proposition 37, in his work on "Legislative Power," is applicable. See also pp. 350, 351, 425-468, of that work, and the cases cited.

If the Dominion, and Dominion only, has power over the source of supply of water, the thing of use to the company to be chartered, then the Dominion has of necessity power to deal in detail with what is necessary to utilize the water supply for purposes beneficial to Canada: see Tennant v. Union Bank, [1894] A. C. 31; Attorney-General for Ontario v. Attorney-General for Canada, [1894] A. C. 189; Regina v. County of Wellington, 17 A. R. 444; Bradburn v. Edinburgh Life Assurance Co., 2 O. W. R. 253, and cases there cited.

[City of Toronto v. Bell Telephone Co., 3 O. L. R. 465, distinguished.]

But, assuming that it is necessary that there should be a declaration by the Parliament of Canada that these works are for the general advantage of Canada, is there not substantially such a declaration in the preamble of the Act of incorporation? . . . Taking the preamble as a declaration is not construing the statute. . . . The preamble shews the intention of Parliament to give the power and the reason why, and that reason is a parliamentary declaration.

Again, may there not be a declaration by implication, or what, so far as all parties interested are concerned, would amount to a declaration? The Act . . . in giving to the company all the powers of a railway company under the Dominion Railway Act, expressly gives the right to expropriate. . . .

Motion for injunction dismissed and action dismissed. Order to go for leave to pay money into Court and for possession. Costs of this application and motion to be paid by Henson to the company.

FERGUSON, J. MAY 11TH, 1903.

TRIAL.

DOWLING v. DOWLING.

Contract—Payment for Services—Proof of Contract—Question for Jury—Motion for Nonsuit.

Motion for a nonsuit in an action tried with a jury at Cornwall. Action for specific performance, or to recover payment for services rendered to defendant on his farm by one of the plaintiffs under an alleged agreement between his father, the other plaintiff, and the defendant.

E. G. Porter, Belleville, for plaintiffs.

J. H. Madden, Napanee, for defendant, contended that no contract had been proved, citing Iler v. Iler, 9 O. R. 550, and Smith v. Smith, 29 O. R. 309.

FERGUSON, J., held that there was some evidence to go to the jury, and that a nonsuit would be erroneous. If the jury believed the evidence that defendant said, "I will pay him well," it was for them to say what, in all the circumstances and surroundings as shewn by the evidence, was the real meaning, and how it was understood by the parties concerned. Motion for nonsuit refused. The jury having found that there was a bargain whereby defendant promised to pay Robert Dowling the younger in money for his services, and that the services were worth $125 a year, which amounted to $979.15, judgment to be entered for plaintiffs for that sum with costs.

MAY 11TH, 1903.

DIVISIONAL COURT.

HENRY v. WARD.

Principal and Agent—Purchase of Goods by Agent—Commission—Ascertainment of Amount.

Appeal by defendant from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 652) in favour of plaintiffs for $7,825 in an action to recover a commission for purchasing for defendant from tobacco growers in Ontario, 2,000,270 pounds of tobacco.

E. S. Wigle, Windsor, for defendant.

J. W. Hanna, Windsor, for plaintiffs.

THE COURT (BOYD, C., and FERGUSON, J.) held that there should be some deduction for the crop not up to the

contract standard, and, making this deduction, the yield should be fixed at 700,000 pounds, and 30 per cent. deducted. Judgment reduced to $4,900 and costs. No costs of appeal.

CARTWRIGHT, MASTER. MAY 12TH, 1903.

CHAMBERS.

BUTT v. BUTT.

Venue—Change of—Slander—Justification—Preponderance of Convenience—Costs of Trial.

Motion by defendant to change venue from Goderich to Sandwich, in an action of slander. The defendant justified the words spoken, and alleged as particulars "that within three months or thereabouts after the marriage of plaintiff to her husband she gave birth to a child, she not having been previously married." Plaintiff laid the venue at Goderich, where she resided. Defendant lived at Windsor.

D. L. McCarthy, for defendant.

C. A. Moss, for plaintiff.

THE MASTER.— . . . The present is a very unfortunate action. Such a charge made against any apparently respectable woman is strongly to be deprecated, unless there is some paramount duty cast upon the informant. . . . I gather from the affidavits that the charge against the plaintiff, if true, is of something that happened at least 20 years ago, and at a time when her residence was, as now, at the township of Goderich. It may therefore not unreasonably be contended that any witnesses on the plea of justification would be found in that neighbourhood. . . . After giving all consideration to the material, I am not able to find "any such preponderance of convenience as is required by the cases to be shewn:" Campbell v. Doherty, 18 P. R. at p. 244. . . . I think, moreover, that the character of the action itself forms an important element in the decision of this motion. The charge admittedly made by defendant, and aggravated by his plea of justification, is one that plaintiff could not be expected to overlook. And I do not think that defendant can expect to be in any way facilitated, or that plaintiff should in any way be hampered in the attempt to vindicate her good name.

The motion will, therefore, be dismissed; costs in cause to plaintiff; any extra costs occasioned to defendant by the trial being at Goderich are left to the consideration of the Judge at the trial.

CARTWRIGHT, MASTER. MAY 13TH, 1903.

CHAMBERS.

FULLER v. APPLETON.

Security for Costs—Several Defendants—Several Orders—Satisfaction by one Payment—Reservation of Right to Apply for Increased Security.

Motion by plaintiff for order directing that $200 paid into Court by him be taken as a sufficient compliance with two orders for security for costs issued by the defendants, who appeared by two different solicitors.

J. B. O'Brien, for plaintiff.

A. C. Macdonell, for defendant Higbee.

Casey Wood, for the other defendants.

THE MASTER.—Defendants are prima facie justified in severing in their defences. From what appears in the affidavits and statement of claim it may well be that Higbee will claim indemnity from his co-defendants if plaintiff should succeed in his action. . . . I do not think that any other order can now be made (except with plaintiff's consent) than that which was made in Edmunds v. Mabee, 11 C. L. T. Occ. N. 177. . . . I have not found any case that adopts the view urged by defendants. No further security is usually given until the case is ripe for trial. . . . I only state the fact that generally $200 is a sufficient sceurity up to the commencement of the trial. The weighty observations of Meredith, J., in Standard Mining Co. v. Seybold, 5 O. L. R. at p. 13, must always be borne in mind. . . . If an application for increased security seems necessary, it will, no doubt, be made in due course. It will then be time enough to consider whether it should be granted and to what extent . . . and what disposition is to be made of the costs of such motion. The present order will be as asked for by plaintiff, and the costs of this application will be to plaintiff in the cause.

FERGUSON, J. MAY 13TH, 1903.

TRIAL.

HOLT v. PERRY.

Executors—Specific Legacy—Right and Duty to Realize Security Specifically Bequeathed—Set-off of Statute-barred Debt Due by Legatee to Testator—Right of Retainer.

Marietta Gardner, who died 1st January, 1902, left a will whereby she made a gift to the plaintiff, her brother, in these

words: "I give and bequeath absolutely unto my brother . . . a certain chattel mortgage for the sum of $700 . . . and I also give and bequeath absolutely unto my said brother . . . a certain claim I hold against my said brother for $300." The next following clause in the will was as follows: "I direct my executors to convert all the rest and residue of my estate into cash, and, after payment as aforesaid of all my debts and funeral and testamentary expenses, I dispose of the same as follows." Then followed legacies and gifts.

Defendants were by the will appointed executors, and they took upon themselves the burden of the trusts.

Defendants threatened to proceed to realize and get in the moneys secured by the chattel mortgage, and this action was brought to restrain them from doing so. An interim injunction was granted.

The action was tried at Toronto.

R. S. Neville, for plaintiff.

E. G. Graham, Brampton, for defendant.

FERGUSON, J.—It was scarcely contended that this gift to plaintiff is not a specific legacy. The contention, however, was that it is a pecuniary legacy as well. This I do not understand, for, according to the argument, almost any specific legacy might be considered also pecuniary in kind and character.

From a comparison of this gift with the cases collected in the 5th ed. of Theobald on Wills, at pp. 128-145, and some others referred to by counsel, and in the 9th ed. of Williams on Executors, p. 1030, I am clearly of the opinion that the gift in question is a specific legacy.

For plaintiff it was asserted and contended that there was no need of getting in the legacy, as the estate was clearly sufficient to answer the demands upon it. Even if this consideration could be entertained at present, it is to be borne in mind . . that there is an action now pending against the estate of the testatrix for the recovery of a large sum of money, and should that action succeed, the case would be different.

[Reference to Williams on Executors, 9th ed., p. 1303.]

I am of the opinion that the executors not only have authority and power to get in this legacy, but that it is their duty to do so, and have it in hand, and safe to answer the proper purposes at the proper time. The getting in of the legacy in the present case must, I think, involve the collection of the mortgage. Plaintiff has an interim order enjoining

defendants against doing this. This order must be dissolved, and the perpetual order asked must be refused.

Defendants set up that, apart from the debt of $300 from this legatee to the testatrix, mentioned in and forgiven by the will, there was another debt from him to her of $220. . . . This debt . . . was barred by the Statute of Limitations. The contention was that, although it could not be collected by action, yet it might be deducted from or set off against this legacy. See Williams on Executors, 9th ed., p. 1171. Defendants sought to have it declared that they had or would have the right to set off this debt of $220 and the interest upon it against this legacy; but I am not of this opinion. . . . "No case has been cited to shew, and it seems to me contrary to principle to hold, that there can be a right of retainer in respect of a debt owing from a specific legatee to the testator:" In re Akerman, [1891] 3 Ch. at p. 218.

My conclusion then is, that there is not and cannot be a right of retainer or set-off of this old debt against this specific legacy. This opinion may be considered premature, but both counsel requested and in fact insisted upon my giving it.

This being my conclusion, it seems not necessary for me to consider the learned argument as to the interest on this old debt.

As each party set up a contention that failed, and as each of the contentions covered about the same amount of trouble and expense, I am of opinion that neither party should have any costs against the other party.

CARTWRIGHT, MASTER. MAY 14TH, 1903.

CHAMBERS.

GOOCH v. ANDERSON.

Trial—Postponement—Absence of Necessary and Material Witness—Terms—Change of Venue—Costs.

Motion by defendant to postpone trial.

S. B. Woods, for defendant.

H. H. Shaver, for plaintiff.

THE MASTER.—The trial should come on at Toronto next week. So far as appears on the material and from the statements of counsel on the argument, I do not see very clearly how defendant's husband can be so "necessary and material a witness that defendant cannot go to trial without him." He had nothing to do with plaintiff, though it would seem

from defendant's affidavit that plaintiff's offer was submitted to and approved of by him before her acceptance of same.

On the whole, I think the trial should be postponed, on the following terms.

If plaintiff does not wish to let the trial go over to the next non-jury sitting at Toronto, which will probably commence about the 14th September at latest, then defendant must be ready for trial at the non-jury sittings to be held on the 16th of next month at Barrie, a place which cannot be inconvenient to either party, or at St. Catharines, if the parties so desire. The defendant to elect forthwith not later than 11 a.m. to-morrow.

I am the more inclined to do this . . . because the case was ready last month, but was not tried owing to the illness of a Judge . . . and because in the present case plaintiff has the very unusual advantage of practically having got from defendant security for costs. . . . Costs should be to plaintiff in any event, as well as any extra costs occasioned by the change of venue.

MAY 15TH, 1903.

DIVISIONAL COURT.

CHANDLER AND MASSEY (LIMITED) v. GRAND TRUNK R. W. CO.

Parties—Joinder of—Two Defendants—Different Causes of Action—Sale of Goods—Claim against Vendee for Price—Claim against Carrier for Loss in Transit.

Appeal by defendant company from order of BRITTON, J. (ante 407), reversing order of Master in Chambers (ante 286), staying proceedings until plaintiffs elect which of the two defendants they will proceed against, and dismissing the action against the other.

D. L. McCarthy, for defendant company.

C. A. Moss, for defendant Kerr.

W. A. Sadler, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., FERGUSON, J.) was delivered by

MEREDITH, C.J.—It is impossible to reconcile all the cases upon this subject, but we think the practice laid down by the more recent cases is clear, and that the order of the Master was right and should not have been reversed. The cases before Smurthwaite v. Hannay, [1894] A. C. 494, were

decided on a group of English Rules dealing not with causes of action, but with parties. Since that case all the decisions in England are in harmony, except perhaps Kent Coal Exploration Co. v. Martin, 16 Times L. R. 486. Collins, L.J., puts the matter very clearly in Thompson v. London County Council, [1899] 1 Q. B. 840, at p. 844. Two cases seem to be the other way, viz., Honduras R. W. Co. v. Tucker, 2 Ex. D. 301, and Bennetts v. McIlwraith, [1896] 2 Q. B. 464, but in each case there was but one cause of action, as is pointed out by Collins, L.J., in the Thompson case, at p. 845. We must interpret Rules 186 and 192 in the light of the authorities, and follow Quigley v. Waterloo Mfg. Co., 1 O. L. R. 606, which proceeds upon the English cases. Here the causes of action against the two defendants are distinct, and they cannot be sued in the alternative. The appeal should be allowed and the order of the Master restored. In view of the conflict of decisions, there will be no costs either here or below.

MacTavish, Co. J. May 16th, 1903.

TRIAL.

BURR v. BULLOCK.

Deed—Conveyance of Land — Cutting down to Security — Bond to Reconvey.

Action for a declaration that a certain conveyance of land, absolute in form, was intended only as a security, and for redemption.

Trial at Cobourg before MacTavish, Co.J., sitting for Falconbridge, C.J.

R. C. Clute, K.C., and J. W. Gordon, Brighton, for plaintiff.

W. B. Northrup, K.C., for defendant.

MacTavish, Co.J.—The question for determination in this case is whether the transaction between plaintiff and defendant was a loan . . . or a sale . . . with a right to repurchase.

About the beginning of October, 1896, plaintiff was in financial difficulties and made application to defendant for a loan, offering as security a mortgage on the property in question. This security the defendant refused to accept, but, in order to save the expense of foreclosure proceedings in the event of default, defendant agreed to lend plaintiff the amount required, and to take as security for the repayment

of the loan an absolute conveyance of the land, giving plaintiff a contemporaneous bond in the penal sum of $1,000, conditioned for the reconveyance of the lands on payment . . . of $550, with interest at 8 per cent., on 11th October, 1896. The bond recites that the deed was "given for securing $550 and interest thereon," etc.

Defendant has been in possession since the date of the conveyance, has made improvements thereon, has been in receipt of the rents and profits, and resists plaintiff's claim to redemption. . . .

Reading the conveyance and bond together as part of one transaction, and taking into consideration the evidence given at the trial, the conclusion is irresistible that the transaction was a loan . . . and that the conveyance was given merely for the purpose of securing to defendant the return of the loan with interest.

Judgment for plaintiff as prayed with costs.

MacTavish, Co. J. May 16th, 1903.

TRIAL.

MATTHEWS v. WELLER.

Husband and Wife—Joint Liability—Evidence—Alternative Liability—Election.

Action against two defendants, husband and wife, to recover the balance of the price of lumber sold and delivered.

Trial at Cobourg before MacTavish, Co.J., sitting for Falconbridge, C.J.

W. L. Payne, Brighton, for plaintiff.

W. B. Northrup, K.C., for defendants.

MacTavish, Co.J.—The only question to be determined is, whether defendants are jointly liable to plaintiff for the amount of the claim sued for. The defendant Alice J. Weller does not dispute her liability.

There is not, in my opinion, any evidence to support a joint liability of husband and wife. This case comes within the principle of the decision in Davidson v. McLelland, 32 O. R. 382.

If there is an alternative liability, I think plaintiff has elected to accept the liability of the wife: Morel v. Westmoreland, [1903] 1 K. B. 64.

Judgment for plaintiff against defendant Alice J. Weller in the usual form, with costs. Action as against defendant D'Arcy L. Weller dismissed with costs.

MacTavish, Co. J. MAY 16TH, 1903.

TRIAL.

ANDERSON PRODUCE CO. v. NESBITT.

Foreign Judgment—Action on—Defence—Fraud—Evidence to Sustain.

Action upon a foreign judgment.

Trial at Cobourg before MacTavish, Co.J., sitting for Falconbridge, C.J.

I. F. Hellmuth, K.C., and D. W. Saunders, for plaintiffs.

W. B. Northrup, K.C., for defendant.

MacTavish, Co.J.—Defendant's contention is, that the judgment in question was obtained by the fraud of plaintiffs upon false evidence adduced in the County Court of Winnipeg on behalf of plaintiffs and by the fraudulent concealment from the Court of the true motive of the transaction between plaintiffs and defendant. . . . This would be an answer to the action: Hollender v. Ffoulkes, 26 O. R. 61; Abouloff v. Oppenheimer, 10 Q. B. D. 295; Vadala v. Lawes, 25 Q. B. D. 310. The evidence must be of that clear and convincing character that the conclusion from it is irresistible that the foreign Court was not merely mistaken, but was actually misled, by the fraud practised upon it, into pronouncing a wrong judgment.

The evidence adduced before me falls far short of this, and I must therefore find the issues in favour of plaintiffs.

Judgment for plaintiffs for amount claimed with costs.