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CARTWRIGHT, MASTER. MAY 29TH, 1903.

CHAMBERS.

SMITH v. McDEARMOTT.

Evidence — Foreign Commission — Examination of Defendant on his own Behalf—Place for Taking Evidence—Expenses of Opposite Party—Costs of Application.

Motion by defendant H. H. Lee for an order directing the issue of two commissions, one to take the evidence of A. M. McDearmott and Oscar G. Lee at Kansas City, and the other to take the evidence of applicant himself at Kingfisher, in Oklahoma Territory.

W. D. Gwynne, for the applicant.

W. N. Ferguson, for the plaintiffs.

THE MASTER.—I think under the cases the material is prima facie sufficient to justify the issue of a commission to examine the witnesses said to be resident at Kansas City. I have looked at the numerous cases cited on the argument and the English cases therein referred to. I do not see that any good purpose will be served by commenting upon them, as they shew that each case must be decided on its own facts and circumstances.

[Porter v. Boulton, 15 P. R. 318, and Mills v. Mills, 12 P. R. 472, referred to.]

I have examined the map, and from it I gather that Kingfisher, where the applicant is said to reside, is not very far distant from Kansas City. Under these circumstances, the order I propose to make is as follows: One commission only should issue. If the appellant so desires, it may be to Kansas City, but I would suggest that some nearer point, such as Chicago, should be named, as, following Mills v. Mills, I

think the applicant should pay at least the actual expenses out of pocket of the plaintiffs' solicitor necessary for his attendance on the commission, before it issues. Costs of motion to plaintiffs in the cause.

CARTWRIGHT, MASTER. MAY 29TH, 1903.

CHAMBERS.

FALVEY v. FALVEY.

Interim Alimony—Wife Leaving Husband—Ability to Support Herself—Application Refused—Special Circumstances.

Motion by plaintiff for an order for interim alimony.

Proulx (Robinette & Godfrey), for plaintiff.

L. V. McBrady, K.C., for defendant.

THE MASTER.—The statement of claim makes the usual allegations, which are repeated in the affidavit of the plaintiff filed on this motion. The statement of defence denies the allegations of plaintiff, and makes serious counter-charges, which are repeated in his affidavit, also filed on the motion.

Mr. McBrady relied on the examination of the plaintiff . . . from which it appears that she has been supporting herself up to the 1st day of this month. . . .

Under the facts of this case, I do not think an order should be made for interim alimony. The plaintiff admits that she left of her own accord, and says that she will never consent to live with her husband again. She has refused an offer which, under the circumstances, seems generous; at any rate it is much more than she is likely to get by litigation, even if successful. She admits her ability to support herself, and fortunately there are no children to complicate matters. The offer made, I understand from Mr. McBrady, is still open to her, and she would do well to consider the prudence of accepting it.

Allen v. Allen, [1894] P. 134, affirms the principle that interim alimony, if granted, is fixed after considering the incomes of the husband and wife respectively. . . .

In the present case the examination of plaintiff was used on the motion without objection. . . .

According to the best opinion I can form, I think it is not a case for interim alimony. The affidavit of defendant is full and explicit as to his financial position, and is not in any way attacked by plaintiff. Altogether, the facts of this case seem to be very different from those of any of the reported cases.

STREET, J. MAY 30TH, 1903.

TRIAL.

PALMER v. MICHIGAN CENTRAL R. W. CO.

Railway—Farm Crossing—Non-repair of Approach within Farm — Injury to Tenant of Farm—Duty of Railway Company as to Repair.

The plaintiff was tenant of the west half of lot 10 in the 9th concession of Yarmouth, through which the defendants' railway passed, and defendants had constructed an overhead farm crossing across their railway for the use of persons occupying the farm. The approach to the crossing extended beyond the boundary fence of the railway land into the farm occupied by plaintiff. At the time the approach was made the defendants offered to build it of earth with a grade of one foot in 20, but, at the request of the owner, it was built with a grade of one foot in 7, with a covering of gravel. On 26th August, 1902, plaintiff, while descending the portion of the approach within his own fence with a load of oats, was upset and injured. The approach to the crossing within the farm fences was out of repair, having been worn so that it sloped away to one side, and the accident to plaintiff was caused by the want of repair. No request had been made by plaintiff or any other person to defendants to repair the approach, nor had any notice been given them that it was out of repair.

J. A. Robinson, St. Thomas, for plaintiff.

I. F. Hellmuth, K.C., and E. C. Cattanach, for defendants.

STREET, J.—The liability of defendants is founded upon sec. 19 of the Railway Act, 51 Vict. ch. 29 (D.), which provides that "every company shall make crossings for persons across whose lands the railway is carried convenient and proper for the crossing of the railway by farmers' implements, carts, and other vehicles." There seems to be no other clause in the Railway Act which imposes upon railway companies any further duties or responsibilities in relation to farm crossings.

The company are authorized by the Act, for the purpose of their undertaking, to divide a farm in two by running their line through it; they are obliged to compensate the owner for the damage done, and further to make a convenient crossing for him over their line of railway. They are obliged, in other words, to give him the easement of a

convenient right of way over their line for his implements, carts, and other vehicles. The company do not appear to be either obliged or authorized to go upon the land of the owner for any purpose connected with the making of the crossing. If a convenient crossing cannot be made without the building of approaches on the land of the owner, then the presumption would be that the work upon his own land must be done by the owner, in the absence of a special agreement relating to it, and that the expense of such work must be taken into account in fixing the original compensation to be paid to him for the severance of his property by the owner This would obviously be the case were the land owner affected injuriously by the construction of the railway by being obliged to construct and keep in repair a greater length of drains upon his own land, for instance. Town of Peterborough v. Grand Trunk R. W. Co., 32 O. R. 154, affirmed by the Court of Appeal, 1 O. L. R. 144, seems against the view that an implied liability exists compelling the company perpetually to repair a work which is not upon their own land, even though originally constructed by them. There is no evidence here to support an agreement on the part of the company to do so in this case, and no such agreement is alleged.

The only want of repair complained of, and to which the accident was due, was with regard to the approach upon the land occupied by plaintiff, and I can find no duty, either express or implied, cast upon defendants to keep this portion of the approach in repair. There was, therefore, no evidence to leave to the jury, and the defendants' motion for a nonsuit should be granted, and the action dismissed with costs.

MEREDITH, C.J. JUNE 1ST, 1903.

CHAMBERS.

MORLEY v. CANADA WOOLLEN MILLS CO.

Pleading—Statement of Claim—Enlargement of Claim made by Writ —Wrongful Dismissal of Servant—Introductory Statement—Depreciation in Stock of Company—Representations—Particulars.

Appeal by defendants from order of Master in Chambers, ante 457.

H. Cassels, K.C., for defendants.

C. A. Moss, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs to plaintiff in any event.

MEREDITH, C.J. JUNE 1ST, 1903.

CHAMBERS.

DIERLAMM v. TORONTO ROLLER BEARING CO.

Pleading — Statement of Claim — Statement of Cause of Action — Sufficiency—Damages for not Transferring Stock—Principal and Agent.

Appeal by defendant Henderson from order of Master in Chambers, ante 463.

A. E. Hoskin, for appellant.

W. E. Middleton, for plaintiff.

MEREDITH, C.J., dismissed the appeal with costs to plaintiff in any event.

MEREDITH, C.J. JUNE 1ST, 1903.

CHAMBERS.

AHRENS v. TANNERS' ASSOCIATION.

Discovery—Examination of Officer of Defendant Association—Person Having Knowledge.

Appeal by the Breithaupt Leather Co. from order of Master in Chambers, ante 464.

W. N. Tilley, for appellants.

C. A. Moss, for plaintiff.

MEREDITH, C.J., dismissed the appeal. Costs in the cause.

BRITTON, J. JUNE 1ST, 1903.

TRIAL.

FENSOM v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Animals on Track—Neglect to Fence—Escape of Animals from Private Way to Track—Escape from Highway—No Person in Charge of Crossing.

Action for damages for loss of cattle owned by plaintiff killed while upon the railway tracks of defendants.

J. H. Clary, Sudbury, for plaintiff.

D'Arcy Scott, Ottawa, for defendants.

BRITTON, J.—The plaintiff resides upon and owns lot 11 in the 4th concession of Lorne, in the district of Algoma. The "Sault" branch of defendants' railway runs through

this township, and a considerable portion of the line has not yet been fenced in, as required by the Railway Act. Plaintiff's cattle were at large near his own home, but not unlawfully, as, by a by-law of the municipality, "all milch cows and other cattle," other than certain ones especially excepted, are allowed to roam at large. On 6th August, 1902, certain of these cattle, including one bull, wandered down a path or road leading to the track, travelled a short distance west upon a road parallel with the railway, and, finally, from part of lot 2 in the 4th concession of Nairn, went upon the track and were killed. I find, on the evidence, that the road which these cattle took and kept until they entered upon the railway property was not, nor was any part of it, a highway within sec. 271 of the Railway Act; and sec. 194, subsec. 3, of the Railway Act, as amended by 53 Vict. ch. 28, sec. 2, applies, and defendants are liable. The neglect of defendants to fence their track was the cause of plaintiff's loss. The value of the animals killed was $327. The by-law prohibited the allowing of a bull to run at large, and the value of the bull was $45, leaving $282.

On 2nd September, 1902, certain other cattle owned by plaintiff strayed and went farther west, entering upon the track at a crossing from a highway. These cattle, being at the crossing without any person in charge of them, were so in violation of sec. 271 of the Railway Act, and plaintiff could not recover for them. Nixon v. G. T. R. Co., 24 O. R. 124, and James v. G. T. R. Co., 31 S. C. R. 436, followed. I find the value of the cattle killed was $143 and the damages for injury to others was $35.

Judgment for plaintiff for $282 with costs.

MACMAHON, J. JUNE 1ST, 1903.

TRIAL.

MARSH v. CITY OF HAMILTON.

Way—Non-repair—Injury to Person Crossing Street Railway Track —Negligence of Street Railway Company—Contributory Negligence—Liability of Municipal Corporation—Liability of Company.

Action against the city corporation and the Hamilton Street Railway Company to recover damages for injuries by a motor car to plaintiff Harold E. Marsh, a boy of eleven, when attempting to cross Locke street in the city of Hamilton. The boy lost his left foot.

J. W. St. John, for plaintiff.

J. W. Nesbitt, K.C., for defendant city corporation.

P. D. Crerar, K.C., for defendant company.

MacMahon, J., found that the car was running at an excessive speed, at least 15 miles an hour; that the bell was not rung, and therefore the attention of the boy was not drawn to the coming of the car; that the boy fell on the street by reason of its being out of repair and in a dangerous condition; and that, had he not fallen, he could have crossed with safety before the car reached him; that, although he fell, he could have regained his feet in time to cross in safety, had it not been for the excessive rate of speed; and that, had it not been for the stones piled on the road, the fender would have worked properly and saved the boy. It was held, therefore, that the cause of the injury to the boy was the negligence of the defendant railway company. The boy in not looking was not guilty of any negligence which contributed to the accident, as, even if he had looked and had seen the car coming, he could have crossed without injury had he not fallen. Brown v. London Street R. W. Co., 2 O. L. R. 53, 31 S. C. R. 642, Danger v. London Street R. W. Co., 30 O. R. 493, O'Hearn v. Port Arthur, 4 O. L. R. 209, distinguished.

Judgment for plaintiff against the company for $2,500 with costs. As against the city corporation, action dismissed without costs.

June 1st, 1903.

DIVISIONAL COURT.

SMITH v. BLOOMFIELD.

Master and Servant—Wrongful Dismissal of Servant—Existence of Contract of Hiring—Question for Jury—Excessive Damages—Absence of Direction—County Court Action—Appeal—New Trial not Moved for.

Appeal by defendants from judgment of County Court of Hastings in favour of plaintiff for $110, being the amount of a verdict found in his favour by a jury.

The action was brought for wrongful dismissal of plaintiff. He alleged that he had been hired by defendants to work on the steamer "Caspian" and had gone on the vessel at Belleville at about midnight between the 8th and 9th July, 1902, and that between two and three o'clock in the morning of the 9th July he had been discharged without any cause, and was put ashore on the bank of the Murray canal 15 miles from home, without money, and that he had been obliged to walk back to Belleville, and became ill in consequence. Defendants denied all plaintiff's statements.

The trial Judge simply left to the jury the question as to the hiring, and whether plaintiff had sustained damage by his dismissal.

Defendants moved for a nonsuit at the conclusion of plaintiff's case, and again asked the Judge to instruct the jury that there was no evidence of any contract of hiring, but took no further objection to the charge, and the jury found for plaintiff $110 damages, for which judgment was ordered to be entered with costs.

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

H. M. Mowat, K.C., and J. M. Mowat, Kingston, for defendants.

H. L. Drayton, for plaintiff.

STREET, J.:—The motion here is to set aside the verdict and judgment entered for plaintiff and to enter judgment for defendants. It is not, and could not be, under sec. 51 of the County Courts Act, an application for a new trial either alone or coupled with any other relief. The sole question, therefore, which we have to consider is whether plaintiff made out a case which he was entitled to have submitted to the jury. In my opinion, the Judge was right in refusing to withdraw the case from the jury, and he could not properly have done so. It appeared that the captain of the "Caspian" was in need of four additional men, and that he had telegraphed ahead to the agent of defendants at Belleville to try to get them for him. When the steamer arrived there at about midnight, the agent had plaintiff and three other men on the wharf ready to go if required. There was evidence that upon the arrival of the steamer the agent called out to the captain that he had four men for him and asked whether he should send them on board, and was told to do so. Thereupon plaintiff was told to go on board, and did so, and he says that he assisted in hauling the gang plank on board when the steamer left, and that he was willing to do any work he was directed to do. He had been previously employed on the steamer at $20 a month, and had left or been discharged. He was not put to work, but was ordered to leave the steamer, which he did. . . . These statements were to some extent contradicted, but there was evidence in support of them all which could not be withdrawn from the jury, and the jury might fairly find upon them that defendants had hired plaintiff to work for them either for the trip or for a month, that being the nature of his former hiring by them. . . .

The jury, being of opinion that there was a hiring and a wrongful dismissal, were entitled to give some damages. I think the Judge should have instructed the jury more fully as to the manner in which the damages should be assessed, and that he should have limited them to such as arose naturally and directly from defendants' breach of contract; but no objection was taken to the charge, and no motion for a new trial was made. . . .

I think, however, that there should be no costs of the appeal, in view of the excessive damages which plaintiff had obtained.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion.

BRITTON, J.:—I agree that the sole question which we have to consider on this appeal is whether plaintiff made out a case as to hiring and dismissal which he was entitled to have submitted to the jury. . . .

[Review of evidence.]

With great respect, I cannot agree that all that took place is evidence of any contract of hiring so that there could be a dismissal, much less a wrongful dismissal, for which this action is brought: see Addison on Contracts, 9th ed., pp. 842, 845, 847.

The plaintiff may have an action for not employing him, or for wrongfully putting him off the steamer after he had been invited to go on board. . . . The sole point is, is there evidence of a hiring? And I think there is not.

CARTWRIGHT, MASTER. JUNE 2ND, 1903.

CHAMBERS.

KEARNS v. BANK OF OTTAWA.

Pleading—Statement of Defence—Malicious Prosecution—Setting out Facts Shewing Reasonable and Probable Cause—Setting out Facts Occurring after Arrest—Remarks of Judge in another Proceeding.

The plaintiff discounted at the North Bay branch of the Bank of Ottawa a note for $50 purporting to be made by a firm of Kearns & Palangie. Four or five weeks after the note had become due, and the same not having been paid, the defendant Kingsmill, local manager of the bank, caused the arrest of the plaintiff on a charge of having obtained money by false pretences. The plaintiff was brought before a magistrate, who, after hearing the evidence, discharged

the plaintiff. The latter then began the present action for malicious prosecution, claiming $10,000 damages.

The plaintiff moved to strike out the 5th, 6th, 7th, and 8th paragraphs of the statement of defence.

N. Murphy, K.C., for plaintiff.

G. H. Kilmer, for defendants.

THE MASTER:—In this action the defendants might have contented themselves with a traverse of want of reasonable or probable cause, as was the case in Roberts v. Owen, 6 Times L. R. 172, cited in Odgers on Pleading, 5th Eng. ed., p. 182. This was not done. On the contrary, the pleader endeavoured to shew that the defendants "having good and sufficient cause, the said William Kingsmill caused a warrant to issue for the arrest of the said plaintiff:" see par. 6. In this view he has apparently attempted to justify the conduct of the defendants, relying it may be on Morse v. Kaye, 4 Taunt. 34, cited by Odgers on p. 182. (I notice this case is not in the revised reports). In that case, however, it may be observed, it was sought to justify the plaintiff's arrest by alleging that he had acted "suspiciously." The Court on demurrer held that the facts from which that suspicion was inferred must be shewn.

The 5th paragraph sets out that Palangie, being asked by Kingsmill's agent why the note had not been paid when due, denied that there was any such firm as Kearns & Palangie, or that he had given authority for either the making or discounting of the note, or that he had in any way received any part of the proceeds. The 6th paragraph states that on application to the plaintiff on 16th January, no satisfaction could in any way be got from him, and that he was thereupon arrested as set out in the statement of claim.

So far as I can see, the two paragraphs are free from objection. They allege matters which may properly be submitted to the jury as shewing reasonable and probable cause. What the result will be is not for us to be troubled with now.

The 7th and 8th paragraphs deal with matters that occurred after the arrest. There is no view that occurs to me in which they can possibly afford any justification of the conduct of the defendants. The question is: Had the defendants reasonable and probable cause at the time when the information was laid? To supply an answer to this, the grounds of the decision of the magistrate are not in any way helpful. The only important fact is that the plaintiff was discharged. If the defendants desire, so much of the 7th paragraph as

states this fact may remain. The rest, in my opinion, should be expunged. So too should the whole of the 8th paragraph. It consists of a statement of facts occurring after the plaintiff's acquittal. It sets out how the defendants then attempted to recover the amount of the note in the Division Court, how the plaintiff did not appear, but his alleged partner Palangie successfully defended himself. The paragraph concludes with a remark said to have been made by the presiding Judge at the trial in the Division Court, which should not in any case be allowed to remain on the record, as it might prejudicially affect the plaintiff's case.

I therefore dismiss the motion so far as the 5th and 6th paragraphs are concerned. But, even allowing the wide range given in the leading case of Stratford Gas Co. v. Gordon, 14 P. R. 407, I think the 7th and 8th must be dealt with as stated above. The first two paragraphs and the first clause of the 9th paragraph of the statement of defence would probably have set up all that the defendants need have said. As the success has been divided, there will be no costs of the motion.

CARTWRIGHT, MASTER. JUNE 2ND, 1903.

CHAMBERS.

ALLEN v. CROZIER.

Security for Costs—Motion to Set aside Præcipe Order—Plaintiff out of Jurisdiction—Money in Hands of Defendant—Action for Account.

Motion by plaintiff to set aside a præcipe order for security for costs in an action against a solicitor.

T. H. Lloyd, Newmarket, for plaintiff.

J. W. McCullough, for defendant.

THE MASTER:—The facts have been fully gone into in Re Solicitor, 2 O. W. R. 268. The costs have been taxed, and amount to a considerable sum. The exact figures have not been furnished. But, on the theory that the solicitor is bound to account for the rents, there would be about $450 due the plaintiff. The defendant, it appears, has become the assignee of two judgments against the plaintiff. On these there is due about $800. It is admitted that he gave only about $100 for them. If he can claim the full amount, there would still be due to him from the plaintiff $350. If the defendant is only entitled to the $100, then the plaintiff would be entitled to $350 or thereabouts.

In this state of facts a motion is made to set aside the order for security for costs, plaintiff's counsel relying on Mr. Winchester's judgment in Re Solicitor and on Duffy v. Donovan, 14 P. R. 159.

I think the motion cannot succeed.

The case of Duffy v. Donovan is entirely different, as will appear from a perusal of the case. There the receipt of the trust funds was admitted by both defendants; here the very point to be decided is, whether the assignment of the rents to the defendant was absolute or only by way of security. That point cannot be usefully considered at present. If on the filing of the defence any admissions should be made in corroboration of the plaintiff's claim, he might possibly have grounds to renew his present motion. Then there is the question of the judgments of which the defendant is assignee, and which he will no doubt set up by way of counterclaim at the proper time. On the question raised as to this by the plaintiff it would also be premature to express any opinion. If the defendant can successfully maintain his position on either of these points, then the right to security for costs is clear. I am not sure if Mr. Lloyd relied in any way on the concluding paragraph of the judgment in Sample v. McLaughlin, 17 P. R. 491. I do not, however, understand that to lay down a general rule. If it did so, it would not have been necessary to the decision of the case, which it has been since held was, that the solicitor, by the use of the names of the plaintiffs (whether authorized or not), had made them parties, and so was himself the actor. This makes a written retainer more a necessary precaution in every case. On the whole facts of this case, I do not think the order for security should be set aside.

Costs of this motion will be in the cause.

TEETZEL, J. JUNE 2ND, 1903.

TRIAL.

REYNOLDS v. TRIVETT.

Limitation of Actions—Real Property Limitation Act—Enclosing Wild Land—Occupancy—Knowledge of Owner of Paper Title.

Action for a declaration that a certain deed by one Allen to defendant Trivett dated 29th February, 1888, and a mortgage made by Trivett to the representatives of the Cawthra estate, were a cloud upon plaintiff's title to the north part (114 acres) of the west half of lot 3 in the 9th concession of Gwillimbury, and for other relief.

John MacGregor, for plaintiff.

T. J. Robertson, Newmarket, and J. H. Moss, for defendant Trivett.

TEETZEL, J.:—I find that by deed dated 22nd July, 1887, plaintiff became possessed of a good paper title to the whole of lot 3, save 200 acres on the front or north end thereof, sold and conveyed for taxes to William Cathcart, by deed dated 3rd October, 1831, and the plaintiff claims that such title covers the 14 acres in question in this action. Defendant's paper title to the north 100 acres is derived from the tax deed. The first conveyance in the chain of title thereafter, dated 24th April, 1860, describes it as the north 100 acres of the west half—metes and bounds being given . . . There can be no question as to the sufficiency of the defendant's paper title to the north 100 acres, but he has not a perfect paper title to the south 14 acres. . . .

I find as a fact that Ezra Grant, the original grantor of the 114 acres to defendant, built a substantial log and pole fence along the south boundary of said 114 acres in 1880 or 1881, and that, when defendant purchased the property, he in good faith supposed it marked the southern limit thereof, and has ever since maintained it as a boundary fence.

I also find as a fact that in 1888 and 1889 similar fences running north from this fence were built along the easterly and westerly boundaries of the 14 acres, connecting with the other line fences of plaintiff and completely enclosing the 14 acres with the other lands of plaintiff to which he had a good paper title.

Ever since the 14 acres were so enclosed, defendant has, either by himself or his tenants, lived upon and occupied the 114 acres as an enclosed farm, having cleared and cultivated the greater part of the front 100 acres of it, and having used this 14 acres with other uncleared land adjoining to the north as one undivided bush, in the usual course of husbandry, for pasture and firewood.

In my opinion this continuous occupancy and use of the enclosed premises as a whole, for more than ten years prior to the commencement of this action, was such actual, constant, and visible occupation thereof as to vest in defendant a good possessory title to the 14 acres. See McConaghy v. Denmark, 4 S. C. R. 632; Harris v. Mudie, 7 A. R. 414; McIntyre v. Thomson, 1 O. L. R. 163, and other cases therein cited.

I am of opinion that this lot of 14 acres, when taken possession of by defendant, was in a state of nature, and has

not since been cultivated or improved except by fencing, but I find as a fact that for more than ten years before the commencement of this action, plaintiff had knowledge of the actual possession and use of the land by defendant in manner aforesaid. . . .

Action dismissed with costs as against defendant Trivett.

JUNE 2ND, 1903.

C.A.

REX v. NOEL.

Criminal Law—Conviction for Shooting with Intent—Leave to Appeal Constitution of Grand and Petit Jury—Rejection of Evidence.

Motion by defendant for leave to appeal from his conviction before MEREDITH, C.J., at Ottawa, upon an indictment under sec. 241 of the Criminal Code, for shooting at one Larocque, with intent to do bodily harm. The defendant was sentenced to five years' imprisonment. The grounds of the motion were that certain evidence, tendered on behalf of defendant, was wrongly excluded, and secondly, that four of the petit jurors were taken to fill vacancies in the grand jury, and defendant was thereby deprived of his usual right to a panel from the lawful number of jurors.

E. E. A. DuVernet, for defendant.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court (OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.) was delivered by

OSLER, J.A.:—Without expressing any opinion as to the soundness of either of the objections taken to the proceedings, viz., the constitution of the grand and petit jury, and the refusal of the learned trial Judge to allow the prisoner's counsel to re-examine the witness Pepin, we think they are such that the prisoner should have, if he desires it, an opportunity of arguing them upon a case reserved. In dealing with the latter objection it will probably be necessary that the whole of the evidence at the trial should be before us, having regard to the provisions of sec. 746 (f) of the Criminal Code. As to the former, counsel may be referred to Burley v. The State, 1 Neb. 385; Runnels v. The State, 28 Ark. 121; Finley v. The State, 61 Ala. 201; Scott v. The State, 63 Ala. 59; and the provisions of the Jury Act and the Criminal Code bearing on the subject.

BRITTON, J. JUNE 3RD, 1903.

TRIAL.

FRANK v. HOHL.

Deed—Conveyance of Land—Action to Set aside—Improvidence—Want of Independent Advice—Absence of Consideration—Costs of Action.

Action brought to set aside a conveyance made on the 13th December, 1900, by plaintiff to defendant of the west half of lot 39 in the 2nd concession south of the Talbot road in the township of Middleton, in the county of Norfolk. It was alleged that plaintiff did not understand that he was executing an absolute conveyance, and did not intend to do so, and that the transaction was an improvident one, and that plaintiff entered into it without having any independent advice, etc. Plaintiff, a German who did not understand English very well, was, at the date of the execution of the conveyance, about 83 years of age and in bad health. His wife, an aged woman, crippled by rheumatism, lived with him. He never had any children. The farm conveyed was not incumbered, and was practically the whole of plaintiff's estate. The farm was of the value of at least $2,500. Defendant was a young man, not related to plaintiff, but a favourite with plaintiff.

R. A. Dickson, Delhi, for plaintiff.

G. W. Wells, K.C., for defendant.

BRITTON, J.:—Upon the whole evidence, the conveyance ought not to stand. Waters v. Donnelly, 9 O. R. 391, referred to. The defendant did not prove nor did it appear in this case "that everything was right and fair and reasonable on the defendant's part." "The transaction must have been known to defendant to have been an improvident one on the part of the plaintiff, who had no proper advice in regard to it." The conveyance from plaintiff (and his wife, to bar dower) to defendant must be set aside on the ground of improvidence and want of independent advice and absence of consideration. No actual fraud has been proved against defendant. He accepted what plaintiff, without advice, was improvidently giving, but he did not urge it upon plaintiff. Indeed he did not appear to realize that plaintiff was giving a farm of considerable value, practically for nothing, and placing himself and his aged wife at the mercy of defendant for a penny of spending money or for an article beyond what would come under the words "respectable maintenance and

support." For these reasons the judgment will be without costs. Defendant may retain possession until 1st December, 1903, upon terms.

CARTWRIGHT, MASTER. JUNE 4TH, 1903.

CHAMBERS.

HALL v. LAPLANTE.

Discovery—Affidavit on Production—Privilege—Confidential Communications—Solicitor and Client — How to Claim Privilege.

By an order made on the 28th April, 1903, defendant was directed to file a further and better affidavit on production, shewing "the nature of the correspondence without any ambiguity whatever, in order that there may be no doubt as to its being privileged," as in Clergue v. McKay, 3 O. L. R. at p. 480.

The defendant accordingly, on 4th May, filed a further affidavit, but plaintiff, being still dissatisfied, moved for a better affidavit.

D. L. McCarthy, for plaintiff.

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

THE MASTER:—In Clergue v. McKay, the principles on which protection is allowed on the ground of professional privilege are stated, and may be found set out at length in the English cases followed and approved in that judgment. If any further information is desired, the whole subject will be found discussed and illustrated in Bray on Discovery, pp. 372-377.

Taking the rule laid down by Cotton, L.J., in Gardner v. Irwin, 4 Ex. D. at p. 53, as the true test, then this second affidavit of defendant is still defective.

The letters referred to in the first two paragraphs should be separated, as can easily be done by setting out first those which come under the first paragraph and then those which come under the second. Let them be numbered, and say the first six (or as the case may be) are those under the first paragraph, and the remainder are those under the second paragraph. And it would be well to use the exact language of the judgment of Cotton, L.J. . . .

The 5th paragraph does not seem to claim any privilege. Unless this can be done on a further affidavit, the two letters therein referred to must be produced. See Milbank v. Milbank, [1900] 1 Ch. 376.

Costs to plaintiff in any event.

BRITTON, J. JUNE 5TH, 1903.

CHAMBERS.

RE SAVAGE.

Will—Construction—Devise—Revocation by Codicil—Effect of—Specific Devises—Residuary Devise—Construing Will on Chambers Application.

John Savage died on the 22nd May, 1890, leaving a will dated 22nd April, 1869, and a codicil thereto dated 23rd April, 1869.

By the will (cl. 3) he devised to his wife, Mary Ann Savage, all his real estate for life; and after her death (cl. 4) he devised to H. M. lot 31 on the north side of Henry street; (cl. 5) to B. B. lot 30 on the north side of Henry street; (cl. 6) all the residue of his real estate to J. B. and B. W. in trust to devote the income and profits to the relief of poor people in the town of Prescott.

The codicil was as follows:

"I hereby revoke my said last will and testament in so far as the same relates to or affects those certain portions or parcels of my real estate, namely, all and singular lot 26 on the south side of Henry street . . . and town lot letter D. . . . and change and substitute for such portion or portions part or parts of said will as refer to or affect said above named parcels of my real estate the following disposition and devise:—I give, devise, and bequeath my said above named real estate unto and to the use of my beloved wife Mary Ann Savage, her heirs, executors, administrators, and assigns, for her and their sole and only use and benefit."

Mary Ann Savage was the executrix of the will. She died on the 7th February, 1902, leaving a will.

The executors of the will of Mary Ann Savage applied for an order declaring the construction and interpretation of the will of John Savage and of the will of Mary Ann Savage, and for the opinion, advice, and determination by the Court of the questions: (1) Does the codicil to the will of John Savage revoke clause 6 of his will? (2) If it does, is there an intestacy as to the real estate not specifically devised, or did Mary Ann Savage take an estate in fee simple in the real estate not specifically devised? (3) If the codicil did not revoke clause 6, is the devise in clause 6 to J. B. and B. W. a valid devise, or is it void for uncertainty or otherwise? (4) If void, did Mary Ann Savage take an estate

therein, or is there an intestacy as to the land mentioned in clause 6?

G. H. Watson, K.C., for executors.

W. E. Middleton, for Ada Savage.

T. Mulvey, K.C., for devisees of widow.

P. K. Halpin, Prescott, for beneficiaries under will of John Savage.

BRITTON, J., held that the codicil executed on the 23rd April, 1869, to the will of John Savage of 22nd April, 1869, revoked the devise in clause 6. (2) That Mary Ann Savage took an estate in fee simple in all the real estate of John Savage not specifically devised.

Quære, whether a Judge in Chambers ought to assume jurisdiction to answer questions so important as to construction. R. S. O. 1897 ch. 129, sec. 39, In re Williams, 1 Ch. Ch. 372, Re Hooper's Will, 7 Jur. N. S. 595, Re Lorenz, 4 L. T. N. S. 501, and Re Evans, 30 Beav. 232, referred to.

Costs of all parties out of estate.

MEREDITH, C.J. JUNE 5TH, 1903.

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

Security for Costs—Action for Penalties—Statute—Provision as to Consent of Attorney-General—Effect of Obtaining Consent—Unsubstantial Plaintiff—Common Informer—Rule 1200.

Appeal by plaintiff from order of Master in Chambers, ante 468, requiring appellant to give security for costs.

George Bell, for plaintiff.

R. B. Beaumont, for defendants Parker & Co.

MEREDITH, C.J., dismissed the appeal with costs to respondents in any event.

MEREDITH, C.J. JUNE 5TH, 1903.

CHAMBERS.

McDONALD v. PARK.

Parties—Joinder of Causes of Action—Action to Set aside Will and Establish Earlier Will—Different Beneficiaries—Inconvenience—Jurisdiction of High Court.

Appeal by plaintiff from order of Master in Chambers striking out paragraph 4 of the statement of claim and making other necessary excisions, on the ground of improper joinder

of separate and distinct causes of action, viz., a claim to set aside a will, and a claim to establish an earlier will.

Casey Wood, for plaintiff.

C. A. Moss, for defendant George McDonald.

W. E. Middleton, for other defendants.

MEREDITH, C.J., varied the order by restoring paragraph 4, but not interfering with the striking out of the paragraph of the prayer for relief which specifically asked that the earlier will might be established, without prejudice, however, to the plaintiff contending that he was entitled to that relief under the general prayer, and made the costs here and below costs in the cause.

MACMAHON, J. JUNE 5TH, 1903.

TRIAL.

RODERICK v. SUPREME TENT OF KNIGHTS OF THE MACCABEES OF THE WORLD.

Life Insurance—Death of Insured—Presumption—Absence for Seven Years—Rebuttal of Presumption—Circumstances—Evidence.

Action by Annie Roderick upon a benefit certificate for $2,000 issued by defendants. The question for trial was, whether Francis Edgar Roderick, the insured, and husband of plaintiff, was alive or dead. He was one of the charter members of Amity Tent, No. 120, of Hamilton. He was married to plaintiff in 1886, and the certificate was issued to him on 9th September, 1893. Plaintiff was named as beneficiary therein. Roderick came to Hamilton from Sackett's Harbour, in the State of New York. He left Hamilton early in February, 1894, remained a few days, and again left, and was last heard from by his wife in a letter which he wrote to her from Buffalo on the 14th May, 1894. He paid the monthly dues called for by the certificate up to the time of his death. The plaintiff paid all dues since up to the time the action was brought. Roderick was secretary of a camp of the Independent Order of Foresters at Hamilton, and upon his leaving Hamilton it was found that he had collected from the members about $100, for which he had not accounted. An information was laid and a warrant issued in February, 1894, for his arrest.

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

W. M. McClemont, Hamilton, and H. H. Bicknell, Hamilton, for defendants.

MacMahon, J., held that when a person is absent for seven years without being heard from by those with whom he would naturally communicate were he alive, the presumption is raised that he is dead. Regard, however, must always be had to the circumstances under which the person absented himself, and as to whether he would probably communicate his whereabouts to his relatives. Roderick had committed a criminal offence and left Canada under a cloud, and that would render it improbable that he would let his whereabouts be known. And slight evidence will rebut the presumption of death after the seven years have elapsed. There was uncontradicted evidence that Roderick was in Chicago in 1897, and the seven years presumption has been effectually rebutted. See Providential Assurance Co. v. Edmond, 12 App. Cas. at pp. 512-3; Watson v. England, 14 Sim. 23; Bowden v. Henderson, 2 Sm. & G. 360.

Action dismissed with costs.

June 5th, 1903.

DIVISIONAL COURT.

MATTHEWS v. CITY OF HAMILTON.

Nuisance—Municipal Corporation—Sewer—Discharge of Hot Water into Bay—Effect upon Ice—Vessel Moored in Bay —Injury to—Damages—Right of Owner of Vessel to Maintain Action.

Appeal by defendants from judgment of County Court of Wentworth, awarding plaintiffs $200 damages and costs, for injuries caused to a certain steamer, "Acacia," the property of plaintiffs, by reason of alleged negligence of defendants.

F. MacKelcan, K.C., for defendants.

E. H. Ambrose, Hamilton, for plaintiff.

The Court (Street, J., Britton, J.) held that defendants have the right to discharge water from their sewers into Burlington bay, provided they do not interfere with the rights of persons lawfully using the waters of the bay. The plaintiffs were lawfully using these waters in mooring their steamboat at the wharf during the winter months. The evidence establishes damage to plaintiffs caused by the discharge from defendants' sewer into the bay of hot water, by the effect of which the ice forming about plaintiffs' vessel was affected, and the safety of the vessel's mooring was interfered with. The discharge of the hot water into the bay was, under the circumstances, a public nuisance, and the plaintiffs, having received

special and peculiar damage from it, are entitled to maintain this action: 10 Am. & Eng. Ency. of Law, 2nd ed., p. 248; 21 ib. p. 442; Wood on Nuisances, 2nd ed., sec. 480; Original Hartlepool Collieries Co. v. Gibb, 5 Ch. D. 713; McDonald v. Lake Simcoe Ice Co., 26 A. R. 416, 31 S. C. R. 133; Ellis v. Clemens, 21 O. R. 227.

Appeal dismissed with costs.

OSLER, J.A. FEBRUARY 14TH, 1903.

C.A.—CHAMBERS.

RE ONTARIO CONTROVERTED ELECTIONS ACT.

Trial of Petitions—Charges and Expenses of Stenographers—Payment.

Applications having been made for payment of the charges and expenses of stenographers attending the trials of Provincial election petitions out of the deposits of $1,000 in each case made by the petitioners under secs. 13 and 14 of the Ontario Controverted Elections Act, the following memorandum was prepared by

OSLER, J.A.:—The Rota Judges, after full consideration, are all of opinion that such charges and expenses are not payable out of, or a charge upon, the deposit.

Section 13 expressly defines the purposes for which the security is given, viz., payment of all costs, charges, and expenses that may become payable by the petitioner: (a) to every person summoned as a witness on his behalf; or (b) to the member or candidate against whom the petition is presented. Section 102 refers to no other costs, charges, and expenses than these. The amendment introduced into it by 2 Edw. VII. ch. 12, sec. 4, does not in the least enlarge or extend its meaning, and confers upon the Judges no more power to order payment of the reporter's expenses out of the fund on deposit than those of the registrar. The reporters' attendance is not directed by the Judges, as in the case of a trial under the Dominion Act, or by the parties, but by the Attorney-General's department, and their expenses form, or, in the opinion of the Judges, should form, part of the expenses of the Court, and be defrayed just as are those of the registrar.

The practice under the Dominion Controverted Elections Act has been referred to as warranting the orders now applied for, but, besides that the reporters are not Dominion officers, the provisions of the Dominion Act on the subject are express

(secs. 41, 43, R. S. C. ch. 9), and make the expense of employing the shorthand writer—whose attendance is directed by the Judges—costs in the case.

Considering that election petitions are intended to be tried and disposed of as nearly as possible in the same way as an ordinary action in the High Court, there seems no reason why the litigants should have the expenses of the reporter in the former if they do not in the latter. Rather is the contrary the case, as there is an element of public interest attaching to an election petition which is absent from a mere action between private parties.

BOYD, C. JUNE 5TH, 1903.

TRIAL.

SELBY v. MITCHELL.

Sale of Goods—Machinery—Action for Price—Counterclaim for Breach of Warranty—Appreciation of Evidence.

Action by a firm of machinists carrying on business in the city of Kingston against a firm of contractors in the town of Gananoque to recover the value of an engine installed in defendants' boat and the value of work done and material supplied, the amount claimed being $633.80.

The defendants alleged that the plaintiffs never installed an engine and boiler in the boat in accordance with the agreement, and counterclaimed for $500 damages for the loss sustained by reason of the engine and boiler being worthless to them and defective, and for breach of warranty.

A. B. Cunningham, Kingston, for plaintiffs.
D. M. McIntyre, Kingston, for defendants.

BOYD, C.:—I have read over the whole of the evidence in this case, i.e., what was taken before me and the further evidence taken before the Master, and have considered the very full and able arguments supplied by both sides.

The evidence both as to the facts and the scientific aspect of the case is extremely conflicting, but on the main matters in dispute I think the defendants have failed to shew that there was any such explicit and minute guarantee as they set forth. What was guaranteed was that which is found in the letter of 19th May from plaintiffs: "We will guarantee the working of the engine and the boiler"—i.e., in a reasonable way. The chief complaint at first was as to the engine, and another one has been supplied, which does not appear to be open to any serious objection. The boiler was not objected to till afterward, and then it was on the ground that

the heating surface was inadequate. But that is based, I think, upon the claim of the defendants to have a speed of nine or ten miles an hour, which the plaintiff did not agree to provide for.

The defendants' own witnesses say "that the boiler is good except as to capacity," and another "that it is large enough to drive the boat 6 or 7 miles an hour," but it will not supply this continuously.

Against this there is the evidence of the plaintiffs that they made good time with the boat, and of the man who invented this kind of boiler, that it is sufficient for its work. The tests applied by the defendants appear to be rather hypercritical, having regard to the absence of the guarantee claimed by the defendants.

The best conclusion I can reach is, that that is a fair sum admitted by Mitchell, one of the defendants, that he offered the plaintiff $575 and "call it square" before action brought.

The best conclusion I can reach is, that that is a fair sum to be paid by the defendants, $575, with costs of action to plaintiffs. Counterclaim dismissed without any costs either way.

JUNE 5TH, 1903.

DIVISIONAL COURT.

GILLETT v. LUMSDEN.

Trade Mark—"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.

Appeal by defendants from judgment of Street, J. (4 O. L. R. 300, 1 O. W. R. 488), in favour of plaintiff in an action to restrain defendants from infringing plaintiff's registered trade mark for "Gillett's Cream Dry Hop Yeast," by selling yeast cakes under the name of "Jersey Cream Yeast." The Judge below held the words "cream yeast" were not the proper subject of a trade mark, being common words of description, but that, the plaintiff's yeast having acquired a reputation in the market under the name of "cream yeast," that name was his property as against persons seeking to use it for the purpose of selling other goods of the same character, and he was entitled to have defendants restrained from so using it.

The appeal was heard by BOYD, C., FERGUSON, J., MACLAREN, J.A.

G. F. Shepley, K.C., and F. C. Cooke, for defendants.

C. A. Masten and J. H. Spence, for plaintiff.

Boyd, C.—The plaintiff puts his case on this, that he is entitled to the exclusive use of the word "cream" in connection with yeast. It is not contended that there is any similarity by the make-up of the goods in packages of defendants with those of plaintiff—the appeal to the eye would inform any one of the difference—but in ordering cream yeast, which the plaintiff's is called, there would be "awkwardness" in confounding defendants' Jersey cream yeast with it. There is no proof of actual deception—but all rests on the opinion of the manager of plaintiff.

There was no proof of advertising plaintiff's goods as "cream yeast" prior to defendants' use of the name complained of. The evidence at most puts it thus, that an order for "cream yeast" might cause confusion between plaintiff's and defendants' products; but the same witness says that defendants' output is known in the trade as "Jersey Cream Yeast." The defence shews that the name of "Jersey Cream" was honestly come by, being used by defendants in baking powder since 1890—and repels any idea of fraudulent appropriation, though that this is not essential in passing-off cases. It makes in the same direction of honest dealing, that the article made by plaintiff was not in the market advertised and openly vended when defendants began to use "Jersey Cream" in yeast cakes—the sale had been for years in abeyance—though that is not fatal to plaintiff's right to recover, if otherwise entitled. There is no copying of any part of plaintiff's label as to directions by defendants, as Mr. Justice Street appears erroneously to have thought.

Assume that the plaintiff has a trade mark or label in which the words "cream yeast" are used, yet there is no invasion of this on defendants' part—there is no colourable imitation of the whole thing which is the trade mark.

Then I think this case is covered by . . . Raggett v. Findlater, L. R. 17 Eq. 29. "Cream" is used by plaintiff merely as a descriptive word to suggest the frothing appearance of the yeast as it works (yeast froths like cream), and, as a word in common use to indicate a creamy, frothy look, it is not to be monopolized by plaintiff: In re Smokeless Powder Co.'s Trade Mark, [1892] 1 Ch. at pp. 194-6. To adapt the language of Malins, V.-C., in the case cited, "the word 'Jersey' completely distinguishes it from plaintiff's, as does also the character and form of the label:" L. R. 17 Eq. at p. 43. There is no evidence going to shew that the user of the words by plaintiff has been so long and so exclusive as to make the descriptive term in any sense distinctive.

Besides, Jersey cream is actually used in defendants' preparation, and a man may state that fact on his label without being exposed to injunction: see Turton v. Turton, 42 Ch. D. at p. 147.

Here there is no obvious imitation by defendants of plaintiff's label or of the words he uses in it, judged by ocular inspection, and, according to the latest decision, "the eyesight of the Judge is the ultimate test:" per Farwell, J., in Bourne v. Swan, [1903] 1 Ch. 229. . . .

The action fails and should be dismissed with costs, and the appeal allowed with costs.

FERGUSON, J., gave written reasons for the same conclusion.

MACLAREN, J.A., also concurred.

CARTWRIGHT, MASTER. JUNE 6TH, 1903.

CHAMBERS.

CASTLE v. CHAPUT.

Parties—Adding Party — Alternative Relief—Joinder of Causes of Action—Jury Notice—Leave to Give after Time Expired.

Motion by plaintiff for leave to add as a defendant one J. C. Campbell referred to in the 3rd paragraph of the statement of defence as a traveller in the employ of the defendants who acted for them in the transaction out of which the present action arose.

R. C. H. Cassels, for plaintiff.

W. E. Middleton, for defendants, contended that, although plaintiff might have a separate cause of action against Campbell, it was not so connected with the action against the firm as to be capable of being joined to it.

THE MASTER referred to Bennetts v. McIlwraith, [1896] 2 Q. B. 464, Honduras R. W. Co. v. Tucker, 2 Ex. D. 301, and Thompson v. London County Council, [1898] 1 Q. B. at p. 845, and proceeded:—

In deciding these questions in Chambers, the pleadings only can be looked at. The question is, what does the party allege? Not, what can he prove? If the present action had been brought at first against the present defendants and

Campbell, could the latter have been rightly struck out as not being a proper party under Thompson v. London County Council and cases fillowing that decision? Has not this point been made clear by . . . Tate v. Natural Gas Co., 18 P. R. 82? That case was followed in Langley v. Law Society of Upper Canada, 3 O. L. R. 245, where (p. 249) Meredith, J., speaks of the plaintiff being in doubt as to the person from whom he is entitled to redress, as being the decisive point for consideration. . . .

I am of opinion that an order should go in the same terms as to costs and otherwise as in Tate v. Natural Gas Co.

In the same case a motion was made for leave to give a jury notice, which was overlooked, as explained by affidavit of plaintiff's solicitor. This should be allowed on the authority of Macrae v. News Printing Co., 16 P. R. 364.

As this will be embodied in the same order as the other relief asked for, it is not necessary to make any separate provision as to the costs.

CARTWRIGHT, MASTER. JUNE 6TH, 1903.

CHAMBERS.

HASKINS v. MAY.

Evidence—Examination of Witness de Bene Esse—Order for.

Motion by defendant for an order allowing him to examine a witness, one Isabelle Hartwell, de bene esse.

S. H. Bradford, for defendant.

C. A. Moss, for plaintiff.

THE MASTER.—As defendant is willing to furnish plaintiff with a copy of the depositions free of charge, I think the usual order may go for the examination de bene esse of Isabelle Hartwell. Whether or not her evidence will be material must be left for determination at the trial, and cannot be usefully considered now.

The defendant makes out the usual prima facie case, and I am unable to see any ground on which the order can be properly refused.

The costs of the motion will be disposed of by the taxing officer.

CARTWRIGHT, MASTER. JUNE 6TH, 1903.

CHAMBERS.

JOHNSTON v. LONDON AND PARIS EXCHANGE.

Discovery—Production of Documents—Action for Penalties—Præcipe Order for Production by Defendants—Setting aside.

Motion by defendants to set aside an order issued by plaintiff on præcipe for production of documents by defendants. The action was brought to recover penalties under sec. 17 of 63 Vict. ch. 24 (O.).

R. B. Beaumont, for defendants, contended that the order was futile and useless and therefore unnecessary.

George Bell, for plaintiff, contended that the order should not be set aside, but defendants should be left to claim privilege, if so advised.

THE MASTER.—There are no cases that are exactly in point. But Malcolm v. Race, 16 P. R. 330, does not seem to be distinguishable in principle. . . . This judgment was cited with approval in Hopkins v. Smith, 1 O. L. R. 659. In that case a motion was made similar to the one under consideration. I therefore make the order that was made by the Chancellor in that case, setting aside the order for production with costs to defendants in any event.

MEREDITH, J. JUNE 6TH, 1903.

CHAMBERS.

RE MOUNT v. MARA.

Division Court—Jurisdiction—Amount in Dispute—Claim for Price of Horse—Sale by Wrongdoer—Contract or Tort—Prohibition.

Motion by defendant for prohibition to a Division Court. The plaintiff sued for the price of a horse sold to defendant. There was no dispute as to the agreement for sale. The only dispute as to the bargain, was as to the time and manner of delivery of and payment for the horse. The horse was delivered to defendant by plaintiff's brother, in plaintiff's absence, and the price was paid to the brother. Plaintiff contended that the brother had no authority to receive payment, and, as it was so found, and also that the money never reached plaintiff, judgment was given against defendant for the price of the horse. This motion was made on the

ground that plaintiff's claim was really one in trespass or for trover, and that the amount claimed and for which judgment went was beyond the Division Court jurisdiction.

J. C. Judd, London, for defendant.

W. McDiarmid, Lucan, for plaintiff.

MEREDITH, J., held that there was nothing to prevent the plaintiff treating the taking of the horse by defendants as a valid delivery under the contract, and that he did, electing to sue upon the contract, and not for trespass or trover. He had the choice of suing upon the contract or of treating the taking of the horse as wrongful, and suing for the wrong. See Roscoe's N. P., 16th ed., pp. 528, 588, 589.

Application dismissed with costs, fixed at $10.