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HON MR. JUSTICE MIDDLETON. JUNE 23RD, 1913.

ANTISEPTIC BEDDING CO. v. GUROFSKI.

4 O. W. N. 1552.

Evidence—Foreign Commission—Necessity of Evidence—Principles of Granting—Terms.

MASTER-IN-CHAMBERS (24 O. W. R. 613; 4 O. W. N. 1309) granted defendant an order for four foreign commissions to take evidence where he had not been in default and where the evidence sought was necessary for his defence.

Ferguson v. *Millican*, 11 O. L. R. 35, referred to.

MIDDLETON, J., dismissed an appeal by plaintiff from above order, costs to defendant in any event of the cause.

Hawes v. *Gibson*, 20 O. W. R. 517; 22 O. W. R. 46, and *Re Corr*, 22 O. W. R. 537, distinguished.

Appeal by plaintiff from order of the Master-in-Chambers (24 O. W. R. 613), directing the issue of commissions at the instance of the defendant.

F. Arnoldi, K.C., for the plaintiff.

F. Aylesworth, for the defendant.

HON MR. JUSTICE MIDDLETON:—I do not think that this case possesses any of the special features calling for the imposition of terms as in *Hawes* v. *Gibson*, 20 O. W. R. 517; 22 O. W. R. 46; and *Re Corr*, 22 O. W. R. 537. The defendant has a right to present his case as he pleases, unless the Court is satisfied that his conduct is vexatious or *prima facie* unreasonable. I am not so satisfied in this action.

The plaintiff claims that Gurofski, its agent, is liable for the loss of goods by fire because he undertook to place and failed to place insurance; that the agent collected the premiums from the plaintiff, but, failing to pay them over, the policies were cancelled. What the defendant seeks to estab-

lish is that the premiums were by consent of the insurance companies taken into account and dealt with in such a way as to amount to payment, and that therefore the cancellation which the insurance companies made, or attempted, was wrongful and can impose no liability upon him.

The appeal will be dismissed, with costs to the defendant in any event.

1ST APPELLATE DIVISION. JULY 2ND, 1913.

RICE v. SOCKETT.

4 O. W. N. 1570.

Contract—Work and Labour—Building of Silo—Findings of Trial Judge—Counterclaim—Damages for Loss of Crop—Evidence—Quantum of Damage.

SUP. CT. ONT. (1st App. Div.) dismissed appeal from judgment of County Court of Wellington, dismissing plaintiff's action for work and labour supplied under a contract for the construction of a silo, but reduced the damages awarded defendant upon his counterclaim from $96 to $40.

Appeal by plaintiff from judgment of the County Court of the county of Wellington, dismissing an action for $180 for work and material supplied for the construction of a silo, and allowing the defendant $96 on his counterclaim for damages for defective work. See report of appeal from judgment at former trial, 23 O. W. R. 602, 27 O. L. R. 410.

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

R. L. McKinnon, for plaintiff.

J. J. Drew, K.C., for defendant.

HON. MR. JUSTICE MAGEE:—The plaintiff was to furnish the cement and doors and do the work. The defendant was to provide the gravel and stone and water. The plaintiff admits that he was to do a first-class job, so far as his own material and the workmanship were concerned.

The defendant alleges that the work is very rough and defective, the concrete improperly mixed so that it does not form a hard, solid wall, and has, in many places, so little binding that it readily disintegrates, and it would be unsafe

to use. He also alleges that two of the series of horizontal reinforcing rods, which were to go entirely round the silo at different heights and to have the ends hooked together and to be imbedded in the cement, do not go around but stop at the sides of two doors or openings, and consequently the ends are not hooked together, and do not meet, but are merely bent and anchored in the cement.

It is unnecessary to enter into the question whether as to these two rods the failure to fasten them together was owing to a change made at the defendant's request in the height of the doors or openings, or whether, when that change was made, the rods should have been put in a different position. Although the defendant objected to them, and by changing the interval between the rods the subsequent ones were hooked together, it does not appear that he in any way required the plaintiff to change the two rods which he objected to, but allowed him to go on and finish the silo.

But on the question of the workmanship in the concrete wall itself, which the learned trial Judge has found to be defective, whatever opinion one might be inclined to form from merely reading the evidence, which is contradictory, the weight to be attached to the statements of individual witnesses is a matter which the trial Judge has so much better an opportunity of forming an opinion upon that an Appellate Court would not be justified in the circumstances in interfering with his conclusions. He has dealt very fully with the various differences between the parties, and has held that the plaintiff did not in fact perform his contract, and consequently cannot claim payment for it.

The evidence was fully dealt with by counsel, but there does not seem warrant for considering that the learned trial Judge did not reach a correct conclusion when he finds lack of sand, which the defendant offered, lack of cement and lack of proper mixing, resulting in a honeycombed or crumbling wall, and when he prefers to believe the defendant instead of the plaintiff's foreman, who contradicts him.

The defendant has not only resisted payment for the silo but has counterclaimed for damages sustained through not being provided with a silo for the preservation of a crop of eight acres of corn which, in expectation of its construction, he planted and cultivated; and for this the learned trial Judge has awarded $96 to the defendant. The learned trial Judge appears to have been fully justified in finding that it was in the contemplation of the parties that the silo was to

be used for a crop of corn that year. The defendant claims that having no place to put the crop, he left it in the field, feeding it to his cattle as he could, but that in that way one-half of his crop was lost. He himself could not give any idea of the amount of his crop, except that it was a good one, nor of its value, nor of his loss. The learned trial Judge appears to have arrived at the sum of $96 by computing the crop as 12 tons to the acre, and worth $2 per ton in the field, and the loss at one-half the crop. But the same expert witness, whose valuation the learned Judge accepts in this regard, only puts the difference between the use or non-use of a silo as from 4 to 20 or 30 per cent. in favour of the former, which perhaps, he means to be exclusive of the loss from vermin and birds, but he apparently considers the main loss of leaving the corn in the field to be the exposure to the weather, which he puts at 20 per cent. or more, if till late in the season. The defendant made no effort to dispose of any of the corn, nor, so far as appears, to increase his stock of cattle for the purpose of using it. It appears that it is unusual to sell corn, but it does not appear that farmers or others might not be ready to buy. The defendant did nothing to minimize his loss, and singularly enough, grew as much corn the following year, having no silo. Taking his statement that he lost half the corn, there is no evidence that such loss was the result of not having the silo. Upon the evidence $40 would, I think, cover all that the plaintiff should pay.

The judgment should, I think, be varied by reducing the damages on the counterclaim to that amount. With that exception the appeal should be dismissed, but without costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE HODGINS agreed.

HON MR. JUSTICE LENNOX. JUNE 30TH, 1913.

MALOT v. MALOT.

4 O. W. N. 1577.

Statute—Validity of Marriage—1 Geo. V. c. 32—Constitutionality of—Evidence—Refusal to make order.

LENNOX, J., refused to make an order in an action to have a marriage declared null and void under the provisions of 1 Geo. V. c. 32, upon the ground that he was neither convinced as to the truth of the evidence tendered nor of the constitutionality of the statute.

Action to have a certain marriage declared null and void under the provisions of 1 Geo. V. ch. 32.

After the judgment herein reported, 24 O. W. R. 714, the learned Judge heard the evidence of the defendant Carl Malot.

F. A. Hough, for plaintiff.

HON. MR. JUSTICE LENNOX:—Since the hearing at Sandwich I have heard the evidence of Carl Malot. I am not convinced that the facts in this case have been honestly or fully disclosed. I am very far from being convinced, assuming that I have jurisdiction, as to which I entertain the very gravest doubts, that upon the merits the plaintiff is entitled to relief. The story the parties relate is a most improbable one, and all things taken into account in this case I am not able to say that I believe it; and if I were making an order it would be adverse to the plaintiff's claim. In the opinion I have as to jurisdiction it is not necessary that I should give effect to my views as to the result of the evidence—the parties may be able to put it in a more favourable light at another time—I simply decline to make any order.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 8TH, 1913.

NEOSTYLE ENVELOPE CO. v. BARBER ELLIS LTD.

4 O. W. N. 1585.

Patent—Action for Royalties—Patented Envelope—Non-Compliance with Postal Regulations—Substitution of Different Envelope—Refusal of Defendants to Accept—Failure of Consideration—Departure from Specification—Granting of Inconsistent Licenses—Dismissal of Action.

FALCONBRIDGE, C.J.K.B., dismissed an action for royalties for the use by licenses of a patented envelope, holding that as the form of the envelope contracted for had been materially changed to comply with the postal regulations, the altered form was not the article contracted for and there was a failure of consideration.

Action brought on an agreement dated 26th September, 1910, whereby plaintiffs granted to defendants a license for eighteen years for the manufacture and sale of envelopes said to be covered by a certain patent of the Dominion of

Canada, and in consideration thereof defendants agreed to pay to the plaintiff a certain royalty on a minimum quantity to be manufactured by defendants, the quantity running into the millions, and increasing year by year up to a certain period. Tried at Toronto.

C. S. MacInnes, K.C. and C. C. Robinson, for plaintiffs.

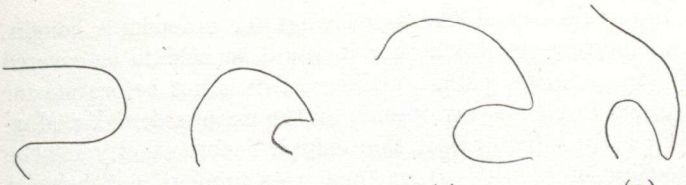
G. F. Shepley, K.C., and G. H. Kilmer, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The patented envelope was alleged by plaintiffs and was supposed to be so constructed that circulars and other printed matter within the classification of third-class postal matter enclosed therein, were secured from falling out of the envelope and were secret, but that the end of the envelope being open, the rate of postage would be that payable in respect of third-class matter which was much less than the usual letter rate.

Section 82 of the Postal Regulations of the Dominion of Canada provides as follows: "Every packet of printed or miscellaneous matter, must be put up in such a way as to admit of the contents being easily examined. For the greater security of the contents, however, it may be tied with a string. Postmasters are authorised to cut the string in such cases if necessary to enable them to examine the contents; whenever they do so they will again tie up the packet."

It is claimed by defendants, and I find to be proved, that the envelope in question when in use and in transit through the mails cannot be opened so as to allow the contents to be examined and replaced without destroying the envelope. The vice-president of the plaintiff company, H. A. Swigert, made a demonstration of the envelope in the witness box, and manifestly somewhat to his own surprise did succeed in opening one without destroying the envelope; but no unskilled person could possibly do so, and no postmaster or post office clerk endeavouring to open it in accordance with the regulations could do so without destroying the envelope, except occasionally and by accident.

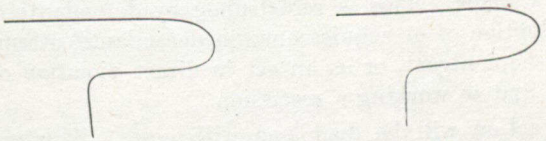
The device is as follows; one of the end flaps terminates in a hook of this shape, (exhibits 7 A. B. C. & D.)



(A) (B) (C) (D)

Before the envelope is fastened this hook is placed in such a position that it engages with a part of the envelope which is already gummed together. As I have said before Mr. Swigert did succeed in disengaging one, bending the envelope so as to make a belly like a sail and thus managing to disengage it without destruction. The defendants, who manufacture and sell envelopes on a very large scale, submitted a sample of this envelope to the post office authorities, viz., to Mr. Ross, Chief Post Office Inspector, who condemned the device and held that the proposed use of that envelope at the rate of postage for third-class matter would infringe the postal regulations. Apart from any rule of the department, I find as a fact that it does infringe the regulation for the reasons I have stated above.

A great deal of correspondence ensued, defendants claiming to rescind the contract altogether, and the plaintiffs made a modification of the envelope above described, and secured from the post office department the privilege of enclosing printed matter in it to be mailed at one cent for two ounces. These envelopes are filed as exhibits 9, and the shape of what was formerly a hook is as represented below:



It is claimed by the defendants that this is not what they bought and this I find to be the case. It is true that it is easier to get at the contents but it presents very little, if any advantage over the old "sealed yet open" envelope, exhibit 10. In exhibits 9 the construction shews a kind of hook, but is a very emasculated hook and does not engage with anything. There is a little of what Mr. Swigert calls the "cam action" which I take to be the result of a motion outward from a point which is not a true centre thereby causing a little additional friction in withdrawing the flap. But as

I have said before this is not what the defendants bought. I doubt very much whether it would be held to be covered by the plaintiffs' patent, although this is not before me for decision in view of my opinion on the main issue. Mr. Maybee, patent solicitor, says that exhibit 7 more exactly fills the specification of the patent than does number 9, 7 being a definite hook which engages the gummed portion. Exhibit 9 shews a curved instead of angular disposition,—it inclines outward when in position, so is much less effective and is easily disengaged. Exhibit 9 has very little effect in preventing the extraction of the contents. Maybee opened one quite easily the first time he tried. But I have said before I am not called on to pass on this point.

I find that the consideration of the contract has wholly failed and that the plaintiffs cannot recover. Apart from any question of representation or misrepresentation by plaintiffs' agent the parties were contracting with reference to an article which would answer the requirements of the Canadian Post Office Department, so as to send the matter enclosed therein at the lower rate of postage, and this article failed to answer them.

There is another element in the case which I am also about to pass over, but it might present a serious difficulty in plaintiffs' way if I had otherwise taken a favourable view of their case, and that is the effect of the license granted by plaintiffs to the W. Dawson Company on the 10th August, 1911, for the manufacture and sale of the envelope east of Kingston, and the privilege of selling in Manitoba and western Canada. This is relied upon by defendants either as an adoption of or acquiescence in defendants' attempt to rescind the contract, or as an act in direct violation of the contract and so working a rescission.

The action will be dismissed with costs. Thirty days' stay.

HON. MR. JUSTICE BRITTON. JULY 8TH, 1913.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

4 O. W. N. 1583.

Mortgage—Judgment for Redemption or Sale—Appeal from Master's Report—Subsequent Encumbrancers — Who are — Subsequent Purchasers—Evidence — Costs — Discretion of Master as to—Appeal Dismissed.

BRITTON, J., dismissed with costs an appeal from the report of the Local Master at Ottawa in a mortgage action.

Appeal by the defendants McKillican and Smith from an interim report made by the Master at Ottawa, dated 13th May, last, heard in Weekly Court at Ottawa, May 31st, 1913.

A previous report was made by the Master, and an application by way of appeal from it was made to HON. MR. JUSTICE SUTHERLAND on various grounds to open it up. This appeal was dismissed, see 22 O. W. R. 791.

An appeal from that judgment was taken to a Divisional Court. That Court thought the facts not fully found by the Master and sent the case back for further inquiry, see 23 O. W. R. 137.

After further enquiry the Master made the report which is the subject of the present appeal.

C. H. Cline, for appellants.

F. A. Magee, for plaintiffs.

HON. MR. JUSTICE BRITTON:—I have before me the findings of fact by the learned Master, his report, and his reasons for his findings and for his report. The appeal was argued ably and at length before me at Cornwall and in addition there were placed before me the written arguments used before the Master and before my brother Sutherland, and before the Divisional Court.

I am of opinion that subsequent purchasers of portions of the mortgaged property, who have given mortgages thereon are not necessarily subsequent encumbrancers; within the meaning of the rules. The plaintiffs were at liberty to make such of the owners of, (as put by the Master)

"parts of the equity of redemption" as they, the plaintiffs, thought proper, parties to the action.

The plaintiffs were not bound at all, as parties, who appeared to have claims to portions of the mortgaged lands.

I cannot say that the learned Master was wrong in finding that there was nothing due by defendant McKillican to the plaintiffs. Having so found, it would have been more logical to have given McKillican her costs. I would do so now, but by the judgment of the Divisional Court costs were left to the discretion of the Master. I am bound by that judgment and cannot interfere with the discretion vested in him. A very large amount of costs has already been incurred in this case, in fact the question is now mainly one of costs, as it appears that the residue of the mortgaged property is amply sufficient to satisfy the balance of the mortgage debt but I am bound to say that some of the points raised by Mr. Cline for appellants, are important and difficult and would seem to invite the opinion of an Appellate Division.

I deal only with the last report and reasons for it, not with any previous opinions or findings during the enquiry.

I agree with the Master that the defendant Smith is not, in this action, and as the matter now stands, entitled to an account and statement in detail of the plaintiffs' mortgage account and of the plaintiffs' dealings with the mortgaged property.

The appeal will be dismissed, under the circumstances, without costs.

HON. MR. JUSTICE BRITTON. JULY 12TH, 1913.

DOUGLASS v. BULLEN.

4 O. W. N. 1587.

Trespass—Injunction—Dispute as to Boundaries — Interim Injunction—Scope of—Damages Sustained under—Trivial Nature of —Reference Refused.

BRITTON, J., dismissed an action for an injunction restraining an alleged trespass on plaintiff's lands, holding that an injunction should not have been sought where the alleged trespass was at best only technical and trivial, but refused to award defendants damages by reason of the interim injunction obtained, holding that its scope had been misunderstood by the defendants and that the damages claimed were too remote.

Action for an injunction restraining defendant from trespassing on plaintiff's lands and counterclaim for damages suffered by reason of an interim injunction order herein.

A. McLean Macdonell, K.C., and O. H. King, for the plaintiffs.

Shirley Denison, K.C., and Standish, for the defendants.

HON. MR. JUSTICE BRITTON:—On the 10th June, 1912, the plaintiff, Douglass, was the owner, and Woods was the tenant, of parts of building lots 171, 172 and 173, on the east side of Surrey place in Toronto, forming part of the Elmsley Villa estate, according to a plan or survey of part of park lot 10, made by J. O. Browne, D.P.S.

The plaintiff Douglass purchased in 1886 and the conveyance to him describes the land by metes and bounds. Since his purchase the plaintiff, Douglass, has been in undisputed possession. In the early part of 1912 the defendant purchased the property lying to the south of plaintiff's for the express and avowed purpose of erecting thereon a large and expensive apartment house. The plaintiffs were quite opposed to such a building close to their southern boundary, and they were on the alert to prevent the defendant trespassing to the slightest extent in prosecuting his building operations.

The plaintiffs allege that immediately before the commencement of this action, viz., on the 10th June, 1912, a surveyor of the defendant entered upon plaintiff's land and planted a post which the surveyor alleged marked the north-east boundary of defendant's land. The plaintiffs allege that the said surveyor assumed to determine for defendant, the southern boundary line of the plaintiff's property, that being the northern boundary line of defendant's property. The plaintiffs allege that this post was at least three inches upon the land of the plaintiffs, and that the so-called boundary line encroached upon plaintiffs' land distances varying from one and three-quarter inches to nine and a half inches. Because of this action of the surveyor the plaintiffs, on the 10th June, applied for and obtained an interim injunction order. The usual undertaking as to damages was given, and the plaintiffs were allowed to file and use further material on motion to continue the injunction. The motion to continue was argued on the 16th July, 1912, and continuance was refused. By that order the costs of and incidental to both

motions were reserved to be disposed of at the trial or other final disposition of this action. The defendant then proceeded with the building, and, with the exception of that part of the northern foundation wall, called the footings, erected it wholly upon his own land. There is now no claim for injunction.

At the opening of the trial before me, counsel for plaintiffs stated that the action was to fix the boundary between these properties of plaintiffs' and defendant, and the plaintiffs asked for a declaration as to the true boundary line.

During the trial counsel for plaintiffs frankly stated that although the encroachment by the footings is something to complain of, that is a comparatively trifling matter, and the action was not brought in reference to these. As to these footings the defendant also alleges that the matter was of trifling character, and he has paid into Court $25 alleging that sum to be sufficient compensation to plaintiffs if entitled to anything.

The defendant claims large damages consequent upon the injunction, and asks for a reference as to these.

I am of the opinion that the plaintiffs were not entitled to proceed by injunction. They acted hastily because they did not want an apartment house close to their southern boundary. They thought defendant intended to act in a high-handed and arbitrary manner and they looked with alarm upon every movement the defendant made. The plaintiffs had the right of course to watch and protect even an inch of their territory, but in a matter of boundary, pending negotiations, proceeding by injunction was not the authorised way.

On the 22nd May, 1912, the plaintiff Woods, and defendant's solicitor Standish, had an interview in which the situation was discussed. What took place is set out in a letter of Mr. Standish to Mr. Woods of 23rd May. The material thing was the discussion about the boundary. Mr. Woods gave Mr. Standish to understand that he, Mr. Woods, had under consideration the erection of buildings on lea of plaintiffs' lands, and the plaintiffs proposition is that if the defendant would build up to the line, the plaintiff would do the same, or that the plaintiffs would build as far north of the line as defendant would build south of it. In that letter of 23rd May Mr. Standish said that it would be more profitable and in Mr. Bullen's interest to build on the boundary

line. The question arose about the defendant getting light, and Standish said further, "It is almost a certainty that Mr. Bullen will so build."

On the 24th May Mr. Woods replied, saying that if defendant wants to purchase "Let him make an offer and I will consider it," and he further said that he was in touch with an institution, and price named was $20,000. He also stated that he would consider an offer, but that defendant could not go through his house to inspect it.

On the 28th defendant's solicitor wrote declining to make any offer to purchase without inspection, but inviting negotiations as to right of light over southerly ten feet of plaintiffs' land. On the same day defendant's solicitor wrote a further letter to Mr. Woods which is as follows:—

"Since writing to you this morning it has occurred to me that in putting in the foundations of the "Athelina" it will be necessary to remove the fence in the rear of 91 Breadalbane street, the old fence. Mr. Bullen wishes to give you as little trouble as possible and would be glad to know if you have any suggestions to make in regard to the matter. He would like to meet your views so far as may be."

The plaintiffs then placed the matter in the hands of their solicitors, who wrote to defendant's solicitors on the 3rd June, threatening that unless defendant was prepared to make amends for his trespass it would be necessary to commence an action and apply for an injunction. To this defendant's solicitors reply, discussing the question of old fences being in direct line of the northerly boundary, and mentioning that there was an overhanging eave to the north of the north wall of the stable, and closing thus, "Our client has not the slightest intention of encroaching in any way on your client's property, and has not done so. You will surely admit that our client is entitled to build up to the limit of his own property and he proposes to do this." "This limit is shewn on the survey which you have examined."

The plaintiffs' solicitors in letter of the 7th June, took exceptions 1st, to the statement that defendant had not extended his building operations beyond what he was entitled to do, and also as to the survey being correct. The plaintiffs' solicitors thought it would be only proper to issue a writ. On the 8th June defendant's solicitors wrote an argumentative letter in reply, and gave the plaintiffs notice that if by

reason of the injunction the defendant would sustain damage he would hold plaintiffs responsible.

The evidence satisfies me that the defendant did not intend to take, or use or injure any part of the plaintiffs' land. There was no question of removing plaintiffs' fence further than was necessary to enable defendant to work to the line.

The defendant did speak of claiming the land to the post mentioned by Wilson, and did speak of the projecting eave, or cornice, of the stable, but apart from a suggestion as to his right he had done nothing up to the time of issuing the writ beyond what seemed reasonable under the circumstances.

The acts complained of, even if done, were not likely to do any irreparable damage to the plaintiffs. If the defendant had actually commenced to build any part of his wall upon plaintiffs' lands he would have done so at his own risk and loss, and would be obliged to pay damages, if any, to plaintiffs, and money in payment of damages would be adequate remedy. Then the matter was in fact comparatively trifling to the plaintiffs.

An injunction might be calculated to do the defendant great damage and if it did not in fact injure it cannot be held to excuse the plaintiffs. This seems to me a case where from first to last there was no intention to injure the plaintiffs, and had the plaintiffs attempted in a reasonable way to meet the defendant a settlement of all of the small matters in dispute could have been arrived at. My inference from the evidence is that the defendant did not at first intend to claim or encroach upon any land in possession of plaintiffs. After relations had become strained, the defendant apparently thought that if his conveyance called for it, and if the surveyor was right in giving him an extra few inches he would take it, but he did not intend to fight for it, nor did he in fact take it, and has not in this action claimed it. The plaintiffs point to defendant's examination for discovery as shewing his real intention before injunction order issued. Defendant's answers upon that examination go no further than to challenge or doubt plaintiffs' paper title to as much land as they had in possession. The defendant did not set up any claim beyond what I have above stated.

The plaintiffs' claim for injunction fails. They had a cheaper, a more just and convenient remedy for all the alleged wrongs done by defendant.

Neal v. *Rogers*, 22 O. L. R. 588, 1910.

The defendant says that owing to the injunction he was unable from June 10th to July 16th to proceed with the erection of the apartment house and thereby sustained heavy damages. These he claims under the plaintiff's undertaking, and asks for a reference.

The order is that the defendant "be restrained from wrongfully entering upon plaintiffs' lands, from pulling down the plaintiffs' fences, from wrongfully taking away the support of the plaintiffs' lands, from encroaching on the boundary of the plaintiffs' lands with excavation for a building, or in any other way trespassing upon the lands of the plaintiffs as set out in the writ of summons."

There seems nothing in that order to prevent the defendant from doing all that he says he desires to do, or all that he afterwards did, viz., erecting the apartment house upon his own land, unless the description by metes and bounds in the plaintiffs' writ was erroneous and so misled the defendant.

The plaintiffs are responsible at least to the extent of costs for wrongfully proceeding by injunction. The plaintiffs put the law in motion, put the defendant upon his defence, but the plaintiffs are not responsible in damages which, if sustained, resulted from an erroneous interpretation by the defendant of the injunction order.

In this case the defendant has in answer to plaintiffs' demand, furnished particulars of alleged damages. These particulars fill 6½ pages, and the damages are of a very varied character, amounting to very many thousands of dollars.

The Court is not bound to grant an enquiry as to damages even where the defendant has sustained some damage by the granting of the injunction, but it has a discretion and may refuse any enquiry if the damage is trivial or remote. See *Smith* v. *Day* (1882), 21 Ch. D. 421. A considerable amount of defendant's claim is for alleged loss of rent. It was held in the case just cited that damage because a person having agreed to rent, refused, as building not completed in time as delayed by injunction, ought not to be the subject of enquiry. The damages ought to be confined to

the immediate natural consequences of the injunction under the circumstances which were within the knowledge of the party obtaining the injunction. The damages claimed are in my opinion too remote. The defendant gave notice to the plaintiffs that he was liable to suffer damage by reason of the injunction and that he would hold the plaintiffs responsible, but as to such damages as are claimed the plaintiffs could have no knowledge and they could not be within their reasonable contemplation when order asked for. Damages should be confined to circumstances of which plaintiffs had notice. See Kerr on Injunction 592.

No doubt the defendant has suffered some damage but I cannot sort out damage by reason of the injunction distinct from loss of time and trouble and detriment arising from litigation, so no enquiry should be directed. See *Gault* v. *Murray*, 21 O. R. 458.

There will be judgment declaring a line as now agreed upon between the parties to be the true boundary line between the properties of plaintiffs and defendant. This line may be described, if the parties agree, by Mr. Van Nostrand, Surveyor. If they do not agree I will set out the line in the judgment, upon the minutes being spoken to.

The plaintiffs will be entitled to the $25 paid into Court as full compensation for the lapping or extension of footings of defendant's wall upon the southern part of plaintiffs' land.

In so far as the action was for injunction it will be dismissed with costs payable by the plaintiffs to the defendant.

There will be no damages to defendant and no enquiry will be directed. In so far as defendant has made such damages a matter of counterclaim, it will be dismissed without cost.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1913.

RE IRWIN AND CAMPBELL.

4 O. W. N. 1562.

Arbitration and Award—Provision in Lease—Award or Valuation—Right to Appeal.

MIDDLETON, J., *held*, that there was no appeal from a decision of three valuators under a clause in a lease, it being a valuation not an award.

Re Irwin, Hawken & Ramsay, 24 O. W. R. 878, followed.

Application by the trustees of the Irwin estate by way of appeal from the award or valuation of three arbitrators. It was objected to that what was appealed from was not an award in an arbitration but a valuation under a clause in a lease and that therefore an appeal lay.

W. N. Ferguson, for appellants.

N. W. Rowell, K.C., and Geo. Kerr, K.C., for Campbell.

HON. MR. JUSTICE MIDDLETON:—Sir Glenholme Falconbridge has construed a precisely similar lease, in *Re Irwin, Hawken and Ramsay, supra*, and holds that it contemplates a valuation, not an arbitration.

It is my duty to follow his decision; so I express no independent view.

The application is, therefore, dismissed with costs.

HON. MR. JUSTICE BRITTON. JULY 16TH, 1913.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.

4 O. W. N. 1591.

Waters and Watercourses—Obstruction of Flow—Injury to Navigation—Damages to Navigation Company—Quantum of.

BRITTON, J., found in plaintiff's favour in an action for damages sustained by the alleged obstruction by defendants of the flow of the Rainy River, causing injury to navigation, and awarded plaintiffs $540 damages and costs.

Action for damages for alleged obstruction of the flow of the Rainy River, caused by the defendants' power dam, which rendered the said river less suitable for navigation by plaintiffs' boats.

I. F. Hellmuth, K.C., and Bartlett (Windsor), for the plaintiffs.

Glyn Osler, for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff company is the owner of certain steamboats and vessels used in navigating Rainy River and the Lake of the Woods. The head office was at Kenora, and the company had made arrangements

for the season of 1911 for the transportation of freight and passengers between the towns of Kenora and Fort Frances and intermediate ports. The two companies sued as defendants in this action, had constructed a dam across Rainy River, above the International Falls, and used this dam for the production of power by means of sluices and gates in the dam. The complaint of the plaintiff company is that during the season of 1911, the defendants by their dam, and by the operation of the gates and sluices therein, so obstructed the water that navigation in Rainy River was impossible for a considerable portion of the season, and the plaintiff company was unable to ply its boats between the towns of Fort Frances and Rainy River and intermediate ports.

The plaintiff company was ready for the season's business on or about the 17th day of June, and made several trips under difficulty between the towns of Rainy River and Fort Frances, and then was obliged to abandon that part of their route. The plaintiff company says that later on the water in the Lake of the Woods became so low, and by reason of the obstruction of the water by the dam of the defendants, and by the defendants' operation of their gates and sluices that the whole of the operations of the plaintiff company had to be abandoned for the balance of the season.

The plaintiff's company claims damages not only for the actual loss sustained during the season of 1911, but for serious damage to the company's future prospects of building up its navigation business on the waters of the Lake of the Woods and Rainy River.

The defendants are two companies, but under the same management and control, one, a Canadian corporation, called The Ontario and Minnesota Power Company, Limited, the other is The Minnesota and Ontario Power Company, incorporated in the State of Minnesota, one of the United States of America. This latter company denies that it has created or maintained any obstruction in the waters of the Rainy River on the Canadian side of the international boundary line between Canada and the United States of America. This last mentioned company, by leave of the Master-in-Chambers, and without admitting the jurisdiction of this Court or the propriety of service of notice of this action upon this defendant, out of the province of Ontario, has entered a conditional appearance, and alleges that it has not obstructed the waters of Rainy River within the province of Ontario, and in the alternative that it has not obstructed them in such manner

as to cause any damage or injury to the plaintiffs within Ontario, and so this defendant disputes the jurisdiction of this Court to entertain this action against it. The two defendants together, and for a common purpose, constructed the dam in question. The Ontario company did the work necessary on the Canadian side of the boundary line, and the Minnesota company did the work necessary on the United States side of such boundary line. The dam when and as completed is a continuous connected work extending completely across Rainy River from Fort Frances on the Canadian side to International Falls on the United States side.

The dam was constructed for the purpose of developing the water power at the point mentioned on Rainy River, and not for the purpose of storing water, or otherwise obstructing the natural flow of the waters of that river, but if the dam does so obstruct the natural flow of the waters as to cause damage to persons lawfully and reasonably using the river for the purposes of navigation, then the defendants are liable. If the dam, as a whole, so interferes with the flow of water as to cause damage to a person using the Canadian side of that river, the United States company is equally responsible with the Ontario company, therefore this Court has jurisdiction to entertain this action. The questions are entirely those of fact and were so presented at the trial.

The plaintiffs' steamers on the line between Kenora and Fort Frances, were the "Kenora" and the "Agwinde," the "Kenora" between the town of Kenora and Rainy River, and the "Agwinde" between Rainy River and Fort Frances. The latter boat on the trip up was to leave Rainy River at 7.10 a.m. and to arrive at Fort Frances at 6 p.m., calling at five small intermediate ports, and calling at any other place on the Canadian side upon being signalled. The evidence does not establish that there has been any such interference by the defendant with the flow of water as to cause damage to the plaintiff company in the running of the steamer "Kenora," or in the navigation of the Lake of the Woods. The plaintiffs' claim, if any, is only as to interference with the running of the "Agwinde." The defendants' contention is that the plaintiffs were engaged in a losing business, that Rainy River was not during the early part of the season of 1911, from a point below the Sault rapids to Fort Frances, easily, if at all, navigable for boats of the size of the "Agwinde," and that plaintiffs knowing this, sought to put the

blame upon the defendants, and to recover damages from them.

The case presents difficulty both as to liability of defendants, and if liable, as to the amount, and as to the proper measure of damages. It is of importance to know that up to the end of the season of 1910 the plaintiffs' company had not been a money-maker. The company had gone behind in the whole $23,588.31, and the defendants are not charged with being responsible for any part of that large loss. At the beginning of the season of 1911 there was a discussion in regard to a pier in the river, and in regard to repair of a dock at Fort Frances.

This is not material only so far as the correspondence speaks of the water in the river. On the 1st June, 1911, the president of plaintiff company wrote to the president of the Minnesota and Ontario Power Company as follows: "Our first steamer leaves Kenora June 17th, and the "Agwinde" will leave Rainy River June 18th. We understand you make a practice of closing off the natural flow of the river at any time it suits you, for the purpose of producing power. This, of course, is to the great detriment of navigation, and this company now protest against the natural flow of the river being interfered with by your companies, and should you persist in doing so we shall hold your companies responsible for any damage we may sustain. Kindly acknowledge receipt and oblige."

The president of defendant Minnesota and Ontario Power Company wrote on the 2nd June, not in reply to the last mentioned letter, but in reply to some former letter, not put in, but in this letter of 2nd June it is stated "Unless we have heavy rains it looks to me as if a gasolene launch is as large a boat as can navigate to advantage in Rainy River."

The plaintiffs' president replied on 5th June: "Your favour of 2nd instant at hand. Note what you say about navigation on the Rainy River. We have a plant that will enable us, if the natural flow the river is not interfered with, to navigate the Rainy River."

On the 9th June the president of defendant company wrote in part as follows:

"Your letter of June 1st, and two letters of the 5th, are duly received, and noted. The tone of your letters does not ring like that of a broad-gauged business man. Anyone reading them would draw the conclusion that you expected to make it as disagreeable for the power company as possible.

We disclaim any responsibility for the low stage of the water in Rainy River. We will be only too glad to see the flow of Rainy River through the dam increase if Providence will provide the water."

On the 15th June plaintiffs' president wrote disclaiming any intention of being disagreeable to the power company, asserting that the defendants had been in the habit of shutting off the water on Saturday nights. He stated that the "Agwinde" would be at the foot of the Sault rapids on June 18th bound up, and if the natural flow of the water is not interfered with we anticipate no difficulty in negotiating the rapids and also the river clear through to Fort Frances.

On the 28th June the "Agwinde" tied up at Fort Frances. On the 7th July, plaintiffs' president wrote: "Owing to your action in putting a boom across Rainy River at Big Nose, we have found it impossible to operate our steamer, the "Agwinde," and since the night of the 28th June she has been detained at Fort Frances. Captain Black notified the foreman at the boom, and also Mr. Sutherland, your manager at International Falls, that he could not attempt to go through the boom again owing to the obstruction. We have also met with loss through your action in interfering with the natural flow of the water, and I now formally notify you that this company intends to hold you responsible."

This last letter is from the president of the Minnesota and Ontario Power Company, is dated 16th July, 1911: "Your favour of the 7th is at hand and noted. The main channel of the Rainy River at Big Fork was open, and in condition for freely navigating your steamers on the 10th instant. Since that time the pier adjacent to the channel has been removed. Therefore the river at that point is clear of both the logs and the pier which you complained of some time ago. The water in Rainy River above our dam is very low, as you are aware. There is very little water flowing into the lake from the side streams on account of the severe drought which has been upon us for nearly two years. We are passing the water through the dam as rapidly as it reaches us. We don't see how you could reasonably expect us to do more than this."

From this correspondence it seems quite clear that the tie-up from 28th June to 7th July was not by the plaintiff attributed to low water. The plaintiff before action was complaining of obstruction by logs, and by a boom which the

plaintiff alleges these defendants had placed across Rainy River. That is more like what is alleged in the other action, brought by the plaintiff against the Watrous Island Boom Company, tried with this action. This action is because of scarcity of water occasioned, as alleged, by the defendants.

There is no doubt that the water from natural causes was exceedingly low in Rainy Lake, as well as Rainy River, during the entire season of 1911. The evidence on behalf of plaintiff as to the month of June is not so strong as is the evidence by witnesses for the defendants, but after the early part of July until the 5th of August the water was too low to permit of safe navigation by the "Agwinde."

The lowness of water was well known to all interested, and the cause of it to a great extent was not in doubt; but the plaintiff believed that there was water enough above the dam, if let down, to permit the running of the "Agwinde," and to watch the defendants, measurements were made daily, and even more frequently. I have studied and compared these measurements. They shew that at times a large quantity of water was held back. Upon the best consideration I can give to the whole evidence I, with some hesitation, come to the conclusion that the defendants did so interfere with the natural flow of the water from above the International Falls into Rainy River, as to cause damage to the plaintiff by preventing the running of the "Agwinde" during part of the season of 1911. It becomes then only a question of amount of damages.

If the defendants had by their dam and its operation prevented the outfitting of the steamers of plaintiff company for 1911, and prevented their running altogether, they would have done a good thing. They plaintiff stood to lose, and did lose, in carrying on their steamboat business that year, according to their statement $16,334.52. That was reduced to $11,334.52 by getting $5,000 for their contract, or settlement, with the government.

On the plaintiffs' original statement the loss was apportioned as follows:—

Steamer "Kenora"	$4,881 17
" "Agwinde"	3,397 63
General loss in management	8,055 72
	$16,334 52

Comparatively little of the loss can be properly attributed to the defendants. The "Agwinde" actually made during the season 14 round trips. The only trips lost were 12, viz., for the weeks beginning July 12th, 19th, 26th and August 2nd, 3 trips a week. Trip reports were put in, one for every trip made. Looking at these, and at the earnings of the boat, my finding is in favour of the plaintiff for $540. It cannot be more, and it would be an injustice to the defendants to make guesses and give more. In my finding I did not lose sight of the fact that had the "Agwinde" been running some of the freight and passengers from the "Kenora" to the "Agwinde," and *vice versa,* would have increased the earnings of the "Kenora.' That amount cannot be ascertained with mathematical exactness. Kenora, Rainy River and Fort Frances are collecting points from and distributing points to other routes, then from or to, either the "Kenora" or "Agwinde." Although the business was a losing one, the plaintiff company is entitled to these damages, as in my opinion their loss by the "Agwinde" would be that much less had the defendants been more careful to allow the water to flow more freely through their dam. The amount allowed by me could be allowed equal to any *per diem* value for the use of the "Agwinde" during the time she was prevented from running. The plaintiff is not entitled to recover for alleged loss in discrediting the route, nor can the plaintiff recover for alleged damage to future prospects of building up its navigation business upon the Lake of the Woods and Rainy River. No such damage was found, and such damages are too remote.

Judgment will be for the plaintiff for $540 with costs.

Thirty days' stay.

HON. MR. JUSTICE LENNOX. JULY 17TH, 1913.

RE McCOUBREY AND CITY OF TORONTO.

4 O. W. N. 1595.

Municipal Corporations—Early Closing By-law—Motion to Quash—Amendment of By-law—Application Refused—Costs.

LENNOX, J., refused to quash a municipal by-law for the early closing of barber shops but amended the same by striking out certain superfluous words.

Motion to quash a by-law of the city of Toronto providing for the early closing of barber shops.

T. J. W. O'Connor, for applicant.

I. S. Fairty, for respondent.

HON. MR. JUSTICE LENNOX:—I see no reason to change the opinion I expressed at the argument, namely, that the by-law substantially complies with the Act. The legislative meaning is not at all clearly expressed, either in 4 Edw. VII. ch. 10, or the Act of the last session, but the exceptions of section 84, as applying to barber shops, would lead to manifest absurdity.

The by-law will be amended by striking out the words "owner complained of," and in all other respects the application will be dismissed and the by-law confirmed.

Owing to the unsatisfactory wording of the statute there will be no costs.