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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 30TH, 1920.

SYLVESTER v. SYLVESTER.

Husband and Wife—Alimony—Circumstances Disentitling Wife to —Adultery—Absence of Direct Proof—Circumstantial Evidence —Findings of Fact of Trial Judge—Appeal—Rejection of Evidence as to Conduct of Husband in Placing Temptation in Way of Wife.

Appeal by the plaintiff from the judgment of LATCHFORD, J., dismissing an action for alimony.

The appeal was heard by MULOCK, C.J. Ex., SUTHERLAND and MASTEN, JJ., and FERGUSON, J.A.

W. R. Smyth, K.C., for the appellant.

R. S. Robertson, for the defendant, respondent.

SUTHERLAND, J., in a written judgment, said that the plaintiff in an action for alimony cannot succeed if she is found guilty of unchastity not condoned by the defendant. It is not necessary that the defendant should prove the actual fact of adultery. The evidence must, however, disclose circumstances from which the "fair inference" flows "as a necessary conclusion:" Alexander v. Alexander and Amos (1860), 2 Sw. & Tr. 95; Loveden v. Loveden (1810), 2 Hagg. Con. 1, 161 Eng. Reps. 648.

The learned trial Judge carefully considered and weighed all the relevant evidence before making his findings of fact; and, if his findings were not disturbed, the appeal could not succeed.

It was plain from the reasons for judgment of the trial Judge that he did not view the defendant's own conduct or testimony with much favour. That was not saying that the trial Judge did not credit the defendant in some definite respects, particularly where his evidence was corroborated in great part both by the plaintiff and the witness Morden and contradicted by them only in some incriminating details as to which both were concerned.

The great difficulty in the way of the plaintiff arose from statements and admissions in her own testimony and statements by the witnesses Herron and Morden, which, coupled with the evidence by the witness Edith Herron and that of the defendant, led the trial Judge to make such definite findings of fact in regard to the conduct of the plaintiff as to disentitle her to relief.

In making a finding against the plaintiff with respect to the Morden incident, the trial Judge definitely accepted the testimony of the defendant and discredited that of the plaintiff and Morden. The learned Judge sitting in appeal (SUTHERLAND, J.) said that he had carefully read the evidence to see if it were possible to disturb this finding, having regard to the principles which appellate Courts are called upon to apply in considering findings of fact made by trial Judges: Colonial Securities Trust Co. Limited v. Massey, [1896] 1 Q.B. 38; Coghlan v. Cumberland, [1898] 1 Ch. 704; Dominion Trust Co. v. New York Life Insurance Co., [1919] A.C. 254, 257; but could not see that the learned trial Judge could, upon the evidence, have come to any other conclusion in the Morden matter.

It was urged that the trial Judge had improperly rejected evidence to shew the "standard and customs of living" of the plaintiff and defendant, alleged to be material and relevant on the question whether adultery had been committed. The husband's carelessness in regard to bringing men into his house to drink and leaving them with his wife, and encouraging her to drink, might be adduced in evidence, in an action for criminal conversation, in mitigation of damages, but it could not be relevant in an action for alimony, unless, at all events, it were alleged that he had knowledge of improper acts on her part as the result of his conduct, and had condoned them. Here it was not suggested that after the Morden incident he did anything to condone it.

The appeal should be dismissed, with the order as to costs appropriate in alimony cases.

MULOCK, C.J. EX., agreed with SUTHERLAND, J.

MASTEN, J., agreed in the result, for reasons stated in writing.

FERGUSON, J.A., agreed in the result and with the reasons of MASTEN, J.

Appeal dismissed.

SECOND DIVISIONAL COURT. JUNE 30TH, 1920.

*PARRY v. PARRY.

Costs—Scale of—Action Brought in the Supreme Court of Ontario—Trespass to Land—Easement—Declaration as to User of Way—Judgment for Plaintiff with Nominal Damages and Costs—Determination by Taxing Officer of Scale of Costs—Rule 649—Appeal—Pleading—Onus—Jurisdiction of County Court—County Courts Act, sec. 22 (1) (d).

Appeal by the defendants from the order of ORDE, J., ante 53, 47 O.L.R. 217.

The appeal was heard by MULOCK, C.J. EX., SUTHERLAND and MASTEN, JJ., and FERGUSON, J.A.

Peter White, K.C., for the appellants.

C. A. Payne, for the plaintiff, respondent.

SUTHERLAND, J., in a written judgment, said, after stating the facts and quoting from the reasons of Orde, J., that he was unable to agree that Bragg v. Oram (1919), 46 O.L.R. 312, had no application. If the defendants had sued the plaintiff for damages for interference with their right of way, enjoyed in a particular manner for many years, by erecting and maintaining longer and heavier bars than had theretofore been in use, and incidentally had asked for an abatement of the nuisance thereby caused, the action would have been one within the competence of a County Court, under sec. 22 (1) (d) of the County Courts Act, provided the claim were not for a larger amount than $500. Because the position of the parties was reversed, and the plaintiff, having replaced the old by new and longer bars, and thus created the difficulty, brought this action for a declaration that he was entitled so to obstruct the way, the real issue was not altered.

Orde, J., seemed to have thought that the defendants, by pleading as they did, had put themselves in a position which had prejudiced the plaintiff. In reality, however, the plaintiff, knowing of the manner in which the right had always been enjoyed by the defendants, and apparently agreed to and acquiesced in by him, interfered with it, then began an action, and delivered a statement of claim by which he alleged that he and his predecessors in title without interruption for upwards of 40 years had maintained certain bars across the way, but without disclosing that he had recently taken these bars down and erected in their place

* This case and all others so marked to be reported in the Ontario Law Reports.

longer and heavier bars. He thus made it impossible for the defendants to plead otherwise than they did unless they were prepared to submit to any kind of bars, however difficult and burdensome to remove and restore.

The title to the land of the plaintiff and defendants was not in dispute. The terms of the right of way were clearly set out in the will. There was no reference therein to bars, and no suggested limitation of the right of way. The onus would seem to be on the plaintiff to shew the right to maintain even such bars as were there before the larger ones were put up. The manner in which the way should be used by the defendants, and the extent, if any, to which their free and full enjoyment should and could reasonably be curtailed for the protection of the plaintiff had been defined by the parties by bars of a certain length and width, erected many years ago and since maintained and acquiesced in. No question of title arose. The plaintiff's claim against the defendants was in reality for damages for their interference with the bars put up by him across the way, and to compel them to replace them if they took them down; and the amount claimed for damages was within the competence of a County Court.

The appeal should be allowed with costs and the order of Orde, J., set aside with costs.

MULOCK, C.J. Ex., agreed with SUTHERLAND, J.

FERGUSON, J.A., agreed in the result, for reasons stated in writing.

MASTEN, J., read a dissenting judgment, agreeing with ORDE, J.

Appeal allowed (MASTEN, J., *dissenting*).

SECOND DIVISIONAL COURT. JUNE 30TH, 1920.

*RE TORONTO ELECTRIC COMMISSIONERS AND TORONTO. R.W. CO.

Street Railway—Poles and Wires upon City Streets—Removal at Expense of Company for Purposes of Toronto Electric Commission—Order of Ontario Railway and Municipal Board—Dissent of Member of Board—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 7—Determination of Question of Law by Chairman—Appeal from Order of Board—No Statutory Authority for Making Company Liable for Cost of Removal—Railway Act, R.S.O. 1914 ch. 185, sec. 59—Absence of Agreement to Pay—Position of Commission—Statutory Agent—Remedy by Action.

Appeal by the Toronto Railway Company (by leave) from an order of the Ontario Railway and Municipal Board of the 16th March, 1920, whereby the appellants were required at their own expense to remove and replace or readjust certain structures erected by them in three streets of the City of Toronto and to pay the cost of all readjustments of poles and wires of the city corporation rendered necessary by their (the appellants') appliances upon these streets.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

D. L. MCCARTHY, K.C., for the appellants.

G. R. Geary, K.C., for the city corporation, respondents.

C. M. Colquhoun, for the Toronto Electric Commissioners, respondents.

RIDDELL, J., in a written judgment, said that the order appealed against was dissented from by Mr. Ingram, a member of the Board, who said that he disagreed with the finding of the Board and with the reasons upon which the finding was based; he made known his views to the Chairman at the time when the judgment of the Board was being prepared; but the Chairman declined to accept those views, and exercised his right under and pursuant to sec. 7 of the Railway and Municipal Board Act, R.S.O. 1914 ch. 186.

The order was valid, therefore, only if the decision were one of law; and the learned Chairman must be considered as deciding that the appellants were liable as a matter of law for this cost. The law he must draw from statute or common law or from the interpretation of an agreement.

There was no statute expressly making the Toronto Railway Company liable to pay to the Toronto Electric Commissioners the cost of the removal by the Commissioners of the poles and other appliances. The only statute that could be appealed to was sec. 59 of the Railway Act, R.S.O. 1914 ch. 185, but the Ontario Railway and Municipal Board was given no jurisdiction to determine the damages under that section. The fact that the Commissioners are a public utility body gives them no more rights in that regard than any other person. And, in any case, the determination of damages would be a finding of fact and not of law. At the common law there is no such liability: Vaughan v. Taff Vale R.W. Co. (1860), 5 H. & N. 679; and there is no agreement that the Toronto Railway Company shall pay anything to the Commissioners. If the Commissioners claim through the city corporation, they are met by the res adjudicata of the original order. The Commissioners repudiate the position of statutory

agents, and successfully distinguish Ridgway v. City of Toronto (1878), 28 U.C.C.P. 579; McDougall v. Windsor Water Commissioners (1900-01), 27 A.R. 566, 31 Can. S.C.R. 326; Young v. Town of Gravenhurst (1910-11), 22 O.L.R. 291, 24 O.L.R. 467. However, if the Commissioners were in no way statutory agents, their position was not bettered.

The Commissioners must rely upon such ordinary methods of enforcing any claim they may have, under sec. 59 of the Railway Act, as are open to all who may consider themselves injured by the appellants' railway. The Courts are open, and so far their jurisdiction has not been taken away.

The appeal should be allowed with costs, including the costs of obtaining leave to appeal.

MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with RIDDELL, J.

MASTEN, J., also agreed, briefly stating reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 30TH, 1920.

RE NEPEAN AND NORTH GOWER CONSOLIDATED MACADAMISED ROAD CO.

Highway—Expropriation of Toll-road by Provincial Government—Compensation Fixed by Ontario Railway and Municipal Board—Appeal—Public Works Act, R.S.O. 1914 ch. 35, sec. 32—Quantum—Evidence—Financial Loss—Replacement Value—Earning Value—Potential Value.

An appeal by the company from an award of the Ontario Railway and Municipal Board of the 25th February, 1920, fixing the sum of $2,800 as the compensation to be paid to the appellants upon the expropriation of their road by the Crown (Province of Ontario).

The company had claimed the sum of $18,422.43, and appealed upon the ground that the amount awarded was insufficient.

The appeal was heard by RIDDELL, SUTHERLAND, KELLY, and MASTEN, JJ.

I. F. Hellmuth, K.C., and Wentworth Greene, for the appellants.

T. J. Agar, for the respondent.

RIDDELL, J., in a written judgment, said that the appeal was launched under sec. 32 of the Public Works Act, R.S.O. 1914, ch. 35. The sole question was as to quantum.

The learned Judge assumed for the purpose of the decision that the Board proceeded upon a wrong principle and that the whole question of compensation was open.

In determining the amount to be allowed for compensation, the matter must be looked at as a business proposition, with all its possibilities and contingencies; and the person whose property is taken away or injured for public advantage should not have his compensation weighed in golden scales.

In the present case no evidence was pointed out to the Court and the learned Judge could find none to prove or even to indicate that the company suffered a financial loss by the expropriation of their road.

The amount allowed by the Board was ample to recompense the company.

The appeal should be dismissed with costs.

MASTEN, J., in a written judgment, said that the contention of the appellants was that the compensation should be ascertained on the replacement value of the property; and that, in the existing circumstances, such replacement value was the governing factor or element in fixing the compensation. In that contention the learned Judge was unable to agree. He was of opinion that the replacement value was relevant and was properly received by the Board; but the evidence of the earning value of the property was also relevant and equally to be considered by the arbitrators, and it outweighed the evidence as to replacement value. That left as the determining factor the potential value of the property, and that potential value was to some extent contingent and speculative, depending on future possibilities. What was certain was, that this roadway was at the present time desired by the Provincial authority as a link in a system of good roads. Other purchasers, such as the county corporation or another toll-road company, might appear, or the road might in the hands of its present owners become a profitable link in a larger system. In the estimation of such possibilities different minds naturally arrive at different conclusions. If the learned Judge had been an arbitrator, he would, as at present advised, have allowed a larger sum than the arbitrators had awarded, but he was quite unable to say that their estimate was wrong.

The appeal should be dismissed with costs.

SUTHERLAND and KELLY, JJ., agreed that the appeal should be dismissed.

Appeal dismissed.

SECOND DIVISIONAL COURT. JULY 3RD, 1920.

*SMITH v. UPPER CANADA COLLEGE.

Principal and Agent—Agent's Commission on Sale of Land—Commission Payable out of Purchase-money when Received—Large Portion of Purchase-money not Received by Reason of Subsequent Agreement Made between Vendor and Purchaser without Privity of Vendor's Agent—Action for Balance of Commission notwithstanding that Whole of Purchase-money not Received—Dismissal of Action upon Question of Law Raised in Pleadings—Effect of sec. 13 of Statute of Frauds (6 Geo. V. ch. 24, sec. 19)—Appeal—New Point Taken by Court—Implied Agreement of Vendor to Do Nothing to Prevent Payment of Purchase-money—Damages for Breach of Implied Contract—Judgment Dismissing Action Set aside, Leaving Case for Trial on New Basis—Necessity for Amendment of Pleadings.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 47 O.L.R. 37, 17 O.W.N. 405.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

A. G. F. Lawrence, for the appellant.

Frank Arnoldi, K.C., for the defendants, respondents.

RIDDELL, J., in a written judgment, said that, in the view he took of the case, the statutes had no bearing; the case had not been placed on the right basis. The real action was not to recover commission at all. Admittedly, commission could not be recovered under the contract between the parties and on its terms, for the money had not been received by the defendants, and therefore was not payable to the plaintiff according to the terms of the contract: Alder v. Boyle (1847), 4 C.B. 635.

The real cause of action was for damages for breach of the implied agreement on the part of the defendants not to do anything to prevent the payment by the purchaser of the purchase-money out of which the plaintiff was to receive his commission.

Reference to Ogdens Limited v. Nelson, [1904] 2 K.B. 410, 418, [1905] A.C. 109; Lazarus v. Cairn Line of Steamships Limited (1912), 28 Times L.R. 244, fourth rule stated by Scrutton, J., at p. 246.

The defendants had broken this contract, and the plaintiff was entitled to a verdict. If he could prove no damage, he was entitled to a judgment for nominal damages and costs: Village of Brighton v. Auston (1892), 19 A.R. 305.

The Court will not, as a general rule, grant a new trial to give the plaintiff nominal damages: Milligan v. Jamieson (1902), 4 O.L.R. 650, 651; but the rule is different where no new trial is necessary, the appeal being from the judgment of a Judge. The learned Judge does not suggest that nominal damages only can be recovered.

While the plaintiff cannot recover his commission as such, the amount of money he would have received had the defendants not broken their implied contract with him will give a satisfactory measure of damages. The defendants may, indeed, be able to prove that their purchasers would not have paid in any event or shew some other special circumstance proving that the plaintiff could not have obtained his commission even had the defendants kept faith with him—that is a matter of evidence.

The appeal should be allowed and the judgment dismissing the action upon the point of law raised in the pleadings set aside, leaving the action to be tried in the usual way. The costs of the hearing below and of the appeal should be costs in the cause.

CLUTE, J., agreed with RIDDELL, J.

SUTHERLAND, J., read a short judgment, in which he said that, with some hesitation, he agreed that the appeal should be allowed on the ground taken by RIDDELL, J.

MASTEN, J., in a written judgment, said that he entirely agreed with the reasoning and conclusion of Middleton, J.

As to the ground upon which the majority of the Court were now in favour of allowing the appeal, the learned Judge pointed out that the decision of Middleton, J., was upon a point of law raised upon the pleadings—practically a substitute for the old demurrer—and the decision of this appellate Court must be confined strictly to the question raised on the pleadings. The Court was not at liberty to substitute a new and different cause of action and to deal with that, in lieu of the actual question that was raised and argued.

However, in view of the new ground taken, the proper course would be to dismiss the appeal with costs to the defendants in any event of the action, but with leave to the plaintiff to amend his statement of claim if so advised.

MULOCK, C.J. Ex., agreed with MASTEN, J.

Appeal allowed (MULOCK, C.J. Ex., *and* MASTEN, J., *dissenting*).

HIGH COURT DIVISION.

LENNOX, J. JUNE 29TH, 1920.

LEWIS v. LEWIS.

Husband and Wife—Alimony—Action for—Motion for Judgment—Absentee-defendant Served by Publication—Rule 354—Proof of Marriage and of Existence of Assets upon which Judgment may be Realised—Reference to Fix Quantum of Alimony.

Motion for judgment on the statement of claim, in default of defence, in an action for alimony.

The motion was heard in the Weekly Court at London.

P. H. Bartlett, for the plaintiff.

No one appeared for the defendant.

LENNOX, J., in a written judgment, said that the action was for alimony. The plaintiff alleged in her statement of claim that the defendant deserted her and their three infant children in the autumn of 1916, without cause or excuse, and the inference was raised that she had no knowledge of where he was, if he was still alive. The presumption of death did not yet arise. She claimed alimony, but did not state that the husband was possessed of property or means, either in Ontario or elsewhere, and said nothing as to his earnings or capacity to earn.

Service of the writ and statement of claim was by publication, under an order of the Court. The defendant was directed to enter an appearance and file his statement of defence "on or before the 25th June instant."

The motion was for judgment and a reference to the Local Master at London to determine the amount of alimony the plaintiff should have. In support of it the plaintiff proved publication as ordered, verified the statement of claim, produced a certificate of the state of the action, including a statement that the pleadings were noted closed on the 25th June, 1920. This was dated the 26th June, 1920. The plaintiff's solicitor's affidavit, made on the 25th June, 1920, was, if anything, ahead of time, as the defendant had all that judicial day to plead; however, it should be taken that the defendant was, legally speaking, in default.

"A defendant who fails to deliver a statement of defence, and against whom the pleadings have been noted as closed, shall be deemed to admit all the statements of fact set forth in the statement of claim:" Rule 354. The language was broad enough, but in a case where the service has been by publication, and in an

action of this character, a judgment should not be pronounced and a reference directed without some actual proof of marriage and that there will ultimately be some means of executing the judgment. Upon the filing of an affidavit of the plaintiff swearing to the solemnisation of a lawful marriage, followed by cohabitation, an affidavit by the plaintiff, or some one else who knows, that there is something upon which a judgment can probably be realised, there will be judgment for alimony, with a reference to the Local Master to inquire and report as to the defendant's means, and his finding of what would be a fair sum to be allowed the plaintiff for alimony—distinguishing how far the support of the children affects the computation—and such other facts as will enable the Court to determine what would be just, in the circumstances; further directions and costs and the ultimate disposal of the matter being reserved.

ROSE, J. JUNE 29TH, 1920.

McLENNAN v. FULTON.

Evidence—Action by Creditor to Set aside Sale by Debtor of Interest in Assets of Partnership—Bulk Sales Act, 1917, 7 Geo. V. ch. 33 (O.)—Application of Act—Question whether Action Brought within 60 Days after Notice to Creditor of Sale Having been Made—Sec. 9 of Act—Evidence—Conflicting Testimony of two Solicitors of Equal Credibility—Preference Given to Recollection of one who Affirms—Other Circumstances—Corroboration—Onus.

The plaintiff, suing on behalf of himself and of all other creditors of the defendant A. G. Fulton, asked for a declaration that a sale by A. G. Fulton of all his interest in the assets of the firm of which he was a member was fraudulent and void as against creditors, both by virtue of the Bulk Sales Act, 1917, 7 Geo. V. ch. 33 (O.), and apart from that Act.

The action was tried without a jury at Sault Ste. Marie.

J. E. Irving, for the plaintiff.

J. L. O'Flynn, for the defendants.

ROSE, J., in a written judgment, said that at the trial he stated his opinion that actual fraud was not proved, and that, apart from the Bulk Sales Act, the claim must fail.

The matter now to be considered was the claim based upon that Act, and the first question was, whether the action was begun within the time limited.

By sec. 9 of the Act, no action shall be brought to set aside or have declared void any sale for failure to comply with the provisions of the Act, unless such action is brought within 60 days from the date of such sale or within 60 days from the date when the creditor attacking such sale first received notice thereof. This action was not brought within 60 days from the date of the sale; and the question was, whether it was brought within 60 days from the date when notice came to the plaintiff or his solicitor.

After the plaintiff had recovered a judgment against A. G. Fulton, and more than 60 days before this action was brought, the plaintiff's solicitor had an interview with Fulton's solicitor, the plaintiff's solicitor seeking and obtaining information about Fulton's dealings with certain interests which he had in a timber company; and Fulton's solicitor asserted and the plaintiff's solicitor denied that, in the course of the interview, the matter of the sale now in question came up and the bona fides of it was discussed.

Each of the solicitors was perfectly sincere in his statement as to his recollection of what was said at the interview. The case was one where, of two witnesses of equal credibility, one positively avers that certain words were said and the other as positively denies it. The rule to be applied is that mentioned in Lane v. Jackson (1855), 20 Beav. 535; Lefeunteum v. Beaudoin (1897), 28 Can. S.C.R. 89, 94; Kastor Advertising Co. v. Coleman (1905), 11 O.L.R. 262, 267; Rex v. Stewart (1902), 32 Can. S.C.R. 483, 501; and other cases. It is to be found that the statement was made, and that he who denies it has forgotten it, unless there is something else in the evidence which justifies the opposite conclusion.

The evidence of the plaintiff's solicitor was said to be corroborated by the fact that he made a memorandum of some of the things told him about the timber, and that nothing about the sale now in question appeared in that memorandum, and by the further fact that he commenced this action very soon after he had examined A. G. Fulton as a judgment debtor and had obtained information about the sale of the interest in the partnership assets. Against these facts, however, was to be set the fact that the plaintiff's solicitor said that, at the time when he recovered his judgment and afterwards, he did not suppose that A. G. Fulton, who managed the business of the partnership, had any real interest in the business. If he did not attach any importance to A. G. Fulton's connection with the firm, it was quite possible that a statement concerning the sale of his interest, and even some conversation about the good faith of the transaction, made and

occurring in the course of an interview concerning a matter to which he did attach importance, would neither fix itself in his memory nor be noted in the memorandum which he made as to the matters about which he was particularly inquiring. This consideration balanced, if it did not outweigh, the effect of the other matters mentioned; and the case was one for the application of the rule referred to. The words of the statute seem to cast upon the plaintiff the burden of proving that he began his action within 60 days after he received notice of the sale.

The learned Judge said that he had considered and reached a conclusion upon the question whether the Bulk Sales Act applied to such a sale as that attacked; but, as that point was one upon which opinions might differ, and a decision of it was unnecessary, he said nothing about it.

Action dismissed with costs.

LATCHFORD, J. JUNE 29TH, 1920.

BATTLE v. QUILLINAN.

Easement—Right of Way over Strip of Land—Unlimited Right Created by Grant—Obstruction of Way by Building—Mandatory Injunction Granted to Compel Removal of Obstruction—Discretion—Costs.

Action for an injunction restraining the defendant from erecting any building upon the southerly 8 feet of lot 73, plan 603, Niagara Falls, and for a mandatory order for the removal of the building in course of erection thereon.

The action was tried without a jury at Welland.

T. D. Cowper, for the plaintiff.

T. N. Phelan, for the defendant.

LATCHFORD, J., in a written judgment, said that the plea set up by the defendant for reformation of the deed having failed, and the erection of a garage on part of the way over which the plaintiff had a right having been proved, the only question remaining for consideration was, whether the defendant should be compelled to remove the obstruction or pay damages.

The garage was undoubtedly a substantial interference with the right, in respect of which the plaintiff was entitled to maintain an action.

When a right of way is created by grant, it must depend on the proper construction of the grant whether the way is to be used for all purposes or for but limited purposes. If, as in this case, there is no limit to the grant, the way may be used for all purposes:

per Mellish, L.J., in United Land Co. v. Great Eastern R.W. Co. (1875), L.R. 10 Ch. 586, 590, cited with approval by Stirling, J., in Sketchley v. Berger (1893), 69 L.T.R. 754, 755, in which a mandatory injunction or the removal of the defendant's building was granted.

The defendant knew that she was wrong in erecting the garage upon the way. This point was of importance in determining the question to be decided: Smith v. Smith (1875), L.R. 20 Eq. 500, 505; Holland v. Worley (1884), 26 Ch. D. 578.

Distinct notice of the objection of the plaintiff to the erection of the building, as well as the small fence on the way, had been given to the defendant. Far from acquiescing in what the defendant was doing, the plaintiff protested against the erection of the garage as soon as the building rose above the surface of the way; and, when but little had been done above the surface, action was brought for a mandatory injunction.

The defendant, however, persisted in the work, and must take the consequences of her wrongful act. The only way in which justice could be done was by restoring the condition which existed prior to the time when the garage or any other obstruction was placed by the defendant on the way. Otherwise, as was said by James, L.J., in Krehl v. Burrell (1879), 11 Ch. D. 146, the consequence would be that a person would have a right to do a wrong to his neighbour at a price to be fixed by the Court. In Lane v. Capsey, [1891] 3 Ch. 411, where it appeared that a claim in a prior action for the removal of a house obstructing a right of way was dismissed without costs, owing to the laches and acquiescence of the plaintiffs, Chitty, J., gave them leave, notwithstanding that a receiver had been appointed, to proceed against the defendants for the abatement of the obstruction.

The building here was not of great value—unlike that referred to in Durell v. Pritchard (1865), 35 L.J. Ch. 223, L.R. 1 Ch. 244.

The discretion to grant a mandatory injunction to remove a building should be carefully, and, indeed, rarely, exercised. But, in circumstances such as exist in this case, where damages are an inadequate remedy, and the defendant acted with the knowledge that she was materially interfering with a clearly defined right, when she had ample space on her own property on which to place the garage without interference with the rights of the plaintiff, and persisted in wrong-doing, the discretion should be exercised. A mandatory injunction requiring the defendant to remove, within one month, the obstructions which she had placed on the way should, therefore, be granted. The defendant should pay the plaintiff's costs.

Reference to Baxter v. Bower (1875), 44 L.J. Ch. 625, and Smith v. Smith, supra.

RE ATTWOOD—KELLY, J.—JUNE 28.

Will—Construction—Effect of Codicils—Harmonising Varying Dispositions Made by Will and Codicils.]—Motion by the executors of the will of Adolphus Charles Attwood, deceased, for an order determining certain questions arising as to the meaning and interpretation of the will and eight codicils. The motion was heard in the Weekly Court at London. KELLY, J., in a written judgment, said that the testator, having by his will and earlier codicils given his son Frank a substantial interest in his (the testator's) real estate, by the codicil of the 19th August, 1918, shewed an intention of depriving him of all these benefits. By a later codicil, Frank again became entitled to share in some of the real estate. The will also provided for payment by the executors to the testator's wife during her lifetime and for her own use of one half of the income derived from an investment of the residue of the estate. This was materially altered by the second codicil (21st January, 1916), whereby the executors were directed to invest $3,500, and pay the income therefrom to the widow for her own personal comfort and support during her life, and to divide what was left of the estate, after setting apart the $3,500, among the legatees. This was repeated in the seventh codicil (9th August, 1918). By the last codicil (23rd December, 1918), the son Frank and his two sons were made "joint and equal heirs" to the north-east quarter of lot 20 in the 9th concession of Lobo. The learned Judge answered the questions submitted as follows: (1) The legacies directed to be paid by para. 5, clauses (c) and (i) of the will are payable now, under the provision of the codicil of August, 1918, to the extent that the estate available therefor is capable, after setting apart the $3,500. (2) The son Frank and his two sons are now entitled to the quarter-lot mentioned. (3) The executors are not required to carry out the provision for keeping down the mortgage on that quarter-lot. (4) The provision in the fourth and seventh codicils for payment of $50 annually for six years to the son Frank has ceased to be in force. Order declaring accordingly; costs of the application to be paid out of the estate, those of the executors as between solicitor and client. J. B. McKillop, for the executors. F. P. Betts, K.C., for the Official Guardian. No one appeared for the other persons interested.

ROYAL BANK OF CANADA v. CARMICHAEL—LENNOX, J.—JUNE 29.

Costs—Defence to Action Withdrawn when Action Came on for Trial—Disposition of Costs by Trial Judge—Consolidation of Actions—Interlocutory Costs.]—The plaintiffs brought five actions against the defendant Carmichael, in each of four of which there was another defendant. The four actions were consolidated, and the consolidated action came down for trial before LENNOX, J., without a jury, at Port Arthur, on the 31st May, 1920, when the defendant Carmichael withdrew his defence to the consolidated action, and judgment was pronounced in favour of the plaintiffs against Carmichael for the several sums claimed and interest, the question of the costs of the actions and certain interlocutory costs left to be disposed of by the trial Judge being reserved. The learned Judge now disposed of the costs by directing that the defendant Carmichael pay the ordinary party and party costs in the several actions so far as they proceeded separately and all costs of and subsequent to the order made by KELLY, J., on the 16th March, 1920. The fee to counsel for the plaintiffs for attending Court on the 31st May was fixed at $80. All costs reserved to be dealt with by the trial Judge to be paid by Carmichael. J. A. Kenney, for the plaintiffs. H. P. Cooke, for the defendant Carmichael.

BROWN v. UNITED GAS COMPANIES LIMITED—LATCHFORD, J.—JUNE 30.

Contract—Supply of Natural Gas—Provisions of Lease Incorporated in Agreement—Stipulation for Annual Payment in Respect of Easement—Breach of Agreement—Damages—Costs.]—Action to compel the defendants to restore the pipe-line and meter for the supply of natural gas to the plaintiff's premises, or for damages for breach of the defendants' agreement with the plaintiff, and for other relief. The action was tried without a jury at Welland. LATCHFORD, J., in a written judgment, said, after stating the facts, that such of the provisions of a certain lease to one Fowler as were inconsistent with the agreement with the plaintiff remained in force by virtue of the incorporation of them in the agreement. Liability continued for an annual rent as long as the pipe-line crossed the plaintiff's land. Liability to furnish the plaintiff with gas to the extent stated in the agreement also continued. There was an added liability to protect the plaintiff against damages in certain events. The clause of the agreement providing that,

in the event of the defendants not supplying gas though the pipe-line, the defendants were to pay the plaintiff a rental of $25 per year, was supplemental to the agreement to pay rent for the easement granted in regard to the pipe-line. This stipulation is not linked with the earlier part of the paragraph; it does not depend on whether a well is drilled or the pipe-line renewed or removed, but on whether the defendants cease to supply the plaintiff with gas as agreed. In the latter event, the plaintiff agreed that his remedy was to be restricted to a right to be paid $25 annually. That this sum was called rental, and not damages, did not affect the plaintiff's rights; but he was entitled to no more than he had expressed his willingness to take. He could not have a mandatory injunction or any sum in damages exceeding the $25 a year. There should be judgment declaring that the plaintiff is entitled to recover from the defendants $25 a year as damages so long as the defendants continue not to supply him with gas; such damages to be computed from the 16th December, 1919, and the first payment to be made on the 16th December, 1920. As the defendants contended that they were under no liability to the plaintiff, they should pay the plaintiff his costs on the Supreme Court scale. G. H. Pettit, for the plaintiff. H. H. Collier, K.C., and L. C. Raymond, for the defendants.