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RIDDELL, J. NOVEMBER 16TH, 1906.

TRIAL.

ZILLIAX v. INDEPENDENT ORDER OF FORESTERS.

Benefit Society—Rights of Member—Action for Declaration of Rights—Domestic Tribunal—Failure to Resort to—Submission to Jurisdiction—Refusal of Court to Entertain Action—Costs.

Action for a declaration of the rights of plaintiff as a member of the defendant society.

C. R. McKeown, Orangeville, for plaintiff.

W. H. Hunter, for defendants.

RIDDELL, J.:—The plaintiff was a member of the Independent Order of Foresters, in the beneficiary or insurance branch. A dispute arising as to his right to continue to be such member, a body of officials of the Order decided against him. An appeal is provided for by the constitution, by which plaintiff is admittedly bound; such appeal being to the Grand Lodge. Plaintiff did not appeal, but, instead of appealing, brought this action for a declaration and other relief. Defendants do not dispute the jurisdiction of the Court, but appear to be willing that the rights of plaintiff should be determined in this action.

Unless this position taken by defendants makes a difference, I am bound to dismiss the action: Essery v. Court Pride of the Dominion, 2 O. R. 596; Dale v. Weston Lodge, 24 A. R. 351.

Does the submission of the defendants make any difference? I think not. Neither member nor "Order" can, I think, be permitted to make a court of justice a convenience for determining questions which ought to be disposed of in the domestic forum. And the maxim "Boni judicis est ampliare jurisdictionem" no more justifies the Court in reaching out for cases for decision than the other maxim "Interest reipublicæ ut sit finis litium" would justify the Court in preventing actions being brought, or in refusing to decide them when properly brought.

The action, therefore, will be dismissed, but without prejudice to any other action being brought after the remedies provided by the constitution of the Order are exhausted. It is not a case for costs.

No doubt a modus vivendi can be arrived at in the meantime, either by plaintiff discontinuing the practices objected to, or by defendants accepting the premiums without prejudice. It is eminently a case for an amicable arrangement.

I should add that in case it be considered that the merits of the dispute should be gone into, the Divisional Court will be in as good a position as the trial Judge for determining these. The facts of the plaintiff's employment as stated by himself are admitted by the defendants, and no question of credibility of witnesses can arise.

CARTWRIGHT, MASTER. NOVEMBER 19TH, 1906.

CHAMBERS.

COLLIER v. HEINTZ.

Pleading — Statement of Claim — Action for Damages for Breach of Contract by Brokers to Purchase and Deliver Shares—No Allegation of Tender or Payment of Price —Amendment.

Motion by defendants to strike out paragraph 3 of the statement of claim as embarrassing.

The facts appear in a previous report, ante 340.

Grayson Smith, for defendants.

S. T. Medd, Peterborough, for plaintiff.

THE MASTER:—Paragraphs 1 and 2 of the statement of claim allege purchase of the shares in question by plaintiff, through defendants as his brokers, and refusal by them to deliver when requested. Paragraph 3 is as follows: "The plaintiff has always been ready and willing to take delivery of the said stock and pay any sum that was legally due by him to the defendants."

For the motion Bloxam v. Sanders, 4 B. & C. 941, was relied on. This shews that, admitting the purchase by defendants for plaintiff, this does not give any right to possession until payment or tender of the price.

It is clear that neither of these facts is positively alleged. Rawson v. Johnson, 1 East 203, was cited on the other side. That, however, was an action for breach of an agreement to sell and deliver malt. It was there said by Lord Kenyon, C.J.: "The defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead that they made the request to him and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested or at any other time, but refused to do so." This was held in such a case to be a sufficient allegation, though at the trial plaintiffs would have to prove that they were prepared to tender and pay the money if the defendant had been ready to carry out the contract.

Affidavits have been filed by both parties on this motion. From that of plaintiff it would seem that his contention really is that the shares were paid for before they were bought, as defendants had, as he thinks, sufficient of his funds in their hands for that purpose. He also alleges an offer "to pay the balance due on said purchase, if any"—but neither payment nor tender is otherwise set up.

Plaintiff should amend so as to let the defendants know which of these allegations they have to meet. It would almost seem that the question is really one of account between the parties.

Plaintiff should amend, and defendants have full time to plead in answer.

The costs of this motion will be to defendants in the cause.

CARTWRIGHT, MASTER. NOVEMBER 20TH, 1906.

CHAMBERS.

GERMAN AMERICAN BANK v. KEYSTONE SUGAR CO.

Summary Judgment—Rule 603—Delay in Applying — Defences—Dismissal of Motion.

Motion by plaintiffs for summary judgment under Rule 603.

W. D. Gwynne, for plaintiffs.

George Bell, for defendants.

THE MASTER:—The action is on a promissory note, and was commenced on 20th June. The defendant appeared on 10th July. The present motion was not launched until 12th November instant.

The delay is not explained. This seems to bring the case within the principle of McLardy v. Slateum, 24 Q. B. D. 504, cited and approved in Ontario Bank v. Farlinger, 7 O. W. R. 315.

In the former case it was said: "The view taken by other Judges and by the Masters is that the intention of the Order was that the plaintiff should apply within a reasonable time after the appearance of the defendant." Had the statement of claim been delivered in September, the action would have been disposed of before this motion was launched; so that the plaintiffs would not seem to have been very anxious to obtain what they are now seeking. The venue is at Toronto.

The defendants . . . have set up three defences. Some of these (if not all) do not seem very substantial. But, in view of the whole circumstances, I think defendants should be allowed at least to deliver a statement of defence. Then perhaps plaintiffs will be able to get judgment on the pleadings without a trial. If a trial is necessary, defendants must facilitate this in every way so that the case can be heard at the present non-jury sittings.

Costs will be in the cause. . . .

BRITTON, J. NOVEMBER 20TH, 1906.

CHAMBERS.

HARRISON v. BOSWELL.

Pleading—Statement of Claim—Amendment after Issue Joined and Parties Examined for Discovery—Leave to Set up Fraud—Discretion—Appeal—Costs.

Appeal by plaintiff from order of a local Judge refusing leave to plaintiff to amend statement of claim.

J. H. Spence, for plaintiff.

W. E. Middleton, for defendant Boswell.

Beattie, London, for defendant Kincaid.

BRITTON, J.:—The question presented for decision on this appeal is one of some nicety and of considerable difficulty. The question is, should plaintiff, who brought suit against defendants Boswell and Kincaid, and who in his statement of claim alleged a cause of action not against the defendants jointly, but against Boswell as the owner of premises and so liable for repairs which plaintiff did, and against Kincaid upon his alleged promise to pay for these repairs, be allowed to amend by setting up an entirely different cause of action against Kincaid alone, and alleging fraud on the part of Kincaid in obtaining money from plaintiff, and alleging that part of the money so fraudulently obtained from plaintiff is now held by Kincaid in the bank as trustee for defendant Boswell. Upon the new cause of action stated in the proposed amendment, defendant Boswell would be affected only to the extent of restraining her from disposing of money which Kincaid says he holds as trustee for her, to which money plaintiff makes a claim.

I have come to the conclusion, upon a consideration of the very wide language of Rule 312, and of the cases to which I was referred, and other cases, that the amendment should be allowed. Plaintiff should have an opportunity, and in this action, of determining the position of defendant Kincaid, as between the parties, and, if entitled to any part of the $1,100, to get it without being compelled to institute a new action against Kincaid, or against both defendants.

The question before me is of amendment before trial. Issue has been joined upon the claim presented by plaintiff's original statement of claim, and unless plaintiff chooses to abandon that claim there must be a trial. The parties have been examined at very considerable length and upon the case which plaintiff desires to present by the amendment asked. A great deal of expense will be saved by having the whole matter tried out in the present action, instead of compelling plaintiff to start afresh. Indeed, after reading the depositions, I feel compelled to make the amendment asked, as it is necessary for "the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case."

What is asked by the amendment is a matter in dispute; it was so when the interim injunction was obtained; it was so when the examination of plaintiff and defendants took place. Defendants in the examination appear to me to have proceeded upon the theory that plaintiff was not limited to the precise claim as in the statement of claim. . . .

[Reference to Raleigh v. Goschen, [1898] 1 Ch. 73.]

The other case strongly relied upon by defendants is Hendricks v. Montagu, 17 Ch. D. 638, in which Jessel, M.R., stated his rule to be not to allow any amendment in which fraud is charged. That rule was stated as a general rule, but the Master of the Rolls said: "I do not as a rule allow amendments to make a charge of fraud at a time when a case is launched independently of fraud. . . . Of course, like all my rules, it is not an absolute rule. I make an exception to it if I see good ground for doing so, but generally it is my rule."

I follow this. It clearly states the position. This, in my opinion, is a case for the exception. There is good ground for allowing at this stage the amendment asked.

A further rule was laid down by Lord Esher in Steward v. North Metropolitan Tramways Co., 16 Q. B. D. 556: "The amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they would be injured, it ought not to be made." See Williams v. Leonard, 16 P. R. at p. 549.

This amendment will not in any way put defendants or either into the position that they or either of them must be injured. They will not be made liable upon the amended pleading unless the evidence warrants it, and plaintiff is entitled to be heard and in this action.

It was argued that the discretion of the local Judge, who refused leave, ought not to be interfered with. This is very different from the exercise of discretion at the trial by a trial Judge. At this stage of the proceedings, plaintiff should be allowed as of right, upon terms, to amend.

The appeal will be allowed, the order dismissing plaintiff's motion for leave rescinded, and plaintiff is to have the leave to amend as asked. Costs of motion to amend and of the amendment to be costs to the defendants in any event. Costs of this appeal to be costs in the cause. Defendants may re-examine plaintiff for discovery if they desire to do so, and plaintiff to attend at his own expense upon an appointment for such examination.

ANGLIN, J. NOVEMBER 20TH, 1906.

TRIAL.

McMURCHIE v. THOMPSON.

Chose in Action—Voluntary Assignment of Fund to Wife of Assignor—Informality—Validity as Equitable Assignment—Subsequent Assignment for Value—Priority—Notice to Holders of Fund—Executors—Oral Notice to One.

An interpleader issue to determine whether defendant, a prior volunteer assignee, or plaintiffs, subsequent assignees for value, should be held entitled to the proceeds of the share of the deceased husband of defendant under the will of his father.

E. L. Dickinson, Goderich, for plaintiffs.

W. Proudfoot, K.C., for defendant.

ANGLIN, J.:—James Thompson sen., who died on 6th July, 1885, bequeathed to his son James (the late husband

of defendant) and to his sons Edward and William, in equal shares, the residue of his estate, subject to an annuity to his widow of $125. The executors retained, under the directions in the will, to meet this annuity, a sum of money, in which, with accumulated interest thereon, the share of James Thompson, on the death of his mother, amounted to $574.18. This sum, less costs of payment in, etc., taxed at $25.82, was, by order of a local Judge, made on application of the executors, paid into Court to abide the result of the interpleader issue by such order directed.

Defendant married the late James Thompson jun. early in 1893. According to her evidence, she shortly afterwards pressed her husband, who was addicted to drinking habits, to make some provision for her. She swears that he then said he would at once transfer to her his interest in his father's estate, and that he immediately wrote and handed to her the following document, which she produces: "Petrolia, July 18th, 1893; I have assigned all that I possess to Misses Jas. Thompson. James E. Thompson." In the following year she says he executed and gave to her this further assurance: "Petrolia, April the second, 1894; if anything was to happen to me I leave to my wife Jennie Thompson the money that belongs to me by my father's will after mother death to be handed over to her and all other estate that I should possess and money. James Thompson, Petrolea."

Upon the evidence of Mrs. Thompson, and having had the opportunity of comparing these documents with papers which are admittedly in the handwriting of her deceased husband, I find that both are genuine, and have no doubt that both were prepared and given her in the circumstances which Mrs. Thompson describes.

The second document, which is, in my opinion, testamentary in character, of itself avails nothing; but it affords a strong indication of the probability of the story which defendant tells.

I therefore find that James Thompson jun., deceased in 1903, intended to assign and did in fact assign by parol to his wife . . . all his estate capable of being so transferred, including specifically his interest in the estate of his deceased father.

Although this assignment was voluntary, it was binding and effectual, because, dealing with property incapable of legal transfer, the assignor did everything in his power to make a complete assignment, and left undone nothing material thereto. As against him, there was a complete gift to his wife of his share in the estate of his father: Harding v. Harding, 17 Q. B. D. 442, 445; Lee v. McGrath, 10 L. R. Ir. 45, 49. This assignment, made in 1893, was not within the scope of . . . R. S. O. 1887 ch. 122, sec. 6, which was restricted to "debts and choses in action arising out of contract." It stands, therefore, as an equitable assignment of a chose in action incapable of legal transfer, for which neither writing nor any particular form of words is requisite, provided the intention to make a present transfer is satisfactorily proven: Trusts Corporation of Ontario v. Rider, 27 O. R. 593, 24 A. R. 157. As the assignment . . . relates to property over which courts of equity had special jurisdiction, the assignee could sue in such courts in his own name.

The title of defendant being, therefore, complete, it only remains to determine whether she preserved her priority as against plaintiffs, who hold subsequent assignments for value, of which formal notice was duly given to the executors, in whose hands the fund lay. Mrs. Thompson swears that in 1895 or 1896, shortly after she had separated from her husband, she, accompanied by her brother, called on William Bryan, one of the executors, and advised him of the fact that her husband had transferred his interest in the estate to her. Her brother fully corroborates her statement. William Bryan admits that Mrs. Thompson and her brother called on him and spoke about "her right to this money," but he cannot remember whether this was prior or subsequent to his receipt of notice of the claim of plaintiffs, of which he was notified early in 1897. He is, however, quite certain that Mrs. Thompson did not inform him that she held an assignment from her husband. Upon this conflicting evidence the finding must be in favour of defendant, whose positive testimony is strongly and directly corroborated by that of her brother. Having gone to Mr. Bryan for the express purpose, as she and her brother both say, of imparting to him information as to the assignment which she held, their recollection of what was actually said is more likely to be accurate and reliable than his. Since

. . . Ward v. Duncombe, [1893] A. C. 369, it is impossible to contend successfully that notice to one of several trustees, not himself the assignor, is not effective to secure the priority of the assignee who gives such notice over subsequent assignees.

There must, therefore, be judgment for defendant; and plaintiffs should pay her costs of this issue and of the application upon which it was directed.

CARTWRIGHT, MASTER. NOVEMBER 23RD, 1906.

CHAMBERS.

HOWLAND v. CHIPMAN.

Parties — Joinder of Defendants — Pleading — Statement of Claim—Multifariousness—Embarrassment.

Motion by defendant Chipman for an order requiring plaintiff to elect whether he will proceed against the applicant or his co-defendant, or to strike out parts of paragraphs 15, 17, and 19 of the statement of claim.

C. A. Moss, for defendant Chipman.

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

THE MASTER:—The action is brought against Chipman and the executrix and sole devisee under the will of the late W. H. Howland, plaintiff's son and former partner.

The statement of claim alleges that plaintiff and his son were in partnership, under which plaintiff was entitled to be paid by his son two sums of $85,000 and $55,000; that as such partner and with the money of the firm, the deceased acquired stock in what is now the Crow's Nest Pass Coal Company; that he always admitted his liability for the two sums above mentioned (which were to be paid out of the proceeds of said stock), and also to convey to plaintiff half of the said stock; that the said son died in December, 1893, leaving these matters unsettled; that the deceased made his wife sole executrix and devisee; that she almost at once left this province and has never returned, the control

of her husband's estate being given by her to defendant Chipman; that it was always represented to plaintiff that the stock in question was valueless, and that otherwise he was refused any information; that Chipman has now in his own name and control stock of the company to the value of $200,000, to which he has no right or title; and that his co-defendant has stock to the amount of $500,000 or thereabouts.

Plaintiff accordingly asks: (1) a declaration that the deceased held the stock in question as trustee for himself and plaintiff equally; (2) for an inquiry as to the dealings of defendants with the stock and for an order for delivery to plaintiff of his share or interest therein; and (3) payment of the sums of $85,000 and $55,000 out of the share of the deceased in the trust estate, with interest.

The motion was supported on the ground that these defendants could not be joined in one action, because the claims against them were separate and distinct, as Chipman was not interested in the claim for the $140,000, so that under the former practice the bill would have been demurred to successfully as being multifarious.

Unless this objection is valid, the motion must fail according to the principle in Andrews v. Forsythe, 7 O. L. R. 188, 3 O. W. R. 307, and cases cited, especially Evans v. Jaffray, 1 O. L. R. 614. . . .

[Reference to Daniell's Chancery Pleading and Practice, 1st Am. ed., p. 384; Salvidge v. Hyde, 5 Madd. 138, Jacob 151.]

Although in some sense the claim to be repaid the $140,000 is separate, and one in which Chipman is not concerned, yet the main relief is to have the trust as to the stock declared and carried out. These matters are certainly not in their nature separate and distinct, but are such as are properly and necessarily united as against the executrix, and the fact that Chipman is "a necessary party to some portion only of the case stated" does not allow him to maintain an objection of multifariousness: per Lord Cottenham in Attorney-General v. Poole, 4 My. & Cr. 17, at p. 31.

For these reasons it seems that plaintiff cannot be required to elect. There would appear in this case even more than in Evans v. Jaffray, supra, to be "such unity in the

matters complained of" as not only justifies but requires the retention of the moving defendant.

Then as to the motion against parts of paragraphs 15, 17, and 19 of the statement of claim.

As to the first of these no valid objection can be taken. The statement is of fact which plaintiff will rely on to account for the delay in bringing this action.

The allegation in paragraph 17 is introduced as a reason for making Chipman a defendant and requiring him to account for the stock in his possession.

The 9 or 10 words objected to in paragraph 19 do not seem in any way embarrassing. The paragraph simply repeats in a concise way the allegation that the stock held by both defendants belongs in part to plaintiff, and as to the rest to the estate of the plaintiff's deceased son. . . .

The main question is one of some difficulty, so that the costs may be in the cause.

CARTWRIGHT, MASTER. NOVEMBER 23RD, 1906.

CHAMBERS.

REID v. GOOLD.

Parties—Addition of Defendant—Motion by Original Defendants—Guarantors of Promissory Note — Avoidance of Multiplicity of Proceedings—Judicature Act.

Motion by defendants, who were sued as guarantors of a promissory note, for an order adding the maker as a defendant.

W. T. Henderson, Brantford, for defendants.

S. C. Biggs, K.C., for plaintiff.

THE MASTER:—About a year ago a limited company bought machinery from plaintiff, and gave the note sued on as payment.

The note was for $1,935.46, and payable in a year. Before maturity the company were claiming from plaintiff

$953.46 or thereabouts for breaches of the agreement of sale.

Plaintiff shortly afterwards sued the guarantors, who have paid into Court $1,195.01, as being all that is justly due. In their statement of defence they allege that plaintiff agreed when the note was given that the exact amount should be adjusted during the currency of the note.

No doubt what is the correct application of Rule 206 (sub-sec. 2) is not always obvious. This question was lately considered in Imperial Paper Mills v. McDonald, 7 O. W. R. 472, where the ruling cases are cited. The reasons of the Chancellor in that case would seem to justify the present motion, . . . for which reliance was placed on Montgomery v. Foy, [1895] 2 Q. B. 321, and it was argued that here the real question in controversy is whether any greater sum than the $1,195.01 paid into Court is due to plaintiff, and if that is so, then the presence of the company is necessary so that the whole matter arising out of the contract may be disposed of in one action, which is one of the cardinal principles of the Judicature Act. Otherwise the defendants in this action would be obliged to get the company to bring a new action against plaintiff for damages. It was said by Lord Esher in Montgomery v. Foy, supra, at p. 325, that Norris v. Beazley, 2 C. P. D. 80, which was relied on in opposition to the motion, was open to observation, being decided at an early stage of the decisions on the Judicature Act. In the same case A. L. Smith, L.J., at p. 328, pointed out that if such an action for damages was brought, while the first action was pending, the Court would order them to be tried at the same time, so that only the true balance should be paid to plaintiff.

It will be seen that in Norris v. Beazley, the action was against the person primarily liable. Even there the decision seems to have proceeded on the ground that plaintiff had no possible claim against the Niger Company in respect of the acceptance, as the company was not in existence when it was given. And Denman, J., put his decision on the ground that the company was not a "necessary party" within the meaning of the Rule. Grove, J., also relies on the fact that the contract there was only between plaintiff and defendant and that the Merchants Company had nothing to do with the acceptance sued on.

The facts of the present case are widely different and much more favourable to the motion, which I think should be granted in the interests of justice and also of all the parties concerned. The guarantors should not be required to pay more than the amount which plaintiff is entitled to recover, on the contract of which the note sued on forms part. The company which gave the note should not be obliged to bring a separate action for damages, when that claim can be conveniently and properly disposed of in this action, as it would have been had the company been made a defendant originally.

The plaintiff will in this way be saved the risk of having to defend an action in Alberta, where the company's mill is situated, and where, it may be, their head office is situated.

Above all, the interests of justice, as defined by the Judicature Act, sec. 57, sub-sec. 12, would seem to require that wherever it can possibly be done without injustice or inconvenience one action should be sufficient "for the determination of all the matters which must be dealt with before the rights of the parties are finally settled:" per Meredith, C.J., in Morton v. Grand Trunk R. W. Co., 8 O. L. R. 381, 4 O. W. R. 126, and so "multiplicity of legal proceedings concerning any of such matters may be avoided:" Judicature Act, supra. . . .

The costs will be in the cause, as this question is always one of some difficulty.

NOVEMBER 23RD, 1906.

DIVISIONAL COURT.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons — Service out of Jurisdiction—Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Appeal by plaintiff from order of MABEE, J., ante 558, affirming order of Master in Chambers, ante 439, setting

aside order obtained by plaintiff allowing service upon defendants in Glasgow, Scotland, of the writ of summons and statement of claim, and dismissing the action, which was brought to recover damages for injuries sustained by plaintiff in Ontario owing, as alleged, to the premature explosion of a defective fuse manufactured by defendants, and used by plaintiff's employers in Ontario.

T. N. Phelan, for plaintiff.

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

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

ANGLIN, J.:—Notwithstanding the brilliant and ingenious argument presented by counsel for the appellant, it seems clear that service of the writ of summons in this action out of the jurisdiction should not be permitted. It is only where the tort for which the plaintiff brings action has been committed within Ontario that Rule 162 (e) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.

Assuming that the plaintiff had a cause of action against these defendants (a question with which it is unnecessary to deal, but which it is by no means clear should be determined in plaintiff's favour: Winterbottom v. Wright, 10 M. & W. 109; Earl v. Lubbock, [1905] 1 K. B. 253; Collis v. Selden, L. R. 3 C. P. 495; but see Parry v. Smith, 4 C. P. D. 325; Elliott v. Hall, 15 Q. B. D. 315; Farrant v. Barnes, 11 C. B. N. S. 553:) I find myself quite unable to follow Mr. Phelan's argument that the tort which gave rise to that cause of action was "committed" within Ontario. The charge preferred against the defendants is that they were "negligent in allowing the fuse (which injured the plaintiff) to be manufactured and sold in a defective condition." How this fuse reached the employers of the plaintiff is not alleged or suggested. The manufacture and the sale by defendants, negligence in both of which plaintiff alleges as the tort or wrong committed by defendants, must, in the absence of any contrary allegation, be deemed to have taken place in Scotland, where the defendants carry on business. If these alleged negligent acts constitute the wrong done

by defendants, though a result of that wrong—perhaps a more or less direct result—may have been injury sustained by plaintiff in this province, it seems to me impossible to maintain that such wrong or tort was committed in Ontario, or elsewhere than in Scotland. It is true that the invasion of plaintiff's right of personal security occurred in this province, but a wrong or tort comprises also the wrongful act or omission of the alleged tort-feasor. Before it can be said that a tort has been committed in Ontario, within the meaning of Rule 162 (e), it must be established, I think, that the wrongful act or omission of the tort-feasor, which caused the injury to the plaintiff, took place in this province. That is not, and could not well be, alleged by the present plaintiff; and, if it were, the Court, in the exercise of the discretion which it certainly posseses in regard to the application of the provisions of Rule 162 (e), should, in such a case as that now before us, decline to permit service out of the jurisdiction.

The appeal fails and must be dismissed with costs.

NOVEMBER 23RD, 1906.

DIVISIONAL COURT.

SHERLOCK v. CITY OF TORONTO.

Contract—Work and Materials on Building—Time Fixed for Completion — Delay of Owner of Building — Increase in Cost of Materials — Contract Price — Correspondence — Quantum Meruit.

Appeal by plaintiff from judgment of BOYD, C., dismissing the action.

Plaintiff contracted with defendants for a fixed sum of $2,050 to perform certain work on a building called the manufacturers' building, to be erected by defendants, the contract requiring the work to be completed on or before 2nd August, 1902.

Defendants omitted to erect the building before 2nd August, 1902, thus making it impossible for plaintiff to perform his contract within the stipulated period, and it was not until March, 1903, that the building had been so far completed as to enable plaintiff to commence his work.

In the meantime the cost of performing the work covered by the contract had increased by $390.80.

On 25th February, 1903, defendants' architect wrote to plaintiff urging an early start with his work.

After certain communications between plaintiff and representatives of defendants, plaintiff, about 8th April, 1903, began the work and ultimately finished it, and this action was brought to recover $390.80, being the increased cost over the original contract price of $2,050, to which he was put because of an increase in the cost of labour and material.

The appeal was heard by MULOCK, C.J., ANGLIN, J., CLUTE, J.,

C. A. Masten, for plaintiff.

J. S. Fullerton, K.C., and F. R. MacKelcan, for defendants.

MULOCK, C.J.:—The question arises, on what terms did plaintiff perform the work? He had not made a commencement prior to the time named in the contract for its completion. True, he had purchased some materials, but they had remained his property. He was not bound to perform the work at a subsequent time, nor under conditions different from those contemplated by both parties when the contract was entered into. That would have been a different contract: Bush v. Trustees of the Port and Town of Whitehaven, Hudson's Building Contract, 2nd ed., vol. 2, p. 121.

Defendants' default went to the root of the contract, and entitled plaintiff to treat it as at an end: Poussard v. Spiers, 45 L. J. Q. B. 621. He does not, however, appear to have done anything until after the receipt of the architect's letter of 25th February, 1903. In the meantime defendants had been getting the building ready for the work described in plaintiff's contract, and on that day the architect wrote plaintiff as follows: " . . . I trust you will lose no time in getting your material ready for a very early start, as the building is in an advanced state now, and ready to receive attention on your part."

The contract provided that plaintiff's work should be done to the satisfaction of defendants' architects, and this letter from one of those officers was an intimation that he

expected the work to be executed, except as to time, in accordance with the terms of the original contract. On 25th March, 1903, plaintiff wrote to the defendants' Board of Control that, as he had been unable to complete his contract by 2nd August, 1902, he would require an additional sum of $390 to complete it, and on 2nd April he appeared before the Board of Control and advised them as to his demand for $390, when Mr. Loudon, one of the members, said: "Now, Sherlock, you go ahead, and we will do what is fair with you." It does not appear that the Board authorized or indorsed this statement, and apparently the plaintiff did not accept it as the decision of the Board, but merely the view of one member, for in answer to another letter from the architect of 3rd April complaining of delay and insisting on an immediate start, plaintiff replied enclosing a copy of his statement to the Board and adding: "I had an interview on Thursday April 2nd with the Board and explained my position in reference to starting the work on said building. I am waiting their reply to the above statement." As he received no communication from the Board, the fair inference, I think, is that he did not start his work on the faith of Mr. Loudon's remark. No doubt plaintiff was aware that Mr. Loudon could not bind defendants, and something more was necessary in order to charge them.

The architect, however, left no doubt as to the terms on which he required the work to be performed, for on 8th April he wrote to plaintiff stating that he had instructions from the Parks and Exhibition Committee to give him notice to deliver material and proceed, failing which he was liable to instant dismissal on his failure to comply with the notice, and concluding: "I am instructed to employ other persons to finish the work, charging the cost thereof against your contract."

This is the notice provided for in the contract in order to take the work out of the contractor's hands, and was the clearest intimation that plaintiff's demand for an additional allowance was not acquiesced in, and that if he went on with the work it would be under the terms of the contract, except as to date of completion.

Without saying more, plaintiff began his work, and on 21st April wrote the architect saying: "Please find enclosed list of labour and material deposited and erected by me at the manufacturers' building . . .. total $1,000."

On 23rd April, 1903, the architect issued to plaintiff a progress certificate in the following words: "To R. T. Coady, City Treasurer. This is to certify that Mr. James Sherlock has performed portion of his contract for the plumbing and drain work on your manufacturers' building, entitling him to a payment of $500 of his contract, dated March 18th, 1902.

"Amount of contract $2,050
"Amount of his certificate..... 500
"Balance after payment .....$1,550."

This is receipted as follows: "Received payment,

James Sherlock, 24 April."

Thereafter further progress certificates, similar in language, were issued, and the amount thereof accepted and receipted for by plaintiff, until it came to the certificate for the balance, $150. For this plaintiff gave no receipt. He states that each time of presentation of his certificates to the treasurer for payment he protested in respect of his additional claim.

On 26th May the architect wrote plaintiff as follows: "Pursuant to the terms of the contract between you and the corporation of Toronto, dated 18th March, 1902;" and then went on to complain of delay, threatening dismissal and the employment of others "to finish the work as provided in the contract." To this the plaintiff replied: " . . . I have called repeatedly for a progressive certificate for $500, for which I think according to agreement I am entitled to." To what agreement does he refer if not the contract of 18th March, 1902? Further correspondence took place, throughout which the architect continued to refer to the "contract," and on 15th January, 1904, plaintiff rendered to the architect an account as follows:

1903	To plumbing manufacturers' building, exhibition grounds, as per contract	$2,050
	Indemnity account	390
		$2,440
	Credit by cash on account.....	1,600
		$840

On 21st October, 1904, the architect issued his final certificate for the balance of the $2,050, adding: "Your indemnity claim by reason of detention will have to be adjusted by the Board of Control, as that is something that does not come under my duties to adjust."

The foregoing references to the evidence shew that this case differs materially from Bush v. Trustees of Whitehaven (supra). There the work was begun within the time provided by the contract, but the action of defendants prevented its completion within the time agreed upon; the contractors nevertheless continued the work, without objection from the other party to the contract, and it was held that, the conditions having materially changed, both parties must be regarded as allowing the work to go on under the altered conditions, and as giving to the contractors a claim in respect of the increased cost because of the delay. But that is not the present case. Here, because of defendants' default (plaintiff not having been able to commence his work within the time provided for its completion), he had the right to treat the contract as at an end, and if the defendants were guilty of a breach, his remedy was an action for damages. He did nothing, however, until called upon by the architect to perform the work. Thereupon he advanced a claim for the additional sum in question. This defendants did not assent to, and plaintiff was notified by the architect that he must proceed under the contract. This he did. He was not obliged to have done so, but, having done so, he cannot now take the attitude that the terms of the contract (except as to time) do not determine the rights of both parties. Before beginning the work, plaintiff having raised the question of an increased price, and defendants through their architect having refused to entertain the demand, and having notified plaintiff that if he would not perform the work at the price named in the original contract, it would be given to others, the inference is, I think, that in order to retain the work, plaintiff elected to abandon his claim and to execute the work at the price named in the original contract. But for so doing, he would have lost any advantage from performing the work, and have been left to whatever legal rights he was entitled to, because of defendants' default. The terms of the contract having by the conduct of the parties been made applicable to the belated work, and plaintiff having for valuable consideration

abandoned his claim, nothing remains entitling him to recover by way of quantum meruit. This appeal should therefore be dismissed with costs.

ANGLIN, J., gave reasons in writing for the same conclusion.

CLUTE, J., dissented, for reasons also given in writing.

OCTOBER 2ND, 1906.

DIVISIONAL COURT.

MAHONEY v. CANADA FOUNDRY CO.

Third Party Procedure — Master and Servant — Action for Death of Servant — Negligence — Condition of Railway Track — Breach of Implied Warranty of Safety — Relief over—Damages—Other Actions Arising out of same Accident—Notice of Trial of Third Party Issue.

Appeal by the Guelph and Goderich Railway Company, the third parties, from an order of BOYD, C., made on 25th September, 1906, reversing an order of the Master in Chambers of 29th June, 1906, by which he set aside an ex parte order giving leave to serve a third party notice upon the appellants.

Shirley Denison, for the third parties.

J. A. Paterson, K.C., for defendants.

T. R. Phelan, for plaintiff.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), was delivered by

MEREDITH, C.J.:—The action is brought by the personal representatives of a deceased person who was in the employment of defendants engaged as a conductor upon a train—I suppose it may be called—which was employed in the erection of a bridge on the line of the third parties' railway, which was in course of construction, to recover damages for his death.

The plaintiff's claim alleges various acts of negligence as the basis of the action, but contains no specific allega-

tion that there was any negligence on the part of the defendants owing to the condition in which the track upon which the train was moving was; and in the affidavits which the defendants file for the purpose of obtaining the leave they say in terms that the accident was caused by the subsiding of the tracks, for which they were in no way responsible.

The Master thought that the case was one in which it was not proper that the third party proceedings should be allowed, and, as already indicated, he discharged the ex parte order. The Chancellor, however, reversed that order, directed that the third party should go to trial at the present sittings, at which the case is entered for trial, and provided what in terms the Rules provide, that plaintiff shall not be prejudiced or unnecessarily delayed by the third party proceedings.

It is somewhat strange, and there was no explanation given of it, that, although the order of the Master in Chambers setting aside his ex parte order was made on 29th June, the appeal from that order was not brought on to be heard until late in the month of September. There was nothing, so far as I am aware, to prevent the appeal having been brought on in vacation and the matter then disposed of.

Plaintiff, as I have said, has set his case down for trial, and he objects to the third party proceedings as unnecessarily delaying the trial; and the third parties appeal on the ground that the case is not one for a third party notice.

We do not agree with the argument of Mr. Denison, that if the case were not complicated by the circumstances to which I shall afterwards refer, it would not be one proper for the third party notice.

In substance, so far as the defendants are setting up a claim against the third parties, it is a claim for a breach of either an express or an implied warranty that the track was safe and sufficient; and if the defect in the track were the sole cause of the accident, and the case were not complicated by other circumstances, Confederation Life Association v. Labatt, 18 P. R. 258, a decision of a Divisional Court, would be a direct authority that such a case is a proper one for third party proceedings. That was an action brought for the conversion of goods; the defendant sought to bring in by the third party proceedings the person who had sold him the

goods, claiming relief over founded upon either an express or an implied warranty of title upon the sale of the goods; and it was held by Mr. Justice Meredith in the first instance and afterwards on appeal by a Divisional Court that it was a case coming within the Rule for third party proceedings.

There is, however, in addition to the circumstances I shall refer to, the fact that, according to the allegation of defendants, if the accident was caused by the subsiding of the track, that was outside of their control, and they are not liable. If that be so, the case is not one for third party proceedings.

There is not only the action by Mahoney, but also two other actions, one by representatives of a workman who was killed, and the third by a workman who was injured in the same accident; and also there may be a third claim,—although Mr. Paterson indicated that that might not be pressed—by the defendants for the damage done to the derrick.

Now it seems to me it would be improper that the third parties should be subjected to have the damages for which, if they are liable at all, they are liable for upon their breach of their warranty or undertaking, or whatever it was, to provide a safe and sufficient track, assessed piecemeal. If the third party notice is permitted to stand, there will be an assessment of part of the damages now; then it may be that if third party proceedings are taken in the other cases, there will be separate assessments there also, or if third party proceedings are not taken in those cases, there would be the necessity of an action by defendants against the third parties for the damages which they will claim to have suffered, if they fail in the actions.

Looking at that circumstance, and having regard to the terms of the Rule that the plaintiff is not to be prejudiced or unnecessarily delayed, we think the order of the Chancellor ought not to stand.

The plaintiff, as I have said, has his case entered for trial, and is ready to go on, and if, according to the practice, the result of an order letting in the third party to defend is to open the pleadings and to require a new notice of trial and a new entry of the cause, the result will be that the plaintiff will be thrown over until the next sittings of the Court for the trial of jury cases.

In Confederation Life Association v. Labatt, Mr. Justice Rose held that the effect of an order giving the third party leave to defend was to open the proceedings, and that he was entitled to a new notice of trial. That case has apparently been recognized as laying down the proper practice in that respect, and therefore the result of allowing this order to stand would be, if upon the order for directions the third party was permitted to defend, that the plaintiff would be thrown over until the next sittings of the Court for the trial of actions with a jury.

Upon principle, I do not see why the third party should not be entitled to the same notice of trial that he would be entitled to if he were defendant to an action brought by the defendant against him. It is practically a cross-action, and it is settled that there is no power in the Court to abridge the time allowed for service of a notice of trial.

It would be very desirable that the parties should all agree to be bound by the trial in this action as to the cause of the accident; but we are unable to force the parties to agree to that, and apparently the third parties are unwilling to agree.

We think, therefore, it would be unjust to the plaintiff and not convenient that the third party proceeding should be permitted to go on, and the result, therefore, is that the appeal must be allowed, and the order of the Master in Chambers must be restored; the appellants will have their costs of the appeal to the Chancellor and of this appeal, to be paid by the defendants, and the costs of the plaintiff of the two appeals will be costs to him in any event of the action.

ANGLIN, J. NOVEMBER 24TH, 1906.

TRIAL.

SMITH v. SMITH.

Dower — Lands Subject to Charge for Maintenance — Exchange for Other Lands—Conveyance to Chargee—Recital — Evidence to Contradict — Right to Dower Subject to Charge and to Lien for Improvements—Costs.

Action for dower, tried without a jury at Milton.

G. H. Kilmer and D. O. Cameron, for plaintiff.

G. H. Watson, K.C., J. G. Farmer, Hamilton, and J. W. Elliott, Milton, for defendant.

ANGLIN, J.:—Plaintiff sues to recover dower out of certain property in the town of Oakville. Her deceased husband, Miles H. Smith, under the will of his father, who died in 1886, became the owner of two farms known as "the Homestead farm" and "the Brethour farm," charged with certain provisions in favour of his sister, which have been satisfied, and with the maintenance of his mother, the defendant, during her widowhood. In November, 1890, Miles H. Smith borrowed . . . $2,000 from one Thomas to enable him to go into business at Oakville, giving as security a mortgage on the Brethour farm, in which his mother, the defendant, joined as a mortgagor. In May, 1891, Miles Smith arranged with one Turner to exchange the equity in the Brethour farm for the Oakville property in which plaintiff now claims dower. This Oakville property was free of incumbrances. The deed from Turner to Miles Smith bears date 12th May, 1891, and was registered in December of the same year. Meantime, on 23rd September, 1891, Miles Smith married the plaintiff. Defendant had, with her son, gone into possession of the Oakville property in May, 1891, and, upon his marriage, her son took his wife, the plaintiff, to reside there also. The marital relations of this pair were very unfortunate. After two separations within a year of their marriage, lasting each for several months, they separated a third time about April, 1893, and since that time plaintiff has resided with her father. The title to the Oakville property remained in the name of Miles Smith until December, 1895, when he made a general assignment for the benefit of his creditors to one Howarth. In February, 1896, Howarth, by deed which contains a recital that Miles Smith had satisfied the claims of all his creditors, reconveyed the Oakville property to Miles Smith. By deed dated 18th March, 1896, Miles Smith conveyed the Oakville property and his interest in the Homestead farm to his mother, the defendant. This deed contains recitals that the Oakville property had been conveyed to Miles H. Smith, instead of to defendant, by mistake, and that Miles H. Smith was indebted to defendant in the sum of $2,380 and interest, on promissory notes; that defendant had instituted suit to recover these moneys and to establish

her claim for maintenance under her husband's will; and that, in consideration of the withdrawal of such suit, Miles Smith had agreed to convey the properties in the deed described to defendant. The grant is made in consideration of the premises and of . . . $2. After some peculiar matrimonial adventures, in which plaintiff was not a participant, Miles Smith died in October, 1905.

Although several defences were pleaded to plaintiff's claim, there is no evidence before me justifying consideration of any defence except an alleged agreement made between defendant and her son, Miles Smith, as defendant asserts, in May, 1891, before her son's marriage to plaintiff, that, in consideration of defendant relinquishing her right to maintenance charged upon the Brethour farm, and joining her son in conveying that farm to Turner, he should hold the Oakville property . . . in trust for her. The conveyance to Miles Smith from Turner is in form absolute, containing no allusion to any trust whatever.

In her defence defendant pleads that the conveyance of the Oakville property was made to her son Miles through error and mistake, and should have been made directly to herself. The recital in the deed of 1896 from the son to the mother is of similar import. But in her evidence at the trial defendant said positively that it was, for some reason that she is quite unable to explain, clearly understood that the conveyance from Turner should be made to her son, and that he should, at some later date, transfer the property to her. Plaintiff joins issue on the defence pleaded. The question, therefore, for determination is whether Miles H. Smith acquired and held the Oakville property on trust to convey it to his mother. Plaintiff has not pleaded the Statute of Frauds in her reply as an answer to this alleged parol trust. In argument her counsel asked to be allowed by amendment to so plead. In the view which I take of the evidence, I shall not direct this amendment.

The evidence of defendant is in many respects not satisfactory; yet she was not at all shaken in her story that she joined in the conveyance of the Brethour farm only on condition and in consideration of her son acquiring the Oakville property for her. In corroboration she offers the evidence of her brother, John Wilson, who states that

Miles Smith told him in 1891 that he held the Oakville property for his mother, and that she was to have a deed of it; and also that of G. H. Morden, who says that Miles Smith told him that the Oakville property was acquired for his mother for her interest in the Brethour farm. But the daughter of defendant, also called on her behalf, who says she was living with her mother in 1891, and fully understood the arrangement upon which the exchange of the two properties was effected, stated that the understanding was that her mother's interest in the Oakville property would be the same as she had in the Brethour farm.

Plaintiff, on the other hand, swears that her then intended husband assured her, when negotiating for the Oakville property in May, 1891, that he was acquiring it as a home for himself and her. There is also the singular fact that, although fully aware that the title to this property stood in her son's name from 1891 (she says the deed to her son was in her possession), defendant took no steps to secure a transfer of it to herself until 1896; there is the further fact that this property was apparently treated as something which passed under the assignment from Miles H. Smith to Howarth in 1895; and there is the utter absence of any adequate explanation why the deed of this property was intentionally (as defendant swears) taken in the name of her son, if it were from the first also intended that it should be absolutely and entirely hers.

Again, the Brethour farm is sworn by witnesses for defendant to have been worth not more than $2,500 to $3,000 in 1891; the Oakville property was, I find upon the evidence, worth about $3,500. On the former the mother had a charge for maintenance, which was also charged on the more valuable Homestead farm, where she had a right of residence as well. Her counsel in argument estimated the proportion of her maintenance which the Brethour farm should bear as three-eighths, the Homestead farm being in this view chargeable with the provision made for her residence, and also with five-eighths of the cost of her maintenance. So that, if defendant's story of the arrangement should be accepted in its entirety, upon the exchange of a mere three-eighths of her maintenance during her widowhood (exclusive of the provision for residence) upon a pro-

perty worth $2,500 to $3,000, she obtained the fee simple in a property worth $3,500.

Looking at the whole evidence, and weighing as best I can all the probabilities, I have reached the conclusion that the daughter, Mrs. Chisholm, correctly stated the arrangement made in 1891, when she said that the agreement was that her mother should have in the Oakville property the same interest which she had formerly in the Brethour farm, namely, a charge of maintenance upon it jointly with the Homestead farm, to the exclusion of provision for her residence, which was, by her husband's will, charged expressly upon the Homestead farm. In this view, the making of the deed of the Oakville property to Miles H. Smith—wholly inexplicable upon defendant's own story—is quite readily understood. His conveyance to his mother in 1896, with its recital that the title had been vested in him by mistake, falsified by defendant's evidence, I cannot regard as aught else than an attempt on the part of Miles H. Smith and his mother to defeat whatever claim plaintiff—with whom Smith had then finally broken—might make to dower out of this property.

I, therefore, find plaintiff entitled to dower out of the Oakville property, subject to the right of defendant to a charge for maintenance thereon, to the extent to which she had a similar charge under her husband's will upon the Brethour farm, and also subject to any claim which defendant may have for permanent improvements made by her upon the Oakville property, to priority for which, it was conceded by counsel for plaintiff at the trial, defendant is entitled. . . .

[Judgment accordingly, with a reference to a Master.]

Plaintiff having succeeded in establishing her right to dower, but only subject to a charge in favour of defendant, which plaintiff did not admit—in the exercise of my discretion, I allow to plaintiff one-half of her costs of this action down to and inclusive of judgment, to be paid her by defendant. Further directions and subsequent costs reserved.

BRITTON, J. NOVEMBER 24TH, 1906.

TRIAL.

PREST v. PREST.

Lunatic—Moneys Expended in Maintenance of Lunatic not so Found — Right to Recover — Ability to Contract — Necessaries—Evidence.

Action to recover moneys expended by plaintiff in the care and maintenance of defendant, a supposed lunatic, tried without a jury at Belleville.

E. G. Porter, Belleville, for plaintiff.

Malcolm Wright, Belleville, for defendant.

BRITTON, J.:—Plaintiff and defendant are brothers. Defendant is the owner of a farm of 55 acres . . . but he has not done any work worth mentioning upon his farm or elsewhere for a score of years. The father of plaintiff and defendant has been dead about 20 years. Defendant became more or less incapable during the lifetime of his father. After the father's death, defendant lived with and was cared for by his mother and brother John, and by John after the mother's death. About 1st July, 1896, John removed from Huntingdon, and Mrs. Wiggins, a sister, took charge of defendant. About the middle of April, 1898, an arrangement was made by Mrs. Wiggins for defendant, or by defendant himself, with plaintiff, that plaintiff would take defendant's farm and maintain defendant. It is not pretended that any promise by defendant to pay for his maintenance arises by implication, which as between strangers would arise. It is a case in which an agreement must be proved. . . . It is not suggested that plaintiff was either able or willing to take care of and maintain defendant without compensation, but it is alleged that there was the express bargain or arrangement between Mrs. Wiggins, with the approval of other members of the family, on the one side, and plaintiff on the other, that plaintiff should simply get the use of defendant's farm for the care and service rendered to defendant.

The case is not at all like or governed by Redmond v. Redmond, 27 U. C. R. 220, or Iler v. Iler, 9 O. R. 551, or similar cases.

Plaintiff says Mrs. Wiggins did propose that he should take defendant's farm and maintain defendant. Plaintiff was at first unwilling to take defendant at all. Afterwards, upon a full consideration of the matter, and after talking about it with his family, and after defendant came to plaintiff and said to plaintiff, "Go in and work the place and you will get your pay," plaintiff consented.

Defendant did not improve in health; he became more troublesome; the health of plaintiff's wife was menaced by the work put upon her; so about April, 1906, plaintiff took steps to have defendant placed in the Rockwood hospital for the insane, where he now is.

Plaintiff gave evidence that what he and his family did for defendant was worth $1 a day, and he claims $300 a year for the 8 years. Against that he is willing to credit $50 a year for the use of the farm, which, according to the evidence of plaintiff and his witnesses, is only of the value of from $1,200 to $1,500.

I am of opinion that defendant had sufficient mental capacity, at the time of his going into plaintiff's family to reside, to know that he was to pay plaintiff for what plaintiff did. I think that defendant now knows that he was taken care of by plaintiff at his, defendant's, expense. Defendant was not imposed upon by anything plaintiff did. Plaintiff does not set up any hard and fast bargain as to amount. Plaintiff, if entitled, is entitled only to what is reasonable for the services rendered. Defendant was of weak mind, unable to take care of himself, but he was not a lunatic so found or declared in any proceeding. Plaintiff knew all about defendant, and could not be heard in any attempt to enforce any executory contract which was not for defendant's benefit. This case differs from cases cited in which the action was against a person in fact insane, but where plaintiff had no knowledge of, and no reason to suppose the existence of, insanity. Defendant was subject to insane delusions. . . . He was sane upon certain subjects; he had lucid intervals. I do not think defendant's delusions were sufficient to avoid a contract to pay what was reasonable for his maintenance. Labour and money were ex-

pended for protection of defendant's person and estate: see Pollock on Contracts, 7th ed., pp. 91, 92; Williams v. Wentworth, 5 Beav. 325; Jenkins v. Morris, 14 Ch. D. 674; Macdonald v. Grout, 16 Gr. 37.

Apart from the question of defendant's competency to contract, the facts seem to bring this case within the decision of Re Rhodes, 44 Ch. D. 94, to the extent at least of the proposition that "wherever necessaries are supplied to a person who, by reason of disability, cannot himself contract, the law implies an obligation on the part of such a person to pay for such necessaries out of his own property." But, if no competency to contract, or if competency and no contract, a further question presents itself. Defendant owned a farm; the income from it might be regarded as sufficient for his maintenance. If not in fact sufficient, was the deficiency provided in labour and food and raiment under circumstances from which an implied obligation would arise? . . . The care was a day-by-day service—an expenditure of time and money by plaintiff for defendant—which, I think, was necessary.

There is no way of computing or arriving at the value with anything like mathematical accuracy, but I think there is a way of doing so without injustice to defendant. I find that what plaintiff did was reasonably necessary, and no more than was reasonably necessary, for defendant's care—so plaintiff is entitled to recover in this action.

Plaintiff's statutory declaration furnished to the medical superintendent at Rockwood, to the effect that he, plaintiff, did what he did for defendant out of pity for him can hardly be urged against plaintiff. The declaration must be taken as a whole. Plaintiff claims in it $1 a day, and I think plaintiff meant that he would not even for $1 a day do what he did for defendant unless moved by pity so to do.

. . .

One dollar a day is an unreasonable amount, in the circumstances. The amount must in some way be considered according to defendant's means and station in life. The care of him was disagreeable work, no doubt, and it became increasingly so, but $1 a day would soon absorb defendant's farm and put him upon the public. I think the supposed yearly value of defendant's property on 15th April, 1898, may be taken as a fair estimate of the amount to be paid to

plaintiff. Defendant's farm as a farm should be worth $75 a year and taxes. The house as a residence, when plaintiff's care of defendant commenced, brought $6 a month. . . . If the house could have been rented for $72 a year, that together with $75 for the farm, making in all $147 a year, would be reasonable compensation to plaintiff. Care for 8 years at $147 a year, $1,176. Plaintiff must be charged with amount received from house rent, $108, and 9 years' use of farm at $75 a year, $675, in all $783, which, deducted from $1,176, leaves $393.

Judgment for plaintiff for $393 with costs.

MACMAHON, J. NOVEMBER 24TH, 1906.

TRIAL.

DART v. QUAID.

Promissory Note—Action on—Defence of Non Fecit—Consideration—Purchase Price of Horse—Finding as to Signatures—Knowledge of Nature of Document Signed — Agreement Admittedly Signed—Reference to Notes—Holder in Due Course.

Action on a promissory note for $666 and interest, tried without a jury at Chatham.

L. J. Reycraft, Ridgetown, for plaintiff.

M. Wilson, K.C., and W. E. Gundy, Chatham, for defendant.

MACMAHON, J.:—The action is brought on a promissory note, of which the following is a copy: "Dunlop, January 31, 1905. On the 1st of April, 1906, for value received, I promise to pay R. Hamilton and John Hawthorne or order six hundred and sixty-six dollars ($666.00), at the Bank of Commerce, Goderich, with interest at the rate of six per cent. per annum." This was signed by Robert Quaid, Burt Quaid, Albert Quaid, Fred Quaid, James Scott, and John Quaid, the defendants.

This note is the first of 3 promissory notes for an equal amount, signed by defendants, and said to represent the price of a Percheron stallion purchased from the payees of the note, through their agent, George H. L. Watterworth. . . . .

Defendants plead non fecerunt; that plaintiff is not a holder for value; that defendant agreed to take shares in the horse then in possession of Watterworth as agent for Hamilton and Hawthorne, said shares as a matter of form being fixed at $200 each, and that the horse was to be left in possession of defendant Robert Quaid, and the price was to be paid out of the earnings of the horse, 33 per cent. whereof each year was to be handed over to Hamilton & Hawthorne until the horse in that way paid for himself.

Hamilton & Hawthorne deposited in the Molsons Bank at Ridgetown the above notes and others aggregating $60,000, being what are called syndicate notes or notes given by several persons who had joined in the purchase of stallions from them. Such of these as plaintiff wished to purchase were offered by Hamilton to him, and he made a selection of $20,000 of the notes, for which he, on 21st September, 1905, paid $17,850. He is a holder in due course. . . .

Robert Quaid is a farmer . . . and defendants Burt, Albert, and Fred Quaid are his sons; John Quaid is his nephew; and James Scott is a farmer. . . .

Robert, Burt, and Fred Quaid were examined for discovery on 29th September, 1906, and there was at that time an inclination on the part of each to deny his signature to the note. Robert said it looked like his signature; thought it was his signature; but he never signed a note, and what he did sign was a paper about 18 inches long, which Watterworth represented as an agreement whereby they were to have the use of the horse for 3 years, and were to give 33 per cent. of what the horse made during that time, when they were to become the owners of it. When asked if he signed more than one document, he answered: "I think we signed three of these agreements for one, two, and three years." When shewn the note, he said: "The writing part was not there, but whether I looked it over or not I can't say, but I was listening to him as I am to you now. He

(Watterworth) hands me the paper and he says, 'Put down your name there,' and I did." Question 45: "Was there no writing in the body of this (the note) when you signed it?" A. "No.

At the trial he said he saw a horse at the London Fair that Watterworth had, who asked him if he could not take a share in a horse, saying he would put one in the neighbourhood, and the horse would pay for himself out of what he would earn; that during the signing of the papers one of the boys asked if one of the papers was a note, and Watterworth replied, "No note about it;" and that Watterworth read over the agreement to them, and they signed three agreements—"We signed two agreements and an insurance policy." . . .

[The learned Judge here summarized the evidence of the other defendants, which was similar to that of Robert Quaid, and continued:]

I find that, after bargaining about the horse in Robert Quaid's house, the three notes were signed there by Robert Quaid and his three sons, and two days afterwards by John Quaid at his father's house, and by James Scott, who directed his son Robert to sign for him.

That night, after the notes were signed by Robert Quaid and his sons, Watterworth gave to Robert Quaid this guarantee: "Dunlop, Jan. 31st, 1905. For consideration of $2,000 we hereby guarantee the Percheron stallion Munster (5332 h) to foal 50 per cent. of the mares bred to said stallion during the season of 1905, and with proper management if said stallion does not comply with said guarantee we hereby agree and bind ourselves to furnish another stallion of the same value. If said stallion is in as good health and as sound as when sold to the company at or on the premises of owners free of charge to them. Hamilton & Hawthorne." . . .

On 3rd February, 1905, on Watterworth's return to Robert Quaid's house, he gave him the following certificate, which Robert Quaid said he read over on the morning of the 4th: "Dunlop, February 3rd, 1905. This is to certify that Robert Quaid has purchased 2½ shares of $500 in the Percheron stallion Munster (5332 h) from Hamilton & Hawthorne, and settled for the same."

A like certificate for each of the following was left . . . . at Robert Quaid's house; Robert B. Quaid (Burt), 2 shares, $400; Thomas F. Quaid (Fred), 2 shares, $400; James A. (Albert), 2½ shares, $500.

A certificate was sent by Watterworth, dated 3rd February, from London . . . addressed to John Quaid . . . .

A certificate was on the same day either sent to James Scott or left at Robert Quaid's for him, certifying that he had purchased one-half share at $100.

The note sued on and the other two notes signed by defendants are all cut exactly the same size—8 inches wide by 4 inches deep—and evidently bound in a book with the counterfoils attached, and perforated to enable the blank notes to be readily detached. The bodies of the notes are in good clear type, the names of the payees, "R. Hamilton and John Hawthorne," being in capitals. The blanks for the place where made, the date when payable, the amount of the note, and the place where payable, are all filled in in large and extremely legible writing.

Defendants said that all the documents they signed were 18 inches long, while the three notes are 4 inches in length or depth, and were never any longer. If defendants, or any of them, had looked while signing, it was impossible that they should not have seen and recognized that what they were signing were promissory notes. If they did not look, they were guilty of negligence, and therefore liable to a holder in due course.

It strikes me that the story about not knowing that what they were signing were notes representing the price of the stallion, was an afterthought. They received the guarantee in which the price of the horse is mentioned as being $2,000. Then the certificates left with or for the purchasers shew that the shares held by them amount in the aggregate to $2,000.

On 8th February, 1905, Hamilton & Hawthorne wrote to Robert Quaid saying that they had been informed by Watterworth that he (Quaid) had purchased the stallion "Munster," and they considered that he had bought the best stock horse they imported last fall. Robert Quaid answered this letter on 21st February, saying he was well satisfied with the horse. He did not reply saying—as he

should have, were it the truth—"We did not purchase your stallion, but we entered into an agreement with Mr. Watterworth by which we are to have the stallion for 3 years, and he is to be paid for out of his earnings during that period."

At the trial Watterworth said that the agreement which defendants had sworn to as being signed by them he sent to Hamilton & Hawthorne. . . . The agreement is on a printed form, the blanks left being filled in with the class of horse, the name of the stallion, the pedigree number, and the price of the stallion, which is twice written and twice in figures.

This agreement, which is about 8 inches in length and 4 in width (across the width of the paper being printed the agreement, containing 15 lines, which could be read in half a minute), was, I find, signed by the 5 Quaids who signed the note sued on, and also has the name of James Scott, which, I assume, is the signature made by himself at James Quaid's house.

The agreement is as follows: "For the purchase of a stallion horse to be held in Dunlop and surrounding towns and their vicinity, I hereby agree to pay the amount subscribed opposite my name for the Percheron stallion 'Munster' (5332 h) to be purchased from Hamilton & Hawthorne, Simcoe, Ont., providing two thousand dollars, $2,000, is subscribed for, or otherwise this agreement shall be null and void, said amount of two thousand dollars ($2,000) to be paid in 3 joint notes of equal amounts, payable in one, two, and three years from 1st April, 1905, with interest at the rate of 6 per cent. per annum, or to be paid in cash at the option of the subscribers on completion of this subscription list. Dated at Dunlop this 31st day of Jan., 1905."

The 6 names were signed below, and opposite each was placed an amount, $500, $400, or $100, the six amounts aggregating $2,000. . . .

I have no doubt that Watterworth said that the horse would easily pay for himself in 3 years, for he told the Quaids they could say they had a stallion worth $2,000, which would secure patronage where the owners of other and less priced stallions would fail. That is how the large revenue was to be derived from the stallion. But Watterworth denied making the statements sworn to, that no notes

were to be given, and that defendants were not to pay unless they got the money out of the stallion's service. I credit Watterworth's evidence because the contract signed by defendants supports it, the guarantee given by Watterworth in the name of his principals supports it, and the certificates left with or sent to defendants support it.

Each of the defendants signed 4 documents, and the agreement they did sign, and the only one they signed, is the one agreeing to purchase the stallion for $2,000, and to give 3 promissory notes for the price. . . . And the certificates left and sent by Watterworth on 3rd February, 1905, correspond with the contract. . . .

These defendants are all intelligent farmers, and I cannot, in the face of the documentary evidence produced, credit the statements made by them that they signed these notes without knowing what they were signing. If they did sign without looking and knowing, they were grossly negligent, and Foster v. Mackinnon, L. R. 4 C. P. 704, and Lewis v. Clay, 14 Times L. R. 149, relied on by counsel for defendants, do not apply.

Judgment for plaintiff for $666 with interest and costs.

NOVEMBER 24TH, 1906.

DIVISIONAL COURT.

SELKIRK GAS AND OIL CO. v. ERIE EVAPORATING CO.

Contract—Supply of Gas—Fixing Rate—Oral Agreement — Conversations—Evidence.

Appeal by plaintiffs from judgment of County Court of Haldimand in an action tried by the County Court Judge without a jury.

Plaintiffs were a company supplying natural gas. Defendants were about to start business within the field of operations of plaintiffs. One Grece was the manager of defendants, and had full authority to make a contract with plaintiff. One J. W. Holmes was the officer of plaintiffs

whose duty it was to make contracts with intending consumers of gas. And these two did make a contract for the supply of gas by plaintiffs to defendants for the season of 1905. So far the parties agreed.

This action was brought to recover 13 cents per thousand. The defendants alleged that the price agreed upon was 6 cents per thousand.

The County Court Judge found in favour of defendants, and plaintiffs appealed.

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

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

W. T. Henderson, Brantford, for defendants.

RIDDELL, J. (after setting out the facts as above):—The one issue seems to be, what was the contract that immediately was made?

The learned Judge has found in favour of defendants, upon evidence which counsel for plaintiffs upon the appeal admits is consistent with his finding.

A reading of the evidence convinces me that no other decision could reasonably have been come to.

The facts are chronologically as follow. In May, 1905, Grece applies to plaintiffs for free gas. On 26th June a meeting of the directors of the plaintiffs is held at which a rate for gas, 13 cents per thousand, is fixed by the directors. At this meeting the owner of the business, the real defendant, is present. There is no pretence of any contract having been made at this meeting. On 7th August, 1905, Holmes tells Grece that he does not think Grece will get free gas by means of the subscription list that is being circulated to help defendants, but thinks it will cost him 6 cents, and possibly only 5 cents. No contract yet.

On 12th August, 1905, another meeting of the board of directors of plaintiffs is held, at which Grece is present, when a rate of 13 cents and 18 cents is spoken of, and Grece says to the board, "If gas is going to cost that, I can burn coal cheaper." He is then told that he could see Mr.

Holmes, and he would give him a rate that would not hurt him. No contract so far.

A few days later Grece meets Holmes, and this is his account of the interview and subsequent events: "A few days later I again met Mr. Holmes. I was alone, and asked, 'Is there anything further in regard to gas?' And he said: 'No, nothing more than I have told. I can't tell you exactly, but I will guarantee it will not cost more than 6 cents.' I said, 'If 6 cents is satisfactory to the company, I will use it.' Holmes said, 'It is all right, you needn't worry.' Nothing more said about the gas until the meter was read by Mr. Abrahart in the fore part of October. Mr. Holmes made connection ready for me, and I laid pipe and connected myself, and I began using gas about 23rd September, 1905."

This is the contract sued upon, and is the only contract anywhere alleged.

I cannot understand how there can be any doubt that such evidence amply justified—if, indeed, it did not compel—the learned Judge to find as he did.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

GARROW, J.A. NOVEMBER 24TH, 1906.

C.A.—CHAMBERS.

CITY OF HAMILTON v. HAMILTON, GRIMSBY, AND BEAMSVILLE R. W. CO.

Court of Appeal—Leave to Appeal from Judgment at Trial—Extension of Time—Mistake of Solicitor.

Motion by defendants for leave to appeal directly to the Court of Appeal from the judgment at the trial with a jury

before MEREDITH, C.J., when damages were assessed against defendants at $7,500, and to extend the time for appealing.

J. Dickson, Hamilton, for defendants.

W. A. H. Duff, Hamilton, for plaintiffs.

GARROW, J.A.—Without regard to the merits—the question being simply one of damages—I think leave should be granted. Judgment was delivered only on 11th October last, and within 30 days all the necessary steps to perfect an appeal to this Court were taken, if such an appeal had lain without consent and without leave, as was apparently the mistaken idea of defendants' solicitors. The amount is large. There was an undoubted right to go to the Divisional Court, or to come to this Court on consent or by leave. Defendants have satisfied me of their bona fide desire and intention to prosecute an appeal, and in the circumstances they should be relieved from the consequences of the mistake into which the solicitor fell in not observing that consent or leave was necessary. But they should of course pay the costs of this application and of the other proceedings taken by plaintiffs in consequence of the mistake, in any event of the action. Leave to appeal granted and time extended for 60 days from 11th October.