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MEREDITH, C.J. DECEMBER 4TH, 1906.

CHAMBERS.

MONTGOMERY v. RYAN.

Jury Notice—Striking out—Separate Sittings for Jury and Non-jury Cases—Practice.

Motion by plaintiff to strike out the defendant's jury notice in an action upon a promissory note, in which the venue was laid at Toronto. The motion was addressed to the discretion of the Court, and was not based upon irregularity.

W. N. Ferguson, for plaintiff.

W. M. Hall, for defendant.

MEREDITH, C.J.:—I think the jury notice must be struck out. It is a matter of discretion whether it should be or not. While the practice where the venue is laid out of Toronto is not, except in very rare cases, to make an order in Chambers, but to leave the matter to be dealt with by the trial Judge, a different practice is adopted where the venue is laid where there are separate sittings for the trial of jury and non-jury cases, the latter practically a continuous sitting throughout the year; and in such cases, where the action is one that plainly ought to be tried without a jury, in order to prevent the jury list being incumbered with such cases, thereby involving a very considerable expense to the city, county, or province, because other jury cases would have to wait while such a case was being tried without a jury, the practice is to strike out the jury notice.

This is plainly a case which would be tried without a jury—a case of investigation of accounts.

The order must go. Costs in the cause.

CARTWRIGHT, MASTER. DECEMBER 17TH, 1906.

CHAMBERS.

HAINES v. YEARSLEY.

Summary Judgment—Rule 603—Action on Promissory Note —Defence—Note given on Conditional Undertaking.

Motion by plaintiff for summary judgment under Rule 603 in an action on a promissory note given by defendant to plaintiff.

R. U. McPherson, for plaintiff.

C. P. Smith, for defendant.

THE MASTER:—Defendant's affidavit sets out the transaction which led to the giving of the note. He then says (paragraph 6) that plaintiff "suggested that I should give my promissory note for $1,000, and that he would hold same and would not negotiate it, and that he would not call upon me for payment of same unless and until I collected the amount thereof from (one) Henderson." The following paragraph alleges that "in pursuance of the request, for the purposes and subject to the conditions in the paragraph preceding, I gave to plaintiff the promissory note in question."

There is no impeachment of this affidavit; plaintiff's contention being that no such defence can be set up according to the well-established principle as to written contracts.

The defendant relies on sec. 21, sub-sec. (2), clause (b), of the Bills of Exchange Act, and sec. 88, and cites Commercial Bank of Windsor v. Morrison, 32 S. C. R. 98.

After considering the matter, I think that defendant should be allowed to submit his contention to the Court.

When his statement of defence is delivered, the question of its validity can be tried as on a demurrer, if the facts are not in dispute.

The motion is dismissed; costs in the cause. Defendant should in every way facilitate a trial of the action.

DECEMBER 17TH, 1906.

DIVISIONAL COURT.

HORWOOD v. MACLAREN.

Architect—Work and Material Ordered for Building—Absence of Authority from Owners or Contractors—Warranty of Authority—Personal Liability—Principal and Agent.

Appeal by defendant from judgment of MABEE, J., at the trial, in favour of plaintiffs for $295 and costs, in an action for the price of work and material.

Glyn Osler, Ottawa, for defendant.

E. F. Burritt, Ottawa, for plaintiff.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—Plaintiffs are stained glass manufacturers; defendant is an architect practising in the city of Ottawa.

In the spring of 1905 defendant was employed by the trustees of the Cobden Methodist Church to prepare plans and specifications and supervise the construction of a new church at Cobden.

The whole contract was let to one Simpson, including the windows in question.

Defendant admits that he was not authorized either by the contractor Simpson or the trustees to enter into a contract for either of them.

According to plaintiffs' evidence, the defendant telephoned plaintiffs asking them to put in a tender, which they did. The following is a copy:

"Ottawa, April 12th.

"Mr. J. P. Maclaren,
"104 Sparks Street,
Ottawa, Ont.

"Dear Sirs:—In reply to your inquiry re Methodist Church in Cobden, we beg to quote you the sum of $340 for all windows shewn on elevations and pointed out by you, being two large windows, one front and side entrance, transoms, two single lights east, two tower lights, two double lights west, one light in choir, three lights entrance to choir, three single lights rear. .Design to be similar to one sent you. Quotation includes

2 vents 1 ft. 8 in. x 2 ft. 6 in., large window.
2 vents 1 ft. 7 in. x 2 ft. 6 in., west.
1 vent 2 ft. 9 in. x 2 ft. 6 in., choir.
1 vent 2 ft. 2 in x 2 ft. 2 in., entrance to choir.
1 vent 2 ft. 2 in x 2 ft. 2 in., rear.
2 vents 2 ft. 2 in x 2 ft. 2 in., east.

And the whole properly placed in church finished complete, with all freight and cartage paid by us, scaffolding necessary for placing supplied by committee.

"Hoping to be favoured with your esteemed order, we are,

"Yours truly,
"H. Horwood & Sons,
"per C. G. Horwood,
"Mgr."

Some time after, being at defendant's office on other business, C. H. Horwood, one of the plaintiffs, asked defendant about the tender, and he was told to go on with the work, and he thereupon made the following entry in his memorandum book: "J. P. Maclaren, architect, ordered windows for Cobden Church." Plaintiffs took the necessary measurements, and completed the work. Simpson, the contractor, offered to put them in, and plaintiffs, being very busy at the time, instructed him to do so, and shipped the glass to his address at Cobden, and he put them in for plaintiffs and sent them his bill. This amount has been deducted from the price by the trial Judge, and the judgment entered is for the balance.

Plaintiffs, not having received payment, applied to defendant, who stated that he could not give a certificate un-

til he had inspected the work, and the matter stood over until March, 1901, when defendant telephoned plaintiffs that there was trouble at Cobden, and requested them to send their bill to the trustees. Plaintiffs replied that they "had been dealing with the committee through him," as they understood, and had no suspicion of any trouble, and informed defendant that they held him or the committee responsible for the work. The committee repudiated all responsibility, as they had let the contract to Simpson, and plaintiffs were not aware that the Simpson contract included this glass, but on the contrary were told by defendant that they would be paid by the committee direct. Simpson became insolvent in September, 1905, and assigned all moneys coming to him under the contract to a bank, to whom the payments were made by the committee, in part without the architect's certificate. Plaintiffs had in fact no contract, either with Simpson or the trustees, but furnished the glass at the request of defendant, supposing that he was authorized by the trustees to order it. The glass and work were accepted, but the trustees, having paid the assignee of the contractor in full for the contract, refused to pay plaintiffs.

The evidence of defendant conflicts somewhat with the facts as given by plaintiffs. The Judge has given effect to plaintiff's evidence, and I cannot say that he is wrong in so doing.

Upon the facts as offered by plaintiffs, I am of opinion that defendant has rendered himself liable. He invited the tender, held out that plaintiffs would be paid by the trustees, and, plaintiffs having acted in good faith and furnished the glass at his request, and the trustees not having authorized defendant to make them liable, rendered himself liable, on breach of the implied warranty, that he had such authority. I do not think the Statute of Limitations can help defendant, if at this late date he were allowed to plead it. It has, I think, no application to the present case. The goods were in fact furnished and accepted by all concerned; there is not and never was any dispute as to their quality. The whole difficulty has arisen by the architect taking upon himself to do that which he had no authority for doing, and, however hard it may be, he must suffer the consequence.

Appeal dismissed with costs.

DECEMBER 17TH, 1906.

DIVISIONAL COURT.

BOOTH v. CANADIAN PACIFIC R. W. CO.

Appeal to Divisional Court—County Court Appeal—Right of Appeal—Appeal from Order of County Court in Term Dismissing Motion for New Trial in Action Tried by a Jury—County Courts Act, sec. 51.

Motion by plaintiff for an order quashing an appeal by defendants from an order of the County Court of Carleton, in term, dismissing defendants' motion for a new trial, upon the ground that no appeal lies from such an order.

W. E. Middleton, for plaintiff.

D'Arcy Scott, Ottawa, for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—The County Courts Act, R. S. O. 1897 ch. 55, sec. 51, governs appeals to a Divisional Court. Sub-section (4) provides that where there has been a trial with a jury, a motion for a new trial shall be made to the County Court.

This case was tried by a jury.

If plaintiff is entitled to succeed in this motion, the effect is that in a case of this kind no appeal can be had to a Divisional Court, and the question is, whether the intention of the legislature was to limit an appeal, in a case of this kind, to the County Court. Sub-section (1) provides that any party to a cause or matter in the County Court may appeal to a Divisional Court from the judgment directed by a Judge of the County Court to be entered at or after trial in a case tried without a jury, and also in any case tried with a jury to which sub-sec (4) does not apply. This clause would seem to contemplate a certain class of cases, to be tried with a jury, in which there is an appeal to a Divisional Court.

In Donaldson v. Wherry, 29 O. R. 552, the jury found in favour of defendant, and judgment was entered in his

favour, and upon motion to set aside the verdict and judgment and to enter judgment for plaintiff or for a new trial, the County Court Judge in term made an order setting aside the verdict and judgment, and ordering judgment to be entered for plaintiff. It was held that an appeal by defendant from the order of the County Court Judge in term lay to a Divisional Court. Street, J., points out that the right under sub-sec. (1) of appeal to a Divisional Court in that case was not taken away by sub-sec. (4), because it was not an application for a new trial.

In Irvine v. Sparks, 31 O. R. 603, it was held that an appeal did not lie from a judgment of the County Court setting aside a verdict and ordering a new trial, the appeal having been taken under sub-sec. (4).

In Leishman v. Garland, 3 O. L. R. 241, 1 O. W. R. 22, there was an appeal by plaintiff to a Divisional Court from the judgment of the senior Judge of the County Court, in term, setting aside the judgment of the junior Judge of the same Court in favour of the appellant at a trial without a jury. It was there held that the motion was properly made under sub-sec. (2) and not under sub-sec. (4), and none the less so because, in the alternative, a new trial was moved for; sub-sec. (5) providing that if the party moves before a County Court under sub-sec. (2) in a case in which he might have appealed to the High Court, he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court.

It was strongly urged by Mr. Scott that the judgment in the previous appeal in this case from the County Court was decisive of the present motion, and that the appeal should be heard.

At the first trial of this action before Judge MacTavish and a jury, judgment was given for plaintiff on the answers of the jury. An application was then made in term for a new trial or for judgment for defendant, and judgment was thereupon given in favour of defendant, from which plaintiff appealed to a Divisional Court, and objection was taken to the motion being heard, on the ground that the Court had no jurisdiction to entertain the appeal, and Leishman v. Garland was cited in support of the objection. The Court, however, held that such an appeal lay. It will be seen that the facts on that application were the reverse

of the present. The judgment entered on the findings of the jury having been reversed in term, the Court held that an appeal lay. In the present application the County Court in term confirmed the decision of the jury.

The present case having been heard by a jury, and the judgment entered at the trial upon the findings of the jury having been confirmed in term by the County Court, I think there is no appeal in such a case to the Divisional Court, and the present appeal should be quashed.

MOSS, C.J.O. DECEMBER 17TH, 1906.

C.A.-CHAMBERS.

BURKE v. TOWNSHIP OF TILBURY NORTH.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Trifling Amount Involved—Unimportant Questions—Jurisdiction of Drainage Referee.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 457), reversing judgment of CLUTE, J., at the trial.

J. Bicknell, K.C., for plaintiff.

Featherston Aylesworth, for defendants.

MOSS, C.J.O.:—The action is for trespass to plaintiff's land, and the trial Judge awarded her $10 damages and full costs of action.

A drain was being constructed under the provisions of the Drainage Act along the highway in front of plaintiff's farm, and the trespass complained of consisted in spreading earth excavated from the drain upon a small portion of plaintiff's property.

The trial Judge found that plaintiff's land at the place in question was worth about $10 an acre, and that no more than half an acre was injured, so that, as he said, the whole value of the land itself would only be about $5.

The action is, therefore, one which should not have been brought in the High Court in the first instance. But, through

an inadvertence it was said, defendants in their statement of defence denied all the allegations of the statement of claim, which involved a denial of plaintiff's title, and for this reason the trial Judge awarded costs on the High Court scale, observing that but for that fact he would have felt great hesitation in making any order as to costs.

It appears that in the statement of claim it was alleged that the trespass was upon the south-west part of plaintiff's lot, whereas in point of fact it was upon the north-west part, and it is not improbable that in endeavouring to meet this statement defendants stumbled into a denial of plaintiff's title.

Defendants, among other answers to plaintiff's claim, objected that the case was one which fell exclusively within the cognizance of the Drainage Referee, under sec. 93 of the Drainage Act, as amended by 1 Edw. VII. ch. 30, sec. 4. The trial Judge thought otherwise, but the Divisional Court agreed with defendants' contention, and dismissed the action.

Plaintiff now seeks to carry the case to appeal for the purpose, as it is said, of having the question settled. So that in a case of little more than a technical trespass to land worth $5, and in an action which only an inadvertence in the pleadings rendered proper to be maintained in the High Court, one more decision is sought upon the question whether, on the facts, plaintiff should or should not have resorted to the Drainage Referee for her $5 compensation.

Whether the point involved is or is not yet in doubt, notwithstanding the unanimous decision of the Divisional Court—as to which it is not necessary to express an opinion at present—I think encouragement should not be lent to the prolongation of this litigation. The amount at stake is so trifling, and the matter of so little consequence except to the parties immediately concerned, that the discretion given by the Judicature Act should not be exercised in favour of a further appeal.

There are other grounds of defence open to defendants upon an appeal which are not without weight, and in respect of which the Judge who delivered the judgment of the Divisional Court indicated a view favourable to defendants, and it is possible that success on the question of forum would not mean ultimate success to plaintiff.

Motion refused with costs.

DECEMBER 18TH, 1906.

DIVISIONAL COURT.

DRUMMOND MINES CO. v. FERNHOLM.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Inequitable Contract—Discretion—Appeal—Mistake or Fraud.

Appeal by plaintiffs from judgment of TEETZEL, J., at the trial, dismissing without costs an action by purchasers for specific performance of a contract by defendant for the sale of 10 acres of land. The trial Judge found that the contract was valid, but held that it would be inequitable to enforce it against defendant. He dismissed it without prejudice to plaintiffs bringing another action for the rectification and enforcement of the contract, or for the return of the part of the purchase money paid.

T. D. Delamere, K.C., for plaintiffs.

G. T. Blackstock, K.C., for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., MAGEE, J.), was delivered by

FALCONBRIDGE, C.J.:—The trial Judge has specifically found that it was not the intention of either of the parties that Fernholm should dispose of his house and barn and improvements as part of the agreement. He also finds that it would be inequitable and unjust to enforce the contract against Fernholm, because it certainly is not the real bargain he intended to make.

These findings appear to be justified upon the evidence of Fernholm. This defendant is a Swede, and manifestly labours under extreme disability when undergoing straight cross-examination in a language with which he is but imperfectly acquainted. The learned Judge has accepted his story in the main, notwithstanding some statements which are not quite reconcilable with each other.

Mr. Blackstock, at the close of the evidence in reply, challenges the plaintiffs, saying, "I propose to comment upon it if Wright, the officer of plaintiff company who made

the contract with Fernholm, is not called." Wright was not called, and Fernholm's evidence therefore stands uncontradicted. I would have thought that the Judge's expressions are equivalent to, or would justify, a finding that there was either a mutual mistake or fraud in the written document.

However, the Judge bases his decision on the ground that the circumstances make it inequitable for the Court to interpose for the purpose of a specific performance. The letter of 26th August, 1905, . . . which is relied upon by plaintiff as depriving the agreement of its inequitable character, is purely illusory. It is not executed by the company; it is not even signed by Wright as manager; and it leaves Fernholm entirely at Wright's mercy as to what particular two acres should be chosen and allotted to him. I am of opinion that, even putting the case upon the lower ground upon which the Judge has chosen to place it, he has exercised a judicial discretion in the matter, and that his judgment is right. The judgment appears to be sufficiently favourable to plaintiffs in that the action was dismissed without costs, and without prejudice to any action which plaintiffs might be advised to bring for rectification and specific performance, or for return of the purchase money.

In my opinion, the appeal ought to be dismissed with costs.

DECEMBER 18TH, 1906.

DIVISIONAL COURT.

LUDGATE v. CITY OF OTTAWA.

Highway—Non-repair—Injury to Pedestrian—Snow and Ice on Sidewalk—Notice to Municipal Corporation—Gross Negligence—Damages.

Appeal by defendants from judgment of MABEE, J., ante 257, in favour of plaintiff for $250 in an action for damages for personal injuries sustained by plaintiff owing to a fall upon a sidewalk in the city of Ottawa, alleged to be dangerous owing to its condition by reason of snow and ice.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

W. E. Middleton, for defendants.

D'Arcy Scott, for plaintiff.

RIDDELL, J.:—It was argued that, assuming the state of the street to be such as found by the trial Judge, there was nothing to justify a finding of gross negligence against the municipality. A great many cases were cited to us, some from the English Courts and some from Canadian Courts, and many from the American Courts. I have read all the English and Canadian cases and many of the American, but I find nothing which would justify us in departing in any degree from the decision in the Supreme Court of Canada in City of Kingston v. Drennan, 27 S. C. R. 46. Mr. Justice Sedgewick, in giving the judgment of the majority of the Court, discussed the meaning of the phrase "gross negligence," and came to the conclusion that it meant "very great negligence." I do not know that this advances the matter very much, if any; but I have seen no definition that is any better. Without attempting further to define the expression, it appears to me that if the jury could properly find "gross negligence" in the Drennan case, the present case is a fortiori.

The facts as admitted and as found by the trial Judge are in his own words as follows: "The ice . . . on the inside of the walk . . . ran up to 6 and possibly 7 inches in height." "This condition existed for three or four weeks previous to the accident without any reason being given why this ice could not have been removed." "During a mild minter, with the appliances used by the city for the removal of just such dangers. . . . It is in a populous section of the city, much travelled, within half a dozen doors of one of the most travelled streets of the city, . . . its presence appears to have been known to those whose duty it would seem to me to be, under the by-law, to see that it was removed." This ice sloped down to the level in a distance of two or three feet—as it is put by the ward foreman, the ice sloped down to nothing above the middle of the sidewalk—the sidewalk being 5 or 6 feet wide. The Judge finds that this was "gross negligence" within the section so as to make the defendants liable.

Applying the law as laid down in the Drennan case and in the charge of the Chief Justice of the Common Pleas (with which I entirely agree) set out on p. 54 of the report in 27 S. C. R., it does not seem to me that the trial Judge can be said to be wrong in his finding.

The plea of contributory negligence is disposed of by Gordon v. City of Belleville, 15 O. R. 26.

The motion should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion, referring to and distinguishing Mahoney v. City of Ottawa, 3 O. W. R. 695.

BRITTON, J., concurred, for reasons stated in writing.

CARTWRIGHT, MASTER. DECEMBER 19TH, 1906.

CHAMBERS.

BURNS v. CITY OF TORONTO.

Jury Notice — Irregularity—Striking out—Action against Municipal Corporation—Non-repair of Highway.

Motion by defendants to strike out jury notice as irregular under sec. 104 of the Judicature Act.

John T. White, for defendants.

T. N. Phelan, for plaintiffs.

THE MASTER:—Mrs. Burns, one of the plaintiffs, "fell into an open sewer which had been dug in the street by the defendants," and was injured. The statement of claim then proceeds to say that her injuries "were caused by the negligence of the defendants in not securely guarding said sewer and making the same safe for passengers using the said street." And she claimed damages for her injuries.

It was contended that the failure of defendants to guard the excavation was not non-repair within the meaning of the Act.

But, in view of the recent decisions in Armstrong v. Township of Euphemia, 7 O. W. R. 552, and Hobin v. City of Ottawa, 8 O. W. R. 589, I do not think this argument

can succeed. Here plaintiff's claim is based on an omission on the part of the corporation which rendered the highway unsafe for those entitled to use it. Had the excavation been alleged to have been unlawful, the matter would have been otherwise.

All the authorities are given in the cases cited.

The motion is granted; costs in the cause.

CARTWRIGHT, MASTER. DECEMBER 19TH, 1906.

CHAMBERS.

PATTERSON v. TODD.

Practice—Motion to Dismiss Action—Want of Prosecution—Refusal to Dismiss—Terms—Change of Venue—Speedy Trial—Costs.

Motion by defendant to dismiss action for want of prosecution.

The action was commenced on 13th March. The statement of claim was not delivered until 20th June. The statement of defence was delivered on 24th August, and plaintiff joined issue on 1st September. The venue was laid at Brockville, where the jury sittings were held on 1st September. On 10th September notice of trial was given for the non-jury sittings on 6th December instant.

After the examination of plaintiff on 15th November, his solicitor concluded that the action must fail. On 27th November he wrote to defendants' solicitor to that effect, and stated that he would not enter the action for trial, and that he would so inform his client. The 3rd December was the last day for setting down, and the solicitor at once wrote to plaintiff as above stated.

Plaintiff did not acquiesce in this view of his case, which he was ready to have tried on 6th December. He accordingly went back to Brockville and took other advice, and on 12th December an order was taken out appointing a new solicitor. He, however, was not aware that notice of trial had been given when first consulted on 30th November, and accordingly thought the action could not be tried at that sittings. He did not in fact receive the papers until after 3rd December.

On 7th December this motion was launched, and was argued on 14th December.

C. A. Moss, for defendants.

Grayson Smith, for plaintiff.

THE MASTER:—It was argued that the action had already been virtually put an end to by the letter of 27th November of plaintiff's solicitor.

This, however, is not a necessary conclusion from that letter, as it states that the client was to be informed of his solicitor's opinion. Plainly this was to give him an opportunity of taking other advice, if he desired to do so.

In any case the present motion implies that the action is still pending. The motion itself was justified in view of the action having begun so far back and two sittings having been allowed to pass without its being brought to trial. The next sittings at Brockville will not be until 16th April, and plaintiff says he is ready for trial. If defendant so desires, plaintiff must go to trial at the ensuing Ottawa assizes. This change of venue will really be for the convenience of the parties and their witnesses and a saving of expense, as Ottawa is much nearer and easier of access to Burritt's Rapids, where plaintiff resides and his witnesses no doubt also, than Brockville, and defendant resides in the county of Carleton. Subject to this condition, the motion will be dismissed, but the costs of and incidental thereto will be to defendant in any event.

OSLER, J.A. DECEMBER 19TH, 1906.

C.A.—CHAMBERS.

MATHEWSON v. BEATTY.

Court of Appeal—Leave to Appeal Direct from Judgment at Trial—Amount Involved—Reasons for Granting Leave—Form of Order—Recital.

Motion by defendants for leave to appeal direct to the Court of Appeal from the judgment at the trial.

F. E. Hodgins, K.C., and W. N. Ferguson, for defendant.

R. McKay, for plaintiff.

OSLER, J.A:—For the purpose of this application, I may properly hold, upon the affidavit filed and the note of the judgment, that the amount involved is upwards of $1,000. There is a judgment for damages for timber already cut, $565, followed by a judgment for an injunction restraining defendants from removing the timber remaining on the lots, sworn to be of the value of $800 or thereabouts, which, if the judgment is wrong, the defendants, by the very terms of the judgment, must lose if it stands. So I think that I have jurisdiction to make the order. I think also that I ought to make it, as a Divisional Court would probably feel itself bound to follow the judgment of a former Divisional Court in Dolan v. Baker, 5 O. W. R. 229, 10 O. L. R. 259, upon which, as counsel inform me, the trial Judge acted.

An order, therefore, is granted giving defendant leave to appeal direct to this Court, passing over the Divisional Court.

The order should recite, "and it appearing that the matter in controversy in the appeal exceeds the sum or value of $1,000 exclusive of costs, and therefore that an appeal would lie from the decision of the Court of Appeal to the Supreme Court of Canada."

Costs of the application to be costs in the cause.

BOYD, C. DECEMBER 20TH, 1906.

TRIAL.

KNILL v. GRAND TRUNK R. W. CO.

Railway—Injury to Land by Laying Double Tracks—Action for Damages—Remedy by Arbitration under Railway Act—Farm Crossing—Blocking by Heaping up Snow—Actionable Wrong—Limitation of Time for Bringing Action—Blocking of Drains—Assessment of Damages—Costs.

Action to recover damages for injury to plaintiff's farm by the laying of tracks by defendants across it.

BOYD, C.:—Part of the damages claimed in this case arises from the defendants having so raised the new line of rails forming the double track where it crosses plaintiff's

land as to raise the grade of his farm crossing. There is greater trouble and difficulty in the use of the crossing, as alleged, by the impossibility of stopping a loaded team to shut the farm gate on the upward grade, so that it requires either a smaller load to be carried or a man to be employed to shut the gate, so as to keep out cattle from the track while the load is being driven across. This difficulty arises from the construction of the double track, and is a matter to be redressed by compensation under the Railway Act, and not by way of action (see sec. 120), unless negligence or want of authority to construct on the part of defendants is alleged and proved. There is no evidence before me to shew want of authority or negligence in construction on their own land of the second track, upon the part of defendants, so as to give a right of action on this matter of the inconvenient crossing.

In the other matter of complaint, the taking up of planks, and blocking of crossing in 1904-5 by heaping up or shovelling up snow thereon by defendants, that would be, I think, an actionable wrong, if the action had been brought in time, i.e., within one year after the injury resulted from the piling up of snow and taking away of planks—but this action, begun on 15th November, 1906, is outlawed by sec. 242 of the Railway Act.

This leaves as the only cause of complaint the damage suffered from blocking of the drainage and piling up of the tiles, which I thought at the trial was a liability of defendants, for which I now assess the sum of $40 damages. I feel the less regret at this result of the litigation when I recall the fact of plaintiff's application to the Board of Commissioners with a view of getting the crossing redressed, and his refusal to comply with the reasonable terms imposed by them under sec. 198.

Judgment for $40 and no costs.

As to the exclusive jurisdiction over farm crossings being vested in the Board of Railway Commissioners, see Grand Trunk R. W. Co. v. Perrault, 36 S. C. R. 671.

As to the regulation and construction of drainage facilities, jurisdiction being in the Board of Railway Commissioners, though the Court may enforce the payment of damages for lands injured by improper backing of water, see Langlois v. Grand Trunk R. W. Co., Q. R. 26 S. C. 511.

DECEMBER 20TH, 1906.

DIVISIONAL COURT.

LONDON AND WESTERN TRUSTS CO. v. CANADIAN FIRE INSURANCE CO.

Fire Insurance—Subletting of Premises—Change in Nature of Risk—Notice to or Knowledge of Assured—Landlord and Tenant—Control of Landlord.

Appeal by plaintiffs from judgment of FALCONBRIDGE, C.J., ante 273, dismissing an action by the liquidators of an insolvent company, the owners of a building in the town of Sudbury, insured by defendants for 3 years from 4th October, 1904, and destroyed by fire on 30th November, 1905, to recover the amount of the insurance.

The substantial defence was that the insolvent company leased to one Ferres, a Syrian merchant, a portion of the insured building, and that Ferres took possession thereof and put and kept therein for sale a stock of merchandise, and carried on the business of a merchant, which change of occupation was material to the risk, which thereby became a mercantile one, and more hazardous than that described in the application for insurance.

G. C. Gibbons, K.C., for plaintiffs.

N. W. Rowell, K.C., for defendants.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—This case requires that the legal effect of the statutory condition as to change of risk in a fire policy should be considered, as found in R. S. O. 1897 ch. 203, sec. 168 (3).

It is laid down in . . . Am. & Eng. Encyc. of Law, 2nd ed., vol. 13, p. 286, that under the usual form of policy it is avoided only by an increase of risk by any means within the knowledge or control of the assured, and therefore such an increase, if unknown to him or not within his control, is not fatal. To support this text is cited Brenner v. Liverpool, etc., Ins. Co., 57 Cal. 101, 21 Am. R. 703, and the Canadian case Heneker v. British America Assurance Co., 14 C. P. 57.

The "usual form" refers to what is called "the standard form of policy," i.e., one framed by the statute of the state, having the stipulation that "if the hazard shall be increased by any means within the control or knowledge of the assured," it shall be void: 19 Cyc. 711; and among the cases cited is the one relied on by Mr. Gibbons of Nebraska v. Christian, 2 Neb. 572, 45 N. W. Repr. 624, 26 Am. St. R. 407. This case, in which the policy was as in our statute, decides that where a tenant, without the knowledge or consent of the insured, increases the risk, it does not avoid the policy, unless it also contains a stipulation to the effect that an increase of risk by the tenant will render it void.

So in a very late case from Kentucky, 1905, North British Ins. Co. v. Union Stockyards, 87 S. W. Repr. 285, where the words of the condition are the same—not in the copulative, as suggested during the argument, but in the disjunctive "control or knowledge"—and where the tenancy was, as here, subsequent to the policy, it was held that the policy was not avoided by the tenant using the premises in a more hazardous way without the knowledge of the insured, and otherwise than allowed by the lease.

But the most satisfactory case in its reasoning, and one binding upon us, if it is not distinguishable, is Heneker v. British America Assurance Co., 14 C. P. 57, 62. It was there pointed out by Adam Wilson, J., for the Court, that during the lease, tenant was as much the owner of the land for his limited interest as the owner, the tenant of the fee, is for his larger interest. The landlord could not enter upon his tenant, unless by a reservation to that effect, without becoming a trespasser—the same as if he were the merest stranger—and during his term the tenant may build as much as he pleases (without regard to the landlord) so long as he does not commit waste. If (he says) the change had been made with the express consent of the landlord, it might have been well, and it was under his control—but when made without his knowledge, we do not think that it must be held to be within his control.

The only distinction . . . in this case was that the change was made by a tenant who was let into possession after the policy. This is not a material difference—having regard to the reasoning of Mr. Justice Wilson. When the policy was made, it was known that the premises were

of tenement character, occupied or to be occupied by tenants. The subsequent tenant made a change in the occupancy by bringing in a quantity of goods to be sold, creating, it is said, a mercantile risk. Be that as it may, there was no structural change—no waste—nothing in respect of which the landlord could have interfered had he known, and at best the increase of risk is so slight that the finding might well have been the other way.

But granted some increase of risk: the change was made by the tenant for his own purposes, not as agent of the landlord, and not with the assent and not with the knowledge of the landlord. This being so, the cases justify the conclusion that they were made by a stranger (or as if a stranger), one over whom the landlord had no control.

That there was a break in the tenancy is of no importance. The change, if made by any tenant who is in for the time being as owner, is one which is not within the control of the landlord. Had he known of it, whether within his control or not, it might be his duty to notify the company. But no state of facts is proved here to shew that the landlord should do anything more than he did, i.e., remain passive, because unaware that any change was being made in the premises, for which the tenant regularly paid his rent.

The cases upon which the judgment in appeal rests are ones in which the condition was absolute against any change of risk, in which case the insured is liable to lose his insurance if any one makes the change; whether known to or controllable by him or not.

In my opinion, the judgment should be reversed, and the company be ordered to pay the amount insured and costs of action and appeal.

DECEMBER 19TH, 1906.

DIVISIONAL COURT.

KENT v. JOHN BERTRAM SONS CO.

Negligence—Injury to Workman—Contributory Negligence—Finding of Jury.

Appeal by defendants from judgment of MEREDITH, C.J., at the trial, upon the findings of the jury, in favour

of plaintiff for the recovery of $450 in an action for damages for injuries sustained by plaintiff while engaged in putting in gas fixtures in defendants' factory. Plaintiff was crushed between a column and a crane which was being propelled along a track. Plaintiff alleged negligence on the part of defendants. The jury found the facts in favour of plaintiff, with one exception referred to below.

E. E. A. DuVernet, for defendants.

G. Lynch-Staunton, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

FALCONBRIDGE, C.J.:—The finding of the jury that plaintiff could by the exercise of reasonable care have avoided the accident, viz., by the use of a ladder, etc., at first sight seems to interpose a formidable bar in the way of plaintiff's recovery. But, having regard to the evidence, the nature of the case, and the explanation of the jury, it really only defines and describes a degree and kind of negligence in plaintiff, which is very different from the contributory negligence which would disentitle him to recover. It is an example of a case where the plaintiff by his own negligence has brought about a condition of affairs which is unusual or awkward, but which does not exempt the defendant from liability if he could by the exercise of ordinary care have avoided injuring the plaintiff.

The rule was formulated in Davies v. Mann, 10 M. & W. 546, and has been recognized in numerous cases and by text writers ever since.

We reserved judgment for the purpose of reading over the evidence given in order to satisfy ourselves whether there was a case to go to the jury. We are all of opinion that there was abundant evidence proper to be submitted to the jury, and upon which they could reasonably find as they have done in plaintiff's favour.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 21ST, 1906.

CHAMBERS.

COPELAND-CHATTERSON CO. v. LYMAN BROTHERS.

Pleading—Default in Delivery of Defence—Noting Pleadings Closed—Setting Aside Note and Leave to Defend—Terms —Costs.

Motion by defendants to set aside a note entered by plaintiffs that the pleadings were closed, no statement of defence having been delivered, and for leave to defend.

G. H. Kilmer, for defendants.

W. E. Raney, for plaintiffs.

THE MASTER:—The writ of summons issued on 4th April, 1906, and defendants appeared on the 12th. The statement of claim was delivered on 26th June. On 25th April plaintiffs commenced an action against the Business Systems Limited, in which the statement of claim was delivered on 9th May, and statement of defence on 14th June. The solicitors were the same in both actions, and on 29th June plaintiffs' solicitors wrote to defendants' solicitors suggesting that, as the "Business Systems had taken over the defence in this case," against the Lyman Brothers, these two actions ought to be consolidated, and asking if defendants' solicitors would consent to this being done. Defendants' solicitors declined, and plaintiffs' solicitors wrote again, in terms implying that they supposed that both actions would be defended.

No statement of defence was, however, delivered in the Lyman action, and on 12th October plaintiffs noted the pleadings as closed, without giving any notice to defendants' solicitors of their intention to do so. This silence continued until on 17th December instant plaintiffs moved ex parte for judgment, and the present motion to set aside the note and allow the defendants to defend was directed by the Judge before whom the motion for judgment came, to be made before me, and was argued on 19th instant.

In view of the facts, as evidenced by the correspondence, there can be no doubt that the motion must be granted. The only question is one of the terms.

I had occasion to express my view of the proper way to deal with the slip of a solicitor in Muir v. Guinane, 10 O. L. R. at pp. 369, 370, 6 O. W. R. 64; and that when solicitors have been practising on easy terms, such reasonable conduct is not to be discouraged by imposing penalties whenever any little slip or oversight takes place: Canadian General Electric Co. v. Keystone Construction Co., 8 O. W. R. at p. 685.

Here defendants were plainly in default. On the other hand, it would have been more conducive to harmony and the interests of the clients if the default had been brought to the notice of the other side before noting it.

The order will allow defendants to plead, which they must do not later than 29th instant. They will take out this order, and there will be no costs of the motion to either party. I understand it was agreed that the costs of the motion for judgment are to be to plaintiffs in any event, and that this is to be included in the order to be made on the present motion.

MAGEE, J. DECEMBER 21ST, 1906.

TRIAL.

BISHOP v. BISHOP.

Trusts and Trustees—Land Conveyed to Son of Tenant—Agreement to Purchase—Declaration of Trusteeship—Conflicting Evidence—Improvements by Son—Equitable Decree.

Action by a father against his son for a declaration that the former was the true grantee named in a deed conveying land, and was the owner of the land, and that the defendant had wrongfully asserted title as the grantee, and had wrongfully made a mortgage thereon, and for possession of the land and damages.

MAGEE, J.:—Plaintiff is 80 years old and illiterate. In 1871 he came to Ontario from England, and in 1873 went to live on the land now in question, which then belonged to one Thomas Cundle. It consisted of 5 acres close to the

town of Barrie, upon which was a small house, in which plaintiff, with his wife and their unmarried children, has lived ever since. In 1871 he had 4 daughters and 3 sons, the youngest being the defendant, who was born in 1867, and has the same name as the plaintiff, George Christopher Bishop. The plaintiff asserts that from the first he had an agreement with Cundle for the purchase of the property for $500. Whether that be so or not, he had not been able to pay anything on the principal, at all events, of the purchase money, up till September, 1890, and any moneys paid by him had been received by Cundle as rent, at the rate of $36 per annum or $3 per month, as shewn by the receipts. It may be that Cundle, who is said to have been a careful man, although agreeing to sell, would only treat plaintiff as tenant, and thus have power of distraining until something was paid on the purchase money. But, although not paying more than the rent, plaintiff had made improvements by addition to the house, fencing, etc. He and Cundle had occasional dealings with each other—buying and trading colts, hay, pasture, etc. On 18th September, 1890, plaintiff paid a sum of money to Cundle, who gave a receipt in full of rent and all accounts to date. On 22nd September, 1890, an agreement under seal was entered into between Thomas Cundle and George C. Bishop, described as a labourer and an unmarried man, for the sale of the property to the latter for $500, payable by instalments with interest at 6 per cent. yearly.

On the date of and after this agreement the following payments were made: 22nd September, 1890, $100; 27th October, 1891, $50; 6th November, 1891, $54; 2nd August, 1892, $100; 18th September, 1893, $12; then 6 payments of $14.40 each for interest in the autumn of each of the years 1894, 1895, 1896, 1897, 1898, and 1899; and then on 30th September, 1899, $100, and on 23rd January, 1900, $142.80.

This was the final payment, and thereafter a deed bearing date 23rd January, 1900, was made by the executor of Thomas Cundle to George C. Bishop, therein described as a mechanic.

In March, 1900, a mortgage of the land was made by defendant, as George C. Bishop, to Mrs. Spry, securing repayment of $150 lent to him and interest.

This action was brought on 10th October, 1905, plaintiff in his statement of claim alleging that he was the

grantee named in the deed of 23rd January, 1900, and was the owner of the land, and that defendant had wrongfully claimed to be the grantee, and had wrongfully made the mortgage, and praying to have it so declared, and to have defendant ordered to give up possession of the land, and for damages.

Plaintiff's solicitor had previously written to defendant claiming one-half of the land.

At the trial it became manifest that, whatever other rights plaintiff might have, he could not establish that he was the person intended by Mr. Cundle as the grantee in the deed. An amendment of the pleadings was asked for and granted. . . .

The net result of the evidence is that out of the whole $360 paid for the property over and above the mortgage, defendant has contributed out of his own means only . . . $50. . . .

We find then that the land on which the family had been living for 17 years, which they understood plaintiff had the right to on payment of $500, on which improvements had been made, which had increased in value, and which Cundle refused to sell to another over plaintiff's head, for even a larger price, is somehow in September, 1890, put in the name of the youngest of the family, then only 23 years old, who was not a farmer or gardener or labourer, but a plasterer, and who up till that time had not been able to accumulate any money or property, and does not appear to have succeeded better for 10 years afterwards. Plaintiff and his family with defendant continued to live there, and matters went on just as before, and on several occasions the son spoke of the property as if it were his father's. There could not have been, in the circumstances, any intention on the part of plaintiff of depriving himself or his wife of their home. If the making of the agreement in the son's name at that time was with plaintiff's knowledge and consent, the situation then and the conduct of the parties as to occupancy and payments afterwards precludes the presumption that the transaction could be taken as an intentional advancement of the son, and as matters stood up till January, 1900, it must, I think, be taken that defendant was really trustee for plaintiff. If the son obtained the agreement without his father's

knowledge, then it would be unconscionable to allow him to hold the benefit of it, obtained and withheld in such circumstances. . . .

After the son's marriage he (about 1903 and 1904) built a house for himself and his wife on the land. Plaintiff says he forbade him to do so, but it is manifest that he and the family assisted to some extent in the building, and helped defendant to move into it. . . .

It would be inequitable that the son should be deprived of that house or the ground immediately occupied with it, not including any worked or used by or for plaintiff since the house was occupied. The house is said to have cost about $300, the whole property to be now worth $1,200 to $1,500.

The evidence has been very contradictory, and on both sides has been in some respects very unsatisfactory.

The judgment will declare defendant to have been a trustee of the whole of the land for plaintiff, but to be now entitled in his own right to the ground occupied or used with the house built by defendant, to be specified by metes and bounds; that defendant should bear, in respect of the ground so occupied with or used with the house, payment of a due share of the purchase money, $500, paid for the whole property to Mr. Thomas Cundle or his estate, such share to be in proportion to the relative value of such ground before the house was built, as compared with the whole of the property at that time, and to the extent of such share shall pay and discharge the existing mortgage for $150, and the balance of the mortgage shall be borne by plaintiff, and defendant shall execute to plaintiff (free from any incumbrance done or suffered by defendant) a conveyance of the land, excepting the part to which defendant is declared entitled. No order will be made as to costs up to the present.

The parties will, doubtless, be able to arrive at the measurements, quantities, values, and shares indicated, but, should they not agree, I will hear evidence and settle the amounts of lands and moneys to be inserted in the judgment. I reserve the question of costs involved thereby.

MAGEE, J. DECEMBER 21ST, 1906.

TRIAL.

BELL v. GOODISON THRESHER CO.

Sale of Goods—Threshing Outfit—Incapacity of Engine and Boiler Forming Part of Outfit — Contract — Warranty—Reduction in Purchase Money—Reference—Payment into Court—Promissory Notes—Damages.

Action by the purchasers of a threshing outfit for a return of the money paid and promissory notes given and for damages for breach of the agreement of sale.

MAGEE, J.:—It is conceded that the traction 17 horse power engine to be furnished by defendants was to include an engine and boiler, the former being mounted on and affixed to the latter. The whole machinery comprised what is called a threshing outfit, intended to be not only operated but also moved from place to place by the motive power of the engine. It should, therefore, be adapted to run upon ordinary roads, with their unevenness and grades.

It was intended by plaintiffs to be operated by plaintiff Edward Bell with the assistance of his brother Britton Bell, the former generally but not invariably attending to the engine and boiler, and the latter to the threshing machine. Each of them had experience in running portable threshing machines. . . .

By a memorandum indorsed on the agreement, it was not to be binding after 13th March, 1905, if not accepted by defendants in that time. Apparently to conform to that arrangement, defendants on 9th March wrote Edward Bell that they had received the order for the outfit, and that they intended supplying him with the rig, and would get him up a first class one in every respect. The machinery was received by plaintiffs about 18th April, 1905, at Elmvale station. Edward Bell then got steam up and moved it to their farm, and the next day he again worked the engine. . . . On that first trip he says he experienced difficulty in keeping steam up and had to stop several times. . . . He at that time thought there was some merely temporary cause which he would be able to discover with a

further test, and within 3 weeks afterwards plaintiff gave defendants the 6 notes called for by the agreement, $2,250 in all, of which $125 would be payable 1st November, 1905, and $500 1st January, 1906.

Between that and the commencement of the threshing season, Edward Bell used the engine and boiler on 4 or 5 days driving a circular saw. . . . The threshing season began on 9th August, on which day Edward Bell was at work at Dean's farm. Dean was and is local sub-agent for defendants, looking out for orders for them and assisting in obtaining them. It was through his instrumentality that Bell and Lougheed, the agent who took plaintiffs' order, had come together. . . . On that day it was very hard to keep the boiler properly "fixed" so as to maintain the steam at sufficient pressure, and Bell had to use an unusually large quantity of both fuel and water.

I think it is established that from that time forward until the end of the threshing season, late in November, Bell had constantly recurring difficulty with the boiler in its failure to keep up steam, which necessitated frequent stoppages and loss of time, and always it required excessive labour in fixing, and used considerably more fuel and water than should be needed. The Bells say that it would only keep up steam when the wind was in such a direction that they could safely take the screen off the smoke-stack and get sufficient draught. . . .

The first complaint by Bell direct to defendants was by his letter to Mr. Goodison of 11th September, 1905, which accompanied his testimonial of the same date as to the thresher, feeder, and stacker, which, as he explains, constitutes the outfit therein referred to. In his letter of 16th October, 1905, Bell plainly expressed his dissatisfaction and refusal to use the boiler further, and demanded either a boiler that would make steam or his notes.

The defendants' answer of 18th October does not question his cause of complaint, but rather the contrary, and asked him to finish the season's work, and then send them the engine (meaning engine and boiler), and they would make it all satisfactory, and they say they would send him another engine at once if they had one. On 23rd October he replied that he would "try and pull her through," and he had 49 farms to do, but did not see how he could send it back, as he had taken a contract of cutting shingles, and

he asked them to hold the $125 note for a while, as he had no time to collect. Defendants answered on 24th October that they were glad he was having an exceptionally good season and "would be working nearly all winter," and they would look after his note, and they added, "We will make everything right for you."

Bell continued threshing till 20th November, and during the winter used the engine and boiler in cutting shingles or lumber. Mr. Goodison in his evidence says he does not complain of Bell using it till it was returned. . . .

[The learned Judge then set out negotiations and correspondence, payments made, and an agreement between plaintiffs and defendants as to alterations, etc.]

Finally the engine and boiler were shipped at Elmvale on 21st June, 1906, and arrived at Sarnia about 4th July. . . . Defendants had the boiler cleaned and furbished up and provided with a new smoke-stack, and the valve seat planed, and a rocker valve put in place of the former sliding valve, and the piston rings tightened, but neither a new cylinder nor a new boiler was put on, as had been proposed in December. . . . On 31st July defendants shipped the engine and boiler, and wrote that it was now in first class working order. . . . The engine arrived at Elmvale on Friday 10th August. . . . On Saturday 11th August Bell took the outfit to the farm of Robert Ussher and threshed for an hour. During that time they had to stop twice for steam, and had the same trouble as before. . . .

[The learned Judge referred to repeated trials and attempts to improve the machinery, and correspondence between the parties.]

The main question which arises is whether plaintiffs had any and what reason for complaint about the boiler. The evidence satisfies me that they had. Their contention is that the boiler must have been too small, and this is borne out by the evidence of Mr. St. John, who was called as an expert by the defence to shew that the boiler was well constructed. . . . The engine and boiler did not in fact answer the description of a traction 17 horse power engine, and there is nothing to shew that this was a sale of a known specific article the capabilities of which the purchaser took the risk of.

Bell had complained within two weeks of the beginning of the work for which it was purchased, and again on 11th September, 1905, and on 16th October had written for either a return of his money or a proper boiler. It was by request of defendants themselves that he continued to work the outfit that threshing season, and with their consent that he retained it to work it during the winter. When it was sent back, it was left to defendants to do what might be necessary to comply with the contract. They were then fully aware that it was alleged to be of insufficient capacity. Nothing whatever was done by them to remedy that initial defect, and it was returned in August to Bell without any increased power. . . . Defendants wrote that the machine was sufficient, and they would send men to prove it, and that is still their attitude.

The contract is under plaintiffs' seals. By it the property in the machines was not to pass until full payment, but plaintiffs were to have the right to use them until default, but at their own risk as to damage. It further provides that if it should be found that the machines could not be made to do good work, defendants should have the option of supplying other machines. Another provision is that if "the said machine" (which may mean the original or substituted machines) should not work according to warranty, the notes or money should be refunded, and the purchasers should have no claim for damages sustained by reason of the failure of the machines to satisfy the warranty. The contract also provides that defects or failures in one part or attachment shall not condemn or be ground for claiming renewal or for the return of any other part. The only warranty expressed is as follows: "Said machines are warranted to be well made, of good materials, durable, and, with good care, proper usage, and skilful management, to do as good work as any other of the same size manufactured in Canada." The word "machine" is declared to include every part, fitting, and appliance thereto appertaining.

Some evidence was offered by plaintiffs as to the capabilities of other engines and boilers about the same size, but it was too uncertain both as to their size and performance to prove a breach of the warranty in that respect; and, for the same reason, the express provision as to refund of notes and money in case the machines should not work according to warranty, does not apply.

Apart from capacity, I find that both engine and boiler were well made, of good materials, and durable. It may well be argued, however, that the combined machine could not be said to be well made if one part was not adapted for or so constructed as to reduce the power of the other. But under Frye v. Milligan, 10 O. R. 509, and Tomlinson v. Morris, 12 O. R. 311, damages cannot be recovered under the warranty, as the property has not passed.

Defendants have not availed themselves of the option of supplying other machines, but refuse to do so. The alternative is not stated in the contract, unless it is the subsequent provision as to refund of notes or money already referred to.

Under the clause as to defects or failures in one part, plaintiffs are, I think, deprived of any right to condemn or return any part of the outfit other than the engine and boiler. Not having the right to return all, they cannot claim a failure of consideration to entitle them to a return of the whole moneys paid and notes outstanding.

As the engine and boiler did not answer the description of the machines purchased, plaintiffs are, I think, entitled to that extent to have a return or reduction of the purchase money. In Nichol v. Goatz, 10 Ex. 191, although there was a warranty, and the contract said that was the only warranty, the vendor failed to recover, as the oil did not answer the description. In Josling v. Kingsford, 13 C. B. N. S. 447, though the sale was expressly without warranty, the purchaser recovered his money on the like ground. There is an indication in the letters that at least one of the notes was negotiated by defendants.

The evidence does not enable me to say what reduction should be made in the original purchase money on account of the engine and boiler. Unless the parties can agree, it will be referred to the Master at Barrie to fix the sum. Whatever the amount may be, plaintiffs will be entitled to recover it from defendants with costs, except of the reference, but defendants shall be at liberty to pay the amount into Court and have liberty to apply for repayment thereof to them upon proof that they, or other the lawful holders of the four promissory notes for $500 each, have given credit thereon by indorsement, or in such other way as the Court shall approve, for the amount as fixed or agreed upon, as a

reduction of principal, at and from the dates of the notes, such reduction to be proportioned upon each note, and if the proportionate reduction on the note due 1st January, 1906, would exceed the balance owing thereon, the excess shall be added in equal proportions to the reduction of the other three notes. Instead of paying into Court or to plaintiffs, defendants may apply to dispense with such payment, upon the like proof. In case of payment into Court, plaintiffs, or either of them, upon proof of payment by them of any of the four notes, shall have liberty to apply for payment out of Court of the amount for which credit should be given. Costs of the reference to be payable by whom and to the extent the Master shall direct. The engine and boiler to be at the disposal of defendants.

I do not find that plaintiffs have sustained any damages by loss of time or customers or otherwise in the conduct of their business beyond the benefit they have derived from the use of the engine and boiler.

DECEMBER 21ST, 1906.

DIVISIONAL COURT.

ADAMS v. FAIRWEATHER.

Way—Private Right of Way—Easement—Prescription—Presumption of Lost Grant — Evidence — Interruption—Inconsistent User by Others—Jus Publicum.

Appeal by plaintiff from judgment of MULOCK, C.J., 7 O. W. R. 785, dismissing action for a declaration that plaintiff was entitled by prescription to a right of way appurtenant to his premises, being lot 119 on the east side of Bleecker street, in the city of Toronto, over a strip of land, part of the rear end of defendant's property, known as street numbers 610, 612, and 614, on the west side of Ontario street.

H. E. Rose, for plaintiff.

W. H. Blake, K.C., for defendant.

The judgment of the Court (TEETZEL, ANGLIN, MAGEE, JJ.), was delivered by

MAGEE, J.:—The strip in question, which is alleged to be the servient tenement, adjoins the east side of the lane called Darling avenue, plaintiff's land in respect of which he claims the right of way being on the opposite side of the lane. The lane was a public thoroughfare, and plaintiff says that he "always considered the strip was part of the lane, and never thought it was anything else," and he "always" (that is throughout the 20 years) "thought he had a right," and all his witnesses likewise considered it part of the lane, and said that the public used it as such, and he says the "general traffic would be nearly all on that piece." The evidence for plaintiff, if it established any way at all, established it as a public way.

In Earl de la Warr v. Miles, 17 Ch. D. 53, James, L.J., says at p. 585: "For instance, if the owner of a particular house in London shews that he and all the people who have lived in that house have for a long period gone every year to Hampstead Heath and run about the Heath, he cannot thereby establish a particular right as annexed to that house to go upon Hampstead Heath, when it is quite clear that he only went there like every other person who went from London to recreate himself there." . . .

In Gale on Easements, 7th ed. (1889), p. 164, it is said: "Prescription may be defined to be a title acquired by possession had during the time and in the manner fixed by law. . . . To constitute a legal possession there must be not only a corporal detention or that quasi detention which according to the nature of the right is equivalent to it, but there must also be the intention to act as owner. Thus no legal possession is acquired by a man walking across the land of his friend or using a private way thinking it to be a public one, or unless he would do the act in defiance of opposition."

Here plaintiff, on his own shewing, was not exercising an easement in respect of his land, but only a supposed right as one of the public, a claim which defendant was not called upon to meet.

Appeal dismissed with costs.

CLUTE, J. DECEMBER 22ND, 1906.

TRIAL.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Conspiracy—Trade Competition—Procuring Incorporation of Company to Compete with Plaintiffs—Inducing Plaintiffs' Servants to Leave Employment—Using Information Obtained in Plaintiffs' Employment—Appropriation of Plaintiffs' Documents and Chattels — Master and Servant — Breach of Confidence—Injunction—Damages.

Action for damages and an injunction and other relief in respect of a conspiracy by the defendants Henry J. King and others to procure the incorporation of the defendant company to engage in business in competition with plaintiffs.

W. E. Raney and A. Mills, for plaintiffs.

S. H. Blake, K.C., and W. H. Irving, for defendants.

CLUTE, J.:—Plaintiffs are manufacturers of what is known as "the loose leaf business systems of book and account keeping," and have been engaged in that business in Canada since 1896, and are the owners of letters patent protecting the rights of invention in the system. The personal defendants were in plaintiffs' employment until about the middle of June, 1905; the defendant King as sales manager under contract in writing expiring on 31st January, 1906, at a salary of $1,800 per year. It was a term of his contract that he should "devote his entire time and energy to the company in the capacity of director of promotion and publicity." Defendant Baird was superintendent of plaintiffs' machine shop at a salary of $1,500 a year, and it was a term of his contract that he should devote his entire time and energy to the interests of plaintiffs. Defendants Harcourt, Trout, and Archibald were salesmen for the city of Toronto under contracts in writing; Harcourt at a salary of $2,000 a year ending on 31st January, 1907; Trout for a like term and at the same salary; Archibald for a term ending on 31st August, 1906, at a salary of $1,500 a year. It was also a term of each of their contracts that they should re-

spectively devote their entire time to the business of plaintiffs, and that they should not engage their services or be interested directly or indirectly with any other company, firm, or person, carrying on a similar business to that of the plaintiffs, and in the event of their so doing it was a provision of the contracts that the same might be immediately terminated at the option of plaintiffs. Defendant Hoose was assistant foreman of the machine shop.

The defendant company was incorporated under the laws of the Dominion of Canada; the defendants other than Hoose are members and directors of the same, Trout being vice-president, King managing director, and Archibald secretary-treasurer.

Plaintiffs and their predecessors in title first introduced the loose leaf system of book and account keeping in Canada, and have spent large sums in perfecting and protecting the same and for special machinery and tools to turn out the same, and in procuring customers for their product, the result of which has been to build up a large business connection throughout Canada.

Defendant King, as head of his department, became intimately acquainted with plaintiffs' business, the cost of manufacture, list of customers, and the profits of the business. Defendants King, Trout, Harcourt, and Archibald also had knowledge of plaintiffs' list of customers in Toronto; all of which knowledge was of a confidential character, and not to be communicated to third parties or used against plaintiffs' interests. The machinery and appliances used by plaintiffs in turning out their product are of a special character, devised and made for the purpose. Defendants Baird and Hoose had full knowledge of this and of the special tools to make the same, and they perfectly well understood this knowledge to be of a private and confidential nature.

Defendants King, Baird, Harcourt, Trout, and Archibald, during the early part of 1905, and while in the employment of plaintiffs, decided to form a new company and carry on a business similar to that of plaintiffs, and the time and manner and object of their doing so gave rise to this action.

It is charged that during February, March, April, and May, and the early part of June, 1905, the defendants, other

than the company, maliciously colluded and joined in a conspiracy to procure the incorporation of a company to engage in business in competition with plaintiffs; to induce plaintiffs' servants to break their contracts of employment and to go to defendants; to communicate private and confidential information with reference to plaintiffs' business, the knowledge of which was obtained while in plaintiffs' employment; to print and publish false and malicious statements in relation to plaintiffs' business; to abstract from the business office and to appropriate to the use of defendants certain records, and to abstract from plaintiffs' machine shop and to appropriate to the use of defendants all plaintiffs' fine tools which had theretofore been and were being used in the manufacture of machines and appliances for use in the manufacture of plaintiffs' products, and to use the tools to duplicate plaintiffs' machines and appliances; to make use of private and confidential information acquired by defendants Baird and Hoose while in plaintiffs' employment to duplicate plaintiffs' special machinery; to make use of private and confidential information acquired by defendants King, Harcourt, Trout, and Archibald, while in the employment of plaintiffs, to make for the use of defendants a list of plaintiffs' customers in Toronto, without compensation and to the great injury of plaintiffs; and to deprive plaintiffs of and to give to defendants the business which plaintiffs and their predecessors in title had built up. . . .

The matter was frequently talked over among the defendants, other than Hoose, who in the earlier stages does not appear to have been taken into their confidence. Matters progressed so far that it was decided to place the matter of the formation of the company in the hands of one Wovenden, of Montreal. Meetings were held for 2 or 3 months before 15th June. Wovenden came to Toronto; the prospectus was discussed with him, and he received from defendants, other than Hoose, the data from which it was compiled. I find that this prospectus was printed as early as 6th May, and, while it was not made public, it was shewn to various persons with the object of procuring subscriptions for stock in the proposed company. It is marked private and confidential, and is headed "Prospectus," and is in part as follows:—

"Business. The company is formed for the purpose of acquiring certain patents and manufacturing and selling loose leaf accounting systems.

"Business Arrangements. For the purpose of carrying on such a business, arrangements have been completed to secure the services of 7 men, all experienced in the line of goods and covering every department, both selling and manufacturing, they all having had many years' experience in the largest loose leaf house in Canada. These men embrace the following: general sales manager, mechanical superintendent, and 5 travelling accountants. . . .

"The amount of business done by the selling force interested during the past year for the company they are now connected with was $140,000."

I find from the evidence that the general sales manager referred to is defendant King; the mechanical superintendent is Baird; and the 5 travelling accountants are defendants Harcourt, Trout, Archibald, one Randall, then and now plaintiffs' manager at the city of Winnipeg, and Stanfield, plaintiffs' manager then and now at Hamilton.

At the time the circular was prepared it was expected that both Randall and Stanfield would join defendants. Randall had been down to Toronto, and had talked over the matter with King, Trout, Archibald, and Harcourt, but had come to no decision. On 29th May King writes to Randall. He begins by calling Randall's attention to the fact that his draft for $100 had been refused by plaintiffs. He endeavours to prejudice Randall against plaintiffs, and refers to Randall's correspondence as "clear enough evidence of how you feel." He refers to the general manager Myers as the "plague." He refers to the absence of Mr. Copeland in England. He then proceeds:—

"You are in touch with our first moves. Now, our operations have culminated in something, and it looks as if Business Systems Limited was a certainty—and this is of momentous interest to you. Our capital is assured, and we have already some $40,000 in Toronto, of which 7 of us have taken $15,000. Two weks ago we employed a capitalist named Wovenden in Montreal to secure the balance of the capital. He has secured such men as Senator Robert McKay (who will be our president), and men of like

calibre, and God willing we will apply for our charter next month. See the prospectus. Isn't it a dandy proposition?

"Now, we are assured of capital amounting in cold dollars to $115,000, of which we are calling in about $58,000 or 50 per cent.—plenty of money you will admit.

"We mean business, and can place on the market in about 3 months all our stuff but ledger, and it will take may be 3 more to be ready in that line—but we have a winner I can tell you.

"Now, Arthur, we have a good selling force, but we want better, and we want A. G. R. to join the bunch. Now, Arthur, suppose you don't make quite as much the first year—we can give you a good contract, and, if you come in now, a nice block of stock, and you will be working for yourself.

"We have $15,000 in 2nd and common and will give you the same share of this as all the rest are getting, $2,000. In addition, we want you to take the same amount of stock for cash—the total call on this being $800 in 9 months.

"Our statement—figuring upon a basis of $15,000 profit in any year—would be along the following lines. $15,000 is not high when one considers C. C. (plaintiffs) make $50,000 and pay enormous salaries and expenses."

The letter goes on to shew probable profits, and continues:—

"Now, your share of profits would be $1,650, augmenting your salary to $4,650, figuring you made no commission. If you keep Bainey (another employee of plaintiffs), your chances are for as much money as you can possibly make now.

"We have to cover your territory—it's a good one—and we want you to cover it for us. It would be hard to be working against you, old chap. You must see that we can give the C. C. C. (the plaintiffs) a run for life. Now here is a bully good proposition for you. You fall in line, so will Davidson (plaintiffs' manager at Vancouver), though no mention has been made to him. C. C. Co. is a one-man, Jew-managed outfit from now on. He has the thing cooked, and we are going to try and cook him. I don't mean that we are going to lay low for C. C. Co., but Myers (plaintiffs' manager) must feel the results of our efforts.

"Now, Arthur, don't mention this, as the firm don't know yet. We are not prepared to resign for a couple of weeks, but join us. We can all make money together."

Randall replied on 7th June declining to join defendants. Randall was at this time in the employment of defendants at $150 a month. . . .

King was dismissed on 14th June. Wovenden came up from Montreal on the 15th, and a meeting was held the same evening. At this time Harcourt and Baird had also been dismissed. Trout and Archibald were not dismissed until the next day. On the evening of the 15th an agreement was entered into between Wovenden, of the one part, and defendants King, Baird, Harcourt, Trout, and Archibald, and Standfield, of the other part. The parties agree to form a company within a period of 4 months, and the parties of the second part bind themselves to enter the employment of the company for a period of 5 years at a salary of not less than $2,000 per annum and commission on sales. It is further provided that King is to be manager, Baird, mechanical superintendent, Harcourt, Trout, Archibald, Standfield, and Randall, travelling accountants. They are to devote all their time and energy to the new company. Should the company be incorporated and start business within a period of 4 months, and should any of the parties of the second part fail to carry out their engagement made and make default, they are liable to pay a penalty of $1,000 as damages for such default.

After the meeting at which the above agreement was signed, Baird and King, the same night, went to the house of defendant Hoose, got him out of bed, and then and there engaged him at a salary greater than he received from plaintiffs, the salary to commence at 12 o'clock that night. But for the solicitations of hiring, I find that Hoose would have returned to work for plaintiffs the next day. Hoose carried away from plaintiffs' factory a large number of tools belonging to plaintiffs, many of them specifically made for the making of certain machines of plaintiffs, then and now required in plaintiffs' factory. . . .

Defendants obtained incorporation, and for their company's name, under which they are now carrying on business, they appropriated the words "Business Systems," which plaintiffs had used from the inception of their busi-

ness, and with which they had built up a very large and lucrative business. . . .

To understand the conduct and object of defendants in this case, it is necessary to refer to the nature of plaintiffs' business. Plaintiffs and their predecessors in title in the United States were the first to introduce what is called "Business Systems" of book-keeping and accounts. This system includes ledger binders and holders of accounts made in such form that leaves may be from time to time supplied and put in the old binders and holders. The form is such as to afford convenience to those using them to a greater extent, it is said, than the ordinary ledger, as well as being a great saving in expense. Whatever the reason, the demand for the "Business Systems" has greatly increased, and plaintiffs have established a very large and lucrative business in this line.

The personal defendants—other than Hoose—while in the employment of plaintiffs formed a scheme and by mutual inducements and combination united in the attempt illegally to appropriate a large part of this business which plaintiffs had built up; and with that end in view defendant King, the general manager of defendant company, was the chief mover, though all the defendants—other than Hoose—were very active in the enterprise. These defendants held many meetings, discussed the matter frequently, obtained private and confidential information relative to plaintiffs' business, utilized this in preparing the prospectus of the proposed company, endeavoured to induce the servants of plaintiffs to leave their employ, carried away with them confidential information, and induced other servants of plaintiffs to leave and to carry away with them when they left further papers containing information acquired while they were in the confidence of plaintiffs.

The defendant company, after incorporation, through their general manager and other officers, continued to induce others of plaintiffs' employees to leave plaintiffs and to join the defendant company, and all of the defendants appropriated the records, pattern sheets, tabs, special tools, and private information, and therefrom duplicated plaintiffs' product, and by the information obtained while in the employment of defendants ascertained plaintiffs' customers, and in this way appropriated to a large extent plaintiffs' business.

There was some evidence offered that, while the records, pattern sheets, and special tools, were necessary and useful to plaintiffs in their business, and were helpful to defendants, yet that defendants did not use them to any appreciable extent. I do not believe defendants when they so state. The evidence satisfies me beyond doubt that this confidential information, which was admitted to be beneficial to defendants, and which was admitted to have been used by defendants to a limited extent, was wholly appropriated by them, to the extent of their wants, for the purpose of carrying out their scheme to appropriate plaintiffs' business, and I find as a fact that the defendant company was incorporated for that express purpose, is managed by the personal defendants, and has, as far as a company may without formal by-law or resolution, adopted and taken the benefit of the wrongful acts of the other defendants.

Hoose, who does not appear to have taken any active part in the earlier stages of the conspiracy, left plaintiffs' employment at the solicitation of defendants, and assisted them in their undertaking by carrying away the tools of plaintiffs and using them in furtherance of defendants' business, and I infer from the evidence, and find as a fact, that he had knowledge of the wrongful actions and intentions of defendants, and joined them with a view of assisting them in carrying out their scheme under the inducement of higher wages and in breach of faith with plaintiffs, his former employers.

It is a necessary implication of a contract of service that the servant shall serve his master with good faith and fidelity. . . .

[Reference to Robb v. Green, [1895] 2 Q. B. 315; Lamb v. Evans, [1893] 1 Ch. 218, 226; Morrison v. Moat, 9 Hare 241, 255, 258; Albert v. Strange, 1 Macn. & G. 25; Louis v. Smellie, 73 L. T. N. S. 226; Liverpool Victoria Legal Friendly Society v. Houston, 3 Court of Sess. Cas., 5th series, 42; Merryweather v. Moore, [1892] 2 Ch. 518; Stone v. Goss, 65 N. J. Eq. 756; Brown v. Hay, 25 Rettie 1112; High on Injunctions, 4th ed., sec. 19.]

On this branch of the case I am of opinion that plaintiffs are entitled to an injunction and to a reference to ascertain the damages.

I will deal next with the charge of conspiracy to entice plaintiffs' servants to leave their employment. The mutual solicitation and encouragement among the personal defendants other than Hoose was none the less enticing because they did not require much persuasion. I find as a fact that the personal defendants other than Hoose conspired together while still in plaintiffs' employ to leave, and they endeavoured both before and after they quitted plaintiffs' service to induce other employees to leave, and on their inducement many did leave, and some of those who remained were induced to do so only by higher wages. . . .

[Reference to Regina v. Warburton, L. R. 1 C. C. R. 276; Quinn v. Leathem, [1901] A. C. at pp. 510, 529, 530.]

In O'Keefe v. Walsh, [1903] 2 I. R. 681, it was held that the fact that separate defendants joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, there being in substance only one cause of action, the conspiracy to injure; the damage may be assessed separately, having regard to the date of joining the conspiracy, but acts done in furtherance of the conspiracy prior to the joining may be given in evidence for the purpose of shewing the origin, nature, and object of the conspiracy: and see Owen v. Dwyer, 24 Ir. L. T. R. 111.

I do not find that this precise question of damages has been elsewhere decided, and but for this decision, to which, no doubt, great weight is to be attached, I should have thought that each was liable for all the damages which resulted from the conspiracy, whether the damage accrued before or after he joined it. . . .

The parent conspiracy in the present case was to pirate plaintiffs' business by illegal means. The evidence, I think, is conclusive that all the illegal acts afterwards resorted to were from an early date contemplated by the conspirators. Some of these means were to induce plaintiffs' servants to break their contracts and go with defendants, and to carry with them duplicate orders from customers, the record of sizes, tools, tabs, forms, and patterns, whereby to reproduce plaintiffs' product and reach plaintiffs' customers. . . .

In the very able argument of Mr. Blake it was urged with much force that, as the contract did not in terms pre-

vent the personal defendants from using all the information they could get while in plaintiffs' employment, they had a right to carry away with them this information and to use it in any new business in which they might engage, and that they had a right to make preparations for the proposed business, so that as they stepped out of the one employment they might engage in the other. There is a sense in which this may be true, but I think that there is a clear line beyond which an employee may not pass without rendering himself liable in damages, and that line from the foregoing cases I take to be that he must not break confidence and employ that breach of confidence to the damage of his late employer. The distinction is clearly pointed out by Kekewich, J., in Merryweather v. Moore, [1892] 2 Ch. at p. 524, although the view there taken, that he may make use of what he is able to carry in his head as an act of memory is not fully supported by the cases. The weight of authority sems to be rather against that view, if what was acquired was a matter of confidence peculiar to the business in which he was employed. . . .

[The Judge then quoted from and distinguished Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, [1892] A. C. 25; Allen v. Flood, [1898] A. C. 1, 106, 138, 140, 172; Nichol v. Martin, 2 Esp. 733; and referred to and quoted from Robb v. Green, [1898] 2 Q. B. 315.]

I further find that the incorporation of defendant company under the name which plaintiffs had always used in their business, namely, "Business Systems," was itself one of the acts done for the purpose of carrying out the conspiracy to fraudulently obtain plaintiffs' business. I cannot think that, had the Crown been advised of the facts of this case, in so far as it relates to the name "Business Systems," it would have permitted defendant company to incorporate under that name, to the manifest injury of plaintiffs. . . .

The injunction should be made perpetual and relief granted in terms of paragraphs 1, 3, 4, 9, 10a, 10b, 10c, and 10d, of the prayer of the statement of claim. There will be a reference to the Master in Ordinary to take the account of profits, or assess the damages, or both, as plaintiffs may elect, on the different claims. Costs of this action, inclusive of the entry of judgment to plaintiffs; further directions and subsequent costs reserved.

BRITTON, J. DECEMBER 22ND, 1906.

TRIAL.

CHICAGO LIFE INSURANCE CO. v. DUNCOMBE

Principal and Surety—Bond for Fidelity of Agent of Insurance Company—Advances to Agent and Premiums not Paid over—Construction of Bond—Application to Existing Agreement between Agent and Company—Withholding from Surety Information as to Material Facts—Release.

Action against R. L. Duncombe and T. H. Duncombe upon their bond to plaintiffs. T. H. Duncombe was surety for R. L. Duncombe, who had been and was at the time of the execution of the bond, and was styled therein, the plaintiffs' "agent for the purpose of soliciting for applications to said company for assurance upon the lives of individuals, and of performing such other duties in connection therewith as may be required by the officers of said company."

C. St. Clair Leitch, Dutton, and J. R. Green, St. Thomas, for plaintiffs.

J. M. Glenn, K.C., for defendants.

BRITTON, J.:— . . . Herbert S. Duncombe, a relative of defendants, is a director, the 3rd vice-president, and general counsel of the plaintiffs, who were incorporated only in 1902. Tierman & Stout were general agents of this company, and at first the defendant R. L. Duncombe worked under these general agents. On 11th September, 1905, R. L. Duncombe was appointed agent of plaintiffs, and a formal agreement was entered into between the parties. On 8th November, 1905, a new agreement was made, and on 29th January, 1906, there was yet another new agreement, each later agreement cancelling and superseding the former as between R. L. Duncombe and plaintiffs. On 7th May, 1906, the special agreement of 29th January, 1906, was modified, and was continued in force only subject to the supplementary agreement of 7th May.

R. L. Duncombe bought and paid for some stock in plaintiff company, which was taken in the name of H. S. Dun-

combe, who was surety to plaintiffs for R. L. Duncombe on a bond similar, as he says, to the one that defendant T. H. Duncombe is now on, except that H. S. Duncombe is of the opinion that his bond as surety was for only $1,000.

It was the practice of plaintiffs to make advances to agents, these to be repaid by the agent's commission, and plaintiffs did apparently from first to last advance to R. L. Duncombe between 8th November, 1905, and 7th May, 1906, sums aggregating $900, and it is said that R. L. Duncombe collected premiums for which he did not account in March, April, and May, 1906, amounting to $75.72. A further amount of $60 is charged as an advance to R. L. Duncombe. . . . I am of opinion that the evidence fails to establish that item as against the surety.'

All the advances by plaintiffs to R. L. Duncombe, except $75 advanced on 7th May, 1906, were made before the date of the bond sued on, and the $75 was advanced on the same day the bond was made. The premiums received and not accounted for were all received on or before date of bond, except one small sum of $8.47, which is charged as of 11th May, 1906. The proof of these premium items is not the most satisfactory as against the surety. Very likely they were received by R. L. Duncombe. This action is brought upon the assumption that defendant T. H. Duncombe by his bond became liable and is now liable for the entire debt of R. L. Duncombe to plaintiffs, existing at date of bond, as well as for any indebtedness which would thereafter arise from R. L. Duncombe as agent of plaintiffs to them.

Two questions arise: (1) upon the construction of the bond; and (2) was there such concealment by plaintiffs, or that may be imputed to them, of material facts as to invalidate the bond given by the surety—can plaintiffs recover against the surety upon the bond obtained under the circumstances disclosed by the evidence?

As to the first, I am of opinion that, upon the fair and proper construction of this bond, the defendant T. H. Duncombe, if liable at all, is liable only for advances and default after the making of the contract between plaintiffs and R. L. Duncombe of 29th January, 1906. It was contended and is arguable that under this bond the limit of the surety's liability would be for advances made and money collected after

the execution of it. Cases go a long way towards establishing this contention. . . .

[Reference to Canada West Farmers' Mutual and Stock Ins. Co. v. Merritt, 20 U. C. R. 444.]

One rule of construction is that words are to be given their natural meaning.

In Allnutt v. Ashenden, 5 M. & G. 392, the words, "I hereby guarantee Mr. John Jennings's account with you for wine and spirits to the amount of £100," were held to relate only to existing account, although that account did not amount to £100.

A guarantee may be so worded as to cover past debts, even where a consideration to guarantee such would appear to be wanting, but the language must be clear. Many of such cases to which I was referred were banking cases, where an account existed and was to be continued. There, as might be expected, a guarantee to permit continuation was intended to cover and was held to cover past indebtedness.

I think, in terms, the bond must be held to cover past indebtedness of R. L. Duncombe, so far as that indebtedness was incurred as an agent of plaintiffs under the then existing contract or agreement of agency. The condition is that R. L. Duncombe shall pay over "all money which he now owes or hereafter may owe said company . . . on account of losses or advances made to the said R. L. Duncombe during the continuance of the present agency of the said R. L. Duncombe . . . for the purpose of enlarging the business or otherwise, and whether the same shall have been advanced under the terms of the agency agreement between the said R. L. Duncombe and said company, or any future agreement, or otherwise . . ."

The present agreement of 29th January, 1906—the only agreement as to agency of R. L. Duncombe in force—makes no provision whatever for making loans or advances to R. L. Duncombe. The advances made on and after 29th January, 1906, were probably made because of the existence of the relations between plaintiffs and R. L. Duncombe, but were not made under any terms or stipulations mentioned in that agreement. There is no evidence that the loans or advances were made for the purpose of enlarging the business of R. L. Duncombe, or for such purpose as can be included in the term "or otherwise," applying the ejusdem generis rule of con-

struction. Giving the bond the most liberal construction in favour of plaintiffs, I think the past indebtedness must be limited to that created during the then current agreement between plaintiffs and R. L. Duncombe, and that no advance to him, even if made under some former agreement for agency, is covered, any more than a private debt to plaintiffs owed by R. L. Duncombe as an individual and not as an agent can be recovered by plaintiffs from defendant T. H. Duncombe. The agreement of 29th January, 1906, cancels all previous agreements between plaintiffs and R. L. Duncombe for agency. The only part of the past indebtedness of R. L. Duncombe to plaintiffs for which defendant T. H. Duncombe is liable, if liable at all, is what R. L. Duncombe owed as agent under the only agreement of agency in force on date of execution of bond. . . . .

Upon the second branch of the case. It may be conceded that the contract of suretyship is not one of those spoken of as being uberrimæ fidei, but the creditor or employer owes a duty to the intending surety.

In Davis v. London and P. M. Ins. Co., 8 Ch. D. 469, it was held that the change of circumstances between the company and their agent ought to have been stated to intending sureties. . . .

[Reference to Hamilton v. Watson, 12 Cl. & F. 108.]

In this case there was the evidence of an existing bond, with plaintiffs' third vice-president and general counsel as surety, which bond was to be given up upon getting a new one with defendant as surety. R. L. Duncombe was to get pay for stock owned by him, but standing in the name of this same officer of plaintiff company, but no attempt was made to keep out of the proceeds of stock R. L. Duncombe's indebtedness to plaintiffs, but the whole, by manifest intention, was to be thrown upon defendant, who was in entire ignorance of the real state of affairs between R. L. Duncombe and plaintiffs. . . .

[Reference to Lee v. Jones, 17 C. B. N. S. 482; Railton v. Matthews, 10 Cl. & F. 934; North British Ins. Co. v. Lloyd, 10 Ex. 523.]

I think what the surety would naturally expect was that the contract between the principal debtor and the plaintiffs was that of agency upon a new appointment; that the agent was to give security for work and faithful discharge of duty

and accounting and payment over under this new appointment; and not that the appointment had been made months before; that advances had been made and had not been accounted for under that appointment; that the third vice-president and general counsel of plaintiffs had been surety and was being released upon getting the new bond; and that the contract between plaintiffs and the agent called for security to the amount of only $1,000, that being the amount of bond of H. S. Duncombe. These seem to me to be most important matters for the surety to know, and things that plaintiffs were bound to communicate to the surety, and, in my opinion, the way this bond was received from defendant should be considered as fraudulent on the part of plaintiffs as against him, plaintiffs being affected by the knowledge and conduct of the third vice-president in this matter. . . .

[Reference to Sanderson v. Aston, L. R. 8 Ex. 73. West Zorra v. Douglas, 17 Gr. 466, distinguished.]

There may be dealings between (existing relations between) the creditor and the principal debtor, the withholding of which from the intending surety would, in my opinion, be fraudulent as against him. It is very significant that, notwithstanding the modification in many of the terms of the agreement, R. L. Duncombe did no work or business as agent for plaintiffs after the bond was obtained. A witness said that R. L. Duncombe ceased active work in June, but it is not shewn that he did anything as such agent after the day of the date of the bond.

Action dismissed as against T. H. Duncombe with costs.

DECEMBER 22ND, 1906.

DIVISIONAL COURT.

JARVIS v. JARVIS.

Husband and Wife—Land Purchased by Husband—Conveyance Taken in Name of Wife—Gift or Settlement—Intention—Evidence—Improvidence—Absence of Relation of Confidence—Undue Influence not Shewn—Want of Independent Advice.

Appeal by defendant from judgment of MAGEE, J., in favour of plaintiff in an action by husband against wife to

compel a conveyance to plaintiff of land purchased by him and conveyed to defendant, or for a declaration that she held the land in trust for him, etc.

H. H. Strathy, K.C., for defendant.

M. B. Tudhope, Orillia, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:— . . . Plaintiff is a retired farmer of some 80 years of age, with a grown-up family of sons, whom, as he says, he has "helped too much," or rather "they helped themselves," though he "never gave them a great deal of money." Some 4 or 5 years ago he came to the conclusion that he should marry and have a home of his own, as apparently his sons had left him, because "a home of your own is worth two of other folks'." He had been a pretty careful man, had done all his own business, bought and sold cattle and horses, conducted his farming operations, sold his grain, paid his rent, banked his money, all without assistance, and I can find nothing to indicate that he was a man of less than ordinary intelligence and strength of mind and character.

He married the defendant—a widow—herself with a family, and they seem to have lived on harmonious terms. There is no evidence of any fiduciary relations existing between the two, and no charge is made that plaintiff relied upon defendant for advice in respect of any business transaction, and no suggestion that he was not perfectly competent to understand and transact ordinary business.

No fiduciary relationship will, of course, be presumed.

Thomas Langstaff, the son of defendant, says that shortly before the transaction in question plaintiff and he were at a creamery, and "after we left the creamery Mr. Jarvis told me . . . one of his sons . . . was trying to rogue him; Robert his name was. He says, 'They have been trying to do me up,' and he says, 'As soon as this fall I get things settled I am going to quit farming; I am going to Markham; there is a house there I can get; I am going to buy it, and I will give it to your mother, and they won't have a chance to get that.'" . . . (Plaintiff denied this.)

About the same time he has a conversation with George Langstaff, another son of defendant, and Langstaff's account

is as follows: ". . . Him and I was talking about Orillia, and he said he had a notion of going up to Orillia, and he said, 'If it suits me I am going to buy a place there, and I am going to buy it for your mother.' . . ."

There is no contradiction by plaintiff of this, and though, upon being recalled, he is asked whether he has heard the evidence of his wife's sons, he is asked nothing as to this conversation.

The trial Judge has found that he did so speak to these two witnesses.

The next proceeding is that plaintiff sees one Clark, a land agent at Orillia, about buying a house, and Clark says: "It was Mrs. Jarvis he seemed to want to suit." "He said Mrs. Jarvis was to be suited." And finally a house owned by one Sanderson is picked upon as suitable. Perhaps there is no great significance to be attached to the fact that when a man is buying a house it is his wife "he seems to want to suit," and it is perhaps not at all unusual that a man intending to buy a house to be owned by himself does tell the agent that it is his wife who is "to be suited." But what follows is, I think, quite different in its effect.

The deal is closed by Clark and plaintiff, $50 is paid by plaintiff to Clark, and a receipt given by Clark; and the following occurred, according to Clark:—"When they were paying the $50, or before they paid the $50, Mrs. Jarvis spoke and said this house was to be hers, and he said, 'Yes, the house is to be Mrs. Jarvis's,' and he gave me to understand it was to protect her as much as anything against his children, that his children and him had not been getting on very well, and it was to protect her in case of his death that she would have the property." This is not denied by plaintiff, the trial Judge has not found against it, and it must be taken as established.

An arrangement is then made between Clark and plaintiff that Clark is to bring Sanderson down to the house of Thomas Langstaff that evening and close out the sale. A meeting is accordingly had, at which are present Clark, Sanderson, Thomas and George Langstaff, the plaintiff, and the defendant. The defendant was not called at the trial, her counsel saying (after the evidence of Clark, Sanderson, Thomas and George Langstaff, had been given): "The only other witness I have is Mrs. Jarvis, and I just mention it so that my

learned friend will know, if he wishes to call her, she is here, but she would only corroborate what has already been said, and I do not think there is any object in multiplying evidence."

All these witnesses agree that in answer to an inquiry by Sanderson as to whom the deed was to be made to, plaintiffs said that it was to be made to his wife. The language of the different witnesses, as might be expected, is not identical, but the substance is the same.

Plaintiff says that he did not give any person any instructions to put his wife's name in the deed, that he did not intend the property to go to his wife, "to rob me and my family," but in cross-examination he changes this; and, the occasion being brought to his mind, we find this:—

Q. Were you asked by Mr. Sanderson to whom the deed was to be made down there? A. I don't mind whether I was asked or not, but if I was, of course I expected my name was on the deed. Q. That is not what I am asking you. A. Well, follow me up. Q. Do you remember being asked whose name was to go in the deed? A. I tell you I don't remember whether I was asked about that or not. Q. Then you would not deny that you were asked? You may have been asked? A. Well, I don't think, to tell God's truth, that I was asked; I couldn't say, to tell the truth and swear it here. Q. You would not swear that you were not asked? A. No, I won't say nothing because I can't bring it in mind.

After the defence was closed, plaintiff was recalled, and the following took place:—

Q. You heard Mr. Sanderson swear that you told him to put the deed in your wife's name? A. I did, I heard him swear that. . . .

Q. (by counsel for plaintiff)—Did you ever give him any such instructions? A. Not to the best of my knowledge, I didn't.

As the trial Judge has found, he was then at variance with 3 of his sons, and the evidence convinces me that he desired and intended when buying this house to buy it for his wife, that it should be his wife's, and that his family should not have any interest in it—and that his wife should not be driven to her "thirds."

The trial Judge, however, says he does not find any intimation throughout the conversation that in providing a home for his wife he did not intend to provide a home for himself also—that he intended after the death of his wife and himself that the property should be subject to her disposition, that its destination should be controlled by her rather than himself. I should have been much astonished had it appeared that any such intimation was given; but if the trial Judge intended to find that plaintiff did not understand the effect of what was being done, I most respectfully dissent from that view. He was a man capable "in a dispute of taking his own part," "yet hale and vigorous for a man of his years;" and there is nothing to indicate that he was a man of inferior powers of mind.

There was no pretence that any undue influence had been used; none can be presumed in such a case as this: McConnell v. McConnell, 15 Gr. 20; even if, as was not the case here, there was the existence of confidence: Wallis v. Andrews, 16 Gr. 637; McEwan v. Milne, 5 O. R. 100; and compare Irwin v. Young, 28 Gr. 511; Lavin v. Lavin, 7 A. R. 197.

There is no rule requiring a defendant such as this, in no position of confidence, to prove the absence of undue influence, nor that the grantor had independent advice. . . .

[Reference to Luton v. Sanders, 14 Gr. 537, 538; Armstrong v. Armstrong, 14 Gr. 528, 536; Corrigan v. Corrigan, 15 Gr. 341, 343. McCaffrey v. McCaffrey, 18 A. R. 599, and Hopkins v. Hopkins, 27 A. R. 658, distinguished.]

I do not consider that it is necessarily, in the circumstances of this case, an improvident transaction for a farmer worth $2,400 or so, to expend $1,150 in buying a house for his wife and to give it to her.

If there were any doubt about the intent of plaintiff, his full understanding of the transaction, and his capacity, I think what followed the making of the deed would resolve that doubt in favour of defendant. I do not go into these matters, as, in the view I take, it is not necessary to consider them.

I think the appeal should be allowed and the action dismissed. Substantial justice will be done, however, by directing that no costs be given here or below.