THE

ONTARIO WEEKLY REPORTER

VOL. 24 TORONTO, APRIL 24, 1913. NO. 8

APPELLATE DIVISION.

APRIL 7TH, 1913.

CURRY v. PENNOCK.

4 O. W. N. 1065.

Landlord and Tenant — Forfeiture of Lease—Breach of Covenants against Subletting — Sublease in Substance not in Form — Evidence—No Relief Against—Judgment for Possession.

Action by assignees of lessors for possession of the demised premises on account of an alleged breach of a covenant against assigning or subletting any interest in the demised premises. Defendants had carried on a restaurant business in the premises in question and entered into an agreement with a third party ostensibly for the management of the business for them upon the basis that they should receive $1,500 and the third party all profits above that sum. The arrangement was to be for one year and the $1,500 payable on certain fixed days.

MEREDITH, C.J.C.P. (23 O. W. R. 922), gave judgment for plaintiffs, holding that the agreement complained of was in substance an assignment of an interest in the property.

SUP. CT. ONT. (*1st App. Div.*) affirmed the trial Judge's findings of fact and held that the interest of the defendants had not been forfeited, but had come to an end on account of the termination of the condition upon which it depended, viz., that defendants should themselves remain in possession of the premises demised.

Lockwood v. *Clarke*, 8 East. 185; 9 R. R. 402, followed.

Appeal dismissed with costs.

Appeal by the defendants from a judgment of HON. R. M. MEREDITH, C.J.C.P., 23 O. W. R. 922; 4 O. W. N. 712, on the 28th January, 1913, after the trial before him, sitting without a jury at Toronto on the 24th day of that month, in an action to recover certain premises demised by a lease for breach of the covenants contained in such lease.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR, JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

G. Cooper, for the defendants, appellants.

T. J. W. O'Connor, for the plaintiff, respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The respondent is the assignee of a lease dated 23rd February, 1909, from the owners of the land in question and other land to Maurice Wolff, by which these lands were demised to Wolff for the term of 10 years, from 1st May, 1909, and the action is brought to recover possession of the land in question.

Wolff on the 24th of May, 1909, and before the assignment of his lease to the respondent, executed an agreement under seal by which he granted to the appellants, who are described as licensees, "a license to maintain and carry on a restaurant in the roughcast house in Wolff's Park (except a room on the second floor . . .) for ten years from the 1st of May, A.D. 1909, less the last ten days thereof upon and subject to the terms and conditions hereinafter expressed."

Wolff's Park is the land demised to him by the lessee, and the roughcast house comprises the premises, possession of which is claimed by the respondent.

Among the terms and conditions expressed in the agreement are the following:—

"The licensees . . . shall have no right or power to sell, mortgage, pledge, sublet or assign this agreement or license or any interest therein, nor shall he (sic) permit any person to have any interest in or use any part of the premises, building, erection or space covered by this license for any purpose whatever without the consent in writing of the owner."

The agreement also contains the following provisions:—

"The right to occupy the building and space covered by this license and to maintain and operate a restaurant or other concession, feature or privilege shall continue only so long as the licensee shall strictly observe, comply with and perform the undertakings, provisions, agreements and stipulations agreed and entered into by them in this agreement.

If the licensees shall make default in the strict observance and performance of the undertakings, provisions, agreements and stipulations agreed and entered into by them, the owner may immediately or at any time after such default close up and take possession of the space covered by this license, and this license shall thereby be and become

forfeited and all erections, structures and articles belonging to the licensees on said premises shall forthwith be removed and all privileges of the licensees to occupy or use said premises shall cease and in default of such removal the owner may remove same at the cost and expense of the licensees."

The agreement also contains a provision that the licensees "shall pay the owner annually in advance each year on the 1st day of May as compensation for this license the sum of $400."

On the 1st of October, 1911, the appellants entered into an agreement with Olive Brooker by which, as the respondent contends, they assigned to her an interest "in the agreement or license," contrary to the provisions of the agreement of the 24th May, 1909, and by which and by the subsequent carrying on of the restaurant by Mrs. Brooker, as the respondent also contends, they permitted her to have an interest in and to use the demised premises without the prescribed consent and contrary to their covenant that they would not do so.

The agreement with Mrs. Brooker is peculiarly worded and was, as it appears to me, worded as it is in order to enable the appellants to contend that what has been done does not constitute a breach of their agreement.

The agreement, after reciting that the appellants "are engaged in business . . . under the name of Pennock Brothers Restaurant Parlor," recites that they "are desirous of being relieved from the oversight and care of the said business and have arranged with the party of the second part (Mrs. Brooker) to manage the same for them for a year from the date hereof and that the party of the second part should receive as compensation for her services the profits from the operation of the said business over and above the sum of $1,500," witnesses that in consideration of $1,500 to be paid, $700 on the execution of the agreement and $800 on the 1st May next, the appellants "covenant and agree to allow the party of the second part to carry on said business for the said period and to enjoy and collect the full profits and benefits derived from the operation and carrying on of the said business for the said period."

By a subsequent clause of the agreement, Mrs. Brooker agreed to pay the $800 "on the said first day of April (sic) 1912."

The trial Judge held that the effect of this agreement was, at all events when considered in the light of the way in which it was carried out and the business of the restaurant was afterwards carried on, to permit Mrs. Brooker to have an interest in or use of the property within the meaning of the covenant and as substantially a sub-letting of the property. With that conclusion I agree, and I also agree with the reasons given for it, to which may be added another and I think a very cogent reason—the fact that although the agreement recites that the $1,500 are to be paid out of the profits of the business, $700 were paid in cash on the execution of the agreement, and Mrs. Brooker covenanted to pay the remaining $800 on the 1st of April, 1912, not out of the profits of the business, but absolutely.

That conclusion having been reached, the respondent's right to recover possession seems to me beyond question, and the matters relied on by the appellants' counsel as obstacles to his obtaining relief have no bearing on the question which is to be determined.

Assuming that the agreement of 1st October, 1911, was not a mere license to use the premises but constituted a demise of them to the appellants, which is probably its legal effect, the answer to the argument of the appellants' counsel is that *ex vi termini* the lease to the appellants came to an end when in breach of its provisions they permitted Mrs. Brooker to have an interest in the premises and to use them.

Although the demise to the appellants is in the earlier part of the lease for ten years from 1st May, 1909, the later provision is that her right to occupy and carry on the restaurant "shall continue only so long as the licensees shall strictly observe, comply with and perform the undertakings, provisions, agreements and stipulations agreed and entered into by them in this agreement" . . . and in my opinion upon breach of these undertakings, etc., as I have said the term *ex vi termini* came to an end.

If authority for this proposition be needed; *Doe dem: Lockwood* v. *Clarke* (1807), 8 East 185, 9 R. R. 402, may be referred to.

In that case the habendum was for 21 years, if the tenant, his executors, etc., should so long continue to inhabit and dwell with his and their family, etc., in the farm-house, and he, his executors, etc., should so long continue actually to hold and occupy the said farm, lands, and premises, and not

let, set, assign over, or otherwise depart with the lease or the farm or premises.

The tenant became bankrupt and his assignees, with his approbation and consent, sold the lease, and one Wright, by the appointment of the defendant Brown, managed the farm as his bailiff or agent, and the tenant no longer had the actual occupation of it.

Ejectment having been brought, it was held that the lessor might maintain ejectment without a previous reentry, the continuance of the term being made to depend upon the lessee's actual occupation, and Lord Ellenborough, C.J., in delivering judgment, pointed out that it was not a case of forfeiture, but actual occupation by the lessee was a condition annexed to the lease.

Lawrence, J., said that it was not a case of forfeiture, but of the term itself being made to continue and depend upon the personal occupation of the lessees, adding: "It is like the case of a lease for 21 years if the lessee shall so long live; then if he die before the 21 years run out there is an end of the term. Here the lease in effect is for 21 years if Thomas Clarke shall so long live in the house. Then if he has ceased to live there from whatever cause the condition on which the term was made to determine has happened and there is an end of his interest in the premises."

The appeal fails and should be dismissed with costs.

HON. MR. JUSTICE HODGINS, agreed.

MASTER IN CHAMBERS. APRIL 7TH, 1913.

ROGERS v. NATIONAL PORTLAND CEMENT.

4 O. W. N. 1094.

Pleading — Motion to Strike Out Paragraph of Statement of Claim— Incompleteness — Defendants Sufficiently Notified of Plaintiff's Claim—Object of Pleadings.

MASTER-IN-CHAMBERS refused to strike out on the ground of incompleteness a paragraph of a statement of claim, claiming the reformation of a certain agreement holding that it let defendants know what case they had to meet which was the main requisition in pleadings.

Motion by defendants to strike out an amended paragraph of the statement of claim, as not being a compliance with the order permitting the amendment, and also as not being properly pleaded.

J. Grayson Smith, for defendant's motion.

M. Lockhart Gordon, for plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—On 20th March plaintiff obtained leave "to amend his statement of claim by adding thereto a claim that the agreement in question in this action be reformed."

In pursuance of the above paragraph, 4A. was inserted in the words following:—

4A. "The defendants allege that they are justified in refusing to continue the plaintiff's agency upon the ground that the plaintiff was unable to sell their cement at the price of $1.30 per barrel as provided by clause 4 of the said agreement and the plaintiff says under the proper construction of the said agreement the defendants were bound to reduce their price to meet the ruling market prices or to hold their cement in stock until the same could be disposed of at not less than $130 per barrel, that if the agreement does not bear this construction the same was executed by the parties under a mutual mistake of the true intent and meaning thereof and that the said agreement should be reformed to express the true intention of the parties."

The defendants thereupon made this motion to strike out the above paragraph.

The agreement is not before me at present, but its effect is given in the amended statement of defence, and on its terms the defendants insist—which as they stand do not provide for any lesser price that $1.30 a barrel nor state what was to be done in such case. The whole issue between the parties is as to the terms of the written agreement. It has been expressly pleaded by the amended statement of defence that plaintiff was under that agreement obliged to sell at $1.30 per barrel. The amendment to the statement of claim now made meets this in a way that does not seem objectionable.

It was suggested that the desired reformation should be more distinctly set out. This would no doubt be done in the judgment if the plaintiff's contention prevails. At present the plaintiff's view is indicated sufficiently to let the defendants know what case they have to meet, which is the main requisition in pleadings.

In *Ontario & Minnesota* v. *Rat Portage*, 22 O. W. R. 1, it was held permissible to introduce an allegation in the

statement of defence by the statement "the plaintiff claims." The same rule must apply to the present case.

The motion will be dismissed with costs to plaintiff in the cause. The defendants to have 8 days to amend if desired.

MASTER IN CHAMBERS. APRIL 5TH, 1913.

TUCKER v. BANK OF OTTAWA.

4 O. W. N. 1090.

Action—Motion to Stay—Security for Costs — Assignment for Benefit of Creditors by Plaintiff — Substantial Interest in Action — Lack of, to be Clearly Shewn—Costs.

MASTER-IN-CHAMBERS refused to stay an action or to order security for costs where plaintiff had admittedly made an assignment for the benefit of creditors, on the ground that there was no evidence that plaintiff had no substantial interest in the action.

Garland v. *Clarkson*, 9 O. L. R. 281, and other cases referred to.

Motion by defendant to stay the plaintiff's action or for security for costs apparently on the ground that the suit is in reality for the benefit of plaintiff's creditors.

J. Grayson Smith, for the defendant.

Featherston Aylesworth, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—It is admitted that plaintiff on 21st March, 1911, made an assignment for the benefit of his creditors under R. S. O. (1897) ch. 124, of all his estate real and personal. Any surplus after payment of debts and charges was to be repaid to the assignor.

The affidavit of defendants' solicitor is the only material filed in support of the motion. It states that he has made careful enquiries and believes that plaintiff has never obtained any release or discharge from his creditors, and that he is insolvent and without means or assets exigible under execution—and that up to the present time his creditors have only been paid a dividend of 11 cents on the dollar.

This is answered by an affidavit of plaintiff's solicitor, apparently the same person as the assignee above mentioned. He confines himself to a denial of plaintiff's insolvency and says plaintiff is carrying on his business of buying and selling live stock and was able and willing to advance to the de-

ponent the sum he asked as a deposit before commencing this action. He made the affidavit because plaintiff is at present quarantined for smallpox at Carleton Place, and is out of communication with his solicitor. In *Pritchard* v. *Pattison*, 1 O. L. R. 37, it was said that very clear proof must be given that plaintiff has no substantial interest in the action before such an order can be made. See too *Stow* v. *Currie*, 14 O. W. R. 61, and cases cited there. Giving the widest scope possible to the effect of the assignment as set out in 10 Edw. VII. (Ont.), ch. 64, secs. 8, 9, and 14, yet it is by no means clear that the plaintiff has no substantial interest. The contrary would seem to be the fact. In any case that is a matter that cannot be decided on the present material. It is clearly for the benefit of the plaintiff that he should recover anything possible and so reduce or extinguish the claims against him. For all that appears these claims may have not been paid or released or barred by the Statute of Limitations. The necessary enquiry to determine these questions would be foreign to such an application as the present.

In any case the motion must fail under the principle of the decisions under C. R. 440. In the last of these, *Garland* v. *Clarkson*, 9 O. L. R. 281, the Divisional Court decided that in such a case as the present the assignor was a person for whose immediate benefit the action was brought affirming the decisions in the two cases reported in 10 P. R. 462. See too *Major* v. *Mackenzie*, 17 P. R. 18.

No point is raised at present as to the right of the plaintiff to bring the action. That can, however, be taken by way of defence if tenable. As the assignee is apparently acting as plaintiff's solicitor he must be taken to have given his consent to the action in its present form assuming that any consent was necessary and have satisfied himself of plaintiff being *rectus in curia*.

However that may be the motion must be dismissed, but under the peculiar facts the costs will be in the cause to the successful party.

APPELLATE DIVISION.

APRIL 7TH, 1913.

STRONG v. LONDON MACHINE TOOL CO.

4 O. W. N. 1062.

Principal and Agent—Commission—Concluded Agreement Repudiated by Purchaser—Alleged Misrepresentation—Agreement for Commission Based on Voided Agreement—Later Sale — "Introduction"—Necessity of—Quantum Meruit.

Action by an agent to recover commission upon the sale of the assets of defendant company to another corporation. Defendant company's officers were anxious to sell their concern and retained plaintiff to endeavour to negotiate a sale to the ultimate purchasers, a merger of a number of similar businesses in various parts of the country. It was understood that plaintiff should have a commission, but the amount was not definitely fixed. Plaintiff interested officials of the purchasers, with whom he was acquainted, and negotiations took place looking to the purchase. An agreement eminently satisfactory to defendants, based on a valuation of their assets, was proposed and a memorandum then drawn up between plaintiff and defendants' chief officer which provided for a liberal commission on this basis and a contingent interest of 20 per cent. in any price obtained above such figure. Finally an agreement was prepared and executed by both vendors and purchasers substantially along the lines proposed, and plaintiff went to England, believing the transaction consummated. Later, the purchasers repudiated the agreement, claiming that they had been deceived as to the assets, defendants were advised by counsel they could not enforce it, and, finally, owing to financial pressure, defendants were forced to sell out to the purchasers at a price greatly below that set out in the agreement executed. Plaintiff then claimed his full commission, on the ground that he was not responsible for the invalidity of the prior agreement, and defendants repudiated all liability on the ground that the conditions as set out in the memorandum between plaintiff and themselves, had not eventuated.

MIDDLETON, J., *held*, 23 O. W. R. 592, that the sale first proposed having fallen through, the agreement between the parties dependent thereon also came to an end, but that plaintiff, having set on foot the negotiations which led to the ultimate sale, was entitled to remuneration for his efforts as on a *quantum meruit*, which sum he fixed at $5,000.

"It is not necessary that an agent actually 'introduce' the parties, if he actually sets in motion the forces which later result in the sale."

Judgment for plaintiff for $5,000 and costs.

SUP. CT. ONT. (*1st App. Div.*) dismissed appeal from above judgment with costs.

[See *Burchell* v. *Gowrie*, C. R. [1910] A. C. 250.—*Ed.*]

Appeal by defendant from the judgment of HON. MR. JUSTICE MIDDLETON, 23 O. W. R. 592; 4 O. W. N. 593, after the trial before him without a jury at Toronto on the 3rd day of that month of an action to recover a commission upon the sale of the assets of the defendant company to the Canada Machinery Corporation.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH,

C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE HODGINS and HON. MR. JUSTICE LATCHFORD.

M. K. Cowan, K.C., and T. Hobson, K.C., for the appellant.

J. W. Bain, K.C., for the respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The material facts are fully stated in the reasons for judgment of the learned trial Judge, 23 O. W. R. 592, and when the proper conclusion upon these facts is reached there will be no difficulty in determining the question in issue between the parties.

If, as contended by counsel for the appellants, the proper conclusion of fact is that the measure of the respondent's rights is to be found in the agreement of the 14th July, 1911, the action fails because in that case the right to payment for his services was contingent on an agreement in the terms of the writing of the 29th July, 1911, being concluded between the appellant and the Canada Machinery Corporation, Limited, and such an agreement was not made.

In my view, the agreement of the 29th July, 1911, is not the measure of the respondent's rights.

Before the making of that agreement, the respondent, who was a land agent or broker, had been retained by the appellant to endeavour to bring about a sale to the Canada Machinery Corporation Limited, of the business and property of the appellant, or as it was called a merger between that company and the appellant, and the proper conclusion upon the evidence is, I think, that the respondent was instrumental in bringing the two companies together after a suggestion rather than negotiations for the sale had been if not abandoned at least suspended.

The evidence satisfies me and the learned Judge must have thought that it was not part of the arrangement between the parties that commission should be paid only in the event of the sale resulting in a surplus to the appellant. The evidence of the respondent on this point is clear and that of Mr. Yeates, the managing director of the appellant company, is not satisfactory. When examined in chief as to the arrangement he says nothing about any such limitation, and it was not until his cross-examination that he stated that the commission was not to be paid unless there was a surplus.

When the agreement of the 14th July, 1911, was entered into it was supposed that an agreement for sale in the terms of the writing of the 29th July, 1911, had been reached, and the purpose of the former agreement was to settle the remuneration which the respondent was to receive for his services, the amount of it not having been previously arranged.

It turned out, however, that the writing of the 29th July, 1911, though purporting to be executed by the Canada Machinery Corporation, was not binding on it, and the company refused to purchase on the terms mentioned in it.

Notwithstanding its refusal to purchase on those terms, negotiations were carried on with a view to arranging terms, and these negotiations resulted in a sale being effected but upon terms much less beneficial than those which it was supposed had been come to.

To adopt the view contended for by the appellant would give to the agreement of the 14th July, 1911, a meaning different from that which in my opinion the parties to it intended that it should bear, and different from that which the language used in it imports.

Its object was plainly, as I think, merely to fix the commission which the respondent was to receive if the sale that it was supposed had been arranged for was made, and its effect is to leave open for arrangement between the parties the amount of the commission if a sale should be made on different terms.

It is not as if the respondent had been employed to bring about a sale on the terms of the writing of the 29th July, 1911. Had that been the character of his employment the cases cited by the learned counsel for the appellant might and probably would have applied and the respondent would not be entitled to recover; but that was not its character. His employment was, I have said, to endeavour to bring about a sale, not a sale on the terms of the writing or upon any terms except those which are to be implied from the nature of the transaction, that the person to whom the appellant desired to sell should be willing to purchase on terms to which the appellant would be willing to agree.

The case is, in my opinion, to be dealt with on the footing of the employment being that the respondent should bring the suggested purchaser and the appellant together and having done that and a sale having been eventually

made to the suggested purchaser, the respondent is, in my opinion and as the trial Judge held, entitled to recover as upon a *quantum meruit*, and I see no reason for differing from the conclusion of my learned brother as to the amount to which the respondent is entitled.

I would dismiss the appeal with costs.

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

CHAMBERS.

SCULLY v. MADIGAN.

4 O. W. N. 1003.

Debtor and Creditor — Garnishee — Judgment — Recovered by Debtor Against Garnishee — Stay of Execution — No Debt Due in Præsenti—Assignment of Judgment.

MASTER-IN-CHAMBERS *held*, 24 O. W. N. 251, that where judgment has been recovered by a plaintiff in an action against the defendant, but the entry of judgment has been stayed, there is no debt due and owing from defendant to plaintiff which can be attached by a judgment debtor.

BRITTON, J., dismissed appeal from above judgment with costs.

Appeal by the judgment creditors from the order of the Master in Chambers, 24 O. W. R. 251; 4 O. W. N. 981, discharging the attaching order which had been made against the garnishee attaching an alleged debt due by him to the judgment debtor.

A. W. Ballantyne, for the appellant.

J. P. MacGregor, for the judgment debtor.

Cook (Ryckman & Co.), for the garnishee.

HON. MR. JUSTICE BRITTON:—This appeal cannot succeed. The so-called debt, said to be due by the garnishee to the judgment debtor, is only in reference to a judgment recovered which is not yet final—a judgment on which, prior to the attaching order, proceedings had been stayed, and the stay was on, when attaching order was made. This stay was in order to allow the garnishee to appeal against the judgment, and an appeal has since been launched. The judgment as it stood on the date of the order was no more than the verdict of a jury—it may stand, it may not.

The rule is in my opinion correctly laid down in Cyc. vol. 20, p. 983: "In order that a creditor may maintain garnishment proceedings there must be a subsisting right

of action-at-law by defendant in his own name and for his own use against the garnishee. . . . "A garnishee cannot be held liable, unless it can be shewn that he is indebted to the defendant at the time of the institution of the garnishment proceedings. The establishment of his liability afterwards is not enough."

A judgment on which proceedings are stayed for the purpose of appeal is not proof of a right of action.

The debt to be garnished must be due absolutely and beyond contingency. Such a debt may be evidenced by a final judgment; this judgment is not final.

I think the learned Master is right. The appeal will be dismissed with costs which I fix at $15 for the judgment debtor, and garnishee each. The costs of the judgment debtor may be set off against the judgment which judgment creditors hold. The costs of the garnishee must be paid to him by the judgment creditors of the defendant.

HON. MR. JUSTICE BRITTON. MARCH 26TH, 1913.

STANZEL v. CASE THRESHING MACHINE CO.

4 O. W. N. 1002.

Jury Notice—Striking out—Practice.

BRITTON, J., struck out a jury notice served by defendants, holding that the action being one involving complex questions of law and fact, should not be left to a jury.
Bisseth v. *Knights of the Maccabees*, 22 O. W. R. 89, followed.

Motion by plaintiffs for an order striking out the jury notice served herein.

Grayson Cmith, for the plaintiff.

J. D. Falconbridge, for the defendant.

HON. MR. JUSTICE BRITTON:—Upon reading the pleadings herein it appears perfectly plain that the issues tendered by the plaintiff—and by the defendants in their defence and counterclaim—are such as should be tried by a Judge and not by a jury. The action is a complicated one involving important questions of law and fact. It would be very inconvenient to say the least of it, to have the plaintiff's claim tried by a jury and the defendants' counterclaim tried by a Judge—and the counterclaim is one that in my opinion a Judge would not submit to a jury.

I agree with the case of *Bissett* v. *Knights of the Maccabees*, 22 O. W. R. 89.

The order will be to strike out the jury notice and that the action be tried without a jury. Costs in the cause unless otherwise ordered by the trial Judge.

HON. MR. JUSTICE BRITTON. MARCH 26TH, 1913.

CHAMBERS.

CHWAYKA v. CANADIAN BRIDGE CO.

4 O. W. N. 1001.

Venue — Motion to Change — Delay in Trial — Plaintiff Responsible for — Order Refused — Costs.

MASTER-IN-CHAMBERS, 24 O. W. R. 250, refused to make an order changing the venue to expedite the trial of an action where plaintiff by his own want of diligence and forethought had caused the delay in having the action brought to trial.

Brown v. *G. T. R.*, 23 O. W. R. 74, and *Taylor* v. *Toronto Construction Co.*, 21 O. W. R. 508, followed.

BRITTON, J., dismissed an appeal from the above order with costs.

Appeal by the plaintiff from an order of the Master in Chambers, 24 O. W. R. 250; 4 O. W. N. 980, dismissing an application of the plaintiff to change the place of trial, from that named by the plaintiff, to either Sarnia or Chatham.

The facts are fully set out by the Master in his reasons for judgment.

E. C. Cattanach, for the appellant.

Featherston Aylesworth, contra.

HON. MR. JUSTICE BRITTON:—There is no doubt that the matter of changing the place of trial from that named by plaintiff is largely in the discretion of the Court or a Judge, but the exercise of that discretion is in almost every case subject to this, "Where can the action most conveniently be tried," and the onus is upon the applicant to shew the preponderance of convenience. Generally the application is by defendant, and the change will not be made on account of a trifling difference of expense.

See H. & L. pp. 738, 739. But even when the application is by plaintiff and notwithstanding the plaintiff's right to name the place, having named it, the onus is upon him to shew reasons for change, if he seeks one. The reason here is not one of balance of convenience, not as to fair

trial, but is solely for the benefit of the plaintiff by speeding the trial.

The fact that, if no change, the trial will be delayed is a circumstance to be considered—not sufficient of itself to warrant the change. The convenience of witnesses—or of counsel is not sufficient reason for change. I am bound under the authorities to give effect to the objection that the onus upon the plaintiff has not been satisfied. One would suppose that in the present case, it cannot be a matter of moment to the defendants to delay the plaintiff getting to trial. Whether the plaintiff has a good cause of action or not, it is of considerable importance to him to have his claim disposed of without unnecessary delay and I regret that defendants do not see their way to consenting to a change that apparently would do no more than expedite the trial. The appeal will be dismissed. Costs in the cause to defendants.

MASTER IN CHAMBERS. APRIL 3RD, 1913.

BLACKIE v. SENECA SUPERIOR SILVER MINES.

4 O. W. N. 1039.

Venue—Motion to Change — Convenience—Witnesses — Books of Company—Terms.

MASTER-IN-CHAMBERS changed the venue from North Bay to Toronto where the preponderance of convenience was very manifest, upon terms as to expedition of the trial.

Costs in cause.

Motion by defendants to change venue from North Bay to Toronto.

Featherston Aylesworth, for defendant's motion.

H. Howitt, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—This is an action to recover $6,660 as commission of 5 per cent. on sale of 844,429 shares of the company's stock at 17½ a share—being $7,388.75 less $728.75 paid on account. The statement of defence alleges plaintiff was only to receive commission for sales actually made and stock being allotted therein. Also that the whole shares of the company are only 500,000, and that these were so disposed of that in any case plaintiff could not have had for sale more than 84,429 shares.

No jury notice has been served and it may well be that the case would not be heard at the sittings at North Bay which begin on the 14th inst. The motion is supported by

an affidavit of defendants' solicitor alleging that the president and secretary of the company as well as the great majority of the shareholders reside either in the United States or at Toronto and that this is the fact as to all these persons in respect of whose shares the plaintiff makes his claim in the action.

He further says, as seems reasonably probable, that some at least of these persons must be called as witnesses at the trial.

It is further stated that the head office of the company is at Toronto and that the books and records will be required for use at the trial.

This affidavit is not impeached in any way. The only answer to the motion is an affidavit of the plaintiff that he needs two witnesses both now resident at Cobalt while he himself resides at Cochrane. He does not say if these witnesses have been subpœnaed. On the material and the issues as defined by the pleadings I think the motion should be granted.

Defendants must undertake to produce at the trial either or both of plaintiff's witnesses if in their service as seems most likely. They must also consent to the case being put on the peremptory list in a week after it is set down on the non-jury list here, if plaintiff so desires. In this way no delay will be imposed on plaintiff.

As the cause is at issue the trial might take place if parties are ready some time this month.

Costs of this motion will be in the cause.

HON. MR. JUSTICE KELLY. APRIL 3RD, 1913.

ARMSTRONG CARTAGE CO. v. COUNTY OF PEEL.

4 O. W. N. 1031.

Way—Disrepair of Bridge on Highway—Injury to Motor Truck by Breaking Through — Liability of County—Highway Improvement Act 1912 — Damages — Quantum — Loss of Use of Truck —Liability for.

KELLY, J., *held*, that where a motor truck is injured through the negligence of a municipality, the latter are liable in damages for the deprivation of the plaintiffs of the use of the same during the period of repair and the measure of damage is the cost of replacing the same for such period.

Greta Holme, [1897] A. C. 596, and *The Argentino*, 14 A. C. 519, followed.

Action tried at Brampton on March 12-13, 1913, for $1,500 damages to plaintiff's motor truck caused by its

breaking through a bridge, upon the road between Brampton and Cooksville alleged to have been in disrepair through the negligence of defendants.

Counterclaim by the municipality for $250, expenses incurred in repairing said bridge, alleged to have been injured by plaintiffs' negligence and improper use.

G. S. Kerr, K.C., and G. C. Thompson, for the plaintiffs.

T. S. Blain, and D. O. Cameron, for the defendants.

HON. MR. JUSTICE KELLY:—At the close of the trial I expressed the opinion that on the evidence, the bridge in question was, at the time the accident occurred and for many months prior thereto, badly out of repair and exceedingly dangerous for those having occasion to pass over it, and that those whose duty it was to maintain and repair it had ample means of knowing—and must have known—of its unsafe condition. It is inconceivable that the defendants could have been in ignorance of its condition if reliance is to be placed on the evidence offered for the plaintiffs not only as to want of repair but also as to the length of time prior to the accident evidence of weakness and defects were apparent to those making use of it. That evidence I accept.

The road on what was the bridge is an important highway, on which there is much public traffic of all kinds usually seen on leading roads in long and well settled country places.

On the argument, counsel for defendants contended (though this defence was not expressly raised in the pleadings) that defendants were not, under the Highway Improvement Act and amendments thereto, liable for maintenance and repair.

This road was assumed by the defendants as part of a county road system under the provision of that Act, and a great deal of work of construction and repair had been done on it prior to June 22nd, 1912, when the accident happened which resulted in this action.

Defendants' engineer says that defendants performed work on the road almost up to the bridge and were working in its direction but had not reached it.

Whatever doubt might have been entertained as to the liability of the defendants on the law as it stood prior to the passing of the Highway Improvement Act of 1912 (2 Geo. V. ch. 11)—and on the evidence I felt no uncertainty about defendants' liability—such doubts were set at rest by the provisions of that Act. I am therefore of the opinion that defendants are liable. The other question for determination is the amount of damage sustained by the plaintiffs.

For making repairs to the auto-truck, necessitated by the accident and including the item of $25 for towing the truck from Cooksville, plaintiffs are entitled to $279.44.

For expenses at time of the accident, moving the safe to Toronto, cost of taking the auto-truck from the place of the accident and bringing it to Toronto, freight charges on the safe and truck from Toronto to Hamilton, and telephone charges (all included in the item of $673.35 set out in the plaintiffs' particulars) I allow $147.50, in arriving at which I made a deduction of $25 from the item of $76.80 for moving the safe to Toronto.

Some of the other charges making up this $147.50 may appear to be excessive; but the situation in which the plaintiffs found themselves as the result of the accident was unusual, and they no doubt acted as reasonably as the circumstances permitted in their efforts to remedy the trouble with as little delay as possible; and it was shewn that they actually paid the amounts charged for these items.

The remaining item of $733.08 claimed by the plaintiffs is for damages in being deprived of the use of the truck for 82 days. Defendants contend that such damages are too remote to be charged against them.

The question of remoteness of damage has been much discussed by the Courts and text-writers, and the cases bearing upon it are numerous. In Halsbury's Laws of England, vol. 21, at p. 485, it is summarised thus: "Where a chattel has been injured owing to a negligent act, and the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable." Amongst the cases there cited are *The Greta Holme* (1897), App. Cases 596, and *The Argentino* (1889), 14 App. Cases, 519.

In *The Greta Holme Case* Lord Halsbury at p. 601, says: "It is a sufficiently familiar head of damages between individuals that if one person injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy."

In *The Argentino Case*, where damages were claimed for injury happening to a vessel in a collision, Lord Herschell (at p. 523), says: "I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act, cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision."

Here it is shewn that the truck which was damaged was in daily use by the plaintiffs in their business; that to supply its place and do its work during the time the repairs were being made thereto, it was necessary for plaintiffs to hire teams at a cost per day, in excess of what would have been the cost of operating the truck, of $8.94, and this charge they make for 82 days, from June 22nd, the date of the accident, until October 1st, when the truck was returned to them repaired.

While admitting the plaintiffs' right to recover for such loss the amount claimed—or rather the time for which the claim is made—is excessive. The evidence shews that the repairs necessitated by the accident could have been made in from two to three weeks.

On July 11th, an estimate of the costs of the repairs was furnished to the plaintiffs by the parties who made them, but it was not until August 10th, that plaintiffs gave instructions for the repairs to be proceeded with. Making an allowance of a reasonable time for delivery of truck to the company for repair and for arranging about the repairs, and for the time necessary to make the same, and a further reasonable time for delivery to the plaintiffs at Hamilton when repaired, I think 33 working days is a reasonable estimate of the time for which plaintiffs were deprived of the use of the truck owing to the damage which it had sustained

in the accident. For that time, at the rate of $8.94 per day, plaintiffs would be entitled to $295.02.

This, with the above items of $279.44 and $147.50, makes a total of $721.96, the amount to which I think the plaintiffs are entitled.

In making this calculation I have not overlooked the question of interest or of probable depreciation of the truck through wear and tear had it been in service during the 82 days. I may mention, too, in explanation, that it was shewn by the evidence that part of the delay in having the repairs done was due to negotiations for settlement between the plaintiff and the insurers of the truck, but which resulted in no benefit either to the plaintiffs or defendants.

Judgment will be in favour of the plaintiffs for $721.96 and costs, and dismissing defendants' counterclaim with costs.

MASTER IN CHAMBERS. APRIL 4TH, 1913.

ANGEVINE v. GOOLD.

4 O. W. N. 1041.

Action — Motion to Dismiss—Want of Prosecution—Admissions of Plaintiff—Con. Rules 616, 217 — Plaintiff Suffering from Senile Dementia—Jurisdiction of Master-in-Chambers—Lis Pendens.

MASTER-IN-CHAMBERS *held*, that he had no jurisdiction under Con. Rule 616 to dismiss an action upon the admissions of a plaintiff and that in any case as the plaintiff was mentally incompetent he would not have exercised his discretion to dismiss the action. *Jasperson* v. *Romney*, 12 O. W. R. 115, followed.

Motion by defendant to dismiss for want of prosecution, and also under Consolidated Rule 616, on admission of plaintiff in his examination for discovery, or to vacate certificate of *lis pendens*.

Featherston Aylesworth, for the defendant's motion.

J. M. Ferguson, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—This action was commenced on 16th September last. The statement of defence was delivered on 6th December. The action is apparently a non-jury action, and the place of trial is Welland.

There is no default as the non-jury sittings at Welland are fixed for 20th May, when it is said that plaintiff will be able to attend. If this does not prove to be the case

then motion can be renewed. At present it is premature under *Leyburn* v. *Knoke*, 17 P. R. 410.

The plaintiff asks to be given a lien on the lands set out in the statement of claim alleging that they were purchased by defendant with money given her by him to invest for his benefit. On these lands he has filed a certificate of *lis pendens*, which certainly cannot be vacated before the trial which is only six or seven weeks off.

Then can Consolidated Rule 616 be applied in favour of defendants? Plaintiff's examination certainly discloses a very unfortunate mental condition. So much so that it is doubtful if he should not be represented by a committee or next friend as provided by Consolidated Rule 217. The affidavit of his physician filed in answer to the motion states that plaintiff "Is over 80 years of age, and is suffering from senile dementia, a disease which affects his mind to the extent of rendering him unable to understand and appreciate the nature of a question or of the answer he may give." Whatever effect should be given to this hereafter it seems sufficient to shew that the action cannot be dismissed on account of the admissions of plaintiff. It was said by Riddell, J., in *Jasperson* v. *Romney*, 12 O. W. R. 115, at p. 117, that the Master in Chambers in his opinion has no jurisdiction to apply this Rule, or if he has and refuses the application his discretion would not me interefered with. It, therefore appears that the motion cannot succeed in any of its aspects, and must be dismissed with costs in the cause to plaintiff, leaving defendant to take such other steps as she may be advised in view of what has been sworn to be the mental condition of the plaintiff.

MASTER IN CHAMBERS. APRIL 4TH, 1913.

SCHOFIELD-HOLDEN v. CITY OF TORONTO.

4 O. W. N. 1040.

Discovery—Motion to Set Aside Appointment — Appointment Taken out after Trial Begun and Adjourned — Previous Examinations Had — Appointment Set Aside.

MASTER-IN-CHAMBERS *held*, that a party has no right without special order to discovery after the trial of an action has commenced and been adjourned.

Wade v. *Tellier*, 13 O. W. R. 1132, followed.

Motion by the defendant to set aside an appointment for examination for discovery.

C. M. Colquhoun, for defendant's motion.

E. F. Raney, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—This action was tried together with a cognate one of *Rickey* v. *City of Toronto*, on the 3rd and three following days of last month. It was then adjourned until 28th April inst., in order to have the Toronto Harbour Commissioners added as defendants.

A formal order was made by the trial Judge, which must be considered to have made all necessary provisions and directions so that the case could go on at the appointed time. No mention is found there of any further examination for discovery by either party. But on 31st March, plaintiffs took out an appointment for examination of an officer of the city. This is now sought to be set aside as being issued without authority.

These cases are no doubt of great importance to the plaintiffs. But this does not authorize any deviation from the practice.

The only decision on the point is that of *Wade* v. *Tellier*, 13 O. W. R. 1132, which seems precisely in point. As was pointed out there in *Clarke* v. *Rutherford*, 1 O. L. R. 275, it was apparently assumed that an examination for discovery must precede the trial. And this seems to follow from the ground of the proceeding itself, which is to enable the examining party to prepare for the trial. Once this has begun there can be no examination without an order being had for that purpose. Here if deemed necessary such a term should have been applied for at the adjournment; and the order then made must be deemed to have contained all that either party was entitled to. In *Standard Trading Co.* v. *Seybold*, 6 O. L. R. 379, at p. 380, in a case where there had been a postponement of the trial it was said "Then was the time when all terms—should have been discussed," per Osler, J.A.

The motion is, therefore entitled to prevail, especially as two officers of the defendant corporation were examined for discovery, one of them on two occasions.

Mr. Colquhoun also on the argument agreed to furnish plaintiffs' solicitors with all correspondence relative to the bridge over Keating's cut as soon as it came into his hands.

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

MASTER IN CHAMBERS. APRIL 5TH, 1913.
HON. MR. JUSTICE BRITTON. APRIL 11TH, 1913.

CINNAMON v. WOODMEN OF THE WORLD.

4 O. W. N. 1042, 1094.

Trial—Motion to Postpone — Absence of Alleged Material Witness—Disregard of Con. Rule 518 — Nature of Expected Evidence not Divulged — Matter Left to Discretion of Trial Judge—Terms.

MASTER-IN-CHAMBERS refused to postpone a trial on the ground of the absence of a material witness where it was not shewn that the testimony expected was material, but exacted an undertaking from defendants that if in the opinion of the trial Judge the evidence was material, the trial should be postponed until the evidence was had.

Macdonald v. *Sovereign Bank*, 21 O. W. R. 702, followed.

MIDDLETON, J., affirmed above order.

Appeal by plaintiff from the following order of the Master in Chambers, refusing to postpone the trial of an action to the Toronto fall non-jury sittings.

J. M. Ferguson, for plaintiff's motion.

Featherston Aylesworth, for the defendant, contra.

CARTWRIGHT, K.C., MASTER (5th April, 1913):—This action was begun on 18th June last to recover from defendants $2,000 alleged to be due on a policy issued by them on life of plaintiff's husband on 17th January, 1908, and who died on 29th June, 1911.

The cause was at issue last November. The place of trial named in the statement of claim is Barrie, but apparently this has been changed to Toronto non-jury sittings.

Trial was fixed for 11th March. This was changed to the 17th. so far as appears, without objection by either party. But almost immediately thereafter plaintiff made this motion.

The motion is supported only by an affidavit of plaintiff's solicitor, which displays a diregard of Consolidated Rule 518, which is only too frequent. The ground put forward is that Mr. Daniel Cinnamon is a material witness for the plaintiff, and that on 12th March he left for the Mediterranean and will not return until September.

It is not stated from whom this information was derived nor does it state what evidence he is expected to give. The solicitor says he did not know "nor as I am advised, did the plaintiff know of the intended departure of Daniel Cinnamon until shortly before the 12th of March." Such an affidavit should have been made by plaintiff herself. As in one of the affidavits in answer it is said that Mr. Daniel Cinnamon is an uncle and the administrator of the estate of

the deceased, and a brother-in-law of the plaintiff. This is not contradicted. A more serious objection is that there is no intimation of the point on which the witness can give material evidence. On the argument it was said that he would speak as to the allegation in the reply that the general course of dealing as between the order and its members with reference to payment of dues and otherwise has been such as to constitute an estoppel against the defendants and a waiver of any such right of suspension or forfeiture as is set up in the statement of defence as fatal to plaintiff's claim. Giving the plaintiff the benefit of this suggestion of her counsel on the argument, this would not be necessarily a sufficient ground for postponement. Any such course of dealing by its very terms could not possibly be proved by the statements of one witness, especially of Mr. Daniel Cinnamon—in view of his relationship to the plaintiff and of the position he took as a member of the Executive Council of the order in inducing it at first to admit the claim in question—a sufficient number of such cases to establish a course of dealing would surely be necessary to vary a contract.

This case in many respects resembles that of *MacDonald* v. *Sovereign Bank*, 21 O. W. R. 702. There was the same infirmity in the affidavit of the solicitor filed in support of the motion; both as to the evidence expected to be obtained and as to Consolidated Rule 618. As this is a non-jury action, I think that justice will best be done by making such an order as was made in that case by Middleton, J.

This will provide that the action proceed to trial, if the defendants so desire on their undertaking that if in the opinion of the trial Judge, Daniel Cinnamon can give any such evidence as would justify such a course—then the trial should be adjourned until his return or his evidence has been given on commission—or any other terms that the trial Judge may think right.

The cost will be in the cause unless otherwise ordered by the trial Judge for the reasons given by the learned Judge in the *MacDonald Case, supra.* He can best deal with the whole matter. So far as appears at present the only hope of the plaintiff is to establish the alleged estoppel said to have been created by the general course of dealing as between the order and its members. Something that one witness certainly could not prove by his own evidence.

HON. MR. JUSTICE MIDDLETON (11th April, 1913), dismissed plaintiff's appeal from above order, costs in the cause.