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# Ontario Weekly Notes

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## APPELLATE DIVISION.

FEBRUARY 20TH, 1913.

### PALLANDT v. FLYNN.

*Interpleader—Company-shares—Seizure by Sheriff—Claim by Bank—Order Directing Trial of Issue—Terms—Security Required from Claimant.*

Appeal by the Canadian Bank of Commerce, claimants, from the order of BRITTON, J., ante 681, dismissing an appeal by the bank from an interpleader order made by the Master in Chambers. Leave to appeal was granted by MIDDLETON, J.: see ante 821.

The appeal came on for hearing before MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

R. C. H. Cassels, for the appellants.

J. Jennings, for the execution creditor.

R. J. Maclennan, for the Sheriff of Toronto.

THE COURT, by consent of all parties, varied the order below by directing that, on the appellants failing to give security, by their undertaking, within fifteen days, a sale of the shares seized may be made by the Sheriff, through brokers, but not for less than $2,000 net; the proceeds of sale to be paid into Court to abide the result of the interpleader issue. Costs reserved.

## HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 17TH, 1913.

### REX v. LAPHAM.

*Criminal Law—Extortion—Accusing or Threatening to Accuse of Crime—Criminal Code, sec. 454—Constable Armed with Warrant to Arrest—Magistrate's Conviction—Motion to Quash..*

Motion by the defendant, on the return of a habeas corpus and a certiorari in aid, to quash his conviction and for his discharge.

J. P. MacGregor, for the defendant.
E. Bayly, K.C., for the Crown.

MIDDLETON, J.:—The defendant was found guilty of an offence against sec. 454 of the Criminal Code, in extorting $45 from one Susan McCoppin, by accusing and threatening to accuse one William McCoppin, her husband, of stealing a fox terrier. The defendant, a county constable of Simcoe county, had placed in his hands a warrant for the arrest of McCoppin on the charge of stealing the dog in question from one Hastings. He also received from Hastings written authority to settle with McCoppin. Armed with these documents, he saw Mrs. McCoppin and extorted $45—said to be $35, the value of the dog, and $10 for expenses.

His counsel argues, among other things, that what was done was only a threat to execute the warrant in his hands, and not an accusation of the offence. This question would be difficult if the facts required its determination. It may be that a constable, armed with a warrant, who extorts money from any person by the mere threat to arrest upon a warrant in his possession, for an offence of which the informant accuses that person, is not within the statute. If so, the statute should be amended so as to make it plain that no peace officer can use his office and his duty to arrest under process, as a means of extortion.

In this case the facts quite warrant the finding that the constable did accuse and threaten to accuse McCoppin of the theft.

Notwithstanding Mr. MacGregor's strong plea based upon

the well-meaning ignorance and stupidity of this constable, who, it is said, was really playing the part of a peacemaker, I cannot interfere. That was a question for the magistrate; and I incline to the same view. The conduct of the defendant seems to me to have been high-handed, as well as stupid. That astute observer Bunyan long ago remarked that the Town of Stupidity was not far from the City of Destruction.

The motion is refused, and the prisoner is remanded.

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LENNOX, J. FEBRUARY 17TH, 1913.

## BINDON v. GORMAN.

*Partnership—Establishment of—Oral Agreement to Divide Profits of Land Transactions—Validity—Evidence—Basis of Division.*

Action to establish a partnership and for an account and payment of a share of the profits to the plaintiff.

G. E. Kidd, K.C., for the plaintiff.
J. J. O'Meara, for the defendant Gorman.
M. J. O'Connor, K.C., for the defendant Murray.

LENNOX, J.:—I am asked to pronounce upon the rights, if any, of both the plaintiff and the defendant Murray against the defendant Gorman; and, if there is judgment against Gorman, to apportion the money between Bindon and Murray. I do not think that R.S.O. 1897 ch. 338 and the various cases referred to have any bearing upon this case. It is not a question of an interest in land; it is simply as to certain services and a division of profits; and a verbal agreement to divide profits of transactions in land is valid, at all events where no specific lands are referred to: Gray v. Smith (1889), 43 Ch.D. 208; In re De Nicols, De Nicols v. Curlier, [1900] 2 Ch. 110, and cases there referred to.

If the evidence of the plaintiff and his witnesses is true, the defendant Gorman should pay over a portion of the profits he received in certain transactions to the plaintiff and Murray; and he is keeping the whole of it. The only evidence is that called by the plaintiff and what is furnished from the exhibits; for, so far as Gorman is concerned, unfortunately, he has practically

no memory at all. It is a good deal worse than idle, for it is improper, to have a witness swear to the details of a conversation, and whether or not he sent a certain telegram in the summer of 1905, when it is known that as a matter of independent memory he cannot tell what route he took, either outward or homeward, on an extensive trip he took during that same summer, anything as to the time of his departure or return, who accompanied him, or even whether his wife accompanied him or not; who has no ideas as to the amount of profits he made out of either of the transactions in question in this action; and who, although he had received more than $5,000 profit on the sale of the Brandon property, and had written and sent telegrams in connection with it, could not recall, even after the action was brought, that the property had been sold, the money divided, and the account closed, as shewn by exhibit 22.

On the other hand, there are discrepancies in the evidence of the plaintiff and Murray; they contradict each other in some particulars; and I believe they are both mistaken as to the date at which the telegram instructing Murray to invest was sent, if it was sent. But these differences do not at all go to the root of the matter. I was particularly impressed by the manner in which Murray gave his evidence, and I believe the evidence of this witness and the plaintiff was substantially accurate. I believe that the defendant Gorman sent a telegram to Murray authorising him to invest $10,000, and speaking of a division of profits between the parties to this suit. I am satisfied from the references to Gorman in the correspondence, from Gorman's own telegram and letter from Kansas City, from Currie's evidence as to Murray's determination to have Gorman in the syndicate, and upon the testimony of the plaintiff and Murray, that, before Murray went out west, the defendant Gorman agreed to furnish as much as $10,000 for profitable speculation, and agreed to divide the profits among himself and the plaintiff and Murray. The west was the main outlook, but the moving cause was profits, and the money was to be available for any proposition of which Gorman, when it was submitted, approved.

I am not sure that it was stated that the profits would be divided equally; and, after some hesitation, I have come to the conclusion that division of profits simply does not necessarily mean an equal division. I have no doubt at all that, at the time these transactions were going through, Gorman fully expected to have to share up with the plaintiff and Murray. It is very probable, too, that later on he told the plaintiff that there were

no profits; and, in the condition in which he is, he might say this quite honestly. I will take no account of interest down to the date of the action—it would increase the liability of the defendant Gorman if I did.

I am of the opinion that the defendant Gorman should pay to the plaintiff and Murray one-third of the profit of the Brandon transaction, say $1,700—of which $1,200 will belong to the plaintiff—and he should pay $500 to each of these parties in respect of the Montreal Park realty stock transaction, and interest from the date of suit.

There will be judgment for the plaintiff against the defendant Gorman for $1,700, with interest from the 12th August, 1911, and costs; and for the defendant Murray against the defendant Gorman for $1,000, with interest from the 12th August aforesaid, and Murray's costs of defence.

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BRITTON, J. FEBRUARY 18TH, 1913.

## O'NEIL v. HARPER.

*Highway—User—Dedication — Evidence — Statute Labour — Municipal By-laws—Action for Declaration of Existence of Highway — Parties — Municipal Corporation — Attorney-General—Obstruction—Nuisance—Assault—Costs.*

Action for a declaration that a road crossing the south half of lot 7 in the 2nd concession of the Gore of Chatham was a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon that highway; (3) an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by the defendant upon the plaintiff in attempting to prevent the plaintiff from travelling upon that highway.

J. S. Fraser, K.C., for the plaintiff.
M. Wilson, K.C., for the defendant.

BRITTON, J.:—The plaintiff owns that part of lot 8 in the 2nd concession of the Gore of Chatham lying north of Running creek. The defendant owns the south half of lot 7 in the same concession. The plaintiff alleges that Running creek commences in the 3rd concession of the Gore of Chatham, flows southerly and

easterly through the said Gore of Chatham, and along the north side of the town of Wallaceburg, to the river Sydenham.

The evidence establishes, and I find as a fact, that from the early settlement of the township of Chatham down to a comparatively recent date, a travelled road ran from Nelson street in Wallaceburg—or a point near Nelson street—westerly and along the southern bank of Running creek, crossing lots 11, 10, and a part of 9 in the 2nd concession of the Gore of Chatham; then the road crossed the said creek to the north side thereof, and proceeded westerly and southerly across the remainder of lot 9, and diagonally across lots 8 and 7, to the line between the 1st and 2nd concessions, and on to the river St. Clair.

It was well established that for many years this road was the only direct and travelled road—and called a highway—between Wallaceburg and Baby's Point and Port Lambton.

The part of lot 7 now owned by the defendant was crossed by this road. The obstructions placed by the defendant are on the line of this road.

There is no evidence of any word of the owner of any part of the land where this road passes to shew an intention to dedicate the road to the public.

As to dedication, this case is governed by Mytton v. Duck, 26 U.C.R. 61. In that case Draper, C.J., decided that, as against the grantee of the Crown and those claiming under him, the public user for thirty years, without objection or interference on their part, would furnish conclusive evidence of dedication.

This road was used as a public highway long before the grant by the Crown to the Canada Company of lands over which the road was travelled.

Dedication cannot by mere user be presumed against the Crown, but the Crown granted these, with other lands, to the Canada Company, in 1846.

This road was openly used as a public road at least down to 1896, and thus, according to the case cited, dedication has been conclusively established.

The evidence did not establish that statute labour had been continuously done upon this road; or that any public money had been expended upon it.

It is a fact that the Corporation of the Town of Chatham assumed, by by-law, to close a portion of it; and the Corporation of the Town of Wallaceburg, by by-law, assumed to close a short part at the eastern end. It is difficult to connect the Wallaceburg by-law with this road, as the by-law described it as "the original allowance for road." However, of the inten-

tion of the municipality to close a part of the road in question, there is no doubt. These by-laws do not either assist the plaintiff or prejudice him in his contention.

As to the part of the road in which the plaintiff is particularly interested, no action has been taken in any way by the township corporation; and, so far as appears, no person, other than the defendant, has interfered with the plaintiff or those desiring to use the road.

The case of Dunlop v. Township of York, 16 Gr. 216 (1869), does not conflict with Mytton v. Duck, 26 U.C.R. 61.

It must be accepted as sound reasoning, as stated in Dunlop v. Township of York, that in a new part of the country, or over an area of low land where persons would naturally look for the high places over which to travel, user of a road is not to be too readily accepted as evidence of an intention on the part of an owner to dedicate.

In this case, the great length of the time of the user and the comparatively slight deviations strengthen very much the argument in favour of the highway contended for here.

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Frank v. Township of Harwich, 18 O.R. 344, is in favour of the plaintiff's contention.

Intention to dedicate may be presumed: see Lord Halsbury's Laws of England, vol. 6, p. 33.

The Canada Company, grantors of the lands of the defendant, had other lands in the vicinity. The inference is warranted that they knew of this road, and of its user by the public, if not before, very soon after, the grant to them.

If the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway. The defendant pleads that the plaintiff cannot maintain this action without either the Attorney-General or the Municipal Corporation of the Township of Chatham and North Gore being a party thereto. The plaintiff simply joins issue upon this statement.

The question is, upon the evidence in this case, as laid down in Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. 251, at p. 256, "Can the plaintiff be said to have suffered damage peculiar to himself beyond that suffered by the rest of the public who were also entitled to use the road for any purpose?" I am met at once with the absence of evidence that the plaintiff has suffered damage peculiar to himself beyond that suffered by the

rest of the public who were entitled to use the road. The plaintiff's evidence was almost wholly directed to the question of highway or no highway, and he omitted to prove, if he could prove, either the particular damage to himself by the defendant's obstruction, or to prove an assault.

The defendant in his pleading denies the assault, and in his evidence does not admit it. He admits preventing the plaintiff, on a Sunday, from going through a gateway upon the alleged road. The defendant said that the plaintiff crossed this part of the alleged highway only twice in eighteen months. The plaintiff was not called to deny or explain this evidence of the defendant.

Even if the plaintiff, in erecting the gate on the highway, has created a public nuisance, I am unable to find that the plaintiff suffered particular injury, so as to bring the case within Fritz v. Hobson, 14 Ch.D. 542.

The objections that the municipality was not a party to the action, and that no particular private injury to the plaintiff had been proved, were made upon the argument. The plaintiff did not ask for any postponement to endeavour to get the municipality to intervene, or to supplement the evidence as to assault or private injury.

As the great mass of evidence was given upon the point on which the plaintiff was right, I think justice will be done if the action is dismissed without costs.

The judgment should be without prejudice to any other action by the plaintiff.

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BRITTON, J. FEBRUARY 19TH, 1913.

## FITCHETT v. FITCHETT.

*Husband and Wife—Alimony—Cruelty—Assault—Willingness of Wife that Husband should Leave her House—Permanent Alimony—Amount—Costs—Custody of Children — Access by Father—Terms.*

Action for alimony.

C. M. Garvey, for the plaintiff.
W. A. Henderson, for the defendant.

BRITTON, J.:— . . . The plaintiff, by reason of the assault committed upon her by the defendant on the 24th August,

1912, is entitled to judgment for alimony. After that assault the defendant decided to leave the plaintiff, and the plaintiff was willing that the defendant should go. The plaintiff was the lessee of the house; and, had not the defendant decided to go, the plaintiff would have been justified in refusing to live with him.

The plaintiff is not, in the circumstances, disentitled to recover because she expressed her willingness that the defendant should leave her.

The plaintiff desires to keep their two children, and she is willing that the defendant should, as permanent alimony, pay only an amount that would be reasonably sufficient to enable her to maintain the children. The defendant is not in very good financial circumstances; $5 a week will be sufficient for him to pay, and sufficient for the purpose for which the plaintiff asks money. Owing to costs having been incurred, there may be loss and inconvenience by delay in the plaintiff's receiving any money.

The judgment will be for alimony, and the defendant must pay the costs, which I fix at $80. The plaintiff incurred some unnecessary costs in having witnesses who appeared to know nothing of facts material to the issues herein. These costs will be payable, $5 each week, to the plaintiff's solicitors, commencing on Saturday the 8th March, and on each Saturday thereafter until sixteen payments have been made of $5 each. Then the payment of alimony will commence—on Saturday the 28th June next, and continue weekly thereafter until otherwise ordered, so long as the plaintiff has the custody of and is maintaining the children, as above-mentioned.

The defendant will be released from further payment of interim alimony, even if payments are in arrear under the order made.

There will be an order in reference to the custody of the children. They are to remain in the possession and care of the plaintiff, to be maintained by her until further ordered, free from any interference or attempted control by the defendant. The defendant will be allowed to see the children, or either of them, on any afternoon, at a time to be named, between 2 and 5 o'clock in the afternoon; but not more frequently than once every two weeks, and the interview is not to exceed thirty minutes in duration. No attempt is to be made by the defendant at any interview to influence them, or either of them, against their mother or to make them, or either, discontented with their home. Notice of the time when the defendant wishes to see the children must be

given twenty-four hours before the interview, and the plaintiff is to produce the children, for their father's visit, at Lippincott Barracks of the Salvation Army.

The defendant is not to visit or attempt to visit or see the children at the house where the plaintiff resides; nor is the defendant to visit that house to interfere in any way with the plaintiff, who is now keeping a boarding-house, and so engaged that any such visit would be hurtful to her business.

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LATCHFORD, J. FEBRUARY 22ND, 1913.

## STUART v. BANK OF MONTREAL.

*Trust and Trustees—Interest in Lands Conveyed by Son to Father—Absolute Conveyance—Action to Cut down to Mortgage—Subsequent Transfer by Father to Trustees for Bank in Settlement of Indebtedness—Valuable Consideration—Purchasers for Value without Notice.*

Action by a son of the late John Jacques Stuart, of Hamilton, for a declaration that a conveyance of the 30th October, 1900, of an interest on certain lands in Hamilton, known to the parties as "the north end property," for the expressed consideration of $12,000, though absolute in form, was given to the plaintiff's grandfather, John Stuart, by John Jacques Stuart, merely as security for the repayment of moneys advanced upon account of the said lands by the father to the son; and that the defendants Braithwaite, Alexander Bruce, Wilgress, and R. R. Bruce, to whom the lands were subsequently transferred in trust for the defendant bank, took with notice that John Stuart was merely a trustee of the interest in the lands for his son, and not their absolute owner. The plaintiff asked that, upon payment to the bank of what John Jacques Stuart owed to John Stuart upon the said lands, the plaintiff should be allowed in to redeem. Shortly, the plaintiff's contention was, that the conveyance was in fact a mortgage, and not a deed; and that the defendants, because aware of the fact, were in no better position than the assignees of a mortgage would be in the circumstances.

The questions for determination were: (1) Was the deed taken as security only? (2) If so, were the defendants aware that it was so taken? To entitle the plaintiff to succeed, both

questions—if the defendants were purchasers for value—must be answered in the affirmative.

The plaintiff, under the will of his late father and various assignments and transfers, had the same rights against the defendants that his father would have had if he had lived.

W. M. Douglas, K.C., and W. J. Elliott, for the plaintiff.

Wallace Nesbitt, K.C., and H. A. Burbidge, for the defendants.

LATCHFORD, J. (after setting out the facts at length and quoting portions of the testimony of witnesses):—I find the deed of the 30th October, 1900, to be what it purports to be—an absolute conveyance. . . . I credit the evidence of Mr. Bruce that he had no knowledge that Mr. Stuart ever pretended that his half interest in the property was held merely as security from his son. . . . That the trustees for the bank were purchasers for value, is clear. In consideration of the transfer, the bank abandoned their claim against the Nelson property and the household furniture of "Inglewood" (the Stuart homestead), and gave Mr. Stuart a release.

I find that John Stuart acquired by the conveyance of the 30th October, 1900, all his son's interest in the north end property, subject to no right or limitation whatever; that not only was there no interest reserved to the son, either expressly or by implication, but that no pretence was ever made to the defendants, or any of them, that John Stuart's interest was limited in the way the plaintiff asserts; that none of the defendants had at any time notice or knowledge of the alleged limitation. If there was in fact any such limitation, the defendants, as purchasers for value without notice, are unaffected by it. The Registry Act, I may mention, was, at the trial, allowed to be pleaded in amendment by the defendants.

When, in 1905 and 1906, Mr. John Stuart, personally and by the late Mr. Walter Barwick and his firm, protested against the finality of the settlement (with the bank), no claim was made that an absolute interest in the north end property had not been conveyed to the trustees for the bank; and when, in 1906, application was made for letters of administration with the will annexed to the estate of the plaintiff's father, the schedules filed disclose in the deceased no interest in the north end property.

It is difficult to avoid the inference that the present action is based on an afterthought . . . following on the successful

termination of Stuart v. Bank of Montreal, 17 O.L.R. 436, 41 S.C.R. 516, Bank of Montreal v. Stuart, [1911] A.C. 120, against the defendant bank. The reason of the decision in that case has, however, no application to this.

The action fails and is dismissed with costs.

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WALL v. DOMINION CANNERS CO.—MIDDLETON, J., IN CHAMBERS —FEB. 17.

*Pleading—Statement of Claim—Embarrassment—Promise—Contract—Amendment.*]—Appeal by the defendants from the order of the Master in Chambers, ante 214, 684, refusing to strike out certain paragraphs of the statement of claim. MIDDLETON, J., said that paragraph 6 seemed to be embarrassing; it did not allege a contract, but merely an offer; the allegation of the contract was found in paragraph 4. If it was intended to assign reasons which induced Grant and Nesbitt to make the promise charged, the paragraph was immaterial, as the consideration for the promise was shewn in paragraph 4. If it was intended to allege that the stock was to form part of that "voted" to Grant and Nesbitt, then the defendant company were not concerned unless the stock was still under their control, which was not alleged. If intended, this could be shewn under the allegation in paragraph 4. The plaintiff should have leave to amend if leave was necessary, but paragraph 6 as it stood must be struck out. Costs here and below to be in the cause. James Bicknell, K.C., for the defendants. D. L. McCarthy, K.C., for the plaintiff.

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BECHER v. RYCKMAN—MASTER IN CHAMBERS—FEB. 18.

*Discovery — Examination of Defendant — Amendment of Statement of Claim—Further Examination.*]—Motion by the plaintiff for an order for further examination of the defendant Ryckman for discovery after amendment of the statement of claim. The Master, after referring to the amendments made to the statement of claim, and the matters contained in the original examination of the defendant Ryckman, said that there did not seem to be any ground upon which a further examination could be ordered. Motion dismissed, with costs to the defendants in the cause. E. C. Cattanach, for the plaintiff. K. F. Mackenzie, for the defendants.

HARRIS v. ELLIOTT—MASTER IN CHAMBERS—FEB. 20.

*Pleading—Statement of Claim—Oral Contract—Consideration—Particulars—Con. Rules* 261, 268.]—By the statement of claim the plaintiff alleged that on the 14th September, 1911, the defendant promised to pay to the plaintiff $1,000 on the happening of a certain event, which had happened. Particulars were demanded as to whether this promise was in writing, and, if so, whether by deed or otherwise, and the consideration, if any. Particulars were thereupon furnished as follows: "The defendant's promise to pay alleged in paragraph 3 of the statement of claim was verbal and not in writing." The defendant moved for further particulars so as to shew the consideration relied on to support the verbal promise to pay $1,000 as alleged. The Master said that it might be true that, on this statement of claim as now in effect amended by the particulars, the defendant might have moved under Con. Rule 261 to set it aside as shewing no cause of action, because no consideration was alleged. But there was much force in the answer to this objection, that, if that course had been taken, the Court would have asked the defendant's counsel why he had not moved for particulars, and would have directed the plaintiff to amend by alleging consideration. As the plaintiff had complied with the demand to some extent, he should now state what, if any, consideration was relied on. Then, if there was none or one which the defendant thought insufficient in law, he could move under Con. Rule 261, if so advised. It, therefore, followed that the plaintiff should furnish some answer to the demand as to consideration; and that the time for delivery of the statement of defence should be enlarged meantime. In Odgers on Pleading, 7th ed., p. 91 (p. 88 of the 5th ed.), it is said: "The consideration for any contract not under seal is always material, and should be correctly set out in the statement of claim, except in the case of negotiable instruments." The present statement of claim, therefore, did not conform to Con. Rule 268. Costs of the motion to the defendant in the cause in any event. G. S. Hodgson, for the defendant. Grayson Smith, for the plaintiff.

SCULLY v. RYCKMAN—LENNOX, J.—FEB. 20.

*Money Lent—Action to Recover—Conflict of Evidence—Finding of Fact—Betting—Illegality.*] —Action to recover $2,000 said to have been lent by the plaintiff to the defendant, $250 alleged to have been advanced by the plaintiff to the defendant in connection with betting at the Woodbine races, and $450 for interest: in all, $2,700. LENNOX, J., said that the plaintiff was not entitled to recover in respect of the $250 alleged advances made for the defendant in connection with betting. The plaintiff was not able to say whether the alleged advances were of the class recoverable at law; and, as the claim failed by reason of this uncertainty, there was no necessity for weighing the testimony of the plaintiff and defendant upon this branch of the case. As to the alleged loan of $2,000, the plaintiff produced a receipt for $2,000, dated the 28th September, 1908, upon a printed form, filled up and signed by the defendant. The defendant admitted that he got $2,000 from the plaintiff upon that day; the defendant said that it was not a loan, but a dividend on book-making transactions. The learned Judge, reviewing the conflicting evidence, concludes that the plaintiff is telling the truth when he swears that he lent the defendant $2,000 on the 28th September, 1908, and that the defendant obtained the loan by representing himself as being hard pressed. Judgment for the plaintiff for $2,000 and interest from the 29th December, 1909, with costs. J. P. MacGregor, for the plaintiff. K. F. Mackenzie, for the defendant.