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HON. SIR G. FALCONBRIDGE, C.J.K.B. NOV. 17TH, 1913.

RE CONSOLIDATED GOLD DREDGING & POWER CO.

5 O. W. N. 346.

Trusts and Trustees — Application for Delivery of Securities by Trustees—Trustee Act—Jurisdiction of Court.

FALCONBRIDGE, C.J.K.B., *held*, that the Court had no jurisdiction, under the Trustee Act, to order trustees to hand over certain securities and papers to a party to the trust deed.

The Western Canada Securities Company applied for an order under the Trustee Act directing the Union Trust Company to deliver over certain securities and title papers, and an order was granted accordingly by the Chief Justice of the King's Bench, but before it was issued the Union Bank of Canada asked to have the matter re-opened, whereupon it was again argued and the Chief Justice re-opened the order and dismissed the original application, his reasons for judgment being set out below.

H. Cassels, K.C., for Union Bank of Canada.

R. C. Levesconte, for Western Canada Securities Co.

D. C. Ross, for the Union Trust Co.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—It now appears that the agreement in question was not signed by Davidson until after he had pledged the bonds with the bank. My judgment, therefore, was founded on a mis-statement (I do not say a wilful mis-statement), of facts. But further consideration satisfies me that when I thought I could make an order under the Trustee Act, I had not the provisions of the Statute sufficiently in my mind. I am now of the opinion that the statute is inapplicable and this motion is therefore misconceived and must be dismissed with costs.

The matters involved are of vital importance to the parties and this order will be made in Court or Chambers as may seem proper—my desire being that if the applicants are advised to appeal, that appeal should be facilitated.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 19TH, 1913.

SCHOFIELD v. BLOME.

JOHNSTON v. BLOME.

5 O. W. N. 328.

Negligence—Injury to Workman—Fall from Hoist—Negligence of Foreman—Workmen's Compensation Act—Building Trades Protection Act, 1 Geo. V., c. 71, s. 6—Reasonable Safety from Accident—Evidence—Damages.

Actions for damages for personal injuries sustained by plaintiffs, employees of defendants, by reason of the fall of a hoist being used temporarily by them while bricking up openings in a wall of a building, the said accident occurring through the alleged negligence of defendants. The hoist was operated by a cable and drum driven by a stationary engine which also operated a fixed drum for other purposes.

MIDDLETON, J., *held*, that the defendants were liable under the Workmen's Compensation Act in that plaintiffs were working as they were in obedience to the orders of their foreman, who was negligent in not forbidding the hoisting engine to be used for any other purposes while the plaintiffs were upon the hoist.

That they were also liable under the Building Traders Protection Act, 1 Geo. V., c. 71, s. 6, in that the hoist in question was not being operated so as to afford reasonable safety to those using it.

Judgment for plaintiffs for $3,500 and $2,500, respectively; if liability under Workmen's Compensation Act only, then for $2,700 and $1,500, respectively.

Actions for damages for personal injuries sustained by plaintiffs while in the employ of defendants through their alleged negligence, tried at Hamilton on the 1st and 6th November, 1913, without a jury.

T. Hobson, K.C., and A. M. Lewis, for the plaintiffs respectively.

E. F. B. Johnston, K.C., for the defendant, R. S. Blome Company.

HON. MR. JUSTICE MIDDLETON:—The defendants were contractors for the erection of a large factory in Hamilton. The building was of brick and concrete, and to facilitate its erection a hoist was erected outside the main wall for the

purpose of conveying material to the different storeys as they were erected. This hoist was not intended for passenger use, and consisted of a bucket or platform upon which materials could be placed and elevated. it being removed from the hoist through openings left in the walls for that purpose. These openings were between 2 and 3 feet wide and about 5 feet high. The platform was hoisted by a cable passing over a wheel at the top of the elevator shaft and operated by a drum driven by a stationary engine erected at some little distance from the foot of the hoist. This drum was attached to the main shaft, driven by the engine, by means of a friction clutch. It could be freed from this shaft by releasing the clutch and when so freed it could be held in position by a dog which engaged with a ratchet wheel attached to one end of this drum. This same shaft also operated a fixed drum or winch called in the evidence "a niggerhead." It was close beside the free drum and its attachments, and when the friction clutch was free could be operated independently of the drum used for operating the hoist.

On the day in question the building, so far at least as the exterior walls and heavy interior construction was concerned, was nearing completion. The time had arrived when the temporary holes in the wall could be stopped and the hoist removed. Schofield, the bricklayer, and Johnston, his assistant, were engaged in filling up these holes. Material had been taken up in the hoist and had been used in building-up the holes in the wall from the inside. From the inside it was possible to build the lower part of this filling both inside and outside; but when the top was reached the inside alone could be completed and the outside would have to be completed from the outside. Johnston had descended to the ground by the stairway and ascended in the elevator, on the platform, taking with him mortar, bricks, etc., for the purpose of completing the holes on the outside. When he had reached a point opposite the highest hole the hoist was stopped and Schofield stepped out of a permanent window opening near the hoist on to the platform. Almost at the same moment the elevator fell and both men were thrown to the ground, a distance of some 53 feet. Singularly enough, each man suffered almost precisely similar injury, his back was broken. Fortunately both are making good recovery.

It appears that at the time of the accident the cage was held suspended by the dog in the ratchet wheel, the clutch

having been disengaged, and the shaft passing through this drum and the niggerhead beyond it were being used for the purpose of attempting to haul a carload of sand, weighing about 40 tons, along a contractors' siding close to the foot of the hoist. The rope was found unequal to the strain and broke. This occurred at the very instant of the fall of the elevator. The plaintiffs' theory is that this in some way caused the accident, that it was entirely improper to use the niggerhead for any such purpose when the hoist was suspended outside the building. The plaintiffs further say that although the hoist was not a passenger hoist, and was not intended to be used by the workmen as a passenger hoist, they were using the hoist as a temporary platform for the purpose of enabling them to complete the brick work in question, in obedience to the express orders of Stephan, the defendant's foreman. Stephan, on his part, denies giving any such instructions, and says that his instructions were to leave the outside completion until the hoist had been removed, when that work could have been done from a swing platform which had already been used for the purpose of cleaning and tuck-pointing the bricks at other parts of the wall. The defendants also contend that the accident more probably happened by the negligence of the engineer, Sullivan, who must have pulled the wrong lever, and so freed the dog from the ratchet, in a moment of excitement when he realised that the rope had broken and men were suspended. If Sullivan was negligent, then the defendants claim immunity from liability because he was not a workman having superintendence over the plaintiffs. The plaintiffs claim liability not only under the Workmen's Compensation Act but also at common law.

After very careful reflection I find myself compelled to accept the evidence of Schofield, corroborated by Johnston, not because of the corroboration, but because I believe Schofield; and although I am therefore compelled to find against Stephan, I desire to say that I believe he must have forgotten the orders which Schofield says were given on the morning in question and to exonerate him from any intentional misstatement. Nothing in the story told by Schofield is in any way improbable. The platform of the hoist was a much better place from which to complete the brick work, which required considerable bricks and mortar, than the comparatively narrow swinging platform. So long as due care was exercised there was no particular risk in doing this work

using this hoist for this temporary purpose; but all agreed that it was an entirely improper thing to operate the nigger-head while these men were suspended in the elevator. I think Stephan was negligent in that he failed to forbid Sullivan using the hoisting engine for any other purpose while these men were at work upon the temporary job.

I do not think that this constitutes liability at common law. The hoist was not being used for the erection of brick work as part of a system of construction. What was done that day was merely using a temporary expedient resorted to to meet the then present need—the completion of the brick work; and if Stephan erred in ordering the men to take a position of peril in the elevator or in ordering the machine to be operated for other purposes while they were in the elevator, this was a negligent and improper act on the part of an entirely competent and fit superintendent entrusted by the master with the care of the details arising in the general construction of the work.

The plaintiffs further contend that the rope was defective and that its breaking caused the accident and that this is sufficient to create common law liability.

This contention fails. The rope was not in any way defective. It was supplied for general use and was improperly used to draw the cars as it was too light for the purpose. This was an abuse of good material supplied by the master. Beyond this it is not shewn that this was the cause of the accident.

Mr. Hobson placed the case upon what appears to me to be much safer ground. The Building Trades Protection Act, 1 Geo. V. ch. 71, contains drastic and far-reaching provisions. Section 6 applies to this case. "In the erection . . . of any building no scaffolding, hoists . . . shall be used which are unsafe . . . or which are not so . . . operated as to afford reasonable safety from accident to persons employed or engaged upon the building."

I do not need to go so far as he invites me and to hold that this makes the master liable whenever an elevator or hoist is in fact "unsafe" in the sense that an accident has happened, for it is enough to find as I think I must, on the undisputed evidence, that this elevator was not so "operated as to afford reasonable safety from accident." This liability is created by statute and is not made subject to the limitations imposed by the Workmen's Compensation Act.

The question of damages is not free from difficulty. The men will certainly be disabled for a year. Dr. Cockburn, a very careful and competent surgeon, who examined them under an order, thinks there is probability amounting almost to certainty of some permanent disability and suffering. Under all the circumstances I think I should award Schofield $3,500 and Johnston $2,500. If there is only liability under the Workmen's Compensation Act these amounts must be reduced to $2,700 and $1,500 respectively.

MASTER-IN-CHAMBERS. NOVEMBER 17TH, 1913.

SNIDER v. SNIDER.

5 O. W. N. 325.

Pleading—Statement of Claim—Material Variation from Endorsement on Writ of Summons—Addition of Foreign Executors as Defendants—Attornment to the Jurisdiction—Judicature Act, 1913, s. 16 (h)—Rule 109.

HOLMESTED, K.C., *held*, that where subsequent to the appearance to the writ of summons certain foreign executors had become parties to the action and attorned to the jurisdiction and the plaintiff had thereupon materially changed his claim in his statement of claim from that set out in the writ of summons, he was entitled under the Rules to do so.

Motion by the defendants, the foreign executors of the late Thomas Albert Snider, to set aside the statement of claim on the ground that an entirely new claim from that mentioned in the endorsement on the writ is stated therein, and to dismiss the action on the ground that the plaintiff had abandoned the claim set out in the writ of summons. It was also objected that the statement of claim should not have been delivered because the writ was specially endorsed; this ground was, however, abandoned because the writ had issued before the new rules came into force.

W. J. Elliott, for defendants other than Snider.

H. E. Irwin, for plaintiff.

F. C. Snider, for defendant Snider.

HOLMESTED, K.C.:—The endorsement on the writ is for $10,000 for 2 demand notes and interest thereon. The notes were made by Thos. Albert Snider and the original defendant

Snider was the sole defendant named in the writ as being the Canadian executor of the maker of the notes who is deceased. By order made on the application of this defendant in presence of the solicitor for the plaintiff and of Charles F. Malsbury and the Central Trust & S. D. Co., executors in the United States of the said Thos. Albert Snider, these last-named parties were added as defendants on 13th February, 1913. The order recites an undertaking by their solicitor to accept service of the writ and to enter an appearance and an agreement to waive the issuing of a writ for service out of the jurisdiction.

It is said that this order was made at the instance and request of the added defendants; but that, if it were the fact, is not stated in the order. At all events the order stands, it has never been appealed from, and for weal or woe the defendants are parties defendants to the action, and have attorned to the jurisdiction of the Court.

These defendants having thus been made parties to the action and attorned to the jurisdiction of the Court, are parties for all purposes and cannot now object to any question being raised in the action which might be legitimately raised had they been resident within the jurisdiction of the Court. A defendant cannot appear in an action and disappear at his pleasure. He cannot say I will appear and contest this question, but I will disappear if the plaintiff raises any other question.

The only question therefore, it appears to me, is this. If the defendants were resident within the jurisdiction and served with the writ could they object to the variation from the endorsement of the writ which is disclosed in the statement of claim. Rule 109 contemplates that a statement of claim may alter, modify or extend the relief claimed by the endorsement on a writ, because it provides that where the statement does this, the plaintiff shall not be entitled to judgment in default of defence unless the statement of defence is served personally, or in pursuance of an order for substitutional service. The object of the Rule is obvious. A plaintiff may vary his claim as endorsed on the writ, by his statement of claim (where the writ is not specially endorsed within the present Rules) but if he does so, he must give the defendant due notice of the change. As long as the defendant has due notice of the variation, that is all that is requisite, as it would be obviously unfair and unreasonable

to permit a plaintiff to endorse his writ with one claim, and then without notice to the defendant to make an entirely different claim against him by the statement of claim.

It must be remembered that as the objecting defendants in this case were not parties to the action when the writ was issued the claim now set up in the statement of claim could not have been endorsed on the writ, but when the defendants without objection become parties to the litigation, the plaintiff by his statement of claim may, it seems to me, very properly and without offending any rule of practice, make such claim against the defendants who have as it were thrust themselves into the litigation, as he may see fit. The action was instituted to recover 2 notes made by a deceased person, from his Canadian executor. The claim now is that these notes may be set off against certain notes of the plaintiff in the hands of the defendants, the United States executors, and that the plaintiff may be declared to be entitled to a legacy in their hands free from any claim on the notes which the plaintiff thus proposes to satisfy by set-off. All of this seems to me quite legitimately to be connected with, and arise out of the plaintiff's claim on the notes sued on. The Court being properly seized of the action, and having all proper parties before it, it is bound under the Judicature Act, sec. 16 (h), to deal with the whole question, and it does not seem to me that these defendants are entitled to say that the plaintiff having recovered a judgment on the notes sued on, must then proceed to the United States and litigate the question whether he is entitled to set off his judgment against the notes held by these defendants, and whether he is entitled to his legacy free from any claim of the defendants on the notes held by them.

For these reasons it appears to me that the plaintiff has not in his statement of claim departed from his original cause of action, but by reason of these objecting defendants having become defendants after the suit was instituted, he has a perfect right to present for determination the questions raised in the statement of claim as against them.

The motion is therefore refused with costs to the plaintiff in any event of the action against the defendants other than Snider.

HON MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

RAMSAY v. BARNES.

5 O. W. N. 322.

Injunction—Interference with Neighbouring Landowner's Right of Lateral Support—Tortious Act Admitted—Injunction Oppressive to Defendant—Award of Damages—Quantum of.

MIDDLETON, J., *held*, that where one landowner had admittedly interfered with the lateral support of an adjoining landowner by the digging of a gravel pit, and the damages were capable of estimation in terms of money, and an injunction or mandatory order would be oppressive to the defendants, that damages and not an injunction should be awarded.

Shelfer v. *London Electric Co.*, [1895] 1 Ch. 287, followed.

Action for damages to the plaintiff's land by reason of excavations made by defendant, an adjoining landowner, alleged to deprive plaintiff's land of lateral support, tried at Hamilton on 7th November.

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

C. W. Bell, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The parties are adjoining land owners. The defendant excavated a gravel pit upon his lands, going to a considerable depth, practically up to the boundary line. The sides of this pit are almost perpendicular. At the time of this excavation no particular harm resulted, as the gravel was firmly lodged; but the wall of the pit has now fallen in to some extent and will undoubtedly fall in more.

The action came on for trial at the Hamilton sittings on the 17th June, 1913. Each party then appeared, submitting plans for the construction of retaining walls, which it was submitted would be sufficient to protect plaintiff's land; the defendant not setting up anything that would justify his interference with the plaintiff's lateral support. After some discussion it was arranged that the case should stand over and that in the meantime I should consult an expert engineer and place his views before the parties, who should be at liberty to challenge his report in any way, if they felt inclined to dissent from it. I accordingly placed the situation before Mr. C. H. Mitchell, a well known consulting engineer. He made a careful examination of the

premises and a very full and satisfactory report. Neither party tendered any evidence to attack his findings in any way.

The report shews that the excavation extends some 230 feet from the road, and is of a depth varying from 20 to 26 feet. The soil will probably come to rest when sufficient has fallen to create a slope of 1½ horizontal to 1 vertical.

The works proposed by the plaintiff are to my mind altogether extravagant and unreasonable, for the reasons pointed out by the engineer. They would involve an expenditure of approximately $10.000. The remedy proposed by the defendant, a small retaining wall along the top of the bank, is entirely inadequate. The replacement of the slope would cost about $2,200.

I suggested to the parties a consideration of the question whether this case was not one in which damages might be awarded in lieu of an injunction or mandatory order. The counsel for defendant accepts this suggestion; counsel for the plaintiff contends that this is not a case in which the statute ought to be applied; but without waiving this contention, he gave evidence going to shew the injury done to his lands.

I have come to the conclusion that the case is one in which I should not award an injunction, but damages, and that the damages awarded should be in the nature of compensation and should not be confined to the damages already sustained. In *Shelfer* v. *London Electric Co.*, [1895] 1 Ch. 287, A. L. Smith, L. J. at p. 322, lays down a working rule, stating that damages should be granted if the injury to the plaintiff's legal right is small and is capable of being estimated in money, and can be adequately compensated by a small money payment, and the case is one in which it would be oppressive to the defendant to grant an injunction.

I would supplement what is there said by pointing out that anything like laches or acquiescence on the part of the defendant, even though insufficient to defeat his right, ought to be a most material factor in considering the proper remedy.

In this case the plaintiff probably shared the opinion entertained by the defendant, that the soil was sufficiently rigid to make it safe to leave a practically perpendicular wall; at any rate the plaintiff made no protest and sought no injunction until the entire excavation was made. This

does not disentitle him to his legal remedy, that is, damages, as and when a subsidence occurs; but I think it puts him in a position in which he must rest content with the compensation proposed. I do not think it would be to the interest of either party to leave the matter open for a series of actions to be brought after each subsidence. The plaintiff ought not to complain of compensation; and in *Arthur* v. *Grand Trunk Rw. Co.*, 22 A. R. 89, it is indicated that compensation is the proper basis upon which damages should be estimated.

The plaintiff's experts place the injury to him by reason of the probable subsidence, and practical loss of from fifteen to twenty feet of land, at $2,500. I think this amount is too large; but, on the other hand, I am unable to accept the evidence of the defendant's experts, who place the damage at a nominal sum. I have also to bear in mind that by the wrongful conduct of the defendant he has been able to quarry from his own land a considerable quantity of gravel, of commercial value.

Bearing all the facts in mind, I think the proper sum to award is $1,750; intending by this to compensate the plaintiff fully. The soil and gravel which fall over on to the defendant's property and form a natural embankment to protect the plaintiff's land would then become the property of the defendant, but would be sterile in his hands, as it would be the means of affording the plaintiff's lateral support. I have, however, in the sum mentioned made an allowance for the value of this gravel of which the plaintiff is deprived. I have also considered the injury to the growing trees and the expense of restoring a fence upon the top of the embankment.

I regard the excavation as almost rendering useless, from a commercial standpoint, between 15 and 20 feet of the plaintiff's land. It is true that it will not be absolutely valueless, but it will be much less desirable as a building site, and will materially interfere with possible plans for the laying out of the entire lot.

The judgment will therefore award to the plaintiff the sum named, $1,750 as damages, in lieu of an injunction, and the plaintiff will be entitled to recover his costs of action, including the fee of Mr. Mitchell and his assistants, which I fix at $164. This is to be paid by the plaintiff in the first instance, and included in his costs.

If any special provisions are deemed necessary in the judgment to protect the rights of either party, and they cannot agree, I may be spoken to.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 19TH, 1913.

O'NEIL v. EDWARDS.

5 O. W. N. 348.

Chattel Mortgage — Sale under — Alleged Improvidence — Catering Business—Evidence—Advertising—Dismissal of Action—Costs.

MIDDLETON, J., dismissed an action brought by the maker of a chattel mortgage, alleging that there had been improvidence in a sale thereunder, holding that no case of improvidence had been made out.

Action (tried at Hamilton on Monday the 3rd November, 1913), to recover damages by reason of what was alleged to be an improvident sale under a chattel mortgage.

J. L. Counsell, for plaintiff.

G. Lynch-Staunton, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—The late Benjamin Edwards carried on business for many years in the city of Hamilton. On his death his administrator sold the business to the plaintiff, taking a chattel mortgage to secure part of the purchase-money. The mortgage being in default, a seizure was made under the mortgage on the 29th April, 1913. In the meantime the mortgage had been assigned to the defendant, the widow of the original owner. There was due upon the mortgage $1,750.

Some contention was made at the trial, although not properly raised upon the pleadings, that the defendant was entitled to a further credit of $500. This contention was absolutely unfounded. The not unnatural mistake in the year was made in the date of a cheque given early in January; and by a coincidence one of the stamps placed upon the cheque by the bank was similarly misdated by a year. Out of this it was sought to compel two credits to the one payment.

At the time of the seizure the business had been allowed to run down; many of the goods disappeared and the goods

that were there were in very poor condition. While there had been some renewal of stock and some substituted chattels, in the main the goods upon the premises consisted of old stuff, some of it very old, subjected since the date of the mortgage to 5 years further wear and tear in a catering business. Everything was out of condition and abominably dirty; and Mrs. Edwards and her daughter personally spent much labour in endeavouring to bring the goods to a presentable shape.

At the trial upon the evidence all complaint as to failure to put the articles in proper condition disappeared. The sale was, I think, fair, and conducted in good faith. The amount realised did not pay the amount due upon the mortgage. There was no collusion nor was anything done to indicate other than an honest attempt on the part of the defendant to realise as much as possible in her claim. The plaintiff was regarded as financially worthless, and no hope was entertained of making out of him any balance remaining. The sale was conducted by highly responsible and well qualified auctioneers, of much experience. The mortgagee acted reasonably in employing them and in what they did they acted not only reasonably but skilfully.

Some complaint was made that there should have been an endeavour to sell the stuff *en bloc*. Usually complaint is made if this course is adopted. There was nothing to shew me that more would have been realised had that course been taken. The only serious matter was the inadequacy of the advertisement. The defendant employed as her bailiff Mr. Greenfield, a gentleman who had had experience as a Division Court bailiff, who had acted on some occasions before as bailiff for chattel mortgagees and who until recently was the Court Crier. He inserted advertisements in two issues of the three Hamilton papers, using as a form the form usual in Division Court bailiffs' sales. This certainly did not make an attractive or alluring advertisement; yet it seems to have served its purpose, for there was a good attendance of those who would likely buy articles of the kind in question, namely, those interested in the local confectionery business. As is usual in all sales, it is easy to point to specific articles which did not sell well, partly because they were old and worn, partly because they were dirty and abused, and partly because the demand for such articles is by no means great. Yet no evidence was given to shew that on the whole an insufficient price was realised.

I think the action fails, and should be dismissed. The mortgagee offered if the matter now ends, to forego any claim for costs or for the balance due under her claim. If this is accepted, the judgment may be accordingly. If it is not accepted, the action is dismissed with costs, as I am unable to find any misconduct on the part of the mortgagee. I am also unable to find that from the alleged misconduct any loss has occurred to the plaintiff.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 19TH, 1913.

HICKS v. SMITH'S FALLS ELECTRIC POWER CO.

5 O. W. N. 301.

Negligence—Death of Employee—Caught in Revolving Shaft—Negligence of Superintendent — Person to whose Orders Deceased Bound to Conform — Workmen's Compensation Act — Common Law Liability—Alleged Defective System—Work and Place where being Carried on Unusual—Appeal—Reduction of Damages.

LATCHFORD, J. (24 O. W. R. 556), *held*, that where a workman was killed by being caught in a revolving shaft when moving with other men a heavy fly-wheel through a door within a foot or so of the shaft in question, defendants were liable at common law for maintaining a dangerous and defective system, and also under the Workmen's Compensation for Injuries Act, inasmuch as the accident was attributable to the negligent orders of a superintendent to whose orders the deceased was bound to conform.

Judgment for plaintiff for $4,000 and costs; if only under the Workmen's Compensation Act, for $2,000 and costs.

SUP. CT. ONT. (1st App. Div.), varied above judgment by reducing the damages to $2,000, holding that the defendants were not liable at common law as the work being done and the place where it was being done were unusual.

Ainslie v. *McDougall*, 42 S. C. R. 420, and *Brooks* v. *Fakkema*, 44 S. C. R. 412, distinguished.

No costs of appeal.

Appeal by the defendant company from a judgment of HON. MR. JUSTICE LATCHFORD pronounced 3rd May, 1913, after the trial of the action before him, sitting without a jury, at Perth on the 22nd of April. See 24 O. W. R. 556; 4 O. W. N. 1215.

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.

D. L. McCarthy, K.C., for appellant company.

J. A. Hutcheson, K.C., for respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.: — The action is brought by the widow and infant daughter of Richard Hicks, deceased, who was a workman in the employment of the appellant company, to recover damages under the Fatal Accidents Act for his death, which, as it is alleged, was caused by the negligence of the appellant company.

The facts are fully stated in the reasons for judgment of the learned trial Judge, and it is unnecessary to restate them. His finding was that there was in use by the appellant company "a defective system which caused the death of Hicks;" and he held that the respondents were entitled to recover at common law, and he assessed the damages at $4,000. He also assessed them contingently at $2,000 if ultimately it should be held that the respondents were entitled to recover only under the Workmen's Compensation for Injuries Act.

The right of the respondents to recover under the Act was but faintly denied; but it was contended that they were not entitled to recover at common law.

I should not have differed from the conclusion of the learned trial Judge that the appellant company was liable at common law if the place in which the deceased was working at the time he met with the injury which caused his death had been a place in which in the ordinary course of the business of the company workmen would be required to be employed; for in that case the company would have failed to perform the duty which it owed to its workmen. *Ainslie Mining & Rw. Co.* v. *McDougall* (1909), 42 S. C. R. 420; *Brooks* v. *Fakkema* (1911), 44 S. C. R. 412. No such case was made by the respondents. The place in which the deceased was working was not ordinarily used or intended for workmen to work in. It was a passageway, seldom used; and the occasion of the deceased being at work there was a very exceptional one, due to the necessity of moving through the passageway the large pulley which was to be placed in the engine room. The duty of guarding against the risk to which the deceased was exposed in moving the pulley was therefore, I think, not one which the appellant company might not delegate to a competent superintendent or foreman. Besides this, the projecting end of the shaft was not a source of danger to anyone unless the shaft was in motion; and in the usual course of the business it was not in use during the daytime.

On the morning of the accident, owing to something having occurred which necessitated the repair of a belt in connection with the shaft, which was ordinarily used for the purpose of supplying power to the customers of the appellant company it could not be used, and the other shaft was being temporarily used instead of it. There was therefore the conjunction of two exceptional circumstances which led to the deceased being at work at a place in which he was exposed to unnecessary risk of injury.

For these reasons I am of opinion that the efficient cause of the deceased's injury was not the failure of the appellant company to perform the duty which rested upon it, to which I have referred, but the negligence of the superintendents who had charge of the moving of the pulley, in requiring him to work at a place where, owing to the shaft with the projecting end being in motion, he was in a position which needlessly exposed him to risk of injury.

The judgment should, in my opinion, be varied by reducing the damages to $2,000, and with that variation it should be affirmed. There should be no costs of appeal to either party.

MASTER-IN-CHAMBERS. NOVEMBER 19TH, 1913.

MITCHENER v. SINCLAIR.

5 O. W. N. 347.

Pleading—Defence to Counterclaim — Embarrassing Paragraphs — Motion to Strike out—Leave to Amend.

HOLMESTED, K.C., struck out certain paragraphs of a joinder of issue intended as a defence to a counterclaim which set up no real defence to the allegations therein contained.

Application to strike out second paragraph of the joinder of issue as being no answer to the defendant's counterclaim and as being embarrassing.

John King, K.C., for defendant.

G. R. Roach, for plaintiff.

HOLMESTED, K.C.:—The plaintiff's case may be stated shortly thus: "I agreed with the defendant that he should buy for me certain property. He accordingly bought the property and took the conveyance to himself, and now re-

pudiates my right, and I claim that he should be declared to be trustee for me."

The defendant by his defence denies the plaintiff's case, and sets up a counterclaim, that he is the rightful owner of the land in question and the plaintiff is merely his tenant at will, and he claims possession and rent and $254.40 for money lent and an injunction to restrain waste and to compel plaintiff to remove mechanic's lien which he has suffered to be registered against the property.

To this the plaintiff replies that the defendant by refusal to carry out his agreement to convey the land to the plaintiff, has occasioned damage to the plaintiff. Even under the present loose system of pleading it is difficult for me to see how this can be said to be any defence to the counterclaim.

It is perfectly easy for the plaintiff, in answer to the defendant's claim to possession and an injunction on the facts alleged, to frame a defence. It is also apparently an easy matter to frame a defence to the money claim, and there was no excuse for resorting to the ambiguous statement of paragraph 2 of the joinder issue.

I think this paragraph must be struck out as claimed, with costs to defendant in any event. The plaintiff may amend the joinder of issue as she may be advised and in default of amendment the defendant shall be at liberty to note the pleadings closed as to the counterclaim.

MASTER-IN-CHAMBERS. NOVEMBER 17TH, 1913.

LANGWORTHY v. McVICAR.

5 O. W. N. 345.

Evidence—Privilege—Solicitor and Client—Discovery—Action to Establish Will of Client — Solicitor Named as Executor—Representatives of Testator—Waiver of Privilege by—Costs.

HOLMESTED, K.C., *held*, that the solicitor of a deceased testator whose will was being impeached could not refuse to answer questions upon the ground of professional privilege, where he as executor was seeking probate of such will.

Russell v. *Jackson*, 9 Hare 387, referred to.

Action for probate of a will of which the plaintiffs are executors and which is impeached as being invalid.

The plaintiff Langworthy was solicitor for the deceased and appeared to have acted for him in the preparation and execution of the impeached will. He had been examined for discovery and had objected to answer certain questions on the ground that they were communications made to him as solicitor for the deceased.

Featherston Aylesworth, for defendant.

J. Haverson, K.C., for plaintiff.

HOLMESTED, K.C.:—The privilege is one for the protection of the client, and one which the client may waive. When he is dead it would seem that the privilege enures for the benefit of those who claim to be his representatives, but it is not for the benefit or protection of any one more than of another, and it would seem that any one claiming to be a representative whether as heir or next of kin may waive it. The present applicants claim to be representatives of the deceased on the ground that the will in question is void, and the questions to which answers have been refused are directed to shewing the invalidity of the will. I do not think he, Langworthy, in the circumstances can claim as one of the executors of the impeached will the privilege as against the applicants. *Russell* v. *Jackson*, 9 Har. 387. I think he should attend again and answer all the questions he refused to answer and also any questions properly arising out of his answers. He must also pay the costs of this motion in any event.

HON. MR. JUSTICE LENNOX. NOVEMBER 19TH, 1913.

ROGERS v. NATIONAL PORTLAND CEMENT CO.

5 O. W. N. 349.

Contract—Exclusive Agency for Sale of Cement for Limited Period —Breach by Defendant—Evidence — Damages—Profits—Reference.

LENNOX, J., gave judgment for plaintiff for damages with a reference in an action for breach of contract under which he was to be employed as the sole selling agent of defendant company for a period of five years.

Action by plaintiff for damages for alleged breach by defendants of a contract to employ plaintiff as the exclusive agent for sale of the output of their Durham works for a period of five years.

I. F. Hellmuth, K.C., and M. Lockhart Gordon, for plaintiff.

G. H. Watson, K.C., and J. L. Fleming, for defendant.

HON. MR. JUSTICE LENNOX:—There was a great deal of evidence given for the defence which I cannot accept. In particular, I was very unfavourably impressed by the evidence of Mr. Calder and Mr. Doolittle.

I find that at the directors' meeting on the 13th of January, 1910, it was distinctly stated and clearly understood that the plaintiff would not accept a contract for less than 5 years, and that the contract was authorised by a resolution duly and regularly proposed and passed at that meeting. I find too, however, that the record of this resolution as set out in the minutes is not a correct record of the motion made, put to the meeting and passed. I find that clause number 4 of the contract was discussed at this meeting of the directors and explained, and it was then understood by all parties to mean, and it was employed as meaning only, that the defendant company would not be bound to supply cement to the plaintiff if the price offered netted to the company less than $1.30 f. o. b. at the mill, and the parties to the action have frequently dealt with each other according to this interpretation.

There is no doubt at all as to the attitude of the representatives of the independent companies at the meeting in October, 1911. All present with the exception of Mr. Calder and Mr. McCabe, agreed to reduce the price. These representatives, I think, recognised the necessity of meeting the current market price, but decided not to take upon themselves the responsibility of making a permanent reduction. The conclusion they came to, and announced to the plaintiff, was that the question would be submitted to their board of directors in December, and the plaintiff was to go on selling at the reduced price in the meantime. This was done and the company acted upon it. This is all clear enough from the evidence of Calder and McCabe themselves, without other evidence. There was another reason in the mind of Mr. Calder at this time, which was not declared.

The minutes of the board meeting of the 13th December, 1911, contain no reference to the plaintiff or the contract. There was a discussion between the plaintiff and the members of the board of the defendant company in the Palmer

House that day, and towards the close of the evidence for the defence a distinct effort was made to establish that the discussion took place before the meeting adjourned. The importance of proving this was evidently not apprehended for some time and hence the last state of that evidence, from the standpoint of candour, is worse than the first. This was the most important question the directors had for consideration on the 13th of December. It was announced in the notices sent to the directors—I think it was the only subject specifically mentioned. Keeping this in mind, and noting the care with which even trifling matters are recorded—and that after all this it is deliberately stated that the meeting adjourned because there was "no other business"—and for many other reasons, it would require pretty clear evidence, satisfactorily given, to justify the conclusion that the minutes are incorrect. There is no such evidence. I find as a fact that the meeting was over before Mr. Rogers came in.

The directors have done a lot of fishing and all because of a desire to get rid of the contract and effect a saving on the cost of selling their product. To this end it was decided to sound Mr. Rogers upon various points. The keynote to this determination is to be found somewhere in an unfinished sentence dropped by Mr. Calder, but the attempted execution of the scheme is evidenced by the series of questions put to the plaintiff. Two things stood in their way, one was that plaintiff never had any idea, that I can detect, of either breaking his contract or releasing the company from their obligation under it, and the other was that the leading spirits in the defendant company had a lurking idea that they could do better by holding the plaintiff to his contract, even should he wish to recede from it. I am clearly of opinion that these gentlemen, and the list probably included those who asked questions, had no intention to come to anything definite on the 13th of December; and this may or may not have been a reason for the meeting adjourning before the Rogers contract and the question of sales were taken up. It is beyond argument, of course, that, whatever Mr. Rogers said on this occasion, no action was taken—the sales were to continue to be made under the contract and at the reduced price, and the matter of ultimate decision and action were reserved for the new board.

In what way was it thought that the company might do better then either reduce the price or release the plaintiff?

Mr. Calder gives the key to this. Admitting, as he is compelled to admit, that neither the plaintiff nor anyone else can continue to sell above the market price, and that the company must sell its product or shut down, he says, speaking of the independent meeting in October, 1911: "I did not want to reduce our price because I believed Mr. Rogers had to take our output at a price to net us $1.30 f. o. b. at the mill. That was my view, even if it dropped to $1.10." How long the president and managing director and those in close touch with him continued to hold this view I have no way of determining; but so long as it was cherished it was not likely that the plaintiff would be released even if he desired it.

I come now to the question of what the plaintiff stated at the Palmer House on the 11th of December, 1911, although I fail to see that it is very material, seeing that no action was taken, and both parties continued to recognise and work under the contract as before. A great deal of the contention at this point arises out of a misconception of the meaning of the contract. The plaintiff might, of course, very well say, "You are not liable to me in any way for refusal to supply cement at the cut rate," or "I am under no obligation to sell if you demand a price beyond the current rates;" and, although some of the witnesses, probably from inability to make fine distinctions, plunged a little deeper than this, yet, as a rule, what was stated was singularly indefinite and inconclusive. However, weighing the manner in which much of this evidence was given, the striking contradictions in some cases, and the notable identity of expression in others, and taking the probabilities and the action of the defendants in continuing to deal with the plaintiff just as they had done all along, into account, I cannot believe that the plaintiff made use of any expression to the effect that he had terminated or would terminate the contract, or that it was at an end, but, on the contrary, I find that, as stated by Mr. McCabe in words, and in effect by many others, the plaintiff made it quite plain that "he would go on and sell the same as before but he would not consent to a reduction of his commission for selling the cement;" but at the same time emphasizing, as all witnesses agree, that in a little while sales under such conditions would become impossible. I find, too, that when the plaintiff left the directors in the Palmer House on the 11th of December the hope was still entertained, as shewn by the

evidence of Mr. Frawley, that the plaintiff would eventually agree to lower his commission, that all parties regarded the contract as a subsisting contract, that the plaintiff was to continue to sell under it until the incoming of the new board, and that nothing was done to terminate it; and it was not, in fact or in law, terminated, until the defendants put an end to it by resolution at the board meeting on the 13th March, 1912, and gave notice to the plaintiff.

I accept the statement of the plaintiff as to what occurred at his meeting with Mr. Calder and Mr. Doolittle on the 12th of March, 1912. He had taken advice at that time and, aside from the painful want of frankness which characterized these two witnesses for the defence, their evidence is not only inconsistent with the company's record of this transaction, but pointedly at variance with the record of matters of earlier date, and with the accepted evidence of almost all that occurred at the board meeting of January, 1910. They swear that they did in fact, and in any case it is to be presumed that they correctly reported to their board on the 13th what was said and done on the 12th of March, and equally it must be presumed that the resolution based upon this will be a reflex of their report. The result is not a verification of what these witnesses now say, but the opposite. The resolution as found in the minutes is absolutely inconsistent with what they allege; it reflects the determination of the board to take the initiative of dismissing Mr. Rogers so as to reduce the expenses of sale, and it shews nothing more; and that this idea was clearly focussed in the mind of the president is shewn by his letter of 15th of March, 1912. This letter shews a lot of things. The resolution itself, of course, recognises an existing contract, as did also the resolution of the 1st of March. Mr. Calder in this letter says: "After full consideration our board agreed to discontinue our selling arrangements with you, and sell our product direct from our plant" and "we thoroughly understand and explained to you that the price is now so low that we have to reduce the expense in every possible way. . . . Since we have decided to make the break I suppose it is just as well we should do so at the end of the week, unless, etc. . . . Trusting that we may receive a reply from you accepting this as a conclusion of our business, we are." And, acting upon this decision the company's agents were immediately put upon the road to sell and they sold right along at the current market rates, so that it is quite impossible

to argue that the plaintiff broke the contract or that it was not a subsisting contract until the despatch of this letter, or that any difference of opinion between the defendant company and the plaintiff as to the price at which the goods must be sold was the cause of "the break." It was not; the break was because the directors, recognising that they must meet current prices, and failing to induce the plaintiff to divide his commission, decided to get rid of the plaintiff and counteract the effect of the reduced prices by disposing of their product in a cheaper way; and for this decision they take credit to themselves in a circular letter issued to the shareholders on the 14th of March.

I find that the contract in question was broken by the defendant company, and it was not because of any contention as to meeting or not the market price, but because the defendant company being compelled, as they knew, to meet this price decided to offset the loss, in part at least, by reduced expenses of sale.

The defendant's counsel is entitled to put in portions of the plaintiff's examination for discovery; and, the examination of Mr. Bruce being dispensed with, portions of plaintiff's cross-examination on his affidavit. In the latter case such other portions of the cross-examination as refer to the same subject or question will go in.

There will be judgment for the plaintiff for damages for breach of contract, and the costs of the action; and there will be a reference to the Master-in-Ordinary to ascertain and assess these damages by allowing to the plaintiff the actual net profit which would have accrued to the plaintiff had the contract been observed and performed by the defendant company on their part, taking into account all sales made by the company from the 15th of March, 1912, to the date of taking the account, and ascertaining as nearly as may be the possible sales by the company from that time until the termination of the contract period, namely, the 14th of January, 1915, and an order for payment of the damages so found by the Master.

Costs of the reference reserved.

Execution stayed for 30 days.

HON. MR. JUSTICE BRITTON. NOVEMBER 21ST, 1913.

GROCOCK v. EDGAR ALLEN & CO., LIMITED.

5 O. W. N. 340.

Master and Servant—Contract of Hiring—Employment of Traveller on Salary and Commission Basis—Alleged Misrepresentations—Dismissal—Notice—Master not Bound to Provide Work under Contract — Exaggeration of Damages — Dismissal of Action Brought by Servant.

BRITTON, J., *held*, that where a traveller was employed upon a salary and commission basis his employers were not bound to provide work for him.

Turner v. *Sawdon & Co.*, [1909] 2, Q. B. 653, followed.

Turner v. *Goldsmith*, [1891] 1 Q. B. 54, distinguished.

Action to recover damages for breach by the defendant company of an agreement with the plaintiff as salesman and for an account by the defendant company of all sales made by that company and of all contracts taken, in Ontario, during the term of plaintiff's engagement. Tried at Toronto without a jury.

W. N. Tilley and J. J. McLennan, for plaintiff.

H. E. Rose, K.C., and J. W. Pickup, for defendant.

HON. MR. JUSTICE BRITTON:—On the 2nd of September, 1910, the defendant caused to be inserted in The London "Engineer" the following advertisement:—

> "Canada.—Wanted, a traveller to sell tool steel, steel castings, &c., to reside in Canada. Applicants to state salary and previous experience.—Address, 670 Engineer Office, 33 Norfolk Street, Strand, W.C."

The plaintiff applied by letter dated 3rd September, which was followed by an interview at Sheffield on the 9th day of September. A second letter of the plaintiff on the 12th September was followed by an interview on the 15th September when a verbal agreement was arrived at. This agreement was confirmed by defendant's letter to plaintiff of 16th September, 1910, which is as follows:—

"In reference to the interview you had with us yesterday, we now confirm our appointment of you as our representative in Ontario, Canada, under our manager for Canada

—Mr. Thomas Hampton—who is resident in Montreal, and whose instructions you will of course be required to carry out.

The terms of the appointment are as follows:—Salary, $85 per month, payable monthly. Commission two and a half (2½) per cent. on the net turnover from Ontario. Travelling expenses will be paid by us and also hotel expenses when you are away from Toronto, which will be your headquarters.

Notice:—Three months' notice to be given on either side to terminate this arrangement which is for one year certain. Books, letters and business papers. These are to remain our property and are to be given up in the event of your leaving our service.

We rely upon you giving your best attention to our business and this appointment is made on the understanding that you do not engage in any other business whilst in our employ.

Your salary will commence from the day you sail for Canada, and we shall pay your expenses whilst in Sheffield prior to sailing.

We wish you every success and assure you that you can rely upon us to do everything possible to promote our mutual interests."

The plaintiff by letter of 19th September accepted the terms of defendant's letter, and the contract was thus made.

The plaintiff entered upon his work and the salary commenced on the 22nd October, 1910. Upon the plaintiff's arrival at Montreal, the defendant's manager for Canada, Mr. Hampton, limited the plaintiff's territory to that part of Ontario west of a line drawn west of Ottawa and Kingston. The plaintiff did not at the time object to this, nor did he subsequently attempt to work in the territory in Ontario east of the line mentioned, and I cannot say that the plaintiff has shewn any damage resulting from cutting off the eastern part of Ontario.

On the 22nd May, 1911, the defendant company gave to the plaintiff notice of terminating the plaintiff's employment on the 22nd October of that year. This was sufficient notice under the terms of the letter of hiring. The plaintiff by letter of 6th June, 1911, definitely and in terms accepted the notice. The opening paragraph of plaintiff's letter is as follows:—

"I am in receipt to-day of your letter of 22nd May and beg to accept same as and from July 22nd being three months' notice to terminate my services with you ending October 22nd which is the date of my sailing and entering service with you last year and is in accordance with the "Notice" paragraph contained in your letter of September 16th, 1910."

The plaintiff states that he accepted the engagement upon the representations made by the directors of the defendant company that the company had a very large number of customers in Ontario with whom they were doing business; and the plaintiff alleges that such representation was to the knowledge of the defendant company false and untrue.

I find upon the evidence that all the representations made by the directors of the company, so far as such representations were given in evidence, were substantially true; and I find that there was an entire absence of fraud and bad faith in the negotiations which led to the plaintiff's engagement.

The plaintiff's alleged loss on this branch of the case will be found in his particulars: commission of 2½ per cent. on sales of $6,000 per month, which the directors assured the plaintiff would be the turnover, less commission on actual turnover of $1,200 per month.

Any such loss by reason of alleged misrepresentation is not consistent with plaintiff's letter of June 6th, 1911, in which the plaintiff says he would have accepted a straight salary of $2,000 a year in lieu of $1,000 a year plus 2½ per cent commission on turnover for Ontario. The difference between what plaintiff actually got in salary and commission and what he would have accepted after all representations were considered, is comparatively small.

In reference to plaintiff's complaint that the defendant company refused and delayed to fill orders procured by the plaintiff for goods, I find that while at times there was delay, such delay or refusal, if any refusal, was not intended to prejudice plaintiff but was occasioned in the management of defendant's business; and the management was reasonable, fair and prudent and within what the defendant company had the right to do. It was in the interest of the defendant company to give to the plaintiff reasonable support and assistance; and this in my opinion the defendant company did, so far as consistent with the defendant's

organisation and plan and system of management; and the plan and system were not, in my opinion, faulty or such as to entitle the plaintiff to damage for any alleged loss.

It is a fact that the plaintiff did not during the term of his engagement, prior to the 22nd of May, 1911, sell enough of the defendant's goods to reasonably justify the expense of retaining him in their employment. Apparently, with the exception of one commission in dispute, the defendant company has paid to the plaintiff salary in full to the 22nd October, 1912, and all commissions when such commissions fell due. If there were any commissions not due at the time of issuing the writ herein, the plaintiff is entitled to recover such, but not in this action.

It was not on the trial shewn that any such commissions were unpaid. The one in dispute is that upon a sale of manganese steel crossings to the Intercolonial Railway. The amount of this purchase by the Intercolonial Railway was $2,200, the commission on it would be $55.

I accept the plaintiff's statement, which was that he (the plaintiff) had heard that the Intercolonial Railway placed this order at Ottawa; and plaintiff claims the commission, as Ottawa is in Ontario. Apart from the question of the effect of limiting the plaintiff's territory, by the defendant's manager in Canada, to the line west of Ottawa, as I have mentioned, I am of opinion that the sale to the Intercolonial Railway of these steel crossings cannot be considered as part of the net turnover from Ontario. The defendant company has not raised any question as to commissions on any sales of goods which could properly be called part of the province of Ontario turnover. There is no doubt in my mind that a commission on this sale would have been paid by defendants if applied for and if suit not pending.

On the 1st of September, 1911, the plaintiff was relieved from further work under his agreement. He was told by the manager "Your holidays start from to-day and will continue until the termination of your agreement with this company; and under these circumstances we shall not pay you any further moneys for travelling expenses after to-day, which please note."

The plaintiff was asked to return all books, stationery, etc., the property of the company; and this presumably he did, as no question was raised about it at the trial.

The plaintiff was paid all commissions to the end of his term. It was not shewn that the plaintiff could have ob-

tained any order that would have been accepted for any goods from the 1st of September to the 22nd of October other than those actually sold by the defendant company and upon which the plaintiff received commission. As this contract is to pay wages, namely, a salary of $85 a month, together with commission for the entire output for Ontario, whether sales made by plaintiff or not, I think the case falls within and is governed by *Turner* v. *Sawdon & Co.*, [1909] 2 Q. B. 653. The contract is to pay wages, and the employer is under no obligation to provide work. The work might not increase the plaintiff's remuneration. If it must be presumed that the plaintiff would have made additional sales, so as to be entitled to additional commission, no amount was suggested. The evidence did not establish any. I think this case is close to, but distinguishable from *Turner* v. *Goldsmith*, [1891] 1 Q. B. 54. Putting an end to the term of plaintiff's service was strictly within the agreement, and acknowledged by the plaintiff to be so. During the term down to the 1st September, 1911, the plaintiff was assisted in every reasonable way consistent with the carrying on of defendant's business, and was paid salary and commission to the end. This leaves the plaintiff without any good cause of action.

A great deal of evidence was put in, evidence taken upon commission and by witnesses called at the trial. I have considered it all, but no useful purpose would be served by my giving extracts from, or further commenting upon it. No doubt the result of the plaintiff's entering into this contract has been very unfortunate for him; but the damages claimed, even if there was liability on the part of the defendant company, are greatly exaggerated, and, in the main, too remote to be recovered.

This action will be dismissed, and with costs if costs are demanded. Thirty days.

HON. MR. JUSTICE BRITTON. NOVEMBER 20TH, 1913.

RE McDEVITT.

5 O. W. N. 333.

Will — Condition of Forfeiture — "Instituting Proceedings to Set aside Will"—Filing of Caveat not such Proceeding—Accounts—Reference.

BRITTON, J., *held*, that filing a caveat against the proof of a will is not "instituting proceedings to set it aside" so as to work a forfeiture of the caveator's interests under the will:—

Rhodes v. *Mansell Hill Land Co.*, 29 Beav. 560 and *Williams* v. *Williams*, [1912] 1 Ch. 399, referred to.

Motion by Thomas Quinn and Charles Thomas Sweeney, a committee, and subsequently executors of the will of Daniel McDevitt: 1st, to pass the accounts of the said committee, and 2nd, to pass the accounts of the said persons as executors, and 3rd, for the opinion of the Court and for advice upon the clause 4 of Daniel McDevitt's will.

E. J. Hearn, K.C., for the applicants.

F. Arnoldi, K.C., for Patrick McDevitt.

J. F. Hollis, for Hugh McDevitt.

J. Tytler, K.C., for John McDevitt.

W. E. Raney, K.C., for James McDevitt.

HON. MR. JUSTICE BRITTON:—The applicants by an order made in Chambers on the 18th day of April, 1912, by Hon. Mr. Justice Middleton, were appointed jointly to manage and administer the estate, real and personal, of the said McDevitt in accordance with the powers conferred and under the directions given by that order. These powers and directions are fully set out in the order. The applicants did many things acting under said order. It was further ordered that these applicants, Charles Thomas Sweeney and Thomas Quinn should receive as compensation for their skill and trouble in so administering the said estate such sum as might be allowed by a fiat of a Judge in Chambers in addition to their lawful disbursements.

Daniel McDevitt died on the 29th day of September, 1912, having made his last will and testament on the 6th day of said September, 1912. The said Thomas Quinn and Charles Thomas Sweeney were appointed executors, and

probate of said will was granted to them on the 4th day of November, 1912, by the Surrogate Court of the county of York. The 4th paragraph of said will is as follows:—

"Should any of the beneficiaries named in this my will institute any proceedings to set aside this my will, or any paragraph or clause thereof, he or they shall thereby forfeit all his or their rights and legacies herein provided."

John and James McDevitt, brothers of the deceased Daniel McDevitt, filed a caveat against the proof of the will. By the will the residue of the estate of deceased was given to his 4 brothers, viz., James, John, Patrick and Hugh.

The question is, was the lodging of the caveat, by John and James, instituting proceedings to set aside the will or any paragraph or clause thereof, within the meaning of the above recited clause 4.

The caveat lodged stated the grounds to be,

(1) Want of testamentary capacity,

(2) that the will was executed after the testator had been declared by a Judge of the High Court to be a person of unsound mind, and

(3) that the testator was unduly influenced to make the will.

There has not been in fact the institution by any of the beneficiaries of any proceedings to set aside the will, therefore there has been no "forfeiture of any rights and legacies."

The filing of the caveat was not "instituting proceedings to set aside the will."

A caveator who states as grounds for the caveat is not obliged to proceed to proof, or to attempt to prove these. A caveat is defined as "A formal notice or caution given by a person interested, to a Court, Judge or public officer against the performance of certain judicial or ministerial acts."

A caution, or caveat, while in force, may stop probate or administration from being granted without notice to or knowledge of the person who enters it. A caveat being lodged—a warning should follow, and then if the person who lodged the caveat really intends to contest, he should cause an appearance to be entered. Even then, I do not say that the entering of an appearance would be instituting proceedings to set aside a will. It might well be that a beneficiary would desire to have the will proved in solemn form.

Neither John nor James entered an appearance. The caveat remained in force only three months. See C. R. 23. It was not a correct statement in the caveat that the testator had been declared a lunatic. It was stated in the order above mentioned, that "he was from mental infirmity, arising from constitutional causes, incapable of managing his own affairs. Such a condition may be quite consistent with testamentary capacity.

The cases of *Rhodes* v. *Mansell Hill Land Co.* (1861), 29 Beav. 560, applied in *Williams* v. *Williams*, [1912] 1 Ch. D. 399, are in point on the general question of what action will work a forfeiture under clauses in a will providing for same. I find no case in which the proposition that lodging a caveat is in itself instituting proceedings to set aside a will.

The order will be as stated upon the third point, and that all accounts will be referred to His Honour the Senior Judge of the Surrogate Court for the County of York. He will examine and report upon the charges and disbursements of the applicants, payable under the order of Mr. Justice Middleton, and upon that report I will grant a *fiat* for payment. The learned Surrogate Judge will finally pass the accounts of the applicants as executors.

The costs of all parties except James and John McDevitt, will be paid out of the estate. James and John will each bear his own costs.

HON. R. M. MEREDITH, C.J.C.P. NOVEMBER 20TH, 1913.

RE ANNETT (A LUNATIC).

5 O. W. N. 331.

Lunacy—Application for Order Superseding Lunacy Order—Recovery of Lunatic—Lunacy Act, 9 Edw. VII., c. 37, s. 10—Evidence—Insufficiency of Material—Right to Renew Motion—Reference—Notice to Committee.

MEREDITH, C.J.C.P., refused to make an order under the Lunacy Act, 9 Edw. VII. c. 37, s. 10, superseding an order declaring the applicant a lunatic upon the ground of the insufficiency of the material filed, but gave leave to have the motion renewed upon proper material and proper notice to the committee.

9 Edw. VII. c. 37, s. 10, discussed.

Application by one G. Annett for an order under sec. 10 of the Lunacy Act, 9 Edw. VII., ch 37, superseding an order made on March 10th, 1911, declaring him to be a

lunatic and appointing his wife committee of his person and estate.

The applicant in person for the motion.

HON. R. M. MEREDITH, C.J.C.P.:—The applicant applies in person, for an order, under the tenth section of "The Lunacy Act," superseding an order of this Court, made on the 10th day of March, 1911, by which he was declared to be a lunatic, and his wife was appointed a committee of his person and estate.

From the papers filed upon that application, it appears that the man was, at that time, confined in a private hospital for the insane; but he is now, and apparently has been for some time past, quite at liberty; and, according to his own statements made in argument upon this application, is residing at his own house, with his wife and family, and caring for his own person—and, judging from his appearance, doing so very well—and is also, without any assistance, attending to such business as he has had. And he produces, upon this application, an apparently genuine certificate of Dr. Bruce Smith, dated 2nd April last, in which that competent medical gentleman, and provincial officer, states that he has, upon examination, found that the man not only is not insane, but that to prevent "worry that might have a tendency to disturb or annoy him" he (Dr. Bruce Smith) had suggested that the arrangement made for the care of the man's property while he was a patient at the sanitarium "might now, with advantage to his peace, be dissolved." He also, in that writing, expresses his belief that the man's "former illness" was an acute attack of insanity; and it is observable that, in the application for the declaration of lunacy, nothing was said, by any of the medical men who testified as to the man's insanity, in regard to the character of it, or as to its probable, or possible, duration; things which ought generally to be disclosed upon such an application, especially in acute cases.

No one who is sane should be compelled to live, or to die, under the ban of an order declaring him to be insane; there should be no undue delay in "superseding, vacating and setting aside the order declaring the lunacy;" though, of course, care must be taken that one who has been insane is really sane again—that it is a real case of recovery.

Such cases as *Ex parte Holyland,* 11 Ves. 10, and *Re* Dyce Sombre, 1 M. & G. 116, shew the nature of the evidence which in those days was deemed needful to support an application for a *supersedeas* of a commission in lunacy; and although the same question is involved in this less formal application, and the same principles apply to it, it must be borne in mind that important changes, since those cases were dealt with, have taken place in the legal, as well as in the medical, view of lunacy and the diseases which are the cause of it. The mind is not now looked upon anywhere, as it at one time was by some of the Judges, as one and indivisible; and in the methods of medical treatment, and in the medical view of the curability of the ailment, especially in acute cases, progression is undoubted. As the Act very plainly puts it: "The Court, if satisfied that such person has become of sound mind and capable of managing his own affairs, may make an order so declaring, to be followed, in due course, by an order superseding, vacating and setting aside the order declaring the lunacy."

But, in this particular case, the difficulty is that the application is made by the applicant himself, and he is quite unfamiliar with the practice of the law; so that it comes up in a very insufficient manner. The notice of motion has such a home-made appearance that it might have been misunderstood to be not a real and effectual one. The affidavit of service is made by the man himself, and there is no other affidavit in support of the application. It would, obviously, be improper to make the order asked for upon such material, however strongly one might feel after a discussion of the subject with the man, that he may have a very good case, which might easily be presented properly, and however anxious one might be to avoid keeping a sane man under the cloud of an order of lunacy.

In the circumstances, the best I can do is to say that the application may be renewed on proper material, after proper service of a proper notice of motion upon the committee, or else with her consent properly verified; or that the applicant may have, at once, a reference to the local Master at London, at Chatham, at Sarnia or at St. Thomas, to ascertain and state whether the applicant is now "of sound mind and capable of managing his own affairs;" notice of the proceedings on such reference to be given to the committee, unless her verified consent to the superseding order is filed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 13TH, 1913.

BROOM v. CITY OF TORONTO ET AL.

Trial—Postponement—Action—Dismissal.

SUP. CT. ONT. (2nd App. Div.) *held*, that plaintiff cannot choose his own Judge to hear his action, and if he refuses to proceed with his action when it comes on for trial it should be dismissed with costs.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE LATCHFORD, at trial, dismissing his action with costs.

The case was entered for trial, and notice of trial given, but when the case came on for trial the plaintiff accused His Lordship of being prejudiced against him, and objected to proceeding with the trial, whereupon His Lordship dismissed the action with costs.

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

Plaintiff, appellant, appeared in person.

R. B. Beaumont, for the respondent municipality.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex. (v.v.) :—The case was entered for trial, and notice of trial given: so it was upon the list to be tried at that stage.

It was the duty of the plaintiff to proceed with his case. He notified the Court that he would not do so, his reason being that he did not wish to have his case disposed of by the trial Judge.

It is not the practice of the Court to allow suitors to make distinction as to the Judge who shall try the case. If the case is on the list it is the practice to have it proceed without any unnecessary delay.

All Judges administer the same sort of law and the same sort of justice.

It was the duty of the plaintiff, therefore, to proceed with his action.

He has refused, and the trial Judge had no alternative but to do what he did, viz., dismiss the action with costs.

There is nothing shewn here that was wrong; no reason for supposing that there was any wrong done.

Therefore, no useful purpose is served by setting that judgment aside.

Therefore, we will have to dismiss this appeal.

As no counsel appears to oppose the motion, we will dismiss it without costs.

NOTE.

HON. MR. JUSTICE RIDDELL:—(commenting on the statement of the plaintiff, appellant, to the effect that the trial Judge was prejudiced against him, and unjustly accusing him of being in contempt of Court, threatened him, and refused further to hear him. Mr. Broom had just stated that he had addressed the foregoing remarks about being prejudiced, etc., to the trial Judge),

Said: "Almost any other Judge to whom you thus addressed yourself, Mr. Broom, would have ordered you to be imprisoned for contempt of Court."

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

NOVEMBER 14TH, 1913.

TORONTO & YORK RADIAL RW. CO. v. CITY OF TORONTO.

Railway—Deviation of Line — Order of Ontario Railway and Municipal Board—Jurisdiction—Right of Appeal—Preliminary Opinion of Board not Appealed from—No Right to do so—Jurisdiction of Municipalities over Highways — Meaning of "Deviation"—Street Railways—What Constitute—Franchise—Necessary Extension of—Statutory Powers of Company—Rights of one Municipality as Successor of Another—Construction of Statutes.

COURT OF APPEAL, *held*, 28 O. L. R. 180, that under the various statutes relative to the Toronto and York Radial Railway Company and their predecessors in title, the Metropolitan Railway Company, and their agreements with the county of York, the said company had no right to deviate their line of railway from the west side of Yonge street where it had been constructed and to operate it along what was termed a private right-of-way parallel thereto, which right-of-way, however, crossed five highways within the municipal limits of the city of Toronto.

PRIVY COUNCIL affirmed above judgment with costs.

Order of Ontario Railway and Municipal Board set aside.

Appeal by leave of the Supreme Court of Ontario from an order of the First Appellate Division of that Court, dated the 13th day of February, 1913, allowing an appeal from an

order of the Ontario Railway and Municipal Board, pronounced on the 17th day of June, 1912, and setting aside such order. The said order permitted the appellants to deviate their line of railway from Yonge street, at a point near Farnham avenue, and to continue the same in a southerly direction in the main parallel to Yonge street, to a new terminus, over what was described as a private right-of-way, which, however, crossed five streets within the municipal limits of the respondents.

Sir Robert Finlay, K.C., C. A. Moss, and Geoffrey Lawrence, for the appellants.

W. O. Danckwerts, K.C., and Irving S. Fairty, for the respondents.

The appeal was heard by THE LORD CHANCELLOR, LORD SHAW, and LORD MOULTON.

THEIR LORDSHIPS' judgment was delivered by

LORD MOULTON:—The history of the litigation in this matter is as follows:—

The Toronto and York Radial Company is a railway company which, so far as is material to the decision of the present case, may be taken to be the successors in law to the Metropolitan Street Railway Company of Toronto, which was incorporated by an Act of Legislature of the Province of Ontario passed in the 40th year of the reign of Queen Victoria, and chaptered 84, for the purpose of constructing, maintaining, and operating railways upon and along streets and highways within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities as they might be authorized to pass along, under and subject to any agreement thereafter to be made between that company and the councils of the said city and of the said municipalities, and subject to any by-laws of the same

At the date of the passing of the said Act and until the first day of January, 1888, the portion of Yonge street, to which this case relates, was within the County of York, but by proclamation, dated the 24th September, 1887, the boundaries of the city of Toronto were extended so as to include a portion of such county, such proclamation to take effect from the 1st day of January, 1888. By virtue of such extension, almost the whole of the aforesaid portion of Yonge

street became included within the boundaries of the city of Toronto but a small portion at the northern end situated opposite to and to the south of Farnham avenue still remained within the County of York.

Prior to the above-mentioned extension of the boundaries of the city of Toronto, and while the said portion of Yonge street was still within the county of York, an agreement, dated the 25th June, 1884, was made between the Municipal Council of such county and the Metropolitan Street Railway Company of Toronto. By the terms of that agreement the railway company obtained the right to construct, maintain, complete, and operate a rail track in, upon, and along the above portion of Yonge street, such track to be located and constructed on the west side only of the said street, according to plans to be approved. The company undertook to run at least two cars each way, morning and evening, on a regular time table, at such times as would best meet the wants of the residents and the general public. The privilege and franchise granted by the agreement were to extend over a period of 21 years from its date, and subject to the observance of the conditions and agreements therein contained (which covered many matters not directly relevant to the present dispute) the company were to have the exclusive right and privilege to construct a street rail, or tramway in and upon the said portion of Yonge street. By a further agreement between the same parties, dated the 20th day of January, 1886, the privilege granted by the preceding agreement were confirmed and enlarged in various respects not relevant to the present case, otherwise than that by clause 16 of this agreement the privilege and franchise granted by it in the previous agreement were made to extend over a period of 31 years from the 25th day of June, 1884, so that they will expire in June, 1915.

It is solely under the two agreements above referred to that the Metropolitan Street Railway Company of Toronto acquired and that their successors, the present appellants, possess the right to maintain and operate the street railway along the portion of Yonge street to which this case relates, and they are bound in respect of such privilege and franchise by all the terms and conditions of such agreements. Very numerous Acts of Parliament (being either general Railway Acts, relating to all railways in the province, or special Acts relating to the appellant company or companies,

of which it is the successor), were cited in the argument, but their Lordships are unable to discover in any of such Acts any legislative provision which exempts the appellants from the performance of the conditions of the agreements under which they have obtained these privileges and franchises which they still enjoy. According to the well-known principles of the construction of statutes, clear words are required to give to them a meaning which would interfere with existing contractual arrangements, and their Lordships are of opinion that, so far as concerns the said privileges and franchises obtained under the said two agreements, such words are entirely absent in the present case. It is unnecessary, therefore, to examine in detail the portions of these statutes which were cited in argument of excepting, so far as may be necessary to understand, the decision of the Ontario Railway and Municipal Board which formed the subject of the appeal to the Court below.

By an Act of 1893, the Metropolitan Street Railway Company of Toronto changed its name to the Metropolitan Street Railway Company, and by an Act of 1897 it again changed its name to the Metropolitan Railway Company, but such changes of name have no effect on the rights of the parties to this dispute. On the 6th day of April, 1894, an agreement was made between the Municipal Corporation of the County of York and the Metropolitan Street Railway Company, whereby, amongst other things, it was provided that the company might deflect its line from Yonge street and operate same across and along private properties, after expropriating the necessary rights of way under the povisions of the statutes in that behalf. At the date of such agreement, the County of York had no rights whatever in the portion of Yonge street to which the present dispute relates, except the small portion at the northern end hereinbefore referred to, and it is not contested that the agreement in question could not affect the rights of the appellants, otherwise than with regard to such portion of their track in Yonge street as lay north of the then boundary of the city. But it is necessary to refer to this agreement, inasmuch as much reliance was put upon it as justifying the deviation from Yonge street, north of the city boundary. Their Lordships do not feel called upon to decide whether, as against the Municipality of the County of York, the appellants acquired the right to make the line in its new position, or

whether its so doing would be consistent with their duties, or within their powers in other respects, because they are of opinion that nothing done under the powers of this agreement can in any way affect the rights of the respondents with regard to the portion of Yonge street owned by them and situated within their own jurisdiction.

On the 11th May, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval by the Board of "a plan to deviate the track on the metropolitan division from Yonge street to a private right of way," which was described as being about 125 feet to the west, running parallel with Yonge street. On looking at the plan it is obvious that this is a misdescription of the proposal in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places, public highways which are not, and necessarily cannot be, described as portions of a private right of way. The object and effect of the proposed plan is plain. The company desired by it to take the line off Yonge street without obtaining the consent of the Municipality, and it was not concealed from their Lordships in the argument that it would in future be contended that, thereafter, they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June, 1915.

The respondents, the Corporation of Toronto, opposed the application, and contended that the company had no right to deviate from Yonge street, and that the Board had no jurisdiction to allow the deviation. The Board rejected that contention, and, on the 25th day of October, 1911, they delivered a written opinion to the effect that the company had the right to deviate to their own right of way. It has been strongly contended before their Lordships, as it was in the Court below, that the respondents were bound forthwith to appeal against this expression of opinion of the Board, and that their not having done so should have been punished by a refusal of leave to appeal from the operative order subsequently made by the Board, or should at any rate preclude them from disputing the correctness of the view of the Board as to the law of the case in any subsequent proceeding. Their Lordships are of opinion that there is no founda-

tion for such a contention. The application to the Board was to approve a plan, and until it had made an operative order it was not incumbent (even if it was permissible) upon any objector to appeal against interim expressions of the view of the Board in matters of fact or law. It might well be that the operative order might not have been objectionable to the Corporation, and until they learnt its terms they could not be required to decide whether they would dispute it or not.

On the 17th June, 1912, the Ontario Railway and Municipal Board made an order approving the plans filed by the appellants, and on the 16th December, 1912, leave was obtained to appeal against that order. On the 13th February, 1913, the Appellate Division of the Supreme Court of Ontario gave an unanimous judgment, allowing the appeal and setting aside the order, and it is from this decision that the present appeal is brought.

Their Lordships are of opinion that the decision of the Appeal Court was right and should be affirmed. The line of the appellants in the portion of Yonge street which, ever since 1st January, 1888, has been within the city of Toronto, has been held and operated by the appellants or their predecessors, under and by virtue of the franchise and privileges obtained by them under the agreements of 25th June, 1884, and 20th January, 1886. It is true that these agreements were made with the County of York (within whose jurisdiction this portion of Yonge street then lay), and not with the city of Toronto, but by the indenture of 20th August, 1888, the County of York conveyed to the city of Toronto the whole of its interests in the portion of Yonge street within the city. It is not necessary to decide whether, under the circumstances, the Corporation of Toronto became formally the successors of the County of York under the agreement, so far as it related to this portion of the track, to such an extent that they could have enforced obedience to the terms of the agreement by proceedings in their own name, because, even if that were not so, the County of York were clearly trustees on behalf of the Corporation of Toronto of their rights under these agreements with regard to such portion of the track, and could not have released the appellants from any of its conditions, otherwise than by the request or with the consent of the Corporation of Toronto. The appellants are thus bound by the whole of the

obligations of those agreements, so far as they relate to such portion of the track. As has already been said, there has been no statutable release from those obligations, and it is clear beyond the necessity of argument, that if those obligations still exist, the proposed new line is not in conformity with them. Their Lordships further are of the opinion that the proposed line is neither a deviation nor a deflection within the meaning of the statutes quoted in the argument, relative to the powers of railway companies in general, or the appellants in particular, to deviate or deflect their track, but is a new line which the appellants are desirous of constructing and operating without having obtained any franchise or statutory authority so to do.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of the appeal.

PEARCE v. CITY OF TORONTO.

County Court Jurisdiction—Amount Claimed Beyond Ordinary Jurisdiction—No Dispute by Defendant—10 Edw. VII., c. 30, s. 22, ss. 2—3 & 4 Geo. V. c. 18, s. 15 — Unlimited Jurisdiction Conferred upon County Court by Operation of Section — Action against Municipal Corporation—Ice and Snow on Sidewalk — Quantum of Damages—Appeal—Increase of same by Appellate Court.

SUP. CT. ONT. (1st App. Div.) *held*, that 10 Edw. VII., c. 30, s. 22, ss. 2, as amended by 3 and 4 Geo. V. c. 18, s. 15, confers upon County Courts jurisdiction to any amount named in the statement of claim, where the defendant does not dispute the jurisdiction either in his appearance or statement of defence.

Judgment of WINCHESTER, Co.J., varied by increasing the damages awarded plaintiff from $500 to $750, with costs.

Appeal by plaintiff from judgment of HIS HONOUR JUDGE WINCHESTER, Senior Judge of York County Court, awarding the plaintiff, a dressmaker, the sum of $500 damages, by reason of injuries sustained by her through a fall upon an icy sidewalk. The action was brought for $2,000 damages, and the defendants did not dispute the jurisdiction. The learned trial Judge, while not making a definite finding on the point, intimated that he did not consider that he had jurisdiction to award the plaintiff over $500 as damages.

T. N. Phelan, for plaintiff, appellant.

Irving S. Fairty, for defendants, respondents.

HON. SIR WM. MEREDITH, C.J.O. (V.V.):—We think the learned Judge was wrong in the conclusion he came to that he had no jurisdiction to assess the damages at more than $500. The effect of his decision, if right, would be that you might as well wipe out the provision of the Act upon which Mr. Phelan relies.

The woman, although 50 odd years of age, was earning something in the occupation of dressmaker. She suffered a pretty severe injury, and it must have caused her a good deal of pain and suffering. She was 17 weeks unable to resume her occupation. She expended upwards of $200 for medical expenses, and, in addition to that, the flexibility of her fingers would be permanently impaired.

We think the appeal should be allowed and the damages increased to $750, and that the respondents should pay the costs of the appeal.

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

WILLIAMSON v. PLAYFAIR.

5 O. W. N. 354.

Writ of Summons — Special Endorsement—What Constitutes Liquidated Demand—Con. Rules 33, 37, 56—Appearance—Affidavit.

HOLMESTED, K.C., *held*, that a special endorsement of a writ of summons was valid which stated the precise sum due making proper allowances for credits to be allowed defendant and that since Con. Rule 33 (1913) an interest claim whether payable by way of damages or not can be added to the main claim.

McIntyre v. *Munn*, 6 O. L. R. 290, distinguished.

Motion by defendant to be relieved from filing an affidavit with his appearance as required by the writ of summons, on the ground that the claim endorsed on the writ was not properly the subject of a special endorsement.

F. McCarthy, for defendant.

H. Cassels, K.C., for plaintiff.

The endorsement reads as follows: "The plaintiff's claim is to recover from the defendant the sum of $2,963.93, balance due on this date by the defendant from 10,000 shares of

the capital stock of the Williamson-Marks Mines Limited, which were held by the defendant as collateral security in respect of a loan of $1,000 made by the defendant upon the plaintiff's promissory note for $1,000, dated 10th April, and payable 3 months after date, with interest at the rate of 7% per annum from its date to the date of its maturity. The following are the particulars":—

The endorsement then specifies the amount due on the $1,000 note with interest, the amount received by the defendant in respect of the shares, and strikes a balance and claims that balance with interest from the date of the receipt.

HOLMESTED, K.C.:—It is said that this claim is not a liquidated demand, and *McIntyre* v. *Munn*, 6 O. L. R. 290, is cited in support of that contention. That case, however, appears to me to be clearly distinguishable from the present. There the plaintiff was suing for breach of an agreement by defendant to manufacture timber in respect of which he had made certain advances on account. The defendant having failed to complete the contract, the plaintiff claimed to recover the difference between the value of the timber delivered and the advances made, alleging that the defendant was overpaid. It is obvious that the value of the timber delivered was not an ascertained sum which a jury would have been bound to give a verdict for, but was an unascertained sum to be arrived at upon the evidence, and would depend on the view that the jury might take of the evidence. In this case the claim is entirely different. The plaintiff alleges that the defendant has received $3,400 to which he is entitled. If the fact be as the plaintiff alleges, then a jury or the Court must give a verdict for that specific sum, and they could not properly give any more or any less; that it appears to me is what is meant by a "liquidated demand." Then the plaintiff gives credit for a specified sum, of which he gives the particulars and arrives at the balances due, which sum is a fixed and ascertained sum. The interest on this balance is not, according to the authorities, a liquidated demand, because apparently it is not claimed to be payable by virtue of any contract, express or implied, but, as I gather from the endorsement by way of damages for detention of the money after it became due and which a jury might or might not give. This prior to the amendment of the Rules would have rendered the special endorsement bad as a special en-

dorsement altogether, Holmested and Langton, Judicature Act, 3rd ed., p. 270, but now Rule 33, as at present framed, expressly authorizes the inclusion in a special endorsement of a claim for interest, whether payable by way of damages or otherwise.

Under the Rules as they now stand, the whole endorsement is, in my judgment, a valid special endorsement properly made, of a claim which is properly the subject of such an endorsement.

Even if the interest on the balance were not the subject of a special endorsement, the endorsement would still be a valid special endorsement as to that part of the claim which was properly the subject of a special endorsement: see Rule 37, which points out what is to be done where unliquidated claims, other than interest, are joined with claims which may be specially endorsed.

The defendant's motion fails, and he must pay the costs of the motion.

MASTER-IN-CHAMBERS. NOVEMBER 21ST, 1913.

CAIRNCROSS v. McLEAN.

5 O. W. N. 352.

Judgment—In Default of Statement of Defence—Misunderstanding of Solicitors—Judgment Set Aside—Settlement of Action—Enforcement of—Necessity of New Action—Motion to Strike out Statement of Claim.

HOLMESTED, K.C., set aside a judgment signed in default of delivery of statement of defence upon the ground that the same was the result of a misunderstanding between the solicitors of the parties.

Quære, as to whether a settlement of an action can be enforced in the same action.

Reference to authorities.

Application by defendant to set aside a judgment signed for default of defence and also to set aside the statement of claim.

K. Mackenzie, for defendant.

L. Davis, for plaintiff.

HOLMESTED, K.C.:—The action was commenced on the 9th November, 1910, to enforce a contract for the sale of certain land by the plaintiff to the defendant. It is common

ground that a settlement was agreed to on the terms mentioned in a letter from the defendant's to the plaintiff's former solicitors of the 12th April, 1911.

It is also common ground that that agreement has been in part performed, viz., that the defendant has in the plaintiff's name brought an action against Frank W. Maclean and has succeeded in vacating the registration of a mortgage to him on the property in question and that the defendant has indemnified the plaintiff against the costs of that proceeding.

But there are two items of the agreement which it is alleged have not been performed, viz., the payment of the balance of the purchase money and $15 for costs. About the costs I am not quite sure as nothing was specifically said by either party, but that is immaterial. According to the settlement the balance of the purchase money was to be paid as soon as the registration of the Maclean mortgage had been vacated. When this took place does not appear.

Payment not having been made, the plaintiffs on 23rd October last, filed a statement of claim and on 29th October last, sent the defendant's solicitor a statement of account shewing the amount alleged to be due and claiming $50 for costs. On 3rd November last, payment not having been made, the plaintiff's solicitors wrote to the defendant's solicitors requiring them to file a defence. And it is here that some misunderstanding arose. Mr. Cook, a solicitor in the employment of the defendant's solicitors, says that on receipt of this letter he telephoned to either Mr. Davis or Mr. Mehr and arranged with him that the action should stand until the return of Mr. Mackenzie to the city as it was a matter on which he alone was instructed. This alleged arrangement is denied by Mr. Davis, and he states that he is informed by his partner Mr. Mehr, that he at no time had any conversation with Mr. Cook or with anyone else regarding this matter.

This conflict is regrettable. In the circumstances of the case it seems extremely probable that in the absence of Mr. Mackenzie some communication would in the ordinary course of business be made by Mr. Cooke to the plaintiff's solicitors in response to their letter of the 3rd November. Mr. Davis denies that the communication was made to him which is no doubt true, and he says that Mr. Mehr informed him that he had no conversation with Mr. Cook on the sub-

ject. I have therefore Mr. Cook's positive statement that he did communicate with Mr. Davis or Mr. Mehr and I do not think that that is displaced by Mr. Davis' affidavit and his hearsay statement as to what Mr. Mehr said.

In these circumstances, by some mischance no doubt, the judgment appears to have been signed in breach of an understanding that the matter was to stand till Mr. Mackenzie's return, and must be set aside with costs to the defendant in the cause to be set off against any money which may be found due by defendant to plaintiff.

With regard to the motion to set aside the statement of claim, I do not think that should be done on the present application. Where a settlement of a suit is come to it is not perfectly clear that the settlement may not be specifically enforced in the same action, while there are some cases which seem to shew that a new action is necessary, e.g., *Emeris* v. *Woodward*, 43 Ch. D. 185; *Pryer* v. *Gribble*, 10 Ch. 534; *Askew* v. *Millington*, 9 Ha. 65; *Forsyth* v. *Manton*, 5 Madd. 78; on the other hand there are others which seem to shew that it may be enforced in the suit which is the subject of settlement; see *Small* v. *Union Permanent Building Society*, 6 Pr. R. 206; *Smith* v. *Shirley*, 32 L. T. N. S. 234: 58 L. T. Jour. 443.

In the present case it may be said the statement of claim is not to enforce the compromise, but is based on the original cause. It is, however, subject to amendment. At all events it would seem clear that if the defendant wishes to set up the compromise or settlement he may do so by his defence. It would not, I think, be proper to strike out the statement of claim merely because it is based on the original cause of action; the settlement of 12th April, 1911, may be a bar, but that is a matter which I think cannot properly be decided on an interlocutory motion to strike out the pleading. No extra expense appears to have been occasioned by this branch of the motion.

The order therefore will be that the judgment be set aside and the defendant is to have until Tuesday next inclusive to file his defence.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 27TH, 1913.

ETOBICOKE v. ONTARIO BRICK PAVING CO.

5 O. W. N. 356.

Nuisance—Blasting by Quarry-owners—Danger to Public—Necessity of Method used—Independent Expert—Report of—Modified Injunction—Liberty to Apply—Costs.

MIDDLETON, J., in an action to restrain the owners of a quarry from continuing a nuisance in the form of reckless blasting, granted an injunction restraining the use of the quarry in such a manner as would cause a nuisance, operation of the quarry, however, in the manner pointed out to the Court by an independent expert appointed by the Court, not to be considered a nuisance.

Leave reserved to either party to apply for further order.

Action brought by the municipality of the township of Etobicoke, by the public school section number 3 Etobicoke, by a private individual, and by the Attorney-General who at the trial was added as a plaintiff, to restrain defendants from committing a nuisance in the operation of a shale quarry. Tried at Toronto 23rd June, 1913.

The quarry in question is situated in approximately the centre of a parcel of land owned by the defendant. The public school is in the same block, and the Lambton Road passes immediately to the west of the quarry property.

W. N. Tilley, and J. D. Montgomery, for the plaintiffs.

G. H. Kilmer, K.C., and H. H. Davis, for the defendant.

HON. MR. JUSTICE MIDDLETON:—At the trial I was satisfied that on a good many occasions the defendants' servants had somewhat recklessly used an unnecessary quantity of explosives, and that the blast had frequently been of such violence as to unreasonably interfere with the rights of those living near the property.

As usual in cases of this kind there was some slight tendency to exaggerate the inconvenience, and in some instances a tendency to magnify the possible danger, arising no doubt to some extent from a nervous condition; yet, after making all possible allowances I was satisfied that a real grievance did exist; at the same time I thought that all the matters affording a substantial ground for complaint arose from explosions that were entirely unauthorised or quite unnecessary for the due working of the quarry.

There was suggested to counsel the desirability of an independent expert being appointed who should inspect the works with the view of ascertaining whether they could be conducted in a manner which would not be a menace to the safety of others or so as to amount to a nuisance. This was assented to and I nominated Mr. W. H. Grant, a gentleman who has had much experience in dealing with explosives, and he has now sent in a report of his investigations (dated 27th October, 1913).

This report makes it quite plain that the quarry can be operated without any danger or any appreciable inconvenience to others.

I think the proper disposition of the case is to award an injunction restraining the operation of the quarry in any way so as to cause a nuisance or endanger the life or safety of those travelling upon the streets in question, or residing or being upon the land adjacent to the quarry property; and to further declare that so long as the quarry is operated in the manner pointed out by Mr. Grant in his report this shall not be deemed a nuisance; reserving liberty to the plaintiff to apply if in actual experience it should develop that in so operating the quarry there is in fact a nuisance, and reserving liberty to the defendants to apply if it appears that the quarry cannot be satisfactorily operated in the manner and under the restrictions set forth in the report.

I think it is better to embody these provisions in the judgment rather than simply to restrain the nuisance leaving the parties to work out their rights upon the motion to commit. The liberty to apply which is reserved is intended to secure on the one hand that the plaintiff's rights shall be respected and on the other hand to prevent the destruction for practical purposes of a valuable property.

Inasmuch as the action was rendered necessary by the conduct of the defendants' servants, I think the defendants must pay the costs.