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APPELLATE DIVISION.

OCTOBER 5TH, 1914.

FAUQUIER v. KING.

Contract—Services Rendered—Material Supplied—Money Paid—Claim for Balance—Counterclaim.

Appeal by the defendant from the judgment of SUTHERLAND, J., 6 O.W.N. 310.

The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and BRITTON, J.

G. H. Watson, K.C., and J. F. Smellie, for the appellant.

G. G. S. Lindsey, K.C., for the plaintiffs, the respondents.

THE COURT allowed the appeal as to some of the items and dismissed it as to others; no costs of the appeal.

OCTOBER 6TH, 1914.

*LANGDON-DAVIES MOTORS CANADA LIMITED v. GASOLECTRIC MOTORS LIMITED.

Summary Judgment—Rule 57—Affidavit of Defendant Filed under Rule 56—Failure to Cross-examine—Affidavit of Plaintiff in Suport of Motion—Practice.

Appeal by the defendants from an order of DENTON, Jun. Co. C.J., in an action in the County Court of the County of York, allowing the plaintiffs to enter judgment under Rule 57.

*To be reported in the Ontario Law Reports.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

J. F. Boland, for the appellants.

W. J. Elliott, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MIDDLETON, J.:—

. . . The plaintiffs sued by a writ of summons which was specially endorsed. The defendants, as required by Rule 56, filed an affidavit, but the affidavit filed did not disclose any defence whatever upon the merits, nor did it set out any facts and circumstances sufficient to entitle the defendants to defend the action. Thereupon the plaintiffs moved for judgment under Rule 57, filing an affidavit verifying their cause of action. No further affidavit was filed in answer.

The defendants rely upon certain technical objections, which appear to us to be entirely ill-founded.

First, it is said that the plaintiffs were not entitled to move for judgment without having cross-examined upon the affidavit filed by the defendants.

We do not think that this is the effect of the Rule. Upon an affidavit being filed, the plaintiff, if he sees fit, may cross-examine, or, if he sees fit, he may move for judgment upon the ground that the affidavit does not upon its face disclose a defence.

The whole policy of the Rule is to relieve the plaintiff from the obligation of proceeding in the dark and compelling him to launch a motion before he has ascertained by the defendant's oath whether the defendant has any bonâ fide defence which he desires to urge, and without the further opportunity of testing the bona fides of the defendant by cross-examination upon his affidavit.

Another objection taken was to the filing of an affidavit by the plaintiffs. The Rule does not make any change in the practice laid down in *Jacob* v. *Booth's Distillery Co.*, 85 L.T.R. 262. Upon a motion under this Rule the Court does not attempt to determine facts in issue upon controversial affidavits. The fate of the motion depends upon what the defendant himself sets up; and, while it may not be necessary for the plaintiff to file any affidavit, the fact that he has filed an affidavit pledging his belief in his own claim is certainly unobjectionable.

The appeal fails and must be dismissed with costs.

HIGH COURT DIVISION.

KELLY, J. OCTOBER 5TH, 1914.

H. H. VIVIAN CO. LIMITED v. CLERGUE.

Execution—Judgment for Part of Purchase-money of Land—Inability to Convey Land if Money Realised by Execution—Withdrawal of Execution except as to Costs.

Motion by the defendant for an injunction restraining the plaintiffs from selling land under their execution.

H. S. White, for the defendant.
A. H. F. Lefroy, K.C., for the plaintiffs.

KELLY, J.:—Unless, as is contended for by the plaintiffs, this can be taken out of the authority of such cases as Cameron v. Bradbury, 9 Gr. 67, Fraser v. Ryan, 24 A.R. 441, Gibbons v. Cozens, 29 O.R. 356, and McPherson v. United States Fidelity and Guaranty Co., 6 O.W.N. 677, the plaintiffs cannot, except in respect of costs, enforce their judgment. The judgment was for instalments of purchase-money due to the plaintiffs on their sale of lands, the subject of an offer made on the plaintiffs' behalf to the defendant on the 20th June, 1903, and accepted by him on behalf of himself or assigns three days afterwards.

On the 10th March, 1905, an agreement was entered into between the plaintiffs and the Standard Mining Company of Algoma Limited and the defendant, whereby, after reciting that the defendant had assigned his contract to the mining company, the plaintiffs agreed to sell to that company the same lands—certain rights of the parties to the first agreement being expressly reserved. The plaintiffs now set up that by this latter agreement the defendant ceased to be a purchaser; that his indebtedness to the plaintiffs, for which they obtained the judgment, was not in respect of purchase-money: and that, though the plaintiffs, since the judgment was obtained, forfeited the lands to themselves for default in payment of purchase-money, and later on resold them to other persons, they have not lost their right to enforce the judgment against the defendant.

Reading these two agreements, and especially having in mind the terms of the latter of them, which expressly declares that it and anything done under it shall not affect or prejudice

either the plaintiffs or the defendant in respect of certain parts of the purchase-money therein specified, being the very moneys for which judgment was later on obtained against the defendant, I cannot reach any other conclusion than that the judgment was in respect of part of the purchase-money, I am, therefore, unable to admit the position contended for by the plaintiffs.

In the judgment of the Court of Appeal in this same action, 16 O.L.R. 372 (affirmed by the Supreme Court of Canada, Clergue v. Vivian & Co., 41 S.C.R. 607), this aspect of the case was considered and disposed of. The Chief Justice in his judgment, at p. 379, says: "It is no hardship upon him" (defendant) "to require him to perform the terms of his agreement. With his assent, the benefit of the agreement is now vested in the Standard Mining Company, subject to the question which has been determined in this action. If he now pays the amount he is found liable for, and is not repaid by the Standard Mining Company, he is not without remedy, for he acquires a lien upon the company's interest in the land to the extent of his payment." The Court there unhesitatingly treated the defendant as a purchaser and the moneys now sought to be realised as purchase-money. The plaintiffs, by retaking the lands and then disposing of them to third persons, have deprived the defendant of the benefit and the protection that should be his in the event of his being called upon to make payment; and they have, therefore, lost the right to enforce their judgment so far as it applies to the debt. To that extent the defendant's application succeeds.

The execution, so far as it is for costs, is in a different position. Following what was laid down by my brother Middleton in McPherson v. United States Fidelity and Guaranty Co., supra, the plaintiffs are entitled to proceed on the execution with respect to these costs. On the 23rd September, 1914, the defendant tendered to the sheriff the full amount of the costs claimed under the execution, and interest thereon, acceptance of which was refused. The execution will, therefore, be withdrawn except in respect of these costs (including the costs of the issue and removal of the execution) and interest thereon down to the date of the tender. The defendant is entitled to his costs of this application.

BOYD, C. OCTOBER 5TH, 1914.

*CROZIER v. TREVARTON.

Landlord and Tenant—Action for Damages for Non-payment of Rent—Surrender—Acceptance by Releting—Eviction—Forfeiture of Rent Accrued—Apportionment of Rent—Apportionment Act, R.S.O. 1914 *ch.* 156, *sec.* 4—*Payment for Occupation—Deductions—Costs.*

Action to recover $848.29 damages for breach of a covenant contained in a lease of a farm made by the plaintiff to the defendant.

F. Arnoldi, K.C., for the plaintiff.
H. S. White, for the defendant.

BOYD, C.:—The defendant, being a mason by trade, undertook to lease the farm in question from the plaintiff, who is a lawyer, through the medium of the plaintiff's brother, who is also a lawyer. The farm was sadly out of repair, and the house was uninhabitable, and an agreement was drawn by the plaintiff's brother, acting also for the defendant, by which provision was made for doing various repairs and betterments on the land. This agreement was kept by the plaintiff—no copy furnished the defendant, though he says he repeatedly applied for a copy—and it is now lost. The only evidence is, that the lease is in conformity to that agreement, as stated by the plaintiff and his brother, as against the statement of the defendant that it is not so drawn. My strong impression is, that the defendant was to do or to have done much more work than is admitted by the plaintiff, in many parts of which he (the defendant) was to render service as a mason, and for which he expected and understood he was to be paid or to have it allowed on the rent. This is confirmed by the fact that he gave a detailed account of his services and outlay to his solicitor from time to time as furnished and made. By the terms of the lease he was to get full possession on the 1st November, 1906; but the farm was then in possession of another tenant, Conlin, who paid rent to the plaintiff down to the 1st March, 1907. Not till that date did the defendant get full possession, and thereafter he went on to make the house habitable. He is corroborated in this by the

*To be reported in the Ontario Law Reports.

former tenant—who did not live on the place. He expended, according to Ebbels' account, $109.20 in betterments, and he also paid others for work done on the buildings, etc., the sum of $59.89. He kept possession from March, 1907, till about October, 1908, in all one year and seven months, and paid rent in July, 1908, to the extent of $125. The lease was for ten years at $250 for the first and second years. He was losing money in the place—found it impossible to live there, and vacated possession and went back to his former abode, and so notified the landlord by letter.

There was no personal communication between the parties—the brother was the medium in respect to the doing of the work and ordering supplies and so on.

The landlord, without any word of any kind to the tenant, entered into possession in April, 1909, and rented the place then to a tenant, and afterwards, in the same ex parte manner, to three other tenants, till finally he sold the place in September, 1912.

The only letter, he says, he sent to the defendant was on the 30th November, 1908, after the place had been vacated, claiming as due under the lease $389. For some unexplained reason, the plaintiff in his pleading says that all rent was paid up to the 1st November, 1907, and to the 1st May, 1908. The first item of his detailed claim is for half a year's rent due the 1st November, 1908, a month after the defendant had left the farm. Under the circumstances and considering the situation and capacity of the parties, I declined to allow an amendment of this.

The chief claim is for damages for non-payment of rent down to the sale of the farm in 1912. This claim fails clearly upon the facts of this case. The plaintiff, being notified that the place was vacant and that the defendant had left, accepted that surrender by reletting the farm in April, 1909. That transaction operated as an eviction of the defendant, in the absence of notification to the contrary given to the defendant. He might have preserved his claim under the defendant's lease by proper warning, such as that he was reletting on the former tenant's account, given to the defendant—but he undertook to enter on and lease the farm to others, to the extinction of the defendant's term of years.

The law is well-settled on this head by the case of Walls v. Atcheson (1826), 3 Bing. 462, cited and relied on in Halsbury's Laws of England, vol. 18, p. 549.

Not so clearly settled is the point as to how much rent the defendant must pay. His actual occupation was one year and seven months, and before the next gale-day (May) the plaintiff had rented the farm to the new tenant. Under common law the rent was not due for any intermediate broken period, and the rent accruing would have been forfeited by the re-entry before the gale-day. That is laid down in Hall v. Burgess (1826), 5 B. & C. 332, also cited in Halsbury (vol. 18, pp. 480, 486). But it is said, and the better opinion appears to be, that the Apportionment Act has changed this result: so that rent is held to be payable de die in diem, and so apportionable as to the broken period. . . .

[Reference to Halsbury's Laws of England, vol. 18, p. 480 (n); Foa's Landlord and Tenant, 5th ed. (1914), pp. 117, 118; Hartcup & Co. v. Bell (1883), Cab. & El. 19; Elvidge v. Meldon (1888), 24 L.R. Ir. 91.]

The clause in the Apportionment Act (as it now appears in R.S.O. 1914 ch. 156, sec. 4), making all rent to be regarded as accruing due from day to day, enables the landlord to collect, and renders the tenant who has withdrawn liable to pay, rent up to the time when the landlord puts in a new tenant. In such a case the old tenancy is determined by operation of law except when the reletting by the landlord is on the tenant's account, and the latter has notice to that effect.

The defendant should in fairness pay for his actual occupation, about a year and seven months, and also for the period between his going out and the incoming of the new tenant, for which I would fix as a fair amount the sum of.....$520.00

Deduct from this cash paid	$125.00	
Work done, etc., as noted by Ebbels	109.20	
And cash paid for work as by receipts put in...	59.89	294.09
		$225.91

Judgment for the plaintiff for $225.91: costs to the plaintiff on the lower scale; costs of defence on the higher scale, to be deducted from what is due for claim and costs to the plaintiff; and let the balance be paid to the plaintiff.

LENNOX, J. OCTOBER 7TH, 1914.

EASTERN TRUST CO. v. BERUBE.

Mortgage — Action for Mortgage-money by Executors of Deceased Mortgagee — Services Rendered by Mortgagor to Mortgagee—Promise to Pay for by Legacy—Specific Performance—Interest — Compound Interest — Ademption or Satisfaction—Evidence—Corroboration.

Action by the executors of The Honourable Willian Miller, deceased, to recover the amount alleged to be due upon a mortgage made by the defendant Ernest Edmund Berube, in which his wife, the other defendant, joined for the purpose of barring her dower.

John T. C. Thompson, K.C., for the plaintiffs.
M. J. Gorman, K.C., for the defendants.

LENNOX, J.:—It will be convenient to refer to Ernest Edmund Berube as "the defendant." The plaintiffs are suing for the recovery of $1,663.93 alleged to be owing upon a mortgage made by the defendant, in which Angelina Berube joined for the purpose of barring her dower; and, there being no remedy asked against the mortgaged land, I see no reason why the defendant's wife should be a party to the action. It is not denied that interest for two years was duly paid in money. The mortgage was made on the 9th January, 1900, and the whole of the principal money—$1,000—and the interest became due on the 9th January, 1901. Interest is reserved at the rate of 6 per centum per annum. There is a proviso that the mortgage is to be void only upon payment of interest at the mortgage rate upon principal and interest in arrear, but, notwithstanding this, and that the mortgage was current when 63 & 64 Vict. ch. 29 (D.) was assented to, I do not think that the plaintiffs, in the absence of evidence of the value of money, or a distinct contract subsequent to default, are entitled to recover interest upon interest accruing due after the maturity of the mortgage or to a higher rate than 5 per cent.

The interest then from January, 1902, to January, 1905, to which the mortgagee was legally entitled, was $150, not $180, and this was more than met by admitted disbursements made by the defendant on account of the mortgagee, amounting to $159.-

33. The interest account may, therefore, be considered liquidated down to the 9th January, 1905, although a statement signed by the parties and filed upon the trial would shew a balance, not now claimed, of $20.67. The plaintiffs, however, claim to have interest compounded at 6 per cent. from that date. This, as I have said, I think they are not entitled to: Plenderleith v. Parsons (1907), 14 O.L.R. 619; Imperial Trusts Co. v. New York Security and Trust Co. (1905), 10 O.L.R. 289; and Pringle v. Hutson (1909), 19 O.L.R. 652. If then there was no answer to the action, I would give judgment for the principal money and for 9 years and 9 months' interest to this date at 5 per cent., amounting to say $1,490. But, on the contention of the defendant, to which I propose to give effect, the interest at most would only run to the death of the mortgagee on the 23rd February, 1912, and would amount to $356.25 or a total mortgage account of $1,356.25. This latter amount is only material as a measure of compensation for services which I propose to allow the defendant by the judgment I am about to give.

I come now to the defence and counterclaim. The claim for compensation for services being against the deceased's estate requires corroboration, although, of course, the defendant not being related to the mortgagee, if the fact of service is satisfactorily established, no inference of gratuitous service would arise. But there is abundant corroboration of the defendant's contention upon all the main issues of the defence and counterclaim. I find as a fact that the defendant, at the request of the mortgagee, entered the service of the mortgagee as his valet and nurse or personal servant in the year 1892 and served him in this capacity continuously, whenever required, down to and including a part of the year 1907, and also served the mortgagee thereafter for a further period of about four years; but as to this latter period the evidence was not so specific, and the services rendered were less frequent and onerous than theretofore; and I find that the service was entered upon and all the services were rendered upon the distinct understanding and agreement between the mortgagee and the defendant that the defendant's services would be paid for upon the death of the mortgagee.

I find that the mortgagee promised to leave the defendant $1,000 by his will as compensation for services, and that, in or about the year 1899, he shewed the defendant a provision to this effect in his will or what purported to be his will.

I find that the mortgage was executed upon the understand-

ing of the parties to it that the defendant would never be called upon to pay the principal money, and that it would be discharged by the will, or liquidated by a provision of the will.

I find too that the mortgagee stated that the defendant was to have the furniture, and that several years' service was rendered upon this understanding. I find that the mortgagee upon more than one occasion represented to the defendant, and upon one occasion to the defendant's wife, that he had, at a date later than the date of the mortgage, increased the provisions of his will in favour of the defendant, and that the defendant continued in the service of the mortgagee relying upon these assurrances and expecting to be fully compensated at the death of the mortgagee. There is no specific evidence as to the value of the furniture; but, having regard to the financial and social position of the mortgagee, the forniture of his four rooms in Ottawa would probably be worth at least $500 or $600. The defendant appears to have regarded it as equivalent to his estimate of four years' service—that would be about $1,000—but there is nothing definite upon this point. I am. therefore, clearly of opinion that the defendant is entitled to be remunerated for his services in some way; and, leaving out for the moment the question of the defendant's rights as a matter of law, that the actual value of the services performed far exceed the principal and interest of the mortgage, even as made up by the plaintiffs in the statement of claim. If I accept the evidence of Mrs. Berube—and her evidence appeared to me to be candid and trustworthy—the mortgagee estimated the value of the defendant's services down to 1905 or 1906 at $3,000 or more.

There are decisions to shew that specific performance is not, generally at all events, the proper remedy. It would serve no useful purpose to collect here the cases distinguishing between mere hope or expectation and cases based upon representations as to existing conditions, and I refer only to the statement of the Lord Chancellor in Maddison v. Alderson (1883), 8 App. Cas. 467, at p. 473.

The case I have to deal with is one in which there was a distinct representation as to alleged existing conditions affecting the defendant, a contract induced by these representations, and deferred payment consented to upon the faith of the continuance of these conditions—conditions all within the control of the mortgagee. Entirely concurring then in the undesirability—the practical impossibility—of the Court, by way of specific performance, substituting a verbal bargain for the authenticated

will of a deceased, as declared by Mr. Justice Street in Cross v. Cleary (1898), 29 O.R. 542, at pp. 544-5, I would yet feel no difficulty, upon the facts of this case, in directing specific performance to the extent of enjoining the plaintiffs from collecting the principal money of the mortgage if this were necessary in order to secure what I conceive to be the defendant's rights; and, if this would dispose of all the issues in the action—but it would not—I should still not be making a will for the mortgagee —I should not be directly interfering with the terms of the will he made—I should only be giving effect to what I find as a fact, that there was nothing owing upon the mortgage for principal money at the decease of the mortgagee, that it was adeemed in his lifetime by the services of the defendant under the contract between the parties; and, in effect, though not in terms, this will be my judgment in part.

But it is necessary to deal with the question of interest as well. There is little to be added to what I have already said upon this point beyond this, that there is no evidence that interest was referred to after January, 1909; and, in view of the evidence of the defendant that the mortgagee promised to fix a date beyond which interest would not be exacted and the silence of the mortgagee, there is room for argument at least, and possibly for the inference, that he did not regard it that interest was accruing subsequent to that date, and the more so as the undated letter put in at the trial shews that at the time of its alleged date, 1903 or 1904, and when the full measure of his obligations to the defendant had not accrued, he was looking sharply after what he considered himself entitled to. As against this, there is to be kept in mind the probability of diminished capacity in the mortgagee and the strong counter-presumption arising from the specific terms of a sealed instrument. The interest, I think, must be taken into account. The defendant admits that the mortgagee did not in fact limit the period for payment of interest. But the defendant was to have the furniture in addition to the $1,000 bequest, and this agreement was never abandoned or superseded except impliedly by the promise of more generous compensation, which the mortgagee never made good; and, as I have already said, the value of the furniture would exceed any sum proper to be allowed on the plaintiffs' claim for damages in the nature of interest. The difficulty I feel in this case is as to whether the defendant should not be allowed a substantial sum in addition to the amount represented by the mortgage for principal and interest. There is no doubt at all in

my mind that, in the 15 years of continuous service and the four subsequent years, he earned and had reason to rely upon it that he would be paid more—a good deal more—than he will be allowed by the judgment I propose to give him; but, on the other hand, so long as men continue to transact business by unbusiness-like methods, they cannot complain if the Courts, in the absence of any certain measure of value, feel compelled to stay well within the mark.

The Statute of Limitations has not been set up by the plaintiffs, an amendment was not asked, and an amendment would not be in furtherance of justice. . . .

[Reference to Johnson v. Brown (1909), 13 O.W.R. 1212; Cross v. Cleary, 29 O.R. 542; Wakeford v. Laird (1903), 2 O.W.R. 1093; McGugan v. Smith, 21 S.C.R. 263.]

No question of time limitation appears to have been raised in either of the two last-named cases, and I am bound by the decisions in the Johnson and Cross cases, where the point was specifically considered, if the conditions in this case are the same, and if my decision is to rest upon an implied promise arising from service. I do not think these decisions apply. I am of opinion that there is no time limitation where, as here, upon the facts, if I am correct in my conclusions of fact, the defendant was not entitled to payment until the death of the mortgagee, and could not have sued in the meantime; but, as this case may go to a higher Court, it is right that I should declare what sum he actually earned by the services claimed for. I am of opinion that $150 a year down to 1907, and $100 a year afterwards, would be a fair and just sum to allow. The amount proper to be allowed on the mortgage account would stand against this *pro tanto*.

But I can, I think, allow the defendant substantial, although not perhaps adequate, compensation, and diminish the chances of further litigation by proceeding along other lines. It is right that the plaintiffs should be called upon to make good the representations of fact made by their testator, so far as this can be done with reasonable convenience and without conflicting with the cases in which the Courts have declared against specific performance. The principal money secured by the mortgage I have already sufficiently dealt with. The furniture probably could not now be delivered in specie, but there is no reason why its value should not go in liquidation of the interest. No question of implied contract, with the incidental implied right to periodi-

cal payments, and consequently no question of outlawry, arises here.

There will be judgment declaring that the plaintiffs are not entitled to recover upon the mortgage or enforce it in any way, and dismissing the action with costs; and directing and ordering the plaintiffs to execute and deliver to the defendant a statutory discharge of the mortgage.

I have not overlooked the statements of account of 1905 and 1909. The first is not inconsistent with the conditions then existing as set up by the defendant. The other is; but, corroborated as the defendant was upon all the principal issues, and the evidence of the defendant appealing to me, as it did, as honest evidence, I accept his statement as to how the document of 1909 was obtained. I would have dismissed the action as against Angelina Berube with costs, had I given judgment for the plaintiffs. The defendants were defended by the same solicitors and counsel; and, dismissing the action with costs, no further order is necessary.

TAYLOR v. EDWARDS—KELLY, J., IN CHAMBERS—OCT. 5.

Summary Judgment—Mortgage — Foreclosure — Defence — Rules 56, 57.]—Appeal by the defendant Smith from an order of the Master in Chambers granting summary judgment against him in a mortgage action for foreclosure. With his appearance the appellant filed the affidavit required by Rule 56, and he was cross-examined thereon. Both in the affidavit and in the cross-examination he set up dealings he had with a third party or third parties, but of which there was no evidence whatever that the plaintiffs had any knowledge. Neither in the affidavit nor in the cross-examination was it stated that the appellant had a defence to the action, and his counsel was unable to go further than to say that, if the appellant were allowed to proceed to trial, he might be able to establish a defence. The learned Judge said that that was not sufficient reason for refusing judgment under Rule 57, one of the purposes of which was to afford, in case a defendant has appeared to a specially endorsed writ, a means of obtaining judgment without going to trial, if the defendant in his affidavit or in cross-examination has not disclosed such facts as may be deemed sufficient to entitle him to defend. No such facts were here disclosed, the defendant not having even gone so far as to say that he had a defence. The appeal was dismissed with costs. J. F. Boland, for the appellant. G. T. Walsh, for the plaintiffs.

MURDOCK v. TORONTO CONSTRUCTION CO.—KELLY, J.—OCT. 5.

Contract—Work and Labour—Action to Recover Payment for —Condition Precedent—Certificate of Engineer Withheld in Good Faith—Premature Action—Counterclaim.]—The plaintiffs, who had a sub-contract with the defendants in respect of the construction of the Transcontinental Railway, made three claims in this action: (1) for $180 charged against them by the defendants for clearing the right of way, etc.; (2) for $2,702.42, the cost of fighting forest fires on or near the right of way; and (3) for $1,184.27 charged by the defendants as the plaintiffs' share of the cost of fire protection. The main ground of defence was, that the defendants' contract with the plaintiffs provided that the plaintiffs were to be paid only upon completion of the work covered by the contract to the satisfaction and subject to the acceptance of the chief engineer therein named; that the written certificate of the engineer and the approval of the Commissioners of the Transcontinental Railway were conditions precedent to the plaintiffs' right to payment; and that such certificate and such approval had not been obtained in respect of the items sued for. KELLY, J., who tried the action without a jury, said that this was a complete defence to the action at the present time. The position of the plaintiffs was a hard one. The engineer who had supervision over the work had not issued his final certificate in respect of the work of the plaintiffs, and was not likely to do so until the time should arrive for granting the final certificate for the whole work for which the defendants were contractors, and of which the plaintiffs' work was but a part. It was not shewn that the final certificate had been fraudulently or for any improper purpose withheld. The certificate not having been issued, the action was premature. There was a counterclaim for moneys alleged to have been overpaid to the plaintiffs. The plaintiffs must await the certificate of the engineer, and so must the defendants in respect of their counterclaim. Action dismissed with costs; counterclaim dismissed without costs; both without prejudice to the rights of the parties after final certificate. G. H. Kilmer, K.C., for the plaintiffs. R. McKay, K.C., for the defendants.

RE SCHOOL SECTION 5 IN THE TOWNSHIP OF STEPHEN AND HILL—LENNOX, J., IN CHAMBERS—OCT. 7.

Money in Court—Payment out.]—Application by Simon Hill the younger for payment out to him of the money in Court. LENNOX, J., said that it would have been more satisfactory if it had been stated that the annuities to be paid to the wife of Simon Hill the elder, deceased, had been regularly paid; but enough had been stated to shew with practical certainty that the applicant was solely entitled to the money in Court. Order made directing that the money in Court, about $142.12, be paid out to the applicant. G. Keogh, for the applicant.

VISOR KNITTING CO. v. PENMANS LIMITED (No. 2)—MASTER IN CHAMBERS—OCT. 8.

Pleading—Action for Infringement of Patents for Inventions—Validity of Patents—Inconsistent Pleadings — Rule 157.]—Motion by the plaintiffs for an order striking out the statement of defence except any part which denied that the articles manufactured by the defendants were similar to or amounted to an infringement of the plaintiffs' patent, on the ground that it was inconsistent with the previous pleading of the defendants, and as tending to embarrass the plaintiffs and prejudice the fair trial of the action. Rule 157 says: "A subsequent pleading shall not raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." The Master said that this Rule applied to pleadings in the same action; that is to say, that a plaintiff cannot in a subsequent pleading to his statement of claim plead any facts inconsistent with it, and that a defendant cannot plead any facts inconsistent with his statement of defence by a subsequent pleading. The Rule is intended to apply only to pleadings in the same action, or where a prior action has been prosecuted to judgment. In the first action brought by the plaintiffs against the defendants, they claimed an infringement of the Rottenburg patent, which the plaintiffs owned. In that action, the defendants pleaded that the Rottenburg patent was invalid; that Rottenburg was not the true inventor; that the invention was anticipated in various ways; that the Weinshenck patent was valid, and had priority over the Rottenburg patent; and that there had been prior grants of patents covering the invention claimed.

Particulars of the statement of defence were demanded by the plaintiffs in the first action, and the defendants furnished particulars of 21 different patents, including the Weinshenck patent, claiming priority. In this action the plaintiffs sued for infringement of the Weinshenck patent, which they purchased subsequently to the bringing of the first action, and claimed that the defendants had infringed upon this patent. The defendants pleaded anticipation; that the Weinshenck patent was not valid; and that the invention was not new. The Master said that the plaintiffs were inconsistent in their claims. In the first action they claimed that the Rottenburg patent was valid and in this action that the Weinshenck patent was valid. The defendants were at liberty to allege any fact which would be allowed to be proved at the trial. The trial Judge would allow the defendants to prove that the Weinschenck patent was not valid, and that there were other patents prior to it. Reference to Duryea v. Kaufman, 21 O.L.R. 166. Motion dismissed with costs to the defendants in the cause. A. C. Heighington, for the plaintiffs. T. S. Elmore, for the defendants.

FLETCHER v. CHALIFOUX—MASTER IN CHAMBERS—OCT. 8.

Writ of Summons—Service out of the Jurisdiction—Rule 25 (e), (h)—Breach of Contract — Tort — Conditional Appearance.]—Motion by the defendants to set aside an order of the Local Judge at L'Orignal allowing service of a writ of summons out of the jurisdiction. The plaintiff claimed damages for breach of warranty on the sale of a sawing-machine, or, in the alternative, for wrongfully and unlawfully concealing certain dangerous defects therein at the time of the sale. The plaintiff was a farmer in Ontario, and the defendants carried on business as manufacturers at St. Hyacinthe, in the Province of Quebec. In December, 1913, the plaintiff purchased from the defendants a sawing-machine, which was subsequently delivered to the plaintiff. On the 2nd March, 1914, the machine, while being operated by the plaintiff in Ontario, collapsed, and the circular saw, which formed part of the machine, struck the plaintiff on the left arm, injuring him. The Master said that the order permitting service outside of the jurisdiction could not be sustained under the provisions of Rule 25 (*h*), as the material before the Local Judge clearly established that the defendants did not have property

within the jurisdiction to the value of $200. The plaintiff relied also upon clause (*e*) of Rule 25, and founded his action upon a breach within Ontario of the contract, or, in the alternative, on a tort committed therein. The mere fact that the plaintiff sustained his injury in Ontario was not conclusive that the wrong of the defendants was committed here. The tort was in manufacturing in Quebec the alleged defective machine. The moment it left their possession in Quebec, the tort was committed. The final stage—the collapse of the machine, and the injury to the plaintiff—was the evidence of the wrong. Reference to Anderson v. Nobels Explosives Co., 12 O.L.R. 644. In reference to the claim by the plaintiff for breach of warranty on the sale of the machine, the Master thought that the contract entered into between the parties was to be performed in Ontario, but on this point the parties were at large. It was true that payment was to be made in the Province of Quebec; but that was only a term of the contract. The delivery was to be made to the defendants' agents in Ontario, subject to inspection. Where the place of the performance of the contract is in controversy between the parties, the issue should not be determined in a summary way on affidavits, but the defendants' proper course is to enter a conditional appearance, and then raise the question of jurisdiction in their pleadings: Canadian Radiator Co. v. Cuthbertson, 9 O. L.R. 126. Order made directing that the writ of summons be amended by striking out the alternative claim for damages for tort, and that the statement of claim be amended to conform with the amendment endorsed on the writ; that the defendants be at liberty to enter a conditional appearance; and that costs of the application be costs in the cause. H. S. White, for the defendants. McGregor Young, K.C., for the plaintiff.

CORRECTION.

In REID v. AULL, ante 85, at p. 86, line 20, delete the word "no."