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HON. MR. JUSTICE HODGINS. MAY 14TH, 1913.

CARDWELL v. BRECKENBRIDGE.

4 O. W. N. 1295.

Waters and Watercourses—Dam—Easement to Pen Back Water—Flooding of Servient Tenements—Evidence—Necessity of Literally Continuous Adverse User — Extent of Right Acquired—Alleged Raising of Dam—Prolongation of Period of Flooding—Improved Methods of Water Conservation—Damages—Injunction—Costs.

HODGINS, J.A., *held*, that an easement to pen back the water of a stream and to cause flooding to riparian owners can be acquired by user of the stream in this manner continuously or at regularly recurring intervals for a period of 20 years, but that the extent of the right acquired must be measured strictly by the extent of the user.

Review of authorities.

That therefore an easement by mill-owners to pen back and utilize the spring freshets and such summer rains as would be extensive enough to warrant user, did not justify the storing and conservation of such water as was collected to greatly prolong the period of user beyond the termination of the spring freshets, and so extend the period of flooding of the servient tenements.

Action by four plaintiffs for damages for flooding lands and for an injunction, tried at Peterborough non-jury sittings, December 18th, 19th, 20th, and 21st, 1912, and January 20th, 21st, 1913.

The defendant resisted the claim, setting up that by prescription he had obtained the right to flood the lands of the several plaintiffs.

G. H. Watson, K.C., and L. M. Hayes, K.C., for plaintiffs.

I. F. Hellmuth, K.C., and F. D. Kerr, for defendant.

HON. MR. JUSTICE HODGINS:—The defendant's mill dam is built across the river Ouse just north of the travelled road between lots 10 and 11 in the second concession of Asphodel; and the saw mill and grist mill lie between it and

the road. Above or northward from the dam stretches the mill pond, and on each side of this lie the lands of the plaintiffs. The plaintiff Thomas W. Cardwell owns the west half of lot eleven lying to the west or to the left of the pond, looking north, save some village lots which front on the travelled road. He also owns the west half of lot 12, which lies immediately north of the west half of lot 11.

The plaintiff, Benjamin Cardwell, owns the east half of lot eleven, lying to the east or to the right of the pond looking north, and the village lots nearest the mill property. He also owns the east half of lot twelve, which lies directly north of the east half of lot 11.

The west and east halves of lot thirteen—the owners of which are not plaintiffs in this action—lie to the north of the lands of Thomas and Benjamin Cardwell. Then come the lands of the other plaintiffs; Patrick Fitzpatrick owning the west half of lot 14, and William Garvey owning the east half of lot 14.

Each of the half lots contains one hundred acres.

The complaint of the plaintiffs is that the dam has been raised twenty-one and a half inches since 1885, and has been tightened, resulting in a great increase in the water backed upon their lands, with consequent damage, in later years. The defendant denies the raising and tightening of the dam, and claims the right to flood these lands whenever the natural flow of the Ouse requires him to do so in operating his mill.

The defendant purchased the mill and appurtenant lands in 1885; and in his conveyance from Geo. Read there are included "the mills, dam, and machinery now therein" and a right to enter into and upon an embankment on the west side of the Ouse for the purpose of repairing, amending, and rebuilding the same.

In general outline the facts appear to be that this mill was a going concern when purchased by defendant, and that his predecessor in title, John Powel, had for many years maintained the dam in question with a seven-foot head, according to the evidence of Henry J. Walker, who had run it for seven years until 1884 or 1885. The embankment mentioned in the defendant's deed was then in place, and has been maintained ever since.

In 1886, 1900, 1901 and 1908, some repairs and improvements were made to the dam.

In 1886 the two inside sections of the dam and the timber slide were taken down and repaired. In 1900 and the winter of 1901, steam was put in, the posts replaced in the timber slide, and the old saw mill on the west was taken down, as well as its flume; and the dam was repaired. In 1903 shafting was put across below the dam, a chopper put in, and steam was used to saw and grind chop. In 1908 the old grist mill flume was made into a sluiceway, and a new concrete flume put in to the east.

Much evidence was given upon all the issues raised. The chief disputes were (1) was the dam raised? (2) was it tightened? (3) had the defendant acquired the right by prescription to collect and retain whatever amount of water the dam, if it remained unaltered, could contain at any time? (4) the question of damages and injunction. There were other minor questions, but these formed the chief element in the consumption of the time occupied by the trial.

In discussing the question of the exact height of the present dam and the height of the dam at a time spoken of by one Lobb in 1902 or 1903, and also the height of the embankment and of the water at several dates, a number of plans and elevations were put in. There are four plans which give elevations; exhibits 13, 14, and 28, being confined to the dam, the former taking in the embankment on the west or left side of the mill pond; exhibit 30 dealing with portions of the lands involved.

Mr. Watson for the plaintiffs objected to the later plan on the ground that it professed to give surveys and that Mr. Wright its draughtsman, was not an O. L. S. Mr. Watson referred to 1 Geo. V., ch. 41, sec. 25. I overruled the objection; but Mr. Watson relied on it, and in consequence did not cross-examine at length.

I think that Wright was a competent witness; and the only restraint that I can find in the statute is in sec. 3, which does not in any way affect his right to give evidence. The weight to be attached to it might be measured in some degree by sec. 25.

Plan 13 is unsatisfactory; it has no datum line, and the scale, four feet to one inch, does not agree with the marked measurements. Nor does Mr. Wilkins, who prepared it, give depths to correspond; as his evidence make it 7 feet 8 inches to the top of splash board from bed of river, whereas the plan shews eight feet.

Plan fourteen has a datum line, which is the water level below the dam, which may or may not be the bottom of the mud sill.

Exhibit twenty-eight is also unsatisfactory, as it is obviously not drawn to scale; but it gives measurements and has an intelligible datum point.

Working out the elevation of the dam from these four several plans, there are found heights of 7 feet and half an inch, 7 feet 5 inches, 7 feet 3 inches, 6 feet 10 two-thirds inches, 6 feet 9 and two-thirds inches, on the plaintiffs' plans. Comparing these heights with that of the water in December, 1912, it will be found that they correspond generally with the latter as shewn on them and on the defendant's plan Exhibit 28.

On plan Exhibit 13 the water level on December 10th, 1912, is given as 6.98 feet, or practically 7 feet, i.e., .41 of a foot—equalling under five inches—below the top of the concrete; and on December 12th, 1912, 6.66 feet, or nine inches below.

On plan Exhibit 28 the height of the water on December 4th, 1912, is given as 99.32, and the top of the concrete at 100, the difference being .68. On December 3rd, 1912, the water came approximately to the top of the embankment, which on Exhibit 28 is given as 99.70, and Mr. Wright says this is about five inches above the level of December 4th, 1912; i.e., on the latter date the water would be eight inches below the top of the concrete pier.

These results do not differ greatly, and they all happened in December, 1912.

The height of the water on December 3rd, 1912, is 99.70, or 3 and 6/10ths inches below the top of the concrete, i.e., 7 ft. 1 inch above the water level below the dam—taking plan Exhibit 13 as correct—and about up to the top of the embankment. On December 4th, 1912, it is given as 99.32, which works out at 6.8 ½ inches or 6.9 ½ inches above water level. (See Wright's evidence). On December 10th, 1912, it is given as 7 feet, and on December 12th, 1912, at 6 feet 8 inches. So that on these days it was high and at about the same general level. This level is the height within a few inches of what the dam will hold. Wilkins says a 7-foot head is all that can be got, and that when he measured in June and July there was an inch and a half running over stop-

logs, which were lower by that amount than the splash-board between the slide and the sluice next the grist mill.

On Exhibit 30 there are elevations of the lands of the plaintiff's which, when related to this height of water in December, 1912, enable some idea of the effect of it to be had.

Thos. W. Cardwell's land. The embankment protects this on the east for a distance of about 150 yards (subject to the question of the cuts or breaks in it). Inside the embankment at No. 3, it is lower, 98.1 to 98.5, as compared with 99.5, the top of the embankment. West of this is arable land, 99.9 at the north end, with a low area, 97.8, and a watercourse through it, to the culvert north of Sharp's land. Any break through the embankment or water running over it would naturally flow through this watercourse or down the old course. There is a small triangle just north of the embankment, flooded beyond the edge of the pond at high water. The northern and western part of the farm is high, with water courses flowing down into the pond, and at their entrance this level of water encroaches upon the land. The "deer lick" is on this property, but its elevation is not given. On the other side what is marked "bush" is flooded to the boundary of Benjamin Cardwell's land and beyond the edge of the pond at high water.

Ryan's land. This has the old pine root in it, the elevation of high water mark on which is given as 99.82; the water being up to the root, but below high water mark.

Fitzpatrick's land shews the elm bush on each side flooded, but there are no elevations.

Garvey's land shews a small corner at the north-west flooded, as well as the elm bush, probably six acres in all beyond the edge of high water, but no elevations are given.

Benjamin Cardwell's land. Shews mixed bush at north flooded beyond the edge of the pond at high water; and to the south, part of the pasture field is flooded. Between the two there is a water course running into the pond, of small length.

Plan Exhibit 15 filed by the plaintiffs differs from Exhibit 30 in some degree; shewing, so far as I can follow it, a larger area of overflow; but it does not shew high water mark nor does it indicate more than that the area shewn is "injured by water." There are no elevations upon it. It is

dated in July, 1912, or about five months previous to the making of Exhibit 30.

The river Ouse is said by Wilkins, a surveyor, to have a depth of 7 feet at its deepest part, and that there is a depth of 9 feet at the deepest part on the water side of the embankment.

The rainfall from 1894 does not shew any striking increase; the years 1894, 1897, 1899, 1902, 1906, being all greater than 1909, 1910, 1911, 1912. The snowfall in 1912 was greater than ever before during the same period, mainly in January, February, March, and April; while in 1910 and 1911 it was less than the average. In May, 1912, the rainfall was exceptionally heavy; and it was large in April, 1909, in June, 1911, in July of all four years, in August of 1910 and 1912, and in September of 1911 and 1912.

The principal evidence given regarding the suggested heightening of the dam by 21½ inches was that of John Lobb, whose testimony was taken before trial *de bene esse*. It was supplemented at the trial by that of his son and others.

The top of dam "as shewn by John Lobb" marked in pink on Exhibit 13, is about five and a half feet from the bottom of the mud-sill. I have read and re-read Lobb's evidence, and find it very confused. He says that in 1900, he measured the height of the water, or the dam, as a trifle over five feet from the bottom of the dam on the south side to the top of the timber that was then on. (Q. 45-49.) He says also that in 1902 he put on a timber thirteen or fourteen inches in depth (he thinks, but took no measurements, Q. 8, 9, 10, 20) right on the top of the old dam. (Q. 21) from the west end of the old saw mill flume to the bank. (Q. 17) and he says it is there yet (Q. 106-107) and that it came out of the old saw mill (Q. 104). He further says that at the same time he put a timber from the slide to the old grist mill flume (Q. 34, 36, 37) eleven inches thick (Q. 39) (but see Q. 111) and then thinks this was in 1903 or 1904 (Q. 113-125). His son corroborates this.

Lobb also describes a measurement with a common spirit level and his eye from (or "to" Q. 187) the top stone (or "below the top," Q. 193) of the abutment of the bridge carrying the travelled road over the Ouse and found "it" twenty-seven inches below this level. Counsel says there is no stone

on top of that abutment (Q. 80) and Lobb cannot say what stone in particular he refers to (Q. 189).

Confusion occurs throughout, (See Q. 59-61). He speaks of "replacing the dam" (Q. 30, 40, 68, 72, 81, 172 and 173); of his method of measurement (Q. 48, 72, 76, 207-210) and of the dam then and now (Q. 211-213).

The pulling down of the old saw mill and the consequent repair was in the fall of 1900 or spring of 1901; not in 1903-4, as Lobb puts it. Lobb asserts this was done in pursuance of a claim to raise the water to high water mark (Q. 114) which he disputed; and says his son will corroborate him (which he does). Lobb says he burnt his record of one of these sticks in November, 1912, having heard from his son-in-law Benjamin Slade that this action was dropped. The latter was not asked about this at the trial. Lobb says he had no interest and does not know why McMullen asked him to measure (Q. 184-5), or what intent he had (Q. 200).

Robert Lobb, the son, corroborates his father, and identifies one of the timbers in question as the one marked on the plan "old timber with mortise holes" and as the one put on and disputed about. He says they took off and replaced timbers to the same height as the old dam, and then put this on.

Benjamin Slade also corroborates this.

The cross-examination of both these witnesses was not satisfactory. But the issue between the parties is very plain. The date, however, given by Lobb and his son is clearly wrong.

No other witness—although Mr. Watson named Russell Warner and George Read—deposes positively to the raising of the dam.

Upon the best consideration I can give to this point, and having regard to the detailed evidence of the repairs that were done, how they were carried out and why, and particularly to the dates and the present height as well as to the user sworn to, I have come to the conclusion that the dam was not raised during these repairs, but that confusion has been caused regarding the effect of the work of repair and by the lapse of time, and that what has been spoken of as additional timber is in reality timber used to replace at the same height that already in use or worn out.

I had not the advantage of seeing John Lobb. Ross Lobb's cross-examination revealed a lack of information upon

every circumstance except the one. Slade did not see the Lobbs working, did not take particular notice of the dam till this summer, when he saw that a stick had been put on and splashboard above it; he cannot remember the dam before 1901, and cannot tell from whom he got his information as to when the stick was put on there.

It seems to me that if the dam had only been some five and a half feet high, as indicated in Exhibit 13 and as deposed to by Lobb—in, say, 1902, 1903, 1904, 1905, and 1906, or one foot nine and a half inches less than the present dam, there would have been complaint much earlier than 1912. In 1902 the rainfall was 29.37 inches; in 1904, 26.13; in 1906, 30.98; in 1909, 25.06; while in 1910, 1911, and 1912, it was 24.40, 25.11 and 27.66 respectively.

The snowfall was in those years as follows: 1902, 84.2; 1904, 78.7; 1906, 71.5; 1909, 81.5; 1910, 67.2; 1911, 60.9; 1912, 96.0.

Then again it would have been impossible for Mr. Walker to have got and worked with a seven-foot head, even with splashboards on, for they are only ten and a half inches, giving a total height of six feet four and a half inches; that is, assuming, as the evidence as these witnesses suggest, that there were splashboards over the disputed stick of timber.

Taking Lobb's evidence as to the top of the abutment shewn by Exhibit 14 to be 7.19 above water level below the dam, and if, as he says, the old dam was 27 inches below, that would make it that distance below, or something less than five feet.

Opposed to this evidence given on behalf of the plaintiff there is a very diect and circumstantial denial, by the defendant and his two sons as well as by others, that the dam was raised.

Added to this is the fact that the embankment to the west of the mill, extending one hundred and fifty yards from the saw mill, has not varied in point of height throughout, so far as any witness has observed, since it was put there. The height of this embankment, at the points C. and D. on plan Exhibit 13, is given as 6.88 feet and 6.90 feet respectively; and as 99.70 on plan Exhibit 30, i.e., five inches higher than water level, 99.32, which is very close to the height of the dam as shewn on plan Exhibit 28, 99.27, 99.24, and 99.60—the latter point being farthest west.

I am, therefore, unable to find that the dam was in fact raised by the defendant.

As to the tightening of the dam, the evidence varies. The method of putting in sawdust, etc., originally used, has been followed by the defendant, and was in use as late as December, 1912, when Wright took his measurement. It may have been done oftener of late years, and there is some evidence of this.

Counsel for the defendant, upon the assumption that the dam has remained at the same height—which I have found to be correct—argued at the trial that he had the right to hold all the water that in its natural course came down the Ouse, for so long and during such periods, long or short, as the supply enabled him so to do. In other words, this means that the capacity of the dam and the supply of water were the only limitations on his right to dam the flow of the stream.

I think the right of the defendant must be qualified in some way, and that at least it must be shewn that the user, while not absolutely continuous *de die in diem,* must at all events be so constant that a consistent course of action and use must exist, even though periods elapse without the user being actively asserted. I have therefore to determine what the actual user has been, as defining the scope of the defendant's rights.

The deed to the defendant from Geo. Read, is dated 1st December, 1885, and conveys the mill property "together with the mills, dam, and machinery now thereon," and the right to "enter unto and upon the embankment now on the west side of the said river Ouse for a distance of one hundred and fifty yards northerly from the northerly limit of the lands . . . conveyed, for the purpose of repairing, amending, and rebuilding the same."

In the view I take it is unnecessary to follow out the devolution of title. The property conveyed was a mill property with an existing dam; and whatever right the defendant has acquired depends upon prescription and not upon the conveyances subsequent to his deed from Read, in none of which is there any express recognition of his rights, and, therefore, no express servitude. But I cannot see that the plaintiffs, because they bought from Read, are debarred from claiming that the defendant has exceeded his rights.

There is evidence of the operation of the mill prior to 1885. Henry J. Walker was the miller for the seven years

previous to the sale to the defendant. He says they had a seven-foot head when they put the splashboards on, and that they put them on during part of each year to hold the spring freshet as long as they could. During three springs they operated the grist and saw mill for about six weeks, beginning about the end of March.

W. A. McColl, who worked for Powel in the old saw mill in 1881, 1882, and 1883, says that it and the grist mill were then both run by water, and that it depended on the season how long they could run. In 1881 they shut down on the 15th July; in 1882 on the 30th of June; in 1883 on the 13th of June. Just how he recalled these exact dates does not appear. This, however, corresponds with the testimony of David Breckenbridge as to 1909, 1910, and 1911, that they used water till the middle of July, sometimes the 1st of July and perhaps middle of June; and in a wet fall they might have water again.

It is to be noted that in July 1909, 1910, and 1911, there was a comparatively heavy rainfall. As to the period of about twenty years ago, the defendant testifies that from 1885 to 1901, both mills were operated at the same time in the spring of the year, that that was so in Powel's time, and that in 1900 they lacked water for seven or eight months instead of for two or three months, so they put in steam.

McGrath says he often saw the water running over the top of dam during the spring freshets, April and May.

Roach went to work for Read in 1893 on what is now Cardwell's farm, and says the land would be wet in the spring and then dry off.

David Breckenbridge says the water was seldom up to the top in summer times.

Matthew Breckenbridge testified that in normal conditions—i.e., when the water was three inches below the top of the embankment—the water would not touch Fitzpatrick's, Gorvey's, or Benjamin Cardwell's lands, except, as to the latter, just above the grist mill; and that the months in which normal conditions existed were part of March, April, May, sometimes June and July; big rains would fill the pond up at any time.

The defendant, who says he knows of no appreciable difference in the dam between 1854 and the present time, added "the timber will decay, especially a dam where the water runs out every summer." Various witnesses spoke of the

duration of the spring freshets and some put it as lasting up to the 1st or 15th of May, some to the 15th or end of April.

Without setting out the evidence in more detail, there is, to my mind, until after 1908, a great preponderance in favour of the view that the water was used regularly during the spring freshets up to a seven-foot head, and not after that, and again in the late fall and winter. The evidence I have quoted from the defendant and his sons seems to bear this out. The dates of the repairs, and the fact that on complaint the defendant in the summer let down the water, point too, in this direction.

In 1900 the defendant put in steam; and between that time and 1908 David Breckenbridge says they did not use so much "continuous" water power. They abandoned steam in the saw mill and went back to water power for both in 1908. From that time on the trouble dates.

It may be that the defendant did not use more water power, but having abandoned steam—which his son David said he only used when there was not enough water—i.e., in the summer time—the use of the water was made more continuous and included the summer months. The history of the years after 1908, shews that something had changed.

Richard Barens (called for the defence) says, too, that after the defendant had repaired the dam about four or five years ago they could hold more water—i.e., hold it full but not higher—and that before that time it used to leak through, and that now the dam has been made to hold water. If so, this would account for the added length of time it could be preserved and used. Barens says he knows the mill for forty years.

Benjamin Cardwell noticed the water rising in 1908, and had never seen it so high before, except during freshets.

T. Cardwell said it lasted till the 1st July, although the spring freshet was gone by the middle of April.

As to 1909, 1910, and 1911, the same story is told, although the spring freshets were said to be over as usual.

In 1912, Matthew Breckenbridge admits that the water was up to the top of the embankment nearly the whole of the year.

It is true that the statements of the witnesses on both sides differ in detail, and the above does not accord with all that has been sworn to. As an illustration, more than one

witness deposes to 1911 being dry, while others are equally emphatic that it was very wet. But the whole result of the evidence, which I have gone over carefully, leaves no doubt on my mind that substantially I have given the position which the weight of the evidence supports. Assistance was given by the references to local marks, in this way, that they seem during the last few years to have been submerged to a greater extent than formerly, though it would be profitless to try and set out the details as to each.

From the evidence of the defendant John Breckenbridge and his son, it is plain that in case of heavy rain during the summer they used the water for mill purposes, and that "a good big rain will fill it (i.e., the pond) up in August and any month in the year." There were occasions mentioned by Matthew Breckenbridge in 1911 and 1912 which serve to illustrate the situation. In May, 1911, and July, 1911, the pond was full to the top of the embankment; and probably in June also. That coincides with the rainfall of 3.41 inches in June and 4.62 inches in July. In May and beginning of June, 1912, a very heavy rain came on and filled the pond quite up; and the defendant had to get and did get the stop-logs out. That coincided with the rainfall of 6.77 inches in June.

The inference which I make from these occasions is that the effect of the spring freshets being ended was not felt, because immediately afterwards there was in each year heavy enough rain to increase the height of the pond to the level of the embankment.

In the ordinary course after the freshets the water would be allowed to accumulate gradually and then operate the mill. See Fred Warner, D. Breckenbridge and M. Breckenbridge—who also say that they can operate "some" with a five and a half foot head. There is also the evidence of John C. Read and others, the effect of which is that, generally speaking, no damage was done by the summer rains, as distinguished from the spring freshets.

It is therefore a question whether the temporary holding of the water for use of the mill in the summer when there were occasional heavy rains justifies or is a use similar to the holding of the water during the summer when these rains occurred at a time enabling the defendant practically to continue the high water of the spring freshets, either by better management or by a a tighter dam, in such a way as to overflow the lands of the plaintiffs. If so, the defendant

can practically, during the summer, or at all events for a longer time than formerly, flood the plaintiffs' lands.

It may be said that apart from the question of tightening, the systematic holding up of every increase of water during a dry season, and making use of every rainfall, while a much less lengthy process than during a wet season, is in its legal effect the same. That is, it is a user of the water so far as user can be had, having regard to the season. If so, can the fact that the rains occur immediately after the spring freshets cease, deprive the defendant of the right to use the rain water which happens opportunely to lengthen the spring user, if he has the right to use it if and when it occurs, after an interval?

In Innes' Law of Easements, 7th ed., p. 57, this proposition is laid down: "If a person . . . has obstructed or diverted the waters of a defined natural . . . stream, whether continuously or at regularly recurring intervals, for a period and under the other conditions required for the acquisition of easements by prescription, he may thereby acquire an easement against riparian owners affected by his conduct."

Goddard, 7th ed., p. 346, states it thus: "A right may be acquired to obstruct the water of a stream from flowing in its usual course, and to pen it back on the land of riparian proprietors, if the practice of obstructing and penning it back has continued for twenty years uninterruptedly, and if the servient owner has been prejudiced thereby."

In another part of this author's work, at p. 269, he adverts to the condition described by Innes as "at regularly recurring intervals," thus:—

It should be mentioned that . . . an accidental stoppage in the flow of water is not an interruption which will prevent prescription; for, if such interruptions had that effect, said Tindal, C.J., the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment." See *Hall* v. *Swift*, 4 Bing. N. C. 381. In that case, where a stream of water, from natural causes, ceased to flow in its accustomed course and did not return to it until nineteen years before action, the lapse of time did not cause the loss of the right to the flow of water. Goddard prefaces the above statement with the following remark:—

"Mere non-user will not, in every case, prevent acquisition of an easement; but, to have that effect, it must be coupled with some act indicative of an intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user."

To the same effect is the statement in Angell on Watercourses; "It need not be shewn to flow continually; and it may at times be dry; but it must have a well-defined and substantial existence."

Channell, B., in *Hall* v. *Lund* (1863), 1 H. & C. at p. 685, says that in order to be continuous the user need not be on every day of the week.

I do not find anything to warrant the use of the word "regularly" as meaning at defined or stated time. But there is authority for a qualified meaning . . . i.e., a systematic or necessary recurrence arising either from the course of nature or the necessities of the enjoyment of the easement.

This is illustrated not only by the case of *Hall* v. *Swift* already cited, but by the opinion of Mr. Justice Willes, cited in Gale on Easements, 8th ed., p. 139; "In the case of drains the easement is not strictly continuous; the drain is not always flowing; but there is a necessary and permanent dependence upon it for its enjoyment as a house."

In *Bechtel* v. *Street* (1860), 20 U. C. R. 15, Robinson, C.J., holds it sufficient to maintain a prescriptive right, that the party has kept the water back, not at all times—i.e , through the whole of each day or week or month—but whenever it was necessary for working his mills, letting the water down when it was not necessary for his purpose to keep it up, provided the privilege was so exercised as a matter of right and without denial or interruption by the other party.

I see no reason, therefore, contrary to my first impression, to quarrel with the statement of counsel for the defendant that prescriptive right might be acquired to hold as long as he could all the water that comes down in its natural course for such period or periods as the water lasts. But it equally follows from the cases that there must be a constant and systematic user to support that claim, and the user is the test of the prescriptive right.

Neville, J., in *Attorney-General* v. *Great Northern Rw.* [1909] 1 Ch. at p. 779, says: "The prescription must de-

pend upon and is limited and defined by the user that is proved."

In *Crossley* v. *Lightowler*, L. R. 2 Ch. at p. 481, Lord Chelmsford, L.C., says: "The user which originated the right must also be its measure."

Graham, B., in *Bealy* v. *Shaw* (1805), 8 East 208, speaking of the right to enjoy or divert water, charged the jury that "every such exclusive right was to be measured by the extent of its enjoyment;" and his direction was upheld by the full Court. In *Calcraft* v. *Thompson* (1867), 15 W. R. 387, Lord Chelmsford, L.C., speaks of the easement of light in language which is applicable to an easement such as this, i.e., a right which is gradually ripening—and which after twenty years is absolutely acquired—and continues: "When the full statutory time is accomplished the measure of the light is exactly that (neither more nor less) which has been uniformly enjoyed previously."

This is the rule in this province. The head-note of *McNab* v. *Adamson* (1849), 6 U. C. R. 100, is as follows: "The right which a party has acquired by twenty years uninterrupted user to pen back the water of a stream, in certain quantities, for the purposes of his mill, will be strictly confined to the right as actually exercised. Robinson, C.J., in *Bechtel* v. *Street* (*supra*), says at p. 17: "The important question of fact is not how high the dam was for twenty years, but how high the water has been backed up on the plaintiff's land during that time."

Cain v. *Pearce*, 16 O. W. R. 846; 18 O. W. R. 595; 19 O. W. R. 904; 22 O. W. R. 174, is I think quite to the same effect.

From the above authorities I conclude that, even granting that the use of summer water when it came down is proved, the prescriptive right to use it is limited by the actual user (neither more nor less), and that to use it in prolongation of the spring freshets is a different and more oppressive use, considering the season of the year and the right of the plaintiffs to cultivate their land. In *Hall* v. *Swift* (*supra*) the right had been established by a long course of enjoyment, and the cesser during the dry season was only urged as an interruption destroying the right. It must be borne in mind that one of the elements of a prescriptive right is that the servient tenement shall be burdened with some right openly and continuously exercised, and that it cannot be gradually and insensibly increased.

Goddard on Easements, 6th ed., 398, 399. The exact point is, in my judgment, a narrow one, and the dividing line hard to draw.

But I think that the real answer in this particular case is that the sort of user practised during the summers prior to and after 1886, and down to 1908, was merely to use such head as there ordinarily was—say five and a half feet—and to cease working when that gave out, except after a heavy rain; and not, as has been done since, to so manage and conserve the water that a full seven foot head could be maintained much longer into the summer than formerly.

I think the fair result of the evidence is that the full use of the mill privilege prior to 1908 was confined to the time during the spring freshets, and that after they subsided the mill was worked with a lower head, and was suffered to be idle from time to time rather than injure the lands above it. The evidence of Matthew Breckenbridge as to the incident in May and June, 1911, when they at once let the water off, confirms this.

The time of the spring freshets has been variously stated. John C. Read, the defendant's predecessor in title, puts it at the 15th of May; and so does Garvey. Others make it earlier; and the evidence of McColl and of the defendant's sons already quoted, suggests that the freshets last until much later. However, upon the best consideration I can give to the matter, I think that the 15th of May is a reasonable time to fix as that on which the spring freshets are over.

Upon the question of damages I am not impressed with the idea that the plaintiffs have suffered to the extent indicated by their particulars or as deposed to before me. I have not been convinced that the trees have been injured. If they have been, their commercial value is trifling; and it was left for counsel to suggest that they had in these cases some other value to the plaintiffs or that the serious consequences argued for will necessarily follow.

I think, also, that Thomas Cardwell is to some extent the author of his own damage, and that while he has suffered, the defendant has not been shewn to be the source of all of it.

I do not set out in this judgment a detailed examination of the dispute over the effect of the making or closing of the cuts in and north of the embankment, or of the old ditch and its continuation into Mrs. McMullen's property.

I have, however, gone over it with care, and my judgment is against the plaintiff Thomas Cardwell and in favour of the defendant upon what was done and its effect.

The plaintiffs are entitled to some damages. It is hard to say just how much of the damage has been caused by the defendant's action and how much would have naturally flowed from the wetness of the seasons.

Having regard to the circumstances in each case, the weather records, the time specified during which it is said damage occurred, including any detriment to the trees—and the want of any exact data of the real damage—I fix the damages of Thomas Cardwell at one hundred dollars, of Benjamin Cardwell at fifty dollars, of Fitzpatrick at seventy-five dollars, and of Garvey at seventy-five dollars.

In addition to damages, the plaintiffs are entitled to an injunction to restrain the defendant, after the cessation of the spirng freshets or after the 15th of May, whichever shall be the latest, and until the autumn freshets begin or until the 1st November, whichever shall be the latest, from maintaining the water by his dam so as to overflow the embankment mentioned in his deed; except that in the case of the plaintiff T. Cardwell the injunction shall not extend so as to protect him from flooding occasioned by any cuts or openings beyond the north end of the embankment mentioned in the evidence.

The defendant had the right to stop the old ditch where it entered his land, and is entitled, under his conveyance from Read, to enter on and repair the embankment, and may, if he desires it, have it so declared, especially with reference to the cut or opening known on plan Exhibit 12 as "B."

As to the costs. While the plaintiffs succeed in their claim for an injunction and damages, they fail upon a most important part of their claim, namely, the assertion that the dam had been raised; and they have not proved their damages as set out before the trial. While, therefore, they are entitled to the general costs of the action other than those relating to the taking of Lobb's evidence and the application therefor, I think there must be deducted from these costs one-half of the counsel fees taxed against the defendants for the trial.

Thirty days' stay.

APPELLATE DIVISION. MAY 15TH, 1913.

CLEVELAND v. GRAND TRUNK RW. CO.

4 O. W. N. 1281.

Contract—Breach of—Contract of Hiring — Alleged Agreement to Pay in Part in Kind—Authority of Agent—Statute of Frauds —Evidence.

SUPREME COURT OF ONTARIO (Second Appellate Division) (Sutherland J., dissenting), dismissed plaintiffs' appeal from the Co. J. Hastings granting a non-suit in an action brought by plaintiff for damages for alleged breach of contract to give him certain hay in addition to his wages as a lamplighter of defendant company.

Appeal from the judgment of His Honour the Judge of the County Court of the County of Hastings, dismissing the action which was one brought to recover damages for alleged breach of contract.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

E. G. Porter, K.C., for plaintiff (appellant).

D. L. McCarthy, K.C., for defendant (respondent).

HON. SIR WM. MULOCK, C.J.EX.:—The evidence shews that the plaintiff was, on the 3rd of October, 1911, employed as sectionman on the defendant company's railway, by their foreman William Murphy; and shortly thereafter was appointed by Murphy as lamplighter for the company at Belleville, at the rate of $1.50 per day, the maximum rate paid by the company to lamplighters, and Murphy had no authority to exceed that rate.

After working for a week or two as lamplighter, the plaintiff, according to his evidence, told Murphy, "I will keep this job steady if you will give me the hay that grows there at the east end of the yard." Mr. Murphy said: "If you keep this job steady, the hay is yours; until such time as that hay is fit to cut, the hay is yours." And the plaintiff answered: "I said, all right, sir, I will."

The plaintiff continued as such lamplighter until some of the hay was ready to cut, and upon going to cut it he found a portion of it already cut, and removed, by a man

named Palmateer, apparently with the consent of the company, and the action is for damages caused by the breach of the alleged contract to give the hay to the plaintiff.

The plaintiff, during his period of service as lamplighter was paid in money at the rate of $1.50 per day.

Murphy, who was called by the plaintiff, testified that he had authority to hire the plaintiff as a lamplighter at a rate not exceeding $1.50 per day, and that it was part of his (Murphy's) duty each year to see that the hay in question was cut and removed; and that in order to effect such purpose he was authorized to give it away to anyone in consideration of such removal; and he swore that the giving of the hay by him to the plaintiff was a pure gift for the purpose of securing its removal, and not by way of an addition to the plaintiff's wages.

The plaintiff's contention, in substance, is that he was to receive an addition to his rate of wages, not in money but in kind, viz., in hay, but there was no evidence to submit to a jury of any authority in Murphy to bind the company to a contract for an increase of wages—such increase to be paid to the plaintiff, not in money but in kind, viz., by giving him any property (for example, hay) of the defendant company in behalf of such service.

I, therefore, think the learned trial Judge was right in withdrawing the case from the jury, and dismissing the plaintiff's action, and this appeal should be dismissed, and with costs, if the defendants require them.

HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE SUTHERLAND:—On or about the 3rd October, 1911, the defendants' section foreman employed the plaintiff as a sectionman, and seventeen or eighteen days later offered him the position of lamplighter in the Belleville yards, at the going rate of wages.

The plaintiff says, page 3, he did not "want the job, but Murphy said to him to try it anyway." "You have your horses, you could make quite a bit with them." "There is all that hay over there and Stapley got a lot of it and talked like that. He says you will be able to get a lot next summer; I stopped a minute and thought and I said, well, I will try the job. I might have worked a week or quite a

bit longer—I would not say—and I went to Mr. Murphy; I said, 'I have made up my mind I will keep this job steady if you will give me the hay that grows there at the east end of the yard;' Mr. Murphy said, 'If you keep this job steady the hay is yours, until such time as that hay is fit to cut the hay is yours.'"

"Q. 34. If you will keep this job steady until such time as the hay is fit to cut the hay is yours? A. Yes, sir.

Q. 35. And when he told you that what did you say? A. I said 'all right, sir, I will.'"

At page 11, he says in answer to question 128, "Would you have taken that job as lamplighter at the wages without getting this hay? A. I would not have kept it, no, sir."

Murphy on the other hand says that plaintiff from the outset wanted the position of lamplighter and that the conversation last referred to was in February. He does say also that the plaintiff when first spoken to about the lamplighting job said he would try it. Murphy further says that later he told him, page 30, "he could have the hay if he would stay on the job and cut it clean."

In the statement of claim the plaintiff pleads that after he had been in the employment of the defendants as sectionman, he "and defendants executed another agreement by which the plaintiff was to continue in the employ of the defendants as a lamplighter and was to receive in compensation therefor" the usual wages, and "as additional remuneration for such services, as lamplighter, a quantity of hay."

It is clear, therefore, from the undisputed evidence, that when the plaintiff began his work as lamplighter he was merely to get the usual wages and that there was no bargain made by which he was to get additional remuneration in the form of hay. It is equally clear that some time later there was a talk between the plaintiff and the defendants' section foreman, by whom he was hired, and who, upon the evidence, had authority to hire men, during which the question of his getting the hay if he continued in the employment of the defendants until it was ready to cut and then cut it clean and removed it was discussed.

It appears also that it had been the custom of the defendants, in previous seasons, to give the hay to people who would cut and remove it from their land in question, a custom known to the plaintiff, as he himself had received part of it on a former occasion, and had asked Murphy when discuss-

ing his employment with him, who had got it in the previous year. He was told that the former lamplighter Stapley got it. It was necessary for the defendants to have it removed and in their interests that it should be cut and removed by someone so as to keep their track clean.

Murphy also says, at page 31 of his evidence: "Q. 31. That was a part of your function to get rid of it? A. Yes. Q. 32. And exercising that authority you gave it to him? A Yes. Q. 33. Upon that ground? A. Yes, sir."

He says elsewhere, at page 32: "Q. 52. And who was your superior officer? A. Roadmaster Clare."

"Q. 65. Then you would not have any authority to depart from the scale of wage or anything of that kind without some authority from Mr. Clare, your superior? A. That is raise the wages?

Q. 66. Yes? A. Certainly not.

Q. 67. Then giving this hay to Mr. Cleveland was a matter of a gift which the section foreman gives to anybody who wants it? A. Certainly.

Q. 68. Purely voluntarily on your part? A. Yes.

Q. 69. You either have to cut it or burn it or get it disposed of in some way? A. Yes, sir.

Q. 70. And if you allow somebody to cut it and take it away it saves you doing it? A. Yes.

Q. 71. And that is the whole arrangement as regards the disposal of the hay? A. Yes.

Q. 72. It was not any part of this man's wage? A. I didn't promise it as any of his pay whatever.

Q. 73. It was simply giving him the benefit of some hay? A. Yes, sir."

On the 24th of June the plaintiff says he made preparations to cut the hay, but on going to the spot found part of it cut by some other person. Meantime Murphy had left the employment of the defendant company. The plaintiff says he thereupon went to see Clarke, the section foreman at the time, and he said "he knew there would be bother over it but he could not help it." He also says he saw Clare on the following Sunday, and I quote from page 9 of his evidence:

"Q. 108. What did you go to Mr. Clare's office for? A. I went to see him about why they let anyone else cut the hay.

Q. 109. But you didn't see him? A. I saw him on Sunday morning.

Q. 110. And what took place? A. I told him about it and he said he couldn't help it now; I stated the bargain. I said, if I don't get the hay I am going to make trouble; he didn't know what to think about it, but I says, rather than make any trouble I will pay Simon $5 for his day's work for what he had cut.

Q. 111. For his cutting the hay? A. Yes; he didn't give me very much satisfaction so I walked out; then on Monday morning I came down to the tool house kind of sore, as anybody else would feel, and Mr. Clarke being the nearest man to me I handed him the keys."

Q. 112. The keys of the oil house? A. Yes.

Q. 113. You handed those keys up to Mr. Clarke? A. He says, 'why, what is the matter now?' I says, 'I am going to quit, you people didn't use me square and I won't work for you.' He says, 'you are going to get your hay; the boss told me to stop that man taking any more hay and the company will pay him; we will put in a bill to the company to give him his money at the freight shed for the work he had done in cutting the hay.' I says, 'All right, if you use me square I will go on with my work. I says your lights will be lit to-night, and I went on."

Q. 114. Went on to your work? A. Yes.

Q. 115. And you finished your work Saturday night? A. This was on Monday, and when I went down to the east end, when I had worked my way down there Richard Stapley was loading a load of hay; I don't know whether he took it out or not; I told him not to take it, it was mine."

Neither Clarke nor Clare were called at the trial by the defendants. Plaintiff admits he took about four tons of hay and weeks before giving up his employment. His contention is that as he performed his part of the contract he was entitled to the balance of the hay, and in his statement of claim he puts a value of $200 upon it. At the trial he seems to place the value at $150 in one place and $75 in another.

In their statement of defence, besides the general denial of indebtedness, the defendants also set up a want of authority given by them to anyone to dispose of the hay, their property, and also plead the Statute of Frauds.

The action came on for trial before the Senior Judge of the County Court of Hastings, with a jury, and at the conclusion of the evidence, counsel for the defendants moved for a non-suit. In his judgment at the trial, page 46, the trial Judge says: "I don't think certainly there is any contract in connection with the matter." And again, "the hay was not in existence at that time and when the hay did get in existence Murphy had to get rid of it some way. If Cleveland happened to be there at that time, why, he could have it. . . . I will take the responsibility of a non-suit."

It seems to me he was in error in withdrawing the case from the jury. I think there was evidence of a contract set up and testified to by the plaintiff that should have been submitted to the jury. The question of the agency of Murphy and its scope were also matters which, upon the evidence, the plaintiff was entitled to have go to the jury.

The plaintiff on his motion by way of appeal asks for a new trial, and I think this should be granted. The defendants on the appeal contended that the hay under the circumstances was an interest in land and as there was no contract in writing, as required by the statute, the plaintiff could not succeed. The contract set up by the plaintiff, however, was that if he continued to work at his employment until the hay was ready to cut, it would thereupon become his, provided he cut and cleared clean.

I do not think that under these circumstances the hay could be considered an interest in land.

I would allow a new trial with costs of the appeal to the plaintiff.

HON. MR. JUSTICE KELLY. MAY 9TH, 1913.

MARCH v. STIMPSON COMPUTING SCALE CO.

4 O. W. N. 1259.

Malicious Prosecution—Charge of Theft—Complainant Agent of Defendant Company—Liability of Latter for—Authority of Agent—Lack of Express Authority—Absence of Emergency—No Implied Authority—Review of Authorities—Nonsuit.

KELLY, J., dismissed an action brought against a company for malicious prosecution in respect of an arrest of plaintiff, formerly their agent, on a charge of theft laid by a head agent of defendant company, holding that the complainant had had no authority express or implied to prosecute or arrest anyone in the interest of defendant company.

Bank of New South Wales v. *Owston*, 4 A. C. 270; *Thomas v. Can. Pac. Rw. Co.*, 14 O. L. R. 55, and other cases referred to.

Action for malicious prosecution, tried with a jury.

I. Hilliard, K.C., and W. B. Lawson, for plaintiff.

G. F. Shepley, K.C., and G. W. Mason, for defendant company.

No one appeared for defendant Dent.

HON. MR. JUSTICE KELLY:—Plaintiff in 1910 and the early part of 1911 was in the employ of the defendant company as an agent for the sale of scales.

The defendant company's chief place of business is in the city of Detroit. Defendant Dent was also at that time in the employ of defendant company as a salesman.

About the end of April, 1912, plaintiff, on the information of Dent (who therein professed to act as agent and representative of defendant company), was arrested at Ottawa on a charge of having converted to his own use a scales which he had taken in exchange and as part payment for a scales of the defendant company which he had sold to Stone & Fisher, of Iroquois.

The arrest took place about 9 o'clock in the forenoon, and he remained in custody until about 4 o'clock in the afternoon of the next day. He was taken to Iroquois, where on an investigation before magistrates he was acquitted. Dent was then at his own request bound over to prosecute plaintiff at the Sessions, and such prosecution took place later on at Cornwall. There also plaintiff was acquitted.

The sale of the scales by plaintiff—for conversion of which the charge was laid—was made a year or thereabouts prior to the arrest.

The written contract of employment between plaintiff and defendant company bears date January 12th, 1910. In October and November of that year, dissatisfaction having arisen about the mode of dealing by plaintiff and other agents, owing to scales taken in exchange not having been satisfactorily accounted for or returned, the company in correspondence with plaintiff made it a condition that all scales taken in exchange for scales sold by plaintiff should be immediately returned to them, and in the same correspondence a new scale of payment to plaintiff was fixed. Plaintiff evidently adopted this as a term of his agreement with the company and lived up to it and returned all scales taken in exchange by him till the sale to Stone & Fisher

about April, 1911, when he retained the scales taken in exchange from them; and though in reporting to the company the making of this sale he informed them he was forwarding the old scales taken in exchange, he failed to do so, and later on he sold it and retained the money received therefor. He left the company's employ in or about September, 1911.

Some question of accounts between the plaintiff and the company arose, and interviews took place between plaintiff and Dent, following which Dent consulted Mr. Honeywell, a solicitor in Ottawa, who had previously had some knowledge of the matter. Though he (Honeywell) says he had general information as to the effect of the agreements between plaintiff and the company and the correspondence which took place in relation to the terms of employment, these documents were not submitted to him at the time he was consulted by Dent. He also says that being of the opinion from what was laid before him that plaintiff was guilty of a criminal offence, he referred Dent to Mr. Ritchie, the Crown Attorney, whom Dent then consulted. No papers or documents were laid before Mr. Ritchie, but on Dent's statement that the old scales was the property of the company and that plaintiff had sold it and pocketed the money, he advised that he was subject to prosecution. The arrest then followed.

At the close of the plaintiff's case, counsel for the company asked for a non-suit. I was of opinion that there was sufficient evidence to go to the jury as to the action taken by Dent, but I reserved the question of liability of the company for the acts of their co-defendant, if the jury should find in favour of the plaintiff. The verdict as returned by the jury (which of their own motion they put in writing), was as follows: "We as jury consider that Mr. Dent did not disclose the facts properly to Mr. Ritchie.

"A. No. We as jury agree that the plaintiff is entitled to $1,200 (Twelve Hundred Dollars)."

On this finding I think plaintiff is entitled to judgment as against Dent.

Dealing with the question of the liability of the defendant company, I am unable to see that there was any evidence that Dent had authority, express or implied, from the company to prosecute or arrest. His powers and duties as agent for the company are set forth in the printed agreement of employment between them dated 15th January, 1910.

and which is in the same form as the original agreement between the plaintiff and the company, except that the agreement with Dent contains a provision that he should employ a reasonable number of salesmen, whose contracts would be made with the company; that he (Dent) was to instruct these salesmen and give them assistance in doing their work, and be held responsible by the company for their acts and far any charge-backs or advances which might be made in their accounts or which the company would be unable to collect from the salesmen, as well as for scales and other goods which might be in their hands. The company was also to keep the accounts with the salesmen, and payments to them were to be made direct by the company.

In *The Bank of New South Wales* v. *Owston*, L. R. 4 A. C. 270, where a number of cases touching upon the liability of an employer for prosecution by an employee or officer were considered, it is said (at p. 288): "The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge would not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man whom he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority." Authority may be implied in cases of emergency when the exigency of the occasion requires it; but authority in such a case is a limited one, and before it can arise a state of facts must exist shewing that such exigency is present, or from which it may reasonably be supposed to be present.

In the present case there is no evidence whatever of the existence of any such emergency or exigency. Many months had elapsed between the commission of the act for which the plaintiff was prosecuted and the time of the arrest, and for nearly all that period Dent had knowledge of what had taken place. For a considerable time prior to the arrest, plaintiff was employed in and around Ottawa, and there

were no circumstances or conditions to necessitate immediate action in order to preserve or protect the company's property or interests, or from which it might be inferred that the opportunity to arrest the accused might be lost if the necessary time were taken to refer the matter to the company. There is nothing from which an inference of special authority could be drawn.

We are then to consider whether Dent had authority either expressly or within the general scope of his employment. There is an absence of evidence of any express authority from the company to prosecute plaintiff, or to prosecute any other person in respect of any dealings or transactions with the company, or indicating that the company had knowledge that a prosecution was about to take place or was being carried on, or that Dent contemplated a prosecution; nor is there any evidence that the company approved, ratified or condoned Dent's action.

This part of the case is, therefore, narrowed down to a consideration of the question whether in the scope of his duties Dent had general authority from the company to arrest and prosecute, where no emergency or exigency such as above mentioned, existed.

It is of some importance to bear in mind that the course of dealing, as set forth in the written agreements, required plaintiff to make returns of money and of scales taken in exchange, not to Dent but to the company, and that payments of moneys coming to the plaintiff were to be made direct by the company to plaintiff and not through Dent, and according to plaintiff's own uncontradicted evidence the company shipped scales to him direct and not through Dent. These circumstances indicate the limited character of Dent's authority.

I fail to see any evidence of a general authority to cause plaintiff's arrest or to prosecute, or that Dent's duties involved in their performance the putting of the criminal law in motion. This is not a case of the agent doing an authorized act in an unauthorized manner, but of doing an act not authorized either expressly or impliedly by his employers.

The master's liability for the unauthorized torts of his servant is limited to unauthorized modes of doing authorized acts. Clerk & Lindsell's Law of Torts (1908), Can. Ed. p. 75.

The question of such authority has been dealt with over and over again in such cases as the *Bank of New South Wales* v. *Owston*, cited above; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Henson* v. *Waller* [1901] 1 K. B. 390; *Stedman* v. *Baker*, 12 T. L. R. 451; and also in two cases, comparatively recent, in our own Courts: *Thomas* v. *C. P. R.*, and *Bush* v. *C. P. R.*, 14 O. L. R. 55, in which a number of the English cases are reviewed.

The onus was on the plaintiff to give some evidence which would justify the jury in finding that from the nature of his duties or the term of his employment Dent had authority to institute these criminal proceedings.

In my view he has not satisfied the obligation to give such evidence; and, following the reasoning and the conclusions arrived at in *Thomas* v. *C. P. R.* and *Bush* v. *C. P. R.*, and the authorities on which the judgment in these cases is based, I can only conclude that as against the defendant company the plaintiff had no right to succeed.

Judgment will therefore be in favour of the plaintiff as against the defendant Dent for $1,200 and costs, and dismissing the action as against the defendant company with costs.

HON. MR. JUSTICE MIDDLETON. MAY 15TH, 1913.

SHANTZ v. CLARKSON.

4 O. W. N. 1303.

Company—Assignment for Benefit of Creditors—Sale by Assignee—Action to Set Aside—Inspector Interested in Purchase—Absence of Impropriety — Beneficial Sale—Limits of Equitable Rule—Locus Standi of Plaintiff—Assignment of Stock Since Winding-up—Validity of—Right of Shareholder to Represent Company—Function of Liquidator.

MIDDLETON, J., *held*, that the transfer of one share of stock of a company to the plaintiff after the winding-up thereof was not effective to give the plaintiff a *locus standi* to sue as a shareholder to set aside a sale of the assets made by the assignee of the company.

That even if a shareholder the plaintiff had no right to sue on behalf of himself and all other shareholders of the company, the liquidator alone representing the company.

That the fact that an inspector appointed by the creditors was interested in the purchase was not a ground for setting the sale aside where such inspector had ceased to act as such before the sale and had been guilty of no impropriety and where the sale was a good one, approved of by all the creditors.

Action by Dilman B. Shantz, on behalf of himself and other creditors and shareholders of the Jacob Y. Shantz & Son Company, Limited, to set aside a sale of the assets of the company to the defendant Gross, upon the ground that one Jacob B. Shantz, an inspector of the estate, was interested in the purchase, tried at Berlin, May 13th, 1913.

M. A. Secord, K.C., for plaintiff.

W. N. Tilley, and R. H. Parmenter, for defendant Clarkson.

W. C. Chisholm, K.C., for defendant Gross.

HON. MR. JUSTICE MIDDLETON:—On the 28th February, 1912, the company made an assignment to the defendant Clarkson of all its assets, upon trust to sell and convert the same into money, and to apply the proceeds in payment of the debts, and the balance, if any, to the company.

On the 4th March an order was made on a petition filed 1st March for the winding-up of the company under the Dominion Act; and on the same day an order was made appointing Mr. Clarkson provisional liquidator, upon his giving security to the satisfaction of the Master, and referring it to the Master to appoint a permanent liquidator, and conferring upon the Master all the powers of the Court under the Winding-up Act.

Clause 4 of this order is as follows: "And it is further ordered that, subject to the further order of this Court, the said Geoffrey Teignmouth Clarkson shall be at liberty to take possession of the assets of the said company under the assignment to him by the company for the benefit of its creditors and deal with the same as such assignee as though no petition had been filed to wind up the company, and that until such further order the proceedings under the preceding paragraphs of this order be and they are hereby stayed."

Consequently, no security was given by Mr. Clarkson as provisional liquidator; and, his appointment being conditional upon his giving security, he never became interim liquidator, and the winding up has never been proceeded with.

On the 19th of March a meeting of the creditors was held. Mr. Jacob Shantz, Mr. Butler, and Mr. Whitehouse were appointed inspectors. The inspectors met immediately after the shareholders' meeting and instructed the assignee

to draw up an advertisement for the sale of the business as a going concern.

An advertisement was accordingly published, but the sale was not proceeded with pursuant to it, as the plaintiff desired a postponement, hoping that he would be able to make financial arrangements which would enable him to purchase the property, and reorganize a new company in such a way that the creditors would receive payment in full and that he and the other members of the old company, who had become personally responsible to creditors, would in this way be relieved from liability.

The sale was accordingly adjourned until the 2nd of May. In the meantime and before the date first fixed for the sale an arrangement had been entered into between the plaintiff and his brother, the inspector, Jacob Shantz, by which Jacob was to assist in the purchase and to take stock in the proposed new company.

Upon this coming to the knowledge of the assignee, he informed Jacob that he ought at once to resign, as it would be improper for him to be interested in the purchase while still inspector. Mr. Shantz did not formally retire, but accepted the view of the assignee, and withdrew from the meeting of inspectors; and thereafter, save as to the formal execution of the conveyance, took no part as inspector. He did not learn anything, in his capacity as inspector, not otherwise fully known to him; and he took absolutely no part in the subsequent sale.

Quite unknown to the assignee, Mr. Jacob Shantz had been negotiating with Mr. Gross. Gross was interested in the company, and was contemplating purchasing if Mr. D. B. Shantz did not himself purchase, so as to protect the creditors and to minimize his own loss as a creditor and as surety. Mr. Jacob Shantz, in all that he did, acted with perfect openness and propriety. His position was known both to the plaintiff and to Gross. If his brother could purchase, as he expresses it, he "was with him;" if his brother failed to purchase, then he "was with Gross" to aid him.

When the property was offered for sale a reserve bid of $75,000 had been fixed by the assignee and the other two inspectors. The best bid was made by Gross, who offered seventy thousand dollars. The $75,000 was a sum estimated as being required to pay the creditors in full.

The offer made by Gross was rejected, and the negotiations were continued; the plaintiff hoping for and seeking delay, believing that he might yet be able to obtain financial assistance; but it was plain to all concerned that this hope would never be realized. Finally, after notice to the plaintiff, the assignee, and the inspectors other than Shantz, agreed to accept seventy thousand dollars from Gross, Gross assuming all liabilities incurred by the assignee after the date of the assignment, so that the seventy thousand dollars should be available for the creditors. It now appears that this sum will be sufficient to pay the creditors in full, or almost in full.

The sale was a good sale, and, in the interest of all concerned it should not be interfered with unless there is no other alternative.

The plaintiff Shantz, prior to the liquidation of the company, had held some 459 shares of the capital stock; but before that date he had, with the assent of the company, transferred this stock.

On the same day that the company assigned—the 28th of February, 1912—Shantz himself executed an assignment for the benefit of his creditors.

In these two ways he had at this time divested himself of all title as stock-holder. He is not shown to be a creditor of the company.

Apparently for the purpose of giving trouble, the plaintiff obtained an assignment from his wife of one share of stock, which she held. This assignment is put in at the trial, and bears date the 2nd of April, 1912. I have suspicion as to that being the actual date of the assignment. This assignment is not shewn to have been in any way approved; and, being made more than a month after the date of the winding-up order, is inoperative as a transfer of stock; but it may operate as an assignment of any dividend which might be payable to the shareholders as the result of the liquidation.

It is by virtue of the supposed ownership of this share that the plaintiff claims a *locus standi* to maintain this action. He issued his writ on the 18th of May, 1912, after the contract with Gross, but before a conveyance had been made in pursuance of that contract—the conveyance being dated the 20th May, and registered on the 27th of May, after the registration of the *lis pendens* in this action. In

the meantime a new company had been incorporated; and Gross on the 21st of May conveyed to it. This company has been in possession and operating the plant for the year during which this action has been pending; and the seventy thousand dollars paid by Gross has been held by the assignee.

I think the plaintiff fails, for various reasons.

First, he had not been shewn to be either a creditor or shareholder. On the evidence there is no suggestion that he was a creditor; and I think the transfer to him of the one share of stock after the date of the winding-up order did not make him a shareholder.

Secondly, I do not think the right of action, if any, is vested in the shareholders. Under the trust deed the creditors are first to be paid, and the money is then to be held for the company. Even if a shareholder or creditor, the plaintiff does not represent the company. The rights of the company are vested in the liquidator.

In the next place, although Jacob Shantz had not formally resigned his position as inspector, he was given to understand that he could not take any part in the deliberations of the inspectors, by reason of his contemplated interest in the plaintiff's proposed purchase; and from that time on he took no part whatever in the negotiations leading up to the sale. It cannot be said that he in any way abused a fiduciary relationship.

It is true that Jacob Shantz signed a memorandum in the margin of the conveyance to Gross. This it was said was done at the request of the purchaser, who deemed it essential to perfect the conveyance. But his act in joining in the conveyance was purely formal.

The case is entirely different from any of the cases cited, because there was no knowledge on the part of Clarkson that Shantz had any interest in the purchase made by Gross. There was no collusion in any sense of that term. Clarkson, voicing the views of the creditors, desires to affirm the sale. In no other way can these creditors expect to receive payment in full of their claims. They have no interest in setting aside the transaction.

If the sale was at an undervalue—which is not alleged—the creditors are not concerned; the company alone is interested. Gross was not disqualified from being the purchaser. It was open to him to bid. If Shantz, the inspector, by reason of his sub-contract is disqualified from keeping for him-

self any profits he may make out of the transaction, that is a matter that cannot now be dealt with; for the company, who alone could claim it, and Shantz, who alone could be liable, are not before the Court.

I would be the first to deprecate any attempt to narrow the beneficial equitable doctrine which precludes a person occupying a fiduciary position from himself purchasing without the concurrence of all concerned; but this case illustrates what has often been pointed out, that equitable doctrines must not be pushed to such an extent as to produce a palpable absurdity. When it is realized that in this case an insolvent man, who has assigned for the benefit of his creditors, takes a transfer of one share in a company in liquidation and seeks to set aside a sale of property made by the assignee of the company, which has secured to the creditors payment in full—a result which the plaintiff hoped for but proved unable to bring about—and that this action is brought just at the critical moment of the closing of the transaction and has resulted in withholding seventy thousand dollars from the body of creditors for a year, and when it is not suggested that any other shareholder of the company has any sympathy with the contention put forward by the plaintiff, it is seen how utterly devoid of any semblance of equity this action is.

The action is dismissed with costs.

HON. MR. JUSTICE KELLY. MAY 14TH, 1913.

KING'S COLLEGE v. POOLE.

4 O. W. N. 1293.

Bills of Exchange and Promissory Notes—Action on Note Given by Deceased—Loss of Note—Execution and Delivery Proven by Secondary Evidence—Reference to in Will—Attempt to Alter Beneficiary by Subsequent Codicil—Costs.

KELLY J., gave judgment for plaintiffs for $5,000 and interest against the executors of an estate, upon a note referred to in the will and certain correspondence of the deceased, the execution and delivery of which was proven but which could not be produced, and further *held* that the amount thereof being a debt due by the deceased could not be disposed of in another manner by him in a subsequent codicil to his will.

Action by plaintiffs against the defendants, the executors of the estate of the Reverend Jacob Jehoshephat Salter Mountain, deceased, for $5,000 and interest from May 1st, 1910, the date of his death, as a debt due, or in the alternative, payment of that sum as a legacy, with interest from May 10th, 1911.

J. G. Harkness, for plaintiff and for defendants the Alumni of King's College, Windsor, Nova Scotia.

R. C. Smith, K.C., for the other defendants.

HON. MR. JUSTICE KELLY:—At the hearing I added as parties defendant the Alumni of King's College, Windsor, N.S., a corporate body, and they were there represented by counsel.

By paragraph 19 of his will, dated June 25th, 1902, testator made the following declaration: "It is my desire further that as soon as the obligations of my personal and real estate have been discharged, including the payment of $5,000 (five thousand dollars) to the University at Windsor, N.S., for which I gave "my note of hand," then all my real estate in Cornwall, Ont., in the Isle of Wight, etc. . . . shall be" disposed of as the testator then directed. In a codicil dated April 6th, 1903, he directed that "the $5,000 (five thousand dollars) referred to in my last will and testament as set apart for the benefit of the University at Windsor, Nova Scotia, be paid by my executors to the Alumni Association of King's College, to be held by them in trust for said University, on condition of its remaining as heretofore in the town of Windsor, Nova Scotia, and its being conducted according to the intention of its original founders, as it now is;" and he further directed that the interest only on the sum was to be handed over from time to time to the treasurer of the Board of Governors of the University.

The "note of hand" referred to has not been produced, though it is clear from evidence to which I shall presently refer, that the testator delivered it to the plaintiffs or their representative prior to the making of the will.

In December, 1912, after the pleadings herein had been closed, there were discovered in the basement of the Church of England Institute in Halifax, letters written by the deceased to the Bishop of Nova Scotia (Dr. Courtney) in some of which reference was made to this $5,000. In one, dated November 27th, 1897, where the testator speaks of

the necessity of making a new will owing to his marriage, he says, "nevertheless, I don't think that my bequest to my dear old Alma Mater would otherwise have been vitiated by my subsequent marriage because of the formal note of hand by which at your suggestion I further obliged myself in the same behalf and then enclosed it to the Secretary of the Alumni. Still it is just as well to make assurance doubly sure lest possibly the question might be raised and cause trouble. As it now is this claim would count among my debts and be the first on my property even before my funeral expenses."

In another, dated January 6th, 1903, he says: "I also take the liberty of asking you to send me a copy of the 'note of hand' I sent you some years ago for $5,000 (five thousand dollars) payable after my death to the University of King's College, Windsor, Nova Scotia. I have not been able to find the copy I must have of it somewhere."

The statements made both in the will itself and in these letters indicate that a note for $5,000 was made by the testator payable at his death. There is also the evidence, in his own written acknowledgments, that the note was delivered over. From this I find a clear intention to make the payees creditors of his estate.

It is evident that he adopted this course deliberately, so as to place the holders of the note in the position of creditor rather than of legatee. That being so, the attempt by the codicil to put a condition on the manner and terms of payment could not have any effect as against what I find to be a debt of the testator then existing. While we have the clear evidence of the making and delivery over of the note, there is no evidence that it, or the obligation it represented, was satisfied by payment or otherwise in the lifetime of the deceased; and I think that the estate should now pay to the plaintiffs the $5,000 and interest thereon from May 1st, 1910, the date of the testator's death, such payment to be in full satisfaction of the note and obligation of the testator and of the $5,000 mentioned in the will and codicil.

The note having been lost, or in any event not being forthcoming, the executors will, at the time of payment, be entitled to a bond of indemnity against it from the plaintiffs.

It is not the fault of the executors that the note has not been produced; and until after the close of the pleadings they had no knowledge of the existence of the letters which are a material part of the evidence. This is not, therefore, a case where costs should be awarded. The executors will, however, be entitled to be paid their costs, as between solicitor and client, out of the estate.

HON. MR. JUSTICE KELLY. MAY 15TH, 1913.

DAVISON v. THOMPSON.

4 O. W. N. 1310.

Bills of Exchange and Promissory Notes—Action on Promissory Notes—Alleged Lack of Consideration—Onus of Proof—Evidence—Credibility.

KELLY J., gave judgment for plaintiff in an action upon three several promissory notes, holding that defendant had failed to prove that the notes in question were given for accommodation purposes only as alleged by him.

Action by plaintiff on two promissory notes made by defendant in his favour, one dated November 20th, 1911, for $500, payable two months after date, and the other dated December 18th, 1911, for $600, payable one month after date. These notes were given in renewal of three other notes totalling the same amounts. Defendant did not dispute the making of the notes sued on or the original notes of which they were renewals, his defence being that they were given without consideration and for the accommodation of the plaintiff.

J. T. White, for plaintiff.

W. M. Hall, for defendant.

HON. MR. JUSTICE KELLY:—On the opening of the trial defendant moved, on notice, to amend his statement of defence. I have not allowed the amendment as it involves important transactions between the same parties. Had I allowed it, plaintiff would have been entitled to a reasonable time to reply, and this would have necessitated a postponement of the trial. I, therefore, deal only with the plaintiff's claim.

The determination of the case, as far as verbal testimony is concerned, rests practically altogether on the evidence of the parties themselves, the only other witness called being one for the defendant whose statements do not bear directly upon the making of the notes or on the question of their being for accommodation only.

Not a little evidence was given about dealings between plaintiff and defendant in respect of transactions relating to the Consolidated Gold Dredging Company of Alaska. This is useful only in so far as it helps to decide which of these two parties is the more worthy of belief.

These transactions were of sufficient importance to lead one to suppose that, happening as they did within a comparatively short time before the trial, persons of ordinary intelligence could not have disagreed on the facts of what occurred; but there is the most positive contradiction, not in one particular but in many, and not on trivial points but in respect of weighty and important happenings, so much so that it is difficult not to believe that someone is knowingly misstating the facts.

The circumstances and surroundings, therefore, are material in arriving at the conclusion whom I am to believe.

Plaintiff asserts that the notes were given to cover three sums of $100, $300, and $700, which he paid to the defendant, and for which sums he produces his cheques to the defendant bearing date respectively June 24th, 1911, August 8th, 1911, and August 19th, 1911. Defendant admits the receipt of these cheques and the proceeds thereof, but says the $100 item was for payment for his time and expenses in going to New York for plaintiff, and for a small cash advance and that the other two items were in payment of a commission of $1,000, to which he claims to have been entitled in respect of the dealings with the affairs of the company above referred to.

The original notes were given on August 17th, 1911, on which date plaintiff says he gave defendant the cheque for $700; so that this payment was practically concurrent with the giving of the notes. On its face the transaction has the appearance of a loan or loans and security therefor by the notes. But for this and the circumstances to which I have referred, I might have concluded that the plaintiff had not shifted the burden of proof. From these, however, I conclude that defendant's evidence—whether through defective

memory or otherwise I am not prepared to say—is less worthy of belief than that of plaintiff. For instance, there is the document of July 13th, 1911, written by defendant (as he says at the dictation of the plaintiff). He knew the purpose for which it was intended to be used, but denies that the transactions between him and plaintiff had taken the form in which the commission referred to in that document was to be payable. Their statements do not agree here, but the document is consistent with the story told by plaintiff. Other occurrences, to which I need not specially refer, bear out the truth of plaintiff's statements rather than those of the defendant.

I think the plaintiff is entitled to succeed; and I direct judgment to be entered in his favour for the amount claimed, and costs.

I do not wish to be taken as making any findings upon the claim or transactions in respect of which defendant asked to amend his defence.

HON. MR. JUSTICE MIDDLETON. MAY 15TH, 1913.

FIELD v. RICHARDS.

4 O. W. N. 1301.

Injunction—Trespass and Cutting of Timber on Plaintiff's Lands—Evidence—Right of Successful Party to Costs—Scale of—Damages.

KELLY J., gave plaintiff $105 damages and an injunction as prayed in an action for damages for alleged trespass upon plaintiff's lands and the cutting of timber thereon and for an injunction.

A defendant cannot escape paying costs by saying "I never intended to do wrong."

Cooper v. *Whittingham*, 15 Ch. D. 501, referred to.

Action for an injunction restraining defendants from cutting timber upon the plaintiffs' lands and from trespassing thereon and for damages in respect of such trespass and cutting of timber. Tried at Bracebridge on May 8th, 1913.

R. C. Levesconte, for plainitff.

J. E. Jones, for defendants.

HON. MR. JUSTICE MIDDLETON:—The plaintiff owns lot 15 in 12th concession McLean, intersected by a bay of Lake Menominee (often called by some Rat Lake). The lands

are wooded and were purchased for use as a summer residence. The patent reserves "an allowance of one chain in perpendicular width for a road on the shore." Warne, the patentee, purchased the timber on the road allowance from the townships of McLean and Ridout; but when he sold the land he did not sell the timber on the road allowance. On the 12th July, 1909, Warne for $25 sold to defendant Richards the timber on this allowance with the proviso that all timber not removed by 19th April, 1911, should revert to him. Richards also acquired title to the adjoining lands.

In the winter of 1909-1910 Richards and his co-defendant Zimmerman acting for him cut timber and trespassed on the plaintiff's lands. It is admitted that 21 trees were cut on the portion of the lot north of the bay and it is shewn that 23 trees were cut on the lands south of the lake. A discharged employee of the defendant gave an exaggerated account of the trespass and a motion for an injunction was the result. The plaintiff was also ignorant of the defendant's rights upon the road allowance and much incensed at the destruction of the trees along the shore.

On the return of this motion the defendants were by order allowed to remove the timber cut subject to the plaintiff's right to damages. The timber then cut was the plaintiff's and the defendants must answer for its then value—not as standing timber but as it then was in the log. *Faulkner* v. *Greer,* 16 O. L. R. 123, and 40 S. C. R. 399, are conclusive upon this question.

The 44 trees would cut on the average 3 logs each, and allowing 18 logs to the M. would give about 7,000 feet—probably an under estimate, as some of the trees were very large.

This at $6.50 per thousand would make $45. To this must be added two cords of tan bark,—$10, and I think an allowance should be made for the trespass and injury to the lands. This I fix at $50, making a total of $105.

Then as to costs. In *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, Sir George Jessel says: "When a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs . . . the rule is plain and well settled. It is, for instance, no answer when a plaintiff asserts a legal right for

a defendant to assert his ignorance of such right, and to say, 'If I had known of your right I would not have infringed it.' There is an idea prevalent that a defendant can escape paying costs by saying, 'I never intended to do wrong.' That is no answer, for as I have often said, someone must pay the costs and I do not see who else but the defendants who do wrong are to pay them."

Here the defendants did not admit the wrong and submit to an injunction as they well might have at an early stage and so have avoided the prosecution of the action beyond the injunction motion.

Something is said in the memo handed in by Mr. Jones as to the defendant Zimmerman being a contractor and so being alone liable. This is based on an answer made to a question asked late in the trial and upon which there was no cross-examination.

The defence admits the responsibility of both defendants for the cutting, and no such issue was suggested at the hearing.

Judgment will be for the plaintiff for the injunction sought and $105 damages and the costs of the suit on the High Court scale, including the costs of the injunction motion.

HON. SIR JOHN BOYD, C. MAY 9TH, 1913.

UNITED INJECTOR COMPANY v. MORRISON.

4 O. W. N. 1263.

Patent—Action for Infringement — Combination of Parts—Prior Patent—Novelty—Utility—Trade Name—Injunction—Damages.

BOYD C. granted an injunction and damages in an action for infringement of a patent for a combination of parts holding that the patent possessed both utility and novelty.

Action for infringement of plaintiffs' patent for improved inspirators and of their trade mark and trade name.

D. L. McCarthy, for plaintiffs.

G. H. Watson, K.C., and S. C. Smoke, for defendants.

HON. SIR JOHN BOYD, C.:—This patent is for a combination of parts, and it is not anticipated by another patent granted to the same patentee for another combination of

parts, the constituents of which are not the same as in the impeached patent.

I had no doubt at the hearing as to the utility of the patent. It was strongly urged that what the plaintiff had put in his last patent was substantially described to the world in the drawings and parts of the earlier patent. The lack of novelty in the gauge bolster was said to be because it represented what was called in the former patent the correcting ring or collar, and that the ring or collar was the equivalent of the gauge bolster if the adjustment of parts by increase or decrease of thickness on the under part of the leg of the fulcrum bracket was substituted.

It was sought to support this position by the familiar doctrine in patent law, that if the prior inventor shews one way of carrying out his invention he is entitled to claim it for all other ways. This rule applies when the invention is in respect of a principle, and not the case of a combination of old parts producing a new and useful result.

The application of this doctrine is to be found discussed in *Chamberlain* v. *Broadfield,* 20 R. P. C. 584, and *Consolidated Car Heating Company* v. *Came,* [1903] A. C. 509.

Under the prior patent, when the parts of the machine are assembled for the purpose of being sent out of the shop ready to be operated, a collar or correcting ring of the right thickness is put in between the leg of the fulcrum bracket, and the top of the casing. When the machine thus set up is tested, it always happens that there are cumulative errors which require to be corrected, and this is done by adjusting the thickness of the correcting ring (filing it down, for example), so as to get it of exactly the right size for the particular machine. That collar so adjusted cannot be used in any other machine without making the like appropriate adjustment.

In the later patent the preliminary adjustment of a new machine is attained by making the correction upon the lower face of a collar forming part of the leg of the fulcrum bracket. Apart from, and in addition to this, in the later patent, there is the standard gauge bolster placed between the leg of the fulcrum bracket and the casing of the machine. That is a distinct and separate factor, by changing which according to the capacity required different capacities of tubes can be used in the same machine without any need of going back to the machine shop.

I think the addition of the gauge bolster to the former combination patented by the same inventor is not an obvious thing to the ordinary workman. There is inventive insight displayed, which appears to be accentuated in this case by contrasting the evidence of a witness given for the attack upon the patent at the first hearing and the evidence given by the same witness at the adjourned trial of the case.

I pointed out at the close of the evidence wherein I thought the two patents were distinguishable, and I see no reason to withhold making effective the terms of the judgment then indicated.

(The terms of the judgment were as follows: Defendants were enjoined from using the words "Hancock" or "Hancocks" or "inspirators" in connection with locomotive injectors not manufactured by plaintiffs, and from infringing plaintiffs' patent; plaintiffs were awarded $50 damages for the improper use by defendants of plaintiffs' trade name, and $300 damages for infringement of the patent or at the instance of either party a reference might he had to ascertain the damages. Defendants' counterclaim was dismissed, they to pay the costs of action and counterclaim. In case of a reference defendants are to pay the damages found by the Master forthwith on confirmation of his report.)

MASTER IN CHAMBERS. MAY 8TH, 1913.

FRITZ v. JELFS.

4 O. W. N. 1271.

Costs—Security for—Public Authorities Protection Act, 1 Geo. V. c. 22 s. 16—Action against Police Magistrate—Unofficial Act—Motion to Strike Out Statement of Claim—Alleged Frivolous Action—Con. Rule 261—Jurisdiction.

MASTER-IN-CHAMBERS *held*, that security for costs could not be ordered under the Public Authorities Act, 1 Geo. V. c. 22 s. 16, where the acts complained of are admittedly outside of the scope of the defendant's official duties.

Parkes v. *Baker*, 17 P. R. 345, and *Meredith* v. *Slemin*, 24 O. W. R. 155, followed.

Motion by defendant to set aside the statement of claim as disclosing no cause of action, or for an order for security for costs under The Public Authorities Protection Act—on the ground that the action is brought against the moving

defendant as a Justice of the Peace or police magistrate and that the grounds of action are trivial and frivolous.

S. F. Washington, K.C., for defendant's motion.

L. E. Awrey, for plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The statement of claim alleges that the defendant maliciously advised and procured the landlady of the plaintiff to eject him from the premises held by him under a lease: that in pursuance of this object he wrote a letter to plaintiff on 20th June, 1912, advising him that if he did not leave within two days "I shall have to assist Mrs. Bell in forcibly ejecting you;" that six days thereafter this threat was repeated by a detective of the Hamilton police force, and the following day two constables in their uniform "pursuant to instructions received from the defendant Jelfs forcibly ejected the plaintiff and put his goods and chattels on the street.

For these alleged torts the plaintiff claims $3,000 damages from the defendant.

It is not denied that the defendant is the police magistrate. But he makes affidavit on the motion to which his letter of 28th June is an exhibit. In this he says that what he did was not in any way as such magistrate (see the letter and the erasure of "Police Magistrate" at the foot); and that he was only acting as a friend to Mrs. Bell as he does constantly when poor people come and ask his advice, which is given free. Even without this affidavit it is clear that all that plaintiff charges against him is in no way connected with his office—so as to bring him within the protection of the Act, 1 Geo. V., ch. 22, sec. 16.

This point was dealt with in *Parkes* v. *Baker*, 17 P. R. 345—and very recently in *Meredith* v. *Slemin*, 24 O. W. R. 155. Here there is no pretence that what defendant did was in any way within the scope of his official duties. Defendant himself expressly denies this. This disposes of the motion for security. It was said by Boyd, C., in *Kelly* v. *Barton*, 26 O. R. at p. 621: "If the officer in discharge of a public duty acts irregularly or erroneously he is entitled to the qualified protection of the statute; but if he volunteers or assumes to do something which is not imposed upon him as an official duty, then he is outside" of the statute.

The other branch of the motion cannot be entertained except under Con. Rule 261. This was so decided by Street,

J., in *Knapp* v. *Carley*, 7 O. L. R. 409. See too *Harris* v. *Elliott*, 4 O. W. N. 939.

The motion fails on all grounds and must be dismissed with costs to plaintiff in the cause. This will be without prejudice to any motion that defendant may be advised to make under Con. Rule 261 or otherwise.

MASTER IN CHAMBERS. MAY 13TH, 1913.

RE DAVIS & KORN.

4 O. W. N. 1308.

Judgment—Attaching Order — Unpaid Costs of Solicitors—Cheque Drawn on Bank in Favour of Client—Lien on—Order Refused as against Bank.

MASTER-IN-CHAMBERS, where solicitors had in their possession a cheque drawn in favour of their client for $200, refused to issue an attaching order upon the bank upon which the cheque was drawn for the amount of their unpaid taxed costs, holding that there was no precedent for such a course.

De Santes v. *Can. Pac. Rw. Co.*, 14 O. L. R. 108, referred to.

Motion to make absolute an attaching order granted in this matter on 29th April, 1913.

Lionel Davis, for Davis & Mehr, judgment creditors.

W. J. McLarty, for Theresakorn, judgment debtor.

N. B. Wormwith, for Metropolitan Bank, garnishees.

CARTWRIGHT, K.C., MASTER:—There is no dispute as to the facts.

The applicants were solicitors of the judgment debtor, who was plaintiff in an action which was settled—one of the terms of the settlement was an immediate payment to plaintiff of $200. Each party was to pay their own costs.

The plaintiff refused to pay her solicitors' costs. They thereupon had their bill taxed, and it has been certified at about $160. They received from the defendant a marked cheque on the Metropolitan Bank for $200, which is still in their possession. They now ask for an order that the bank on presentation of the cheque deposit it to the credit of the drawer and pay to applicants the amount of their judgment with costs. I do not see how any such order can be made. No authority was cited for it. The cheque is made by a per-

son who is not a party to this proceeding. If it is to be redeposited to his account he should give the necessary direction or endorsation. Even if the drawer had been the garnishee I do not think that an order absolute could have been made as against him. The difficulty has arisen from the solicitors being in possession of the cheque. Their wisest course would have been to return the cheque with a notice to the defendant or his solicitors that their costs had not been paid, and that they looked to the proceeds of the action for payment. See *De Santes* v. *C. P. R.*, 14 O. L. R. 108, and cases cited. This may yet be done and may probably result in satisfaction of the claim of the applicants. If not an attaching order might issue in respect of the money then in the possession of the defendant.

As the matter stands at present the present attaching order must be discharged with costs to the bank, fixed at $5. The debtor is not entitled to any costs as it is her refusal to pay her solicitors that has caused the present proceedings. And so far as appears, there is no justification for that refusal.

MASTER IN CHAMBERS. MAY 13TH, 1913.

ANTISEPTIC BEDDING CO. v. GUROFSKY.

4 O. W. N. 1309.

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

MASTER-IN-CHAMBERS granted defendant an order for four foreign commissioners to take evidence where he had not been in default and the evidence sought was necessary for his defence.

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

Motion by defendant for a commission to Liverpool, England—to Winnipeg—and to two places in the United States to take evidence of the proper officers of the companies who issued the policies in question in this action in the question of payment.

C. A. Moss, for defendant.

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

CARTWRIGHT, K.C., MASTER:—After the disposition of the previous motion in this case reported in 24 O. W. R. 493,

the plaintiffs amended by setting up the identity of the defendant with the Insurance Brokerage Co. and alleging that the premiums were never paid to the insuring companies and never reached their hands, though the defendant assured the plaintiffs otherwise. The defendant has rejoined that the reply does not disclose any right in the plaintiffs to recover even if the facts as to the identity of the Brokerage Company and the defendant are true.

He further alleges that he obtained insurance for the plaintiff as he had agreed to do, and is not responsible for the pretended cancellation by the insurance companies who issued the policies.

No doubt if the order is granted there can be any trial of the action until after vacation. But this is not of itself any reason for a refusal as there has not been any delay on the part of the defendant in the conduct of the case.

Then the issue raised by the plaintiff is a very serious one for the defendant, involving his honesty and veracity. It is essential for his future business career that he should clear himself in the matter and he is entitled to all reasonable facilities for so doing.

See *Ferguson* v. *Millican*, 11 O. L. R. 35, which gave effect to the principle that defendants are to be allowed all "reasonable facilities for making out their defence." An order will, therefore, be granted, and the costs of same and of the commissions will be reserved to the taxing officer, if not disposed of at the trial.

The date of the return of the commissions should not be later than August 1st—unless otherwise agreed by the parties.

HON. MR. JUSTICE LENNOX. MAY 5TH, 1913.

SHERIFF v. AITCHESON.

4 O. W. N. 1269.

Vendor and Purchaser—Specific Performance—No Completed Agreement—Parties Never "ad idem"—Disparity in Intelligence of Parties.

LENNOX, J., dismissed plaintiff's action for specific performance of an alleged agreement to sell certain lands upon the ground that the agreement had not been proven to have been understood by defendant.

Action for specific performance of an alleged contract to sell certain lands and for damages.

A. C. Heighington, for the plaintiff.

H. Dewart, K.C., for the defendant.

Hon. Mr. Justice Lennox:—The plaintiff has not shewn himself entitled to either specific performance or damages.

This transaction is nothing more nor less than the plaintiff bargaining with the defendant for the tenancy and optional purchase of the defendant's farm, upon the plaintiff's own terms. The defendant signs some of the documents; but every proposal, every figure, every term, and every stipulation is conceived and set out by the plaintiff. I am satisfied that "their minds never met," and that the plaintiff was conscious of this at the time. There was no bargain.

If these points did not stand out so prominently, there are many others which would perhaps bar the plaintiff's way. It is not necessary, however, for me to consider these. The action will be dismissed with costs.

Master in Chambers. May 2nd, 1913.

JORDAN v. JORDAN.

4 O. W. N. 1222.

Evidence—Foreign Commission—Alimony Action—Request of Plaintiff for Travelling Expenses—Refusal of.

Master-in-Chambers refused a plaintiff in an alimony action travelling expenses to attend upon a foreign commission sought by defendant where plaintiff was not entitled to interim alimony.

Motion by defendant for an order for a commission to take evidence for use at the trial, in Chicago, and Bay City, in the State of Michigan, and for letters rogatory in aid thereof.

Shirley Denison, K.C., for defendant.

Plaintiff in person.

Cartwright, K.C., Master:—Plaintiff in person asks to be furnished with means to attend on the examination of the witnesses to be taken under the commission, but does not otherwise oppose the motion.

This claim is based on the fact that the action asks (1), to have the previous consent judgment set aside, and (2) for further and increased alimony. No application has at any time been made for interim alimony and disbursements by the solicitors who acted at first on plaintiff's behalf; although the action was begun in October, 1911, and statement of defence delivered nearly 15 months ago.

Assuming that the plaintiff could now be treated as making such a motion, it could not be granted. In this case there are no allegations such as were made in *Lafrance* v. *Lafrance,* 18 P. R. 62, at p. 64, line 13. Without them no doubt the decision in *Atwood* v. *Atwood,* 15 P. R. 425, would have been applicable. There is therefore no ground for acceding to the plaintiff's application and an order must issue as asked—costs of the motion will be in the cause.

MASTER IN CHAMBERS. MAY 12TH, 1913.

KREHM v. BASTEDO.

4 O. W. N. 1307.

Discovery—Examination of Alleged Assignor of Chose in Action—Con. Rules 440, 441 and 454—Jurisdiction of Master-in-Chambers—Penalty for Refusal to be Examined — Right to Punish Party to Action therefor—Costs.

MASTER-IN-CHAMBERS *held*, that the penalty for contumacy on the part of anyone examinable under Con. Rule 441 was provided for by Can. Rule 454, and that a party to the action could not be penalized for such contumacy, nor was the same cognizable by the Master-in-Chambers.

McWilliams v. *Dickson Co.*, 10 O. L. R. 639, followed.

Motion by defendants for an order dismissing the action with costs, or requiring the attendance for examination of discovery of David Krehm a former partner of the plaintiff.

Gideon Grant, for the defendants.

A. J. Russell Snow, K.C., for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The facts are not in dispute so far as this motion is concerned. The action is brought admittedly in respect of a transaction between the defendant and the then firm of Krehm Bros. at a time when David Krehm was a member of the firm. He has since retired and all his interest in the assets of the partnership

was before action transferred to his brother Nathan by whom the business is still being carried on under the old name. It was argued that this arrangement was in effect an assignment by David Krehm of the chose in action now in question to his brother the plaintiff. Acting on this view the defendants took out an application for the examination of David for discovery under Con. Rule 441. He attended before the examiner but refused to be sworn on the advice of his counsel.

The question chiefly discussed on the motion was whether David was an assignor in respect of the claim made in the present action. But it does not seem necessary to deal with this point at present for this reason. Granting for the sake of argument that David Krehm is an assignor within the meaning of the Rule there does not seem to be any authority for penalising the plaintiff for the default of his former partner. It would seem that the remedy for any contumacy on the part of any one properly examinable under Con. Rule 441 (and perhaps also under Con. Rule 440), is that provided by Con. Rule 454. In such cases proceedings must be taken by attachment as for a contempt of Court by the person sought to be examined but refusing to submit to its process. But such a motion is exempted from the jurisdiction of the Master in Chambers by Con. Rule 42 (1).

Following my decision in *McWilliams* v. *Dickson Co.*, 10 O. L. R. 639, the motion must be dismissed with costs to plaintiffs in any event.

HON. MR. JUSTICE MIDDLETON. MAY 10TH. 1913.

MARTIN v. HOWARD.

4 O. W. N. 1266.

Animals—Lien for Board—Attempted Sale—Conversion—1 Geo. V. c. 49 s. 3 s.-s. 6—Insufficient Notice—Purchase by Vendor—Damages—Costs.

MIDDLETON, J., *held*, that the requirements as to notice of 1 Geo. V. c. 49 s. 3 s.-s. 6 giving innkeepers a lien and a right of sale of goods entrusted to them for arrears of board must be strictly complied with, and further that a vendor thereunder cannot sell to himself.

Action for conversion of a stallion, tried at Bracebridge on 8th May, 1913.

J. I. Mulcahy, for plaintiff.

W. H. Kennedy, for defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff had purchased a stallion from one Armstrong, but apparently had paid very little on account of the purchase. This, however, is not material; as, upon the evidence, the title had passed to him. The horse was boarded by the plaintiff at the defendant's stable, and it is admitted that the defendant was entitled to a lien for its keep. The question as to whether the lien was affected by the horse being from time to time taken away from the stable was not raised nor discussed.

Under the statute 1 Geo. V., ch. 49, sec. 3, sub-sec. 6, the defendant would have the right, after the board was unpaid for two weeks, to sell the horse "on giving two weeks' notice by advertisement in a newspaper published in the municipality."

An advertisement was published in the issue of the Gravenhurst *Banner*, on December 5th and December 12th, of a sale to be held on December 14th. This was not two weeks' notice; and, as the notice is a statutory condition of the right to sell, there was no right to sell at that time.

At the sale the defendant himself bought the horse in, and thereafter claimed to own him.

The right given by the statute is a right to sell. Manifestly this must be a sale to some third person, and the vendor cannot himself be the purchaser.

At the trial I gave leave to amend by alleging conversion, and left only to the jury the question of the value and of the amount due for board.

There will, therefore, be judgment for the net sum of three hundred dollars and costs.

There was no evidence whatever given in respect of the allegation in statement of claim as to discouraging bidding at the sale; nor was any evidence tendered on the part of the defendant to support the allegation contained in the fourth paragraph of the defence.

I do not think it is a case in which I should interfere as to costs.

HON. MR. JUSTICE LATCHFORD. MAY 10TH, 1913.

CHRISTIE BROWN v. WOODHOUSE.

4 O. W. N. 1265.

Land Titles Act—Appeal from Decision of Master—Sec. 140 of Act—Application to Register Objection to Issuance of Certificate of Title—Applicants Barred from Bringing Action for Possession—"Action"—Meaning of.

LATCHFORD J., *held*, that an order debarring the holders of the paper title to certain lands from bringing an action against the occupant for possession did not prevent them from filing an objection in the Land Titles office to the said occupant being registered as owner of such lands.

See S. C. 23 O. W. R. 55.

Appeal by Christie Brown & Co., under sec. 140 of the Land Titles Act, against decision of the Master of Titles, at Toronto, made 25th April, 1913, refusing to permit them to file an objection to one John Woodhouse and his wife being registered as owner of certain lands in the city of Toronto. See S. C. 23 O. W. R. 55.

W. B. Milliken, for motion.

E. Meek, K.C., contra.

HON. MR. JUSTICE LATCHFORD:—The company is by the terms of the order precluded from bringing any action against John Woodhouse for possession of the lands in question. It is also thereby debarred in the opinion of the learned Master from objecting to the registration of Woodhouse and his wife as the absolute owners of the lands.

It seems clear to me that in filing the objection the company was not bringing an action. Unless a contrary intention appears, the word "action" shall be construed "to include suit and shall mean a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." Jud. Act, sec. 2, sub-sec. 2. No contrary intention appears, and the objection filed is not a suit or a civil proceeding begun by writ, or as prescribed by any of the Rules. "Action" as the term is used in the order has in my opinion the meaning attributed to the word by the Jud. Act and not any other.

While the company cannot sue Woodhouse to recover possession of the property, it can I think be heard when it

objects that he and his wife should not be registered as owners of the land under the provisions of the Land Titles Act. With the shield provided by that Act the company can in my opinion defend its paper title against aggressors using the weapons forged by the same statute. It may well be that the applicants can establish the right which they assert, but Christie Brown & Co. are not precluded from questioning that right by the prohibition expressed in the order referred to. It is still open to the company to object that the Woodhouses are not entitled to the registration sought. The objection made should be considered on its merits. The appeal is, therefore allowed with costs, and the matter remitted to the Master of Titles.