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HON. MR. JUSTICE LENNOX. APRIL 14TH, 1914.

GAGE v. BARNES.

6 O. W. N. 232.

Damages—Injury to Land by Subsidence—Depreciation in Value by Probable Future Subsidence—Right to Recover—Judicature Act, Secs. 18, 32—Injunction — Separate Defendants—Apportionment of Damages between.

Defendants had by reason of their excavations caused plaintiff's land to subside and there was probability of a future subsidence from this cause.

LENNOX, J., gave judgment for plaintiff in respect of both past and future damage.

Ramsay v. *Barnes*, 25 O. W. R. 289, followed but doubted.

Semble, that depreciation in the marked value of property, attributable to the risk of future subsidence, is not a legal item of damage.

West Leigh Colliery Co. v. *Tunnicliffe & Hampson Ltd.*, [1908] A. C. 27, referred to.

Action for injury to plaintiff's lands from excavations by defendants on adjoining land.

W. A. Logie, K.C., for plaintiff.

Geo. Lynch-Staunton, K.C., and W. Bell, for defendant Barnes.

H. D. Petrie, for defendant Simons.

HON. MR. JUSTICE LENNOX:—The plaintiff may amend by adding Stephen Simons a party defendant if he desires to do so. The excavations have been completed to the south of the plaintiff's land. Also for a good way north along the west side, and it is not now apprehended that subsequent excavating will be done in a way to invade the plaintiff's rights. The statement of claim only asks for damages, and general relief, but in argument plaintiff's counsel insisted that damages should be awarded upon the basis of the estimated future depreciation in the value of the plaintiff's

land in addition to the injury which was already accrued; or if not then that the plaintiff should have a mandatory injunction compelling the defendants to afford proper lateral support for the plaintiff's land and restore it to its former condition and level. Restoration and adequate support are out of the question—the expense is prohibitive. The benefit accruing would not be at all in proportion to the very heavy outlay which a work of this character would involve. Even where restoration is the proper remedy a plaintiff may have to content himself with something very far short of the old conditions. *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury,* [1908] A. C. 323. The injury to the plaintiff, however, so far as it has accrued, can be adequately compensated in money, and is damage of the class intended to be covered by sec. 18 of the Judicature Act. As to damages, however, for that which is not yet a wrong, other considerations arise. The statute does not create any new cause of action, or enable the Court to reach to that which it could not otherwise include as a basis of relief—it changes only the character of the relief. The removal of lateral support is not in itself a cause of action, and *Arthur* v. *Grand Trunk Rw. Co.* (1895), 22 A. R. 89, is not a guide to the decision of this case. There the wrongdoing was complete upon the building of the embankment and the diversion of the stream; and the Court found that it was permanent, and the loss to the plaintiff immediate and continuous, and his whole cause of action had accrued. See also the cases of *Kine* v. *Jolly,* [1905] 1 Ch. 480, at p. 504, affirmed on appeal in [1907] A. C. 1; and *Colls* v. *Home and Colonial Stores,* [1904] A. C. 179, at p. 212. Even where the statute can be invoked, as in the case of a continuing nuisance, it is a jurisdiction to be cautiously and sparingly exercised. *Shelfer* v. *London Electric Lighting Co.,* [1895] 1 Ch. 287. There are undoubtedly cases in which the beneficial provisions of sec. 18 of the Judicature Act can be given a wider range than in a case of the class I am dealing with. The basis upon which the Court can act, as I understand it, is well defined, and is not of recent origin. The limitation of its powers results from the fact that it is the actual subsidence or falling away of the plaintiff's property, and not the excavation, however, close it may approach, which constitutes the defendant's wrongdoing and gives a cause of action. I have not here to consider the possible right of a landowner to obtain an

injunction *quia timet*—no such question arises here. But the slightest invasion of the plaintiff's property is a wrong. To cause his property to subside or fall away even to the slightest degree, is an invasion of his rights, and gives a right of action without proof of actual loss. *Attorney-General* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301. And whatever may be the law as to the right to an injunction to prevent probable or impending damage, apprehension of damage gives no cause of action for damages, of itself. *Lamb* v. *Walker* (1878), 3 Q. B. D. 389. *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503, makes it clear that the resultant injury, and not the excavation which causes it, is the cause of action, by declaring that the Statute of Limitations runs not from the time that the work complained of was done, but from the time that the actual injury to the plaintiff accrues.

And there is a new cause of action for each new subsidence or falling away. *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 A. C. 127.

And by the judgment of the House of Lords in *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A. C. 27, it was declared that depreciation in the market value of the property, attributable to the risk of future subsidence, could not be taken into account. In that case Lord Macnaghten, at p. 29, says:

"It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner 'may recover for that damage,' as Lord Halsbury says in the Darley Main Colliery Case, 'as and when it occurs.' The damage, not the withdrawal of support, is the cause of action. And so the Statute of Limitations is no bar, however long it may be since the removal was completed; nor is it any answer to the surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation.

If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by apprehension of future damage gives no cause of action by itself." And meeting the case I have here of damage already accrued coupled with the probability of future additional in-

jury from the same cause, Lord Macnaghten adds: "But if depreciation caused by apprehension of future mischief does not furnish a cause of action by itself, because there is no legal wrong, though the damage may be very great, it is difficult to see how the missing element can be supplied by presenting the claim in respect to depreciation tacked to a claim in respect to a wrong admittedly actionable.

Lord Ashbourne, at p. 31, says: "The fear of a subsidence . . . cannot give any cause of action, even although there may have been already a subsidence." . . . And at p. 32, his Lordship quotes with approval from the judgment of Cockburn, L.J., in *Lamb* v. *Walker,* as follows: "Taking the view I do of the leading case of *Backhouse* v. *Bonomi,* I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say, that is anticipated damage expected to occur, but which has not actually occurred and which never may arise."

Lord Atkinson, at p. 33, says:

"In my view, to give damages for depreciation in the market value due to the apprehension of future injury by subsidence is to give damages *for a wrong which has never been committed,* since it is the damage caused by subsidence, and not the removal of minerals, which gives the right of action." The italics are mine.

Based then upon the authorities thus far referred to, I find the plaintiff entitled to damages as follows:

Damage to	dwelling house	$550
"	" store and annex	350
"	" cottage	200
"	" land by excavations to date	250
Total actual damage to date		$1,350

I have not overlooked the cave-in which occurred after the evidence had closed. This is the amount, $1,350, for which I would give judgment if the matter rested here. But I am unable to distinguish this action in principle from the principles governing the decision of my brother Middleton in *Ramsay* v. *Barnes,* 25 O. W. R. 289; and, as well because of the respect I entertain for the opinion of the learned Judge, as of the provisions of sec. 32 of the Judicature Act, I will

assess future damages by reason of excavations at the sum of $450 and direct judgment to be entered for $1,800 with costs.

While I have not deemed it advisable to order restoration by the construction of breastworks, retaining wall or other artificial means, I have estimated the damages upon the basis that all material which hereafter falls from the plaintiff's land will be allowed to remain and accumulate where it falls, so as to confine the falling away within as narrow bounds as possible. There will be an injunction therefore restraining the defendants, the Simons, from removing any of this material and restraining them also from working their gravel pit, blasting or taking out material in such a way as to injure the plaintiff's buildings, and the plaintiff may amend his pleadings so as to claim for this.

There was a strenuous effort to shift responsibility from Barnes to the Simons and from those defendants to Barnes. In every item of damage and wrongdoing they were not perhaps equal contributors, but taking in the whole of the damage awarded I am of opinion that an equal assessment upon Barnes and the Simons is the most equitable adjustment I can make.

Among other relevant cases are: *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *North Shore Rw. Co.* v. *Pion* (1889), 14 A. C. 612; and *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. D. 493.

HON. MR. JUSTICE LATCHFORD. APRIL 14TH, 1914.

ATTORNEY-GENERAL v. PAGE.

6 O. W. N. 228.

Donatio Mortis Causa—Requisites of—Delivery of Insignia of Property—Key of Trunk—Pass-book — Insurance Policy—Contemplation of Death—Evidence—Corroboration.

LATCHFORD, J., *held*, that there was a valid *donatio mortis causa* of the contents of a trunk by the handing over a key, of moneys in the bank by the delivery of a pass book, and of the proceeds of a life insurance policy by the delivery of the policy where the other requirements of a valid *donatio mortis causa* were satisfied.

Brown v. *Toronto General Trusts Corp.*, 32 O. R. 319, *Re Beaumont*, [1902] 1 Ch. 889, referred to.

Action brought by the Attorney-General as administrator of the estate of the late Frederick Hales, a messenger at the time of his death at the Mimico Asylum, against the

defendant, at one time a nurse in the asylum, who claims to be entitled to certain personal property of Hales under a *donatio mortis causa*.

W. J. McWhinney, K.C., for plaintiff.

L. F. Heyd, K.C., for defendant.

HON. MR. JUSTICE LATCHFORD:—The property in question is mainly in the custody of the Court, with the exception of a trifling sum of money and the proceeds of Hales' last monthly pay cheque, $30, which are in the possession of the defendant; and consists mainly of two bank books, representing about $200, and $1,000, the proceeds of a life assurance policy held by the deceased.

Hales was probably *filius nullius*. He had some memory of a mother and grandfather; and had, previous to coming to this country, been in a Barnardo Home from his childhood. So far as appears, he had no living relatives.

The defendant, when Hales met her, was about twenty-seven years of age. She was living separate from her husband, to whom she had been married while under age. He had, after the separation, gone through the form of marriage with another woman, after giving notice to the defendant of an application which he had made for a divorce in one of the United States.

The defendant, though not quite certain she was free, became in August, 1911, engaged to marry Hales. This was clearly established. Hales gave her a ring and spoke of the new relationship to at least one of his associates, many of whom knew of the mutual attachment of the pair, though perhaps not of their actual engagement.

About the end of September Hales was stricken with typhoid fever. He sent for the defendant. Nurses were not permitted to visit at cottages occupied by male attendants at the asylum. One of the Superintendents, Mr. Whitehead, out of sympathy, doubtless, with the lovers, accompanied Mrs. Page to Hales' room and left them together for a few minutes. What passed between the two can be known only from the defendant. Mr. McWhinney has strongly urged that the discrepancies in her statement of what took place indicate that her relation is not truthful. But there is no substantial variance in the accounts she has given upon her examination for discovery, her examination in chief, and her

cross-examination. The discrepancies are slight, and only such as might naturally be expected from a truthful witness of her limited intellectual capacity. I give full credit to her statement of what occurred.

Her evidence is uncontradicted except upon one point, and on that only by the bursar's clerk, Murray, who says that the red bank book was in Hales' trunk, and not, as she states, in her suit case, when he made the inventory. But his memorandum made at the time indicates that both the bank books were in the suit case. Murray also states that "according to memory" he saw the red bank book—perhaps both bank books—in Hales' trunk on the night Hales left the trunk in the room he occupied at the time. Murray's opportunity for observing what was in the trunk was very limited; but even were it better, I should not be inclined to credit his evidence as against Mrs. Page's. I am satisfied that both the bank books were handed to Mrs. Page when Hales delivered to her his other little treasures. It is in the highest degree improbable that he would have removed —as he did undoubtedly remove—his deeds and insurance policies with the almost worthless watch and watch case—from the trunk, and not at the same time take away the bank books which represented his savings of $201.65.

There could, of course, be no valid gift of his real estate. But as to the personalty the only question is whether what took place between Hales and the defendant amounted to a good *donatio mortis causa*.

Hales was not a strong man, and he was smitten with a dangerous, and often fatal, disease. He had no relatives. He entertained for Mrs. Page an affection so sincere that although acquainted with her unfortunate past he had decided to make her his wife. Her intention was to benefit his affianced should he not recover. He delivered to her his purse, containing the key of the trunk which by his order—a significant circumstance—was later delivered to her, a watch and a watch case, the bank books and the bundle of papers, the contents of which were unknown to Mrs. Page until after Hales' death, when it was found to contain his deeds and insurance policies. On the next day Hales sent her by Whitehead his monthly pay check.

In delivering the articles in question, Hales said: "I am very ill. Take these papers, and in case anything happens they are yours. If not, it will be all right anyway," or "you

keep them safe anyway." He also said, "You will find the key of my trunk in the purse."

The requisites of an effective *donatic mortis causa* are stated in 15 Hals. L. E. 431. It must be made in contemplation of death; there must be delivery to the donee of the subject of the gift; it must be made in circumstances which shew that it is to take effect only if the death of the donor follows.

All these necessary elements were present in this case. The gift of the key of the trunk of itself constituted a valid donation of the contents of the trunk (*Jones* v. *Selby* (1710), Prec. Chy. 300) apart altogether from the subsequent delivery of the trunk and what was in it to the defendant.

The gift of the bank pass books operates to pass to the defendant the right to the moneys represented by them. *Brown* v. *Toronto General Trusts Corp.* (1900), 32 O. R. 319. A policy of assurance may also be the subject of a *donatio mortis causa*: *Amis* v. *Witt* (1863), 33 Beav. 619, in appeal from case reported in 1 B. & S. (1861), 109; approved in *Re Beaumont*, [1902] 1 Ch. 889, at 893.

I therefore hold the defendant entitled to the moneys in bank represented by the pass books delivered to her, with accrued interest, and to the moneys and other property in the custody of the Court, in addition to the contents of the trunk, the cash received from Hales, and the proceeds of his salary cheque. She is also entitled to her costs.

I may add that there is ample corroboration of the intention of the deceased to benefit the defendant. This appears from the delivery of the trunk and pay cheque, and from other material facts which appreciably assist me in concluding that the defendant truly states what took place between her and Hales when he delivered his valuables to her.

The evidence of what took place subsequently between her and Dr. Beemer does not weaken her statement. If she understood—which I doubt—the letter read to her by the Superintendent, the relative positions of the two would, I am satisfied, have prevented her from objecting to the statements contained in the letter. In any event there was little in it to which she could take objection.

The action is dismissed and the counterclaim allowed, with costs.

Stay of thirty days.

HON. MR. JUSTICE MIDDLETON. APRIL 4TH, 1914.

ALLIS-CHALMERS-BULLOCK v. ALGOMA POWER CO.

6 O. W. N. 240.

Contract—Supply of Machinery and Plant—Abatement of Price—Evidence—Costs.

MIDDLETON, J., in an action to recover certain sums due under agreements for the supply and installation of certain machinery and plant by the plaintiffs gave judgment for plaintiffs for $4,776.37 without costs.

Action to recover a balance alleged to be due for the supply and installation of machinery and plant under two agreements, tried at Toronto on 2nd, 3rd and 4th April, 1914.

C. A. Moss and F. Aylesworth, for plaintiff.

W. N. Tilley and W. M. Cram, for defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff company entered into two agreements: (1) To supply the defendant company with certain plant required for an extension of its works at Michipicoten Falls; (2) for the construction of certain machinery at the Helen Mine, which the defendant had undertaken, with the mining company, to instal for the purpose of enabling electricity to be used as the motive power at the mine.

Several issues were tried out at the trial and I propose giving my findings upon these very shortly.

In the first place I think the plaintiffs took altogether too long to instal the machinery, and that they are not entitled to recover the full amount claimed under the three items of $301.45, $1,688.82, and $235.18. The amount which I think proper to allow under these three heads is twelve hundred dollars.

Owing to some foreign matter getting into the turbine, or possibly owing to the vanes not being ground with sufficient accuracy, the vanes were chipped and broken and a new runner had to be supplied. This was done during the process of installation and before the operation had been handed over to the purchaser. I think this is outside of the provision of the contract as to the supplying of new parts which prove defective, which can be given full effect to by

holding it as applying to defects discovered after the installation has been completed and the machinery has been handed over to the purchaser. This precludes an allowance of the items $84, $10.50 and $300.

The item $1,083.67 is the cost of installing a new casing to the turbine. Owing to the mode of construction adopted by the plaintiffs, this casting broke down. The steel stays were cast into the cast iron portion of the turbine. This mode of construction has now been abandoned and it is recognized that the stays should be tapped in. The fault was the vendor's, and the breakdown took place while the installation was still under way.

Two items, $40 and $50, for erecting elevated steel platform, I think should be allowed at fifty dollars.

The lost *lignum vitae* block for bearing cannot be charged against the purchaser. This forms part of item $21.46. The remaining items set forth in paragraph eight of the statement of claim are admitted.

Against this claim, which apart from interest aggregates $8,306.66, the defendants have certain cross-claims. Item $122.53 and two items for freight on the generator and new casing, amounting to $147.76, are admitted.

Numerous defects of a minor character were specified, and I accept Mr. Mitchell's valuation of these, amounting to $660.

I am satisfied that the machinery was not, even with the proposed changes, entirely satisfactory, and that some allowance should be made with respect to this, covered by Mr. Mitchell's general annual allowance. This, I think, I would place at $500. I do not think it has been proved that the generator coils were not, at the time they were supplied, up to the requirements of the contract. Many things might have happened to these coils during the course of operation which might account for a premature breakdown under severe strain.

A claim is made with respect to a large number of minor items covered by exhibit 13. No doubt from the general evidence resort was frequently had by the vendors to the Helen Mines machine shop, to aid in the completion of the instalment, and some part of the items which have now been charged by the Helen Mines against the defendants should be paid for by the plaintiffs. It was agreed that I should do my best in apportioning this list; and, after criticizing it

in the best way I can I have decided that the vendors should pay one hundred dollars on this account.

Of more importance is the claim for loss occasioned by delay. I think that for all which comes under this head a substantial allowance should be made, including in it some allowance for extra expense as well as allowance for the loss of profit. Doing my best to ascertain what will be a fair sum, I have concluded to allow two thousand dollars.

I do not think any allowance should be made for the Calder claim, as I have considered the whole situation in fixing the twelve hundred allowed to the plaintiff for installation.

I think this covers everything discussed, and it means an abatement of the balance due the plaintiff by sums aggregating $3,530.29, leaving a net balance due the plaintiff of $4,776.37, which should bear interest at the rate of six per cent. from say first October, 1909.

Each party has succeeded as to his contentions in part, and although the balance is found in favour of the plaintiff, it should not have the entire costs of the action. Some indulgence was granted to the plaintiff by a postponement, and it ought to pay the costs occasioned by that postponement. On the whole, justice will be done by directing that there be no costs to either party.

HON. MR. JUSTICE LENNOX. APRIL 6TH, 1914.

McKERCHEN v. McCOMBE.

6 O. W. N. 224.

Vendor and Purchaser—Specific Performance—Building Restriction—Buildings to be Kept Back from Street Line—Corner Lot—Restriction Limited to Street on which Lot Fronts.

LENNOX, J., *held*, that the following restriction in a deed "No house or outbuilding shall be erected which shall be nearer the street line than twenty feet at any part thereof" in the case of a corner lot only applied to the street upon which the lot faced.

Action for specific performance of an agreement for sale and purchase of the easterly 67 feet 10 inches of lot 99 on the north side of Burlington crescent, according to plan M. 312, Land Titles Office, Toronto.

H. S. Martin, for plaintiff.

C. M. Garvey, for defendant.

HON. MR. JUSTICE LENNOX:—The original building restrictions contained in deed or transfer No. 56996, dated 25th of January, 1910, were modified by an order of Mr. Justice Middleton of the 21st October, 1913, filed as No. 93031, and these were the restrictions affecting and governing this plan at the date of the contract between the parties to this action. The restrictions so far as they affect any question arising in this action are, as set out in the order referred to, as follows:

"(3) No house or outbuilding shall be erected which shall be nearer the street line than twenty feet at any part thereof.

(4) No detached house shall be erected on lands of less frontage than thirty feet and no semi-detached houses shall be built on lands less than fifty feet frontage," etc. The defendant contends that he is not bound to accept a conveyance and complete the purchase if the building restrictions compel him to keep his buildings back 20 feet from the street line of Alberta avenue, a side street as to all the lots laid out west of Alberta avenue, as well as 20 feet back from the street line of Burlington crescent, the street upon which lot 99 is numbered and fronts; and on the other hand the defendant is willing to carry out the contract if the 20-foot restriction applies only to Burlington crescent.

According to these restrictions the frontage of a lot or portion of a lot upon which a dwelling may be erected need not be more than thirty feet in width. There is no special provision as to corner lots. The result is that if the 20-foot restriction applies to a cross or side street as well as to the street the lots front upon the owner of thirty feet of the easterly side of this lot, and the same of other similar lots, could only erect a house ten feet long or wide, outside measurement, or hardly that, a condition certainly not to be contemplated in a residential district. There are other reasons against this contention afforded by an examination of the plan. I realize that to hold that a provision for building back from the street line applied only to the street upon which the property fronts would cruelly disappoint the intention and expectation not only of the sub-divider, but of a large percentage of the purchasers as well, in some residential districts, as for instance where all except corner lots front upon the four streets forming the square, and even in the case I am dealing with there may be some point at

which a very unfortunate condition may arise; but all this can be, and generally is, provided for by the building restrictions; and limitations upon the ordinary incidents of ownership are to be construed strictly.

I have come to the conclusion that the restriction number three above quoted does not prevent the owner of the easterly 30 feet or more of lot 99 from erecting a dwelling or other building of the class defined in the restrictions adjoining to and along the westerly side of Alberta avenue, and that the restriction as to 20 feet from the street line only apply to Burlington crescent upon which this lot fronts.

There will be judgment declaring this and for specific performance, and, counsel not desiring me to do so, I make no order as to costs.

HON. MR. JUSTICE SUTHERLAND. APRIL 7TH, 1914.

HEAMAN v. HUMBER.

6 O. W. N. 221.

Writ of Summons—Service out of Jurisdiction—Order Permitting Set Aside—Irregularities—Con. Rules 26, 28, 32, 298—Affidavit not Filed in Time—Statement of Claim not Served with Writ.

SUTHERLAND, J., set aside an order for service of a writ out of the jurisdiction and such service, upon the ground that the affidavit upon which the order was obtained was not filed prior to taking out the order, that the said affidavit did not disclose a state of facts which would justify the order and that no statement of claim had been served with the writ.

Motion by defendants for an order setting aside the order of a local Judge allowing the issue of a writ of summons for service out of the jurisdiction and the service thereof.

T. G. Meredith, K.C., for the motion.

J. M. McEvoy, for plaintiffs.

HON. MR. JUSTICE SUTHERLAND:—The action is on an agreement for the sale of lands in the Province of Manitoba. The order of the local Judge was based on an affidavit of one of the plaintiffs wherein it was stated that the plaintiffs were desirous of bringing the action for damages for tort committed in the Province of Ontario by fraudulently in-

ducing the plaintiffs to enter into the contract of sale; that defendants were British subjects resident in Winnipeg in the Province of Manitoba, and it was a proper case for service out of Ontario under the rules of Court.

The order gave leave to issue the writ and the writ was issued. The affidavit, order and writ are dated respectively the 9th March, 1914.

In support of the motion the defendants read a certificate of the state of the cause from which it appears that the affidavit on which the order was made was not filed until the 31st March, 1914. An affidavit was also filed by defendants verifying a copy of the writ issued and apparently served, and stating also that no statement of claim was served therewith.

The certificate already referred to shews that no statement of claim has yet been filed. The writ makes no reference to any fraudulent representation but is endorsed with a bare claim to have the agreement cancelled or set aside and the moneys paid thereunder refunded. A statement of claim was produced by the plaintiffs on the motion purporting to be dated the 18th March, 1914, in which express allegations of fraudulent representations are set forth. The grounds set out in the notice of motion are:

(1) The affidavit on which the order was obtained did not disclose facts sufficient to justify the making of the order and was not filed as required by and was not according to the rules. The affidavit was not filed before being used as required by Rule 298. It did not contain a statement that in the belief of the deponent the applicants had "a right to the relief claimed" as required by Rule 26.

(2) That the writ issued was not justified by the order. If the material, however, disclosed a proper ground for asking leave to issue the writ, Rule 32 would probably apply and make it unnecessary that "the precise ground of complaint" should be set forth in the endorsement.

(3) That the writ had not endorsed upon it a minute shewing that it was issued in pursuance of the order.

(4) That the writ is not a specially endorsed writ and a statement of claim should have been served herewith as provided by Rule 28.

On the hearing of the motion the plaintiffs asked leave to file a supplementary affidavit to the effect that in the opinion of the deponent, the plaintiffs have a right to the

relief claimed and after the argument handed such an affidavit in.

I reserved the matter to see if I could or should make an order which would prevent what has been done being entirely abortive.

Upon consideration I am of the opinion, however, that the irregularities are of such a character that the proper disposition of the matter in the circumstances is to set aside the order and service, leaving the plaintiffs to commence their action afresh, if so advised.

The order and service will, therefore, be set aside with costs.

HON. MR. JUSTICE BRITTON. APRIL 11TH, 1914.

SOADY v. SOADY.

6 O. W. N. 240.

Money Lent—Action for—Onus—Failure to Discharge—Statute of Limitations.

BRITTON, J., dismissed an action brought by one brother against another for moneys alleged due him for advances made.

Action by a man against his brother to recover $2,264, made up of ten items of money lent, money paid for the defendant, services, board, etc.

Tried at Toronto without a jury.

W. K. Murphy, for plaintiff.

R. D. Moorhead, for defendant.

HON. MR. JUSTICE BRITTON:—The parties to this action are brothers, residing in Toronto, the plaintiff being an insurance agent, and the defendant a doctor of medicine.

The plaintiff claims $2,264, made up of the following items:

1. Money paid for the defendant for rent of house 402 College street from 7th April, 1907, to 30th June, 1908	$ 600 00
2. Board of defendant for same period.....	455 00
3. Paid for telephone for defendant.....	37 50
4. Paid for furniture bought by plaintiff for defendant at defendant's request	196 25
5. Paid for surgical instruments and stationery for defendant	62 00

6. Services answering bell for defendant from April 7th to December 31st, 1907.....	$ 78 00
7. Paid wages of servant-maid employed by defendant, 26 weeks at $4 a week	104 00
8. Money lent by plaintiff to defendant between January 1st and June 30th, 1908...	105 00
9. Gas used by defendant and paid for by plaintiff	26 25
10. Money received by defendant from plaintiff's business during the year 1908.....	600 00
	$2,264 00

The *onus probandi* is, of course, upon the plaintiff, and he has not established one of the items mentioned in the statement of claim.

He did give evidence of certain money advanced by him to the defendant, but that evidence was met by strong denial, contradiction and explanation by the defendant.

As to all money transactions between the parties prior to 1st January, 1907, they are barred by the Statute of Limitations, and that statute has been pleaded by defendant.

As to nearly all the items, the plaintiff's statement was not that he paid the money at the different times and for the purposes above named, but that he handed the money to the defendant for those purposes.

Apart from the item of board, the claim is simply for money lent, and the plaintiff has not asserted more than the defendant has denied.

The plaintiff and his wife are living apart, and under the circumstances, I treat her as an independent witness.

She thinks defendant owes her husband and her desire is that her husband succeed, but she is truthful, and her evidence only amounts to this—that from time to time she saw her husband hand some money to the defendant, and that the defendant did get some money from the plaintiff's business.

This business was carried on by the plaintiff under the name of "The Empire Tea Company" and was a complete failure.

The plaintiff absconded, but he returned after a little while.

While he was absent, one Sanderson was put in charge of the business, or rather of the premises where the busi-

ness had been carried on—as at that time it could not be called a business—and Sanderson says that he collected money and paid it over to the defendant. He thinks he was there, in charge, four weeks, that he paid over four times a week, and as much as $20 each time. That would amount to $320.

I am not able to rely upon the statement of Sanderson. I think his memory is at fault.

There is an absolute denial by defendant.

The plaintiff's wife was there and the last collection was paid to her.

The evidence of Mrs. Soady, mother of the parties, and all the undisputed evidence as to the stock, the condition of the business, and the surrounding circumstances, is against the evidence of Sanderson as to payment over to defendant of any such amount.

The plaintiff did keep house and defendant did board with plaintiff for a time, but the arrangement was as I find upon the evidence, that the rent of the house which was paid by defendant was to be in lieu of any charge for board.

There is a bitter feeling on the part of each brother toward the other and my conclusion is that the claim of the plaintiff has not in any part been proved.

The action will be dismissed with costs and the counterclaim of defendant against the plaintiff will also be dismissed with costs.

Twenty days' stay.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1914.

OLDS v. OWEN SOUND LUMBER CO.

6 O. W. N. 241.

Contract—Sale of Lumber—Action for Purchase Price—Delivery by Instalments—Default—Evidence—Inspection—Interest.

MIDDLETON, J., in an action by a vendor upon a contract for the purchase of certain lumber gave judgment for the plaintiff for the lumber received by defendant at the contract price, less an allowance to be made because the lumber supplied was below the average of the entire run.

Action tried at Sandwich Assize, without a jury. Action was based upon a contract for the sale of lumber. Certain

lumber had been delivered and paid for, other lumber had been delivered and not paid for. Other lumber was tendered and refused. No claim was made by the vendor save for the price of the lumber delivered and not yet paid for.

J. H. Rodd, for plaintiff.

W. H. Wright, for defendant.

HON. MR. JUSTICE MIDDLETON:—The defence is that the contract called for delivery of the entire quantity and that the vendor not having delivered all, the purchaser can keep what he has without payment, and damages are claimed for failure to deliver and also for the delivery of inferior lumber.

From the beginning the purchaser was in trouble. He had not adequate storage and the state of the market prevented a quick turn over. All the correspondence from an early date must be read with this in mind. The vendor was ready to deliver and in no sense in default. At one time, the vendor was, I think, jockeying to create better evidence of default, and the telegram of September 1st was, I believe, sent after arrangemnts had been made to send the Schoolcraft to Bay City in the expectation of a negative answer being sent. Yet all along the defendants had no real desire to receive more lumber and were quite unable to handle what they had.

The whole run was sold at one price, and the real trouble has arisen from the desire of the purchaser on his part to receive as much as possible of the more valuable and the desire of the vendor to deliver as much as possible of the less valuable.

Each side denies this and it is on the evidence not easy to determine whether the lumber delivered was of a fair average. I am inclined to think that the best was yet to come and that some small allowance should be made on that account.

Part of the lumber was at the time of the contract manufactured and ready for shipment, part was in the log and required time for manufacture and to become in a condition in which it would be fit to ship. This is the meaning of the expression "two lots" in the agreement.

The manufactured lumber was one lot, the lumber to be manufactured was the second lot. This indicates that "ship-

ment" and "delivery" were not used in the contract as meaning the same thing. The lumber that was ready was to be delivered as soon as navigation opened. It would not all go in one shipment but would be shipped at different times but each cargo was to be paid for 60 days from "shipment."

The lumber was to be inspected by a national hardwood inspector to be agreed upon. Grant Hamson was agreed upon and it was well understood that he was not personally to inspect but that the inspection was to be done by his staff. It was so done and on the evidence there is nothing to satisfy me that it was not properly done, and it is, I think, conclusive on the parties.

The claim for damages for failure to deliver has no foundation. The vendor was ready, the purchaser was unready. The market was against the purchaser and he has suffered no damage, even if the default had not been his.

I think he should pay for the lumber he has received at the contract price, less $500, which allowance I make because the lumber supplied was, I think, below the average of the entire run. The defendant should pay interest from 60 days from shipment and the costs of the action.

HON. MR. JUSTICE MIDDLETON. APRIL 14TH, 1914.

FORTUNE v. NELSON HARDWARE CO.

6 O. W. N. 227.

Negligence—Master and Servant — Fall of Elevator—Evidence—Fault of Plaintiff or Fellow-Servant—Common Law Liability.

MIDDLETON, J., dismissed an action brought at common law for personal injuries sustained by the fall of an elevator, holding that no negligence on the part of defendants had been proven and that in any case plaintiff being in charge of the elevator should have seen that it was in proper running condition.

Action by plaintiff at common law to recover damages sustained on 29th March, 1912, when an elevator upon the defendants' premises in which he was, fell. The writ was not issued till 9th January, 1914, so no remedy could be had under the Workmen's Compensation Act.

T. M. Morton, for plaintiff.

M. K. Cowan, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—The elevator fell because the wire hoisting cable had become worn and frayed and so weakened, and the safety device for some reason did not work. There was no defect in the elevator and the safety device was one which ought to have been sufficient. No reason for its failure on this occasion was shewn or in any way indicated.

The plaintiff as the senior clerk in the shop, had a general charge over the whole place, and knew of the condition of the rope, and failed to either report it or to have it repaired. At the time of the accident he assumed the whole blame had no thought of making any claim, thinking he was under the circumstances well treated by being paid full wages, etc. Recently he was discharged for stealing money, and in revenge brings this action.

Mr. Lech, a shareholder of the company, was general manager and the only person occupying a superior position in the shop. He confined himself mostly to office work and general direction of the business, leaving the care of the staff and premises very largely in the plaintiff's hands.

The master, the company, did provide a safe place for the employees to work, and if the place became unsafe, as it did, this was, I think, the plaintiff's own fault. At most it was the fault of a fellow-servant. Mr. Morton cannot at this late date successfully attach the well settled law that the relative positions which the servants occupy in the undertaking makes no difference in the application of the fellow servant doctrine which as is pointed out in Halsbury, vol. 20, p. 133, in the case of corporations, resulted in this defence nearly always succeeding for the corporation itself could scarcely ever be convicted of negligence.

In this case the claim is quite without merit, and I do not experience the regret I generally entertain when this rule prevents a recovery, for the fault here was, I think, with the plaintiff himself.

HON. MR. JUSTICE LENNOX. APRIL 6TH, 1914.

HEDGE v. MORROW.

6 O. W. N. 224.

Title to Land—Improvements—Timber—Rent—Basis of Settlement —Costs.

LENNOX, J., delivered a supplementary judgment to that appearing in 25 O. W. R. 828, the parties having been unable to agree upon a settlement.

A settlement of the action as suggested by HON. MR. JUSTICE LENNOX in his judgment herein, 25 O. W. R. 828, having been found impossible, the following supplementary judgment was delivered by the learned Judge.

Geo. A. Stiles, for plaintiff.

D. B. Maclennan, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—Counsel have not been able to agree upon a settlement. The plaintiff does not propose to take out administration and does not ask to add parties or amend. The lasting improvements made upon the property would be about equal to the value of the timber taken off and I set off the one against the other. As I have already found $2,700 was a fair value for the property at the time defendant purchased. I have come to the conclusion that the actual value of the farm now is $3,000. The defendant is chargeable with $800 for rent, making a total to be accounted for of $3,800. The plaintiff is now in a position to get in the two outstanding shares, and having done this she and the defendant would each have an undivided half interest in the farm and rent or what is equal to an interest of $1,900 each; and this action should be settled upon this basis. The costs of administration and a judicial sale of the property should be avoided.

1. If the defendant within fifteen days from this date notifies the plaintiff or her solicitor that he is willing and prepared to pay the plaintiff the sum of $1,900 upon the execution and delivery to him of a conveyance, and assignment of all the estate, interest and claim of all the heirs and heiresses-at-law and next of kin of Isabella Gilchrist, afterwards Johnston, in the land in question and in and to

their share of rent and if within thirty days after the giving of such notice, or such further time as I or any Judge of this Court may hereafter, upon application, allow, the plaintiff executes and tenders, and upon payment of $1,900, delivers to the defendant a conveyance and assignment as above stated, all intermediate conveyances to the plaintiff being duly registered, or if the defendant neglects or refuses to avail himself of the provisions of this paragraph, the action will be dismissed without costs.

2. If the action is not disposed of under the provisions of paragraph 1 it will be dismissed with costs.

3. Steps hereafter taken by either party to bring about a settlement in pursuance of paragraph 1 will, if unsuccessful, be without prejudice to the right of appeal and, in so far as I have power to provide, without prejudice to the status of either party upon an appeal.

HON. MR. JUSTICE BRITTON IN CHRS. APRIL 15TH, 1914.

ECKERSLEY v. FEDERAL LIFE ASSURANCE CO.

6 O. W. N. 242.

Jury Notice—Action on Insurance Policy — Unsuitable Action for Trial by Jury—Notice Struck Out—Transfer to Non-Jury List —Con. Rule 398.

BRITTON, J., struck out a jury notice upon the ground that the action was not of the character which should be tried by a jury.

Motion by defendant to strike out the jury notice served by the defendant.

J. Y. Murdock, for defendants, for the motion.

J. P. Crawford, for plaintiff.

HON. MR. JUSTICE BRITTON:—I have read the statement of claim, the statement of defence and the affidavits filed, and it appears to me that the action is one which ought to be tried without a jury. I direct that the issues shall be tried and the damages, if any, assessed without a jury. If the action has been entered for trial, the action will be transferred to the non-jury list. This direction is pursuant to Rule 398.

Costs of this motion will be costs in the cause.

HON. MR. JUSTICE MIDDLETON. APRIL 22ND, 1914.

STIMSON v. BAUGH AND PROCTOR.

6 O. W. N. 264.

Bills, Notes and Cheques—Partnership Note—Given for Purchase of Mining Shares.

Action to recover on promissory note signed in the name of E. L. Baugh & Co. by one Proctor. It was contended that there was no partnership between B. and P. and that P. had no authority to sign B.'s name to the note.

MIDDLETON, J., upon the evidence, found in favour of plaintiff. Judgment accordingly.

Action to recover $28,750, price of certain stock, payable under an agreement of 7th December, 1911, represented by a promissory note bearing date 8th December, 1911, given pursuant to this agreement. The note, though signed in the name of E. L. Baugh & Co., was signed by Proctor, and it is contended that there was no partnership between Baugh and Proctor, and that Proctor had not in fact authority to sign the note. Tried at Toronto non-jury sittings.

J. B. Clarke, K.C., for plaintiff.

J. M. Clark, K.C., for defendant Baugh.

Charles Kappele, for defendant Proctor.

HON. MR. JUSTICE MIDDLETON:—The defence filed on behalf of Baugh set out that he was the sole member of the firm of E. L. Baugh & Co. and that Proctor was authorized by him to obtain an option upon the stock in question upon such terms that there should be no liability beyond the $5,000 paid at the time of the giving of the option, that it was understood that the agreement which was executed was in truth an option, and if it was not then there was no consideration for the payment of the $5,000; and Baugh counterclaims for this sum. Proctor denies the agreement and denies all liability thereunder or upon the note which he signed.

By an amendment to his defence made before the trial Proctor sets out that he was acting as sales agent for the stock in the company in question, being employed by Stimson, Baugh, and one McCaffery, and that he entered into this employment upon certain representations as to the value of the property, and that the agreement of the 7th

December was made in reliance upon these representations and in reliance upon the commissions paid under the other agreement as affording a source of payment of any obligation under the agreement in question. He sets out that he had been associated with Baugh in certain other transactions in partnership, and although there was no partnership agreement in writing with Baugh he understood that he was a partner with Baugh in the matters dealt with in the agreement. He denies liability upon the agreement because of certain false and fraudulent representations which he alleges brought about its execution.

At the hearing leave was asked to amend, and amendments have been made both during the hearing and after the argument at the trial. These amendments greatly enlarged the matters to be investigated, and cannot be well understood until the facts giving rise to the action are outlined at some length.

Foster *et al*, were the owners of the mining claims in question. They had given an option thereon to McCaffery bearing date the 7th of February, 1911, to purchase for thirty thousand dollars, payable three thousand dollars 1st March, 1911, seven thousand dollars first June, 1911, ten thousand dollars first September, 1911, ten thousand first December, 1911. McCaffery was not in a financial position to take up this option, and his hope and expectation was to turn it over to some one having capital, upon such terms as to result in some ultimate profit.

McCaffery brought the matter to the attention of Stimson and in the result an option agreement was made on the 11th March, 1911, by which Stimson had the option of paying McCaffery five thousand dollars and assuming the payments due to Foster, securing a half interest in the mining property for these payments. This option was afterwards embodied in a mere formal document bearing date the 27th April, 1911, the precise terms of which are not of importance.

On the 10th May, 1911, McCaffery agreed to sell to Baugh a half interest in the remaining one-half for three thousand dollars, one thousand dollars being paid down and two thousand to be paid after Baugh should personally inspect the property.

For the purpose of placing the property upon the market it was arranged that a company should be incorporated,

called the Porcupine and Hudson's Bay Gold Mines Limited. A charter was obtained for the company on the 29th May, 1911; some of the documents, however, refer to the company as though it had been incorporated at an earlier date.

By a document dated 27th May, 1911, between Baugh, Stimson and McCaffery the incorporation of the company is recited. The parties agree to convey the mining property to the company for $2,500,000 stock, of which $700,000 was to be left in the treasury, $1,800,000 to be divided, $900,000 to Stimson, $450,000 to McCaffery and a similar sum to Baugh. By agreement of the 29th May, 1911, Stimson and Baugh, for the purpose of equalizing their holding, each agreed to convey to the other a half interest for one-half of what the purchase had cost him. Each of them would thus become entitled to hold one-half of three-quarters of the property, or the stock which would represent it.

On June 28th, 1911, McCaffery, Baugh and Stimson conveyed the property to the company in consideration of one million eight hundred thousand shares. On the same day a pooling agreement was made between the three co-adventurers, the terms of which are not of any particular moment. The stock, it was agreed, should be transferred to the Trust and Guarantee Company for the purpose of the pool.

On the 1st August, 1911, an agreement was made between the company and Baugh by which it was recited that a by-law had been passed for a sale of stock at a discount of fifty per cent., and that it had been agreed to give to Baugh the exclusive right or option to purchase two hundred thousand shares at this discount. This was followed by an agreement of the 7th December, 1911, extending the period of the option until the 12th April, 1912.

On the 1st August, 1911, an agreement was also made with Proctor, reciting the option that had been given to Baugh and the authority under the charter to give a commission on the sale of stock of twenty-five per cent. and by this agreement this commission is to be paid to Proctor. This device was resorted to because it was thought that Baugh, being an officer of the company, could not take commission.

To understand these agreements and the situation created some reference to the oral evidence is advisable. The mining property was situate close to other property that had been successfully placed upon the market. A company oper-

ating extensively in Porcupine had secured an option from the owners. It had gone upon the land and had spent considerable money in prospecting, and it had erected certain buildings upon the property. Its option of purchase had been allowed to lapse before McCaffery obtained his option. McCaffery made no secret of this. He claimed that in abandoning this property the company had not acted wisely.

Stimson was a broker who had carried on business in Toronto for many years. He had not had great experience in dealing with mining properties. McCaffery secured an introduction to him, and produced and exhibited to him not only the option but some samples said to be of ore taken from this property, together with a report made by one Meyers, a mining engineer. Some assays were made of samples of this ore. Stimson concluded to buy on the basis of $61,000: that is to say, he paid McCaffery the $5,000 and assumed liability for the $30,000 due the vendors for the balance of their purchase money, he taking a half interest in the property. When I say "he assumed liability," it must be understood that the agreement was in the form of an option; but this is not material, as the price was ultimately paid. $3,500 was paid at the time.

Baugh is a broker residing and carrying on business in Montreal. He is a remote connection of Stimson, and had had many financial dealings with him. Shortly after the making of the agreement under which Stimson acquired an interest in the property, he was in Montreal, in Baugh's office, mentioned to Baugh his agreement with McCaffery, and suggested to Baugh that he should try to buy out McCaffery on the best possible terms, and that they—Stimson and Baugh—should then pool their interests, equalizing the cost and the amount of their holding; Stimson fearing at this time that McCaffery would not be found an entirely easy man to co-operate with in the flotation of the property.

Baugh fell in with this suggestion, and the result was that a telegraphic message was sent by Stimson to McCaffery, calling him to Montreal. Finally the agreement already referred to was arrived at, by which Baugh put up the one thousand dollars on account of three thousand to be paid if Baugh was satisfied upon personal examination, it being understood that the one thousand dollars was to be refunded if as the result of the examination Baugh was not satisfied with the outlook.

Baugh and some friends and associates went to examine the property, and saw all there was to be seen; and Baugh concluded to go into the venture. The series of documents already referred to resulted in due course.

Baugh now claims that he was induced to enter into these agreements by the fraud of Stimson, or by the fraud of McCaffery, for whose conduct he claims that Stimson is responsible.

At the trial amendments were permitted, but the amendments were not made at the time, and have only recently been put in. The amendments made by Baugh, are, I think, an ingenious and carefully thought out attempt to create an embarrassing situation.

Upon the argument, before the amendments were made, I pointed out to counsel that if the issue in the action was confined to the attack upon the agreement sued upon, then the evidence as to what led up to the agreements under which Baugh acquired his original interest in the property was irrelevant, and that if on the other hand Baugh now confines his attack to the agreement in question he might preclude himself from hereafter attacking the earlier agreements. Instead of facing this difficulty what is now attempted is to so plead as to force a determination of the issues as to the earlier agreement and yet leave Baugh in a position in which he can hereafter say that these matters were not in issue in this action.

I do not see that I am much concerned with the success of this endeavour and as all these matters are now brought in issue, I think I should find upon them, even though the ultimate determination of the rights of the parties must be based upon my finding on the agreement of the 7th December.

Mr. Baugh is a man of experience and ability, and in all that he did he acted upon his own judgment and he was in no way outwitted or outmatched by Stimson. He thoroughly understood the situation as to the abandonment of the property by the other mining company. He visited the ground, saw the work that had been done and the buildings that had been erected and abandoned. He thoroughly appreciated the position occupied by McCaffery. He knew that McCaffery was more or less of an adventurer, and that Stimson was in no way vouching for McCaffery's reliability. What both he and Stimson were really concerned about was getting a mining property which was so advantageously situated as

to attract public confidence. They were both expecting to realize more from the sale of the stock to an unsuspecting public than from actual operation upon the mine. From the situation and from what had been learned, I think they both believed the prospect was a good prospect and might develop into a very valuable mine. But when Baugh succeeded in purchasing a quarter interest in the property for three thousand dollars I cannot believe the story which he now tells as to the untold wealth that he was led to believe he was acquiring for this small sum. Mr. Baugh whatever else may have to be said of him, did not lack in shrewdness or ability. A real estate agent in Montreal whose annual income runs from $50,000 to $75,000, cannot successfully pose as a simpleton; and when he says that he was cajoled by a typical vendor of prospects like McCaffery into believing that the iron pyrites he saw through the mining location was pure gold. I find this story quite incredible. As already indicated, the "fool's gold" with which he was particularly concerned, was not that upon the property, but that which still remained in the pocket of the prospective purchaser of the stock.

At a later stage of the proceedings a sample of almost pure gold was produced, and converted into a locket for the purpose of making Proctor, who had theretofore plied the honourable trade of selling gloves, appear to be a veteran prospector, and it is now suggested that this was the sample upon which Baugh bought what he believed to be some thousands of tons of similar material for three thousand dollars, although this sample indicates an ore running $350,000 to the ton. McCaffery no doubt produced this sample, but it did not come nor was it supposed to come from the property in question. It was a sample of California gold, and formed no part of the samples exhibited by McCaffery at the beginning. These samples, upon the evidence, were taken from the property. Nobody regarded them as a fair indication of the real value of the bulk of the material to be mined, least of all Baugh, who went up and saw the property with his own eyes.

Much stress is laid upon the fact that a communication was had by Stimson through Mr. MacNeill, his confidential clerk, with a man named Taylor, in March, 1911, and that the letter received in reply was not communicated to Baugh. MacNeill was always opposed to the purchase by Stimson of this abandoned claim. He wrote to Taylor and received

the reply in question; and I think it is altogether likely that he did shew it to Stimson. It conveyed nothing new to Stimson. Both Stimson and Baugh knew that money had been spent in development work under the old option and that it had been abandoned. I do not think that Stimson regarded as at all material, and I do not think that he acted in any way fraudulently in failing to disclose. It had no effect upon his own conduct. He went on, and put his own money into the property.

Far more significant is what took place when Baugh went up to inspect. He was so convinced that everything was all right that he went behind Stimson's back and endeavoured to arrange for a new option in his own favour if Stimson did not put up the money and take up the property himself.

Shortly after the purchase Stimson left the province for some time. Baugh undertook to carry on development work. He advanced a good deal of money, sent up a diamond drill, and co-operated with McCaffery in working the property. This was done without any particular consultation with Stimson, but on the understanding that Stimson would be answerable for his share of the cost. On Stimson's return Baugh complained of the amount that had been advanced and of the fact that he had had no refund from Stimson, and some little difficulty arose owing to the inclusion in Baugh's demand of items which Stimson thought he ought not to contribute.

Stimson was not entirely in favour of the policy pursued by Baugh. He would have preferred to market the stock before too much was done upon the ground.

McCaffery had suggested to Stimson his desire to purchase Stimson's stock in the company. Stimson, of course, knew what McCaffery had no money with which to purchase on his own behalf, but thought that there was some one behind him who desired to acquire control of the property. Stimson felt himself bound to protect Baugh, who had come into the company upon the understanding that they were to co-operate.

At this stage Stimson had made up his mind to get out of the whole transaction if he could do so without heavy loss. He therefore telegraphed to Baugh on December 5th, 1911, "Have decided to sell my interest Hudson Bay. As promised, give you first offering. Price five cents share for immediate acceptance."

Baugh immediately sent Proctor to Toronto. Proctor endeavoured to secure an option from Stimson upon the stock, and I have no doubt that Baugh is right when he says that his instructions to Proctor were to secure an option. He had given Proctor two cheques, one for $5,000 and one for $2,500; and Proctor's idea was to obtain an option by putting up the $2,500.

As soon as Proctor interviewed Stimson and suggested an option, Stimson declined, and stated that he would only deal on the basis of an unconditional contract. Finally a letter was dictated by Stimson, addressed to Baugh, and given to Proctor, offering to sell the stock upon certain terms. Communication was had over the telephone between Proctor and Baugh. The result was a request for a modification of terms, and a second letter; then further discussion, resulting in a letter dictated by Stimson but signed by Proctor in the name of "E. L. Baugh & Co., per A. P. Proctor," which refers to the two letters signed by Stimson and accepts the offer. This letter states that a contract will be at once drawn.

Stimson was about to leave the city, and Proctor consulted his own solicitor, and had a contract drawn and presented to Stimson for signature. It turned out that this contract was only an option, and I cannot acquit Proctor of the hope and desire to have this document signed by Stimson without Stimson realizing its true nature. The document is not produced, the solicitor who prepared it has unfortunately no copy, and, equally unfortunately, cannot find the stenographic notes from which the original was transcribed. It was, at any rate, contrary to the letters in question and to the intention of Stimson and Proctor.

Stimpson was about to leave the city, and Proctor cononce promised to have the mistake rectified. A new document, that now in question, was drawn by the same solicitor and ultimately signed. Baugh says that he gave no authority either before Proctor's departure to Toronto or otherwise to Proctor to make an absolute contract, and that Proctor's authority was strictly limited to the obtaining of an option.

A telegram is produced, unsigned, but no doubt from Baugh, to Proctor, "Would suggest you comply with Stimson's wishes. Feel confident we could succeed in selling sufficient to pay amount due July at fifteen cents. Find out Mac's (meaning McCaffery's) purchaser if possible."

Upon the evidence I would find as a fact that Proctor had authority from Baugh to make the agreement in question.

Contemporaneously, Proctor signed the note sued on.

Proctor handed over the $5,000 cheque and took the agreement to Baugh, to whom he reported on his return to Montreal. Baugh says he did not tell him the nature of the agreement or the giving of the note, and though he handed him the agreement it unfortunately remained unopened and unread on Baugh's table for many weeks. This I do not believe. Baugh says that Proctor did not tell him that he had given the note; but MacNeill, who was a careful man, wrote to Baugh asking him to substitute for this note, which was not in order so far as the signature was concerned, a note with his own authentic signature. This letter was never answered, and unfortunately for Baugh, he has no explanation for overlooking it.

I would find that Baugh ratified and confirmed by his conduct all that Proctor did for him when in Toronto upon the trip in question, and I entirely disbelieve Baugh's account of his ignorance of what had been done.

Baugh and Proctor were endeavouring to sell stock in the company, and there is a good deal in the correspondence produced which indicates that the whole defence of this claim is not an honest one, but is the result of the failure to market the stock. I do not feel myself called upon to go through this voluminous correspondence with a view of demonstrating this; but there is much in Baugh's evidence, when analyzed with care to indicate his utter unreliability.

A matter which I feel called upon to comment on is the way in which Proctor's evidence was brought before the Court. A motion was made for his examination *de bene esse*. This was at the instance of Stimson, the order was a very vicious one, for it provided that any party to the action might give his depositions in evidence at the trial. Stimson did not desire to use the evidence, as Proctor turned out to be an unsatisfactory witness. On the examination counsel for Baugh took the attitude that Proctor was being cross-examined by him and led the witness most unwarrantably. At the trial, the evidence was put in on Proctor's behalf, counsel for Baugh claiming the benefit of it. I pointed out how unsatisfactory it was to have this evidence, taken when the facts had not been sufficiently disclosed for a satisfactory examination to take place and when the issues were

confined within a comparatively narrow compass, used at this trial with its new and wider issues and no opportunity for adequate examination and cross-examination. Proctor was in Montreal, and his attendance could have been obtained at any time without difficulty. If he would not come voluntarily he might have been brought here on subpoena from Montreal. I suggested and urged both upon his counsel and upon counsel for Baugh the propriety of bringing him here, but they declined and insisted upon the binding effect of the order in question. I do not think his evidence, taken in this unsatisfactory way, at all helps Baugh, nor do I think that I can find in Proctor's own favour upon the strength of that evidence. Proctor held himself out as a member of the firm of E. L. Baugh & Co., and he is bound by his own representation and by the note which he signed. I am inclined to think that in truth there was some special partnership between Baugh and Proctor with reference to this transaction.

I therefore find in favour of the plaintiff upon all the issues in the action, and direct judgment for the amount sued for, with interest from the 30th June, 1912, and costs, less a small amount agreed upon at $9 for which credit is to be given for stock sold by the Trust Company.

I am quite aware that there are minor matters which were discussed at length, to which I have not referred in what I have said. This does not mean that I have not considered these matters; but I find nothing in them to aid the defendant. On the contrary, there is much to indicate his enire lack of good faith.

It was strenuously urged that the proceedings for the incorporation of the company were irregular and that stock was not validly issued. All that was done was done under Baugh's supervision by his solicitor, and I can find nothing to invalidate the stock; but beyond this the agreement between the parties was one which related to the stock as it was, with all its faults. After the stock was sold Baugh acted as owner, and had his nominees substituted as officers of the company, and he really now controls the whole situation.

Pending this litigation the property of the company was allowed by Baugh to be sold to satisfy a small claim. The price realized was nominal. I cannot see how this in any way affects the issues in the action.

HON. MR. JUSTICE MIDDLETON. APRIL 22ND, 1914.

LAWSON v. BULLEN.

6 O. W. N. 257.

Limitation of Actions—Possession of Lane—Title to not Required by Placing Gates at Ends of.

MIDDLETON, J., *held*, that the erection of gates at the ends of a lane over which the person erecting them has a right of way is an equivocal act which may have been done merely with the intention of protecting the right of way from invasion by the public, and does not amount to a dispossession of the owner and so does not give a possessory title.

Littledale v. *Liverpool College*, [1900] 1 Ch. 19, followed.

Action for a declaration of plaintiff's ownership of a certain strip of land and for damages for trespass and other relief. Tried at the Toronto non-jury sittings, 23rd and 24th February, 1914.

H. R. Frost, for the plaintiff.

H. E. Rose, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The dispute in this action is concerning a strip of land used as a lane, immediately to the north of the recently constructed apartment house at the corner of Surrey place and Grosvenor street. This house is erected upon a parcel of land long owned by the late Mr. Baird. This parcel was enclosed to the north by a high board fence, separating it from the lane in question. Mr. Baird never had or claimed to have had any right with respect to this lane. The land north of Mr. Baird's property and south of Breadalbane street, according to the registered plan, was supposed to have a frontage of 135 feet by a depth of 80 feet. In fact, when a survey was made upon the ground it was found to overrun some two feet. This, however, is not material, save an indicating the reason for some slight discrepancy in the measurements, upon which, however, nothing turns.

In 1870 Ross, the then owner, sold the whole 135 feet to Stevens, and by divers mesne conveyances, the whole lot became vested in McLean. In July, 1877, McLean conveyed the south 85 feet of the 135 feet to McBean. McBean at this time built the four houses now found upon the land.

These, fronting on Surrey place, occupy the northern portion, leaving a strip to the south, which is the lane in question, and a narrow strip running, four feet wide north and south at the rear, which has been called for convenience "the alley." This lane and alley were apparently designed to afford a means of access to the rear premises of the houses, which constituted a solid row, without any other entrance to the rear save through the houses.

In July, 1877, McBean mortgaged each of these four houses to the British Canadian Loan Company. The descriptions contained in the mortgages were very carelessly prepared, so far as the rights of way were concerned. According to these descriptions, and as the fact is, each house was given a frontage of nineteen feet six inches, which would have left seven feet out of the eighty-five for a lane. Owing to the overplus the lane was actually approximately eight feet wide. In each of these mortgages the property was described as running to the westerly limit of an alleyway four feet in width, and it was conveyed with a right of way over and along the alley. The southerly house, known as number 21, was described as running to the lane. If one may speculate as to the intention, it was probably intended that the northern houses should have a right of way not only over the alley but also over the lane.

McBean afterwards conveyed the equity in the houses, dealing with the northern pair and the southern pair separately. In these conveyances of the equity of redemption, provision is made for the user by the tenants of all four houses of both the alley and the lane. The conveyance of the southerly house covers also the fee simple of the lane, subject to the rights of way conferred. This lane, it must be borne in mind, had not been included in any of the mortgages to the British Canadian.

Subsequently, the equity of redemption in all the properties became vested in Joseph Dickey, so that save for the rights outstanding in the mortgages, there was unity of seizen, and the rights of way as such would cease to exist. Dickey, however, made default in payment of the mortgages, and in October of 1884, the three northern houses were sold to Mr. S. H. Janes, who subsequently conveyed to the late Mr. Gooch. About the same time the southern house was sold to the late Mrs. Lawson; the conveyance being made a little later, the 19th January, 1885. In all these

conveyances the description followed the description contained in the mortgages.

It was assumed by both Gooch and Lawson, not unnaturally, that they alone were interested in this lane. The Lawsons knew quite well that the title to it had not been conveyed to them; but they assumed that the lane existed solely for the convenience of the four houses.

In 1888 it was found that this open lane had become somewhat of a nuisance, and it was agreed between Lawson and Gooch that gates should be erected, Gooch paying three-quarters of the expenses, Lawson paying one-quarter. If it be material, it is quite clear that this was not done with any idea of affecting Dickey's rights in any way. It was no doubt thought that when the houses had been built and this strip had been set apart as a lane for the four houses, it had practically been dedicated to that purpose and that no substantial interest remained in the owner of the fee.

When the houses were originally constructed the back-yard of the Lawson house was separated from the lane by a fence extending from the rear of the house to the alley. In this fence opposite the back kitchen door, was a gate for the purpose of affording convenient access to the lane. After the gates were erected this fence was suffered to fall into disrepair, the gate disappeared, the fence gradually disappeared. and now nothing remains but a small portion near the other fence.

The tenants of the three northerly houses used this alley and lane for the purpose for which it was originally intended, and brought their ashes and garbage out through the rear of their respective yards down the alleyway, depositing them in an unsightly and unsavory heap in the corner of the alley and lane. The city scavengers periodically backed in through the lane and removed the accumulation. The gate was not always fastened, but when closed, was always opened to enable the scavenger to discharge his functions.

The result of the enclosure by gates and the decay of the fence was to practically bring this laneway into the back premises appurtenant to the Lawson house. No doubt they strung clothes lines across it and occasionally used it for various purposes. In the summer time chairs were placed upon it; more recently a hammock was strung across part of it; and no doubt a sence of proprietorship has gradually sprung up in the minds of the Lawsons.

The Lawsons continued to live on the property until 1897, when they rented the house and went to live on Sherbourne street, returning to Surrey place in 1904. In the meantime the house was occupied by a series of tenants.

In 1894 or thereabouts the ashes and garbage deposited at the corner of the lane had become a considerable nuisance, and the Lawsons complained to the city officials. The result was that from then onward the occupants of the northern houses were required to place their garbage and ashes in receptacles at their back doors in the alleyway. The scavenger, then, backing into the lane, went up the alleyway and removed the ashes and garbage.

I am asked to treat as an assertion of exclusive title to the lane. I do not think this is so. What was done was not by way of assertion of title; it rather constituted an admission of the rights of the occupants of the houses at the north, and the city officials required this right to be exercised in a way that would not cause a nuisance.

As the process of garbage removed evolved the practice of placing ashes, etc., to the rear was largely discontinued, and the ashes were carried in most instances, from the front cellar entrance and placed upon the street. This again has no doubt contributed to the Lawsons' feeling of proprietorship.

Apart from what has been stated, there are one or two specific acts much relied upon. One of the owners stored a launch in the lane in 1905, during the winter months. During the winter of 1909-10 he stored a somewhat larger boat there. During these times the gate was no doubt kept closed.

Some time about 1904 the city started assessing the owners of the fee in lanes which had never been formally dedicated to the public. About that time Mr. Dickey, on receiving his assessment notice, came up and looked at the property, no doubt going upon it. This is relied upon as an entry which would stop the statute from running.

Some other minor incidents have been mentioned, which appear to me to have no bearing whatever upon the dispute.

I am not here concerned with the question as to whether there ever was an easement in favour of the northern houses, nor am I here concerned with the question whether that easement had been extinguished. The dispute before me is, I think, quite apart from these questions.

When Mr. Baird recently sold to Mr. Bullen, Bullen undertook to erect his apartment house up to the northern boundary of his own land. He then found the so-called lane

enclosed and apparently forming part of the Lawson property. He knew that he had no title of any kind to it, yet he took down the southern fence—as to which there is probably no objection—removed the gates, and proceeded to use the lane as a means of access to his property. He hunted up Mr. Dickey, and on the 18th of March, 1912, obtained from him a conveyance of the lane, taken in the name of Mr. Ira Standish, his solicitor; and he justifies the user of this lane by his ownership under this conveyance. He is within his right, unless the Lawsons have acquired a possessory title, as against Dickey, his grantor.

I think it is very doubtful whether the plaintiff had shewn any such continuous possesssion as would in any aspect of the case establish a possessory title; but I need not discuss this at length, as *Littledale* v. *Liverpool College*, [1900] 1 Ch. 19, shews that the erection of gates at the ends of the lane over which the person erecting the gates has a right of way is an equivocal act which may have been done merely with the intention of protecting the right of way from invasion by the public, and does not amount to a dispossession of the owner, and so does not give a possessory title.

Here as already pointed out, the inference from the facts proved is that there was no intention of doing more than necessary to exclude those members of the public who were making this strip a nuisance; so the case in hand does not raise as many difficulties as there were in the English case.

In the use of the lane there was some injury to the building. The defendants have paid $25 into Court. I think this is enough to compensate for this damage.

Under all the circumstances, while I dismiss the action, I think it is not a case for costs.

Some question was raised as to the conveyance from Dickey to Standish by reason of the description forming a cloud on the Lawsons' title to the land conveyed to them. No claim is made under it to more than the lane; and, if so desired, the judgment may declare that it does not form any cloud on the plaintiff's title to the land on which the house stands.

HON. MR. JUSTICE MIDDLETON. APRIL 22ND, 1914.

OCEAN ACCIDENT CO. v. GILMORE.

6 O. W. N. 255.

Insurance—Automobile—Action to Recover Money Paid on Policy—Fraudulent Claim.

MIDDLETON, J., *held*, that the proper inference from evidence was that defendant deliberately placed his automobile upon the railway tracks where it was destroyed. Judgment for plaintiffs for amount paid under the policy with costs.

Action to recover amount paid by plaintiff to defendant under a policy upon an automobile destroyed by being run down by a Grand Trunk train, the ground being that the payment was procured by the fraud of defendant, who, it was said, placed the automobile upon the railway track for the purpose of bringing about its destruction, and that he falsely and fraudulently claimed that an accident had taken place. Tried at Toronto non-jury sittings, 20th April, 1914.

M. K. Cowan, K.C., for plaintiff.

J. M. Godfrey, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—The evidence in this case is extremely unsatisfactory.

On Sunday evening, 2nd November, 1913, at eight o'clock, Gilmore left his place in West Toronto, in company with Cochrane, a half brother of his brother-in-law, in the automobile, for the purpose of having Cochrane's assistance in the adjustment of the carburetor, which it is said was not working satisfactorily. The night was dark and cold with rain and snow. The automobile was an open roadster. Instead of contenting themselves with a trip upon the city streets, they headed for the country, along the Dundas Road for some distance, turning south and reaching the Lake Shore Road near Port Credit. Some time was spent in making adjustments to the carburetor, and finally in cleaning it out, as it became clogged with sand. In the result they were at the Rifle Ranges near Port Credit at 11.30 p.m. This hour is fixed by two reliable witnesses, and is admitted by Gilmore.

The next thing known definitely is that at 1.40 a.m. the car was standing upon the Golf Club crossing of

the Grand Trunk Railway, about half a mile from where it was two hours before. The car was then struck by a Grank Trunk freight train and destroyed. The train officials state that there were no lights upon the automobile at the time.

Gilmore can give no satisfactory account of what took place in these two hours. His efforts to excuse himself, and his version of the affair, are unworthy of belief. Both he and Cochrane stayed at the Port Credit station till morning, when they returned to town, and immediately a claim was made under the policy in question. Each gave to the insurance company a definite statement of what had taken place.

It should be mentioned that Gilmore had bought this car as a second-hand automobile in the previous July, for $900, paying $100 down, the balance secured by a note. He bought it as a speculation, expecting to easily sell it at an advance, but his expectations had not been realized. Two months prior to November he had been using the car in his business and for pleasure, and had had some difficulty in its operation. He had insured it against accident for $1,200, and admits that he was under the impression, until after the night in question, that on the happening of an accident resulting in total destruction he could collect $1,200 from the company.

The company paid $800, as being the value of the car; payment being made on the 26th of November, 1913. Cochrane claimed $300 from Gilmore, and Gilmore refused to pay this. In the result, Cochrane informed the company that the car had been intentionally destroyed. Gilmore on his part laid an information against Cochrane for endeavouring to extort money by threats. This charge was tried at the sessions, and the jury disagreed. Cochrane now tells a story shewing that the car was deliberately destroyed by Gilmore.

I find Cochrane to be an utterly unreliable witness, and if the case depended on his evidence alone, the plaintiffs would fail. An attempt was made to corroborate his evidence by his wife. I cannot believe her story either.

The counsel for Gilmore argues that inasmuch as I do not believe Cochrane, and as Gilmore has denied the crime charged, and as the onus is upon the plaintiffs, I cannot

make the necessary affirmative finding merely because I quite discredit Gilmore.

I think this is too norrow and wooden a view of my duties. While I do not believe either of the men who participated in the transaction of the night in question, I think the proper inference from the evidence is that the car was wilfully destroyed by both. The extraordinary proceedings already outlined, of taking this sick automobile on a dark and wintry night to this lonely spot to adjust its carburetor, the unexplained proceedings between 11.30 and 1.40, the very unsatisfactory evidence of these two men at the trial, all point irresistibly to the one conclusion. I have a suspicion that the $300 which Cochrane expected to receive was the difference between the cost of the machine, $900, and the $1,200 insurance, and that the real trouble arose when it was found that the company would not pay anything beyond the value of the destroyed automobile. But this is really beside the mark.

I realize fully the difficulties suggested in making a finding such as this, but I think, unless wilfully blind, no other conclusion is open to me.

Judgment will therefore be for the plaintiffs with costs