THE

ONTARIO WEEKLY REPORTER

VOL. 24 TORONTO, MARCH 6, 1913. NO. 2

HON. MR. JUSTICE KELLY. FEBRUARY 12TH, 1913.

NILES v. GRAND TRUNK RW CO.

4 O. W. N. 820.

Water and Watercourses—Flooding of Plaintiff's Lands—Unnatural Collection of Surface Water—Defendant Railway Company—Water from Locomotives — Claim to be Acting under Statutory Powers—Municipal Corporation—Liability of—Injunction—Stay.

KELLY, J., *held*, that the powers and privileges given defendant, the Grand Trunk Rw. Co., by statute, did not absolve it from its common law liability to make compensation to plaintiff, the owner of lands adjoining its lands, for an unnatural collection of surface water and other water upon its lands, and the discharge thereof upon the lands of the plaintiff, to their damage.

Rylands v. *Fletcher*, 3 H. L. C. 330, followed.

Judgment for plaintiff for $1,525 and costs, and an injunction. Judgment stayed for four months, to enable defendant to devise a mode of preventing future flooding.

Action for damages sustained by plaintiff through the flooding of his lands by reasons of defendants' wrongful acts upon the neighbouring lands, and for an injunction.

E. G. Porter, K.C., and W. Carnew, for the plaintiff.

D. L. McCarthy, K.C., and W. E. Foster, for the defendant.

HON. MR. JUSTICE KELLY:—Defendants own and occupy for their yards and tracks a large parcel of land in the township of Thurlow, a short distance to the east of their passenger station in the city of Belleville. Along the southerly limit of these lands runs a travelled road leading into Belleville. Immediately to the north of this road, and parallel thereto, are located several railway tracks, including the main line tracks of defendants' road. To the north of the tracks are located defendants' roundhouse for locomotives, stand-pipes for the supply of water, and ashpits used in

quenching and cooling the burning coal and hot ashes which are discharged from the locomotives before they are taken into the roundhouse on returning from their "runs" or trips.

These yards were established comparatively recently; and before the defendants acquired them there was running easterly and westerly, along the north limit of the lands now occupied by the tracks, a public road known as the second concession line. This road has been closed, and has been taken by defendants as part of their yards; and the travelled road above referred to, running along the southerly limit of the tracks, was built by defendants, and is now used in substitution for the second concession road. Running southerly from the travelled road, and from a point therein about south of the defendants' stand-pipes, is another public road known as Herkimer Avenue.

On the east side of Herkimer avenue, and running southerly from the travelled road, are plaintiff's lands, which are known as part of the west half of lot 10 in the first concession of the township of Thurlow. Part of these lands has been used by the plaintiff and his predecessors in title for market garden purposes, and part as meadow land and pasture; other parts being an orchard.

For their purposes, and particularly for use in their stand-pipes and ashpits, defendants draw water from the river nearby. From December, 1910, the escape of waste water from these pipes and pits has been directed towards and discharged through a pipe laid southerly under the tracks until it reaches the travelled road at a point about the westerly limit of Herkimer avenue. The surface water from several acres of defendants' lands is also directed to and through this same pipe.

The quantity of water so brought upon the defendants' lands and discharged on to the travelled road has been variously estimated, but, taking it at the lowest estimate placed on it by witnesses for defendants, who made a test thereof, the amount is very considerable, as it must be when we consider that at least fifty locomotives run into the roundhouse each 24 hours, and that water is used for each of these in the ashpits. In addition to this it was shewn that there is considerable leakage from the stand-pipes, and that water escapes when the locomotive tanks are being filled.

All this water finds its way to and through the same pipe. Tests made by plaintiff's witnesses shew a much greater flow than that shewn by defendants' witnesses. There is no doubt, however, that even if the evidence of the latter be taken, an appreciable quantity is carried towards and on to the travelled road.

The tests were made a short time prior to the trial. In the winter season the quantity of water is increased, as then the pipes flowing into the ashpits are allowed to run continuously or almost so, in order to prevent them from freezing.

For many years there has existed on Herkimer avenue, between 600 and 700 feet south of the travelled road, a culvert from which an open drain runs easterly through plaintiff's lands and through the lands of other owners to the east thereof. The land adjacent to this drain, and also the lands to the east of it, are low-lying.

Defendants, when building the travelled road along the southern limit of their property, constructed a small stone culvert under the roadway at the head of Herkimer avenue. The water which flowed from the defendants' lands through the pipe under the tracks and on to the travelled road exceeded the capacity of this culvert, and part of it overflowed the road from north to south, injuring the surface of the roadbed. The township authorities enlarged the culvert so as to carry all the water under the roadway.

Complaints having been made that this water was overflowing the lands to the west of Herkimer avenue, the defendants in December, 1911, of their own accord, and without any authority from the municipality, dug out and deepened an open ditch on the west side of the roadway on Herkimer avenue, from the travelled road to the culvert opposite plaintiff's lands.

From the time the water began to flow from the standpipes and ashpits, part of it got on to and overflowed plaintiff's lands. The opening and deepening of the Herkimer avenue ditch enabled it to flow more freely and in greater volume to and through the Herkimer avenue culvert; and from that time the quantity which overflowed plaintiff's lands was increased. Before the water from the standpipes and ashpits found its way into the ditch through plaintiff's lands, that ditch was of sufficient capacity to carry off all the water flowing in that direction, and there was none of the trouble

of which the plaintiff now complains. The flooding is and has been such as to seriously interfere with the use of the lands as a market garden, and many fruit trees have been killed or injured. Water also now finds its way into the cellar of plaintiff's residence.

The evidence, not of one witness, but of a number, both as to the manner in which the defendants collected and discharged the water, and also as to plaintiff's sustaining substantial damage, is unmistakable. The condition of which the plaintiff complains, and the damage, are continuing; he is not debarred by lapse of time, as has been contended by defendants, from bringing action.

The law as to liability for interfering with the natural flow of surface water, and causing it to overflow on other lands, is dealt with in such authorities an Angell on Watercourses, 7th ed. 133 (sec. 108j); Gould on Waters, 3rd ed. 539 and 540 ((sec. 266) and 545 (sec. 271).

If the proprietor of the higher lands alters the condition of his property, and collects surface and rain water thereon on the boundary of his estate, and pours it in concentrated form and in unnatural quantity on the lands below, he will be responsible for all damage thereby caused to the possessor of the lower lands. Addison on Torts, 5th Eng. ed. 247.

A railway corporation has no right, by the erection of embankments, construction of culverts, or the digging of ditches, to collect or discharge unusual quantities of surface water upon adjoining lands. Gould, 3rd ed. 551.

Defendants contend that, not only as to the surface water which is directed towards the ditch in plaintiff's lands, but also as to the water which they brought on to their own premises and then discharged in the same direction, they are not liable; that by the terms of their act of incorporation and by the provisions of the Railway Act, they are within their rights in disposing of the water as they do dispose of it, in carrying on the operations of their business.

I am unable to accept this broad proposition, that because they have been given certain powers in furtherance of the objects for which they were incorporated, they have the right so to carry on these operations as, under such circumstances as appear here, to cause damage to others.

The law as laid down in *Rylands* v. *Fletcher*, 3 H. L. Cas. 330, applies to this case. In his judgment in that case, Lord Chancellor Cairns quotes with approval from the judgment

of Blackburn, J., in *Baird* v. *Williamson*, 13 C. B. (n. s.) 317, that "the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril; if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems on principle just." And "it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority, this, we think, is established to be the law, whether the thing so brought be beasts, or water, or filth, or stenches."

Lord Cranworth, in *Rylands* v. *Fletcher*, *supra*, says: "The defendants, in order to effect an object of their own, brought on to their lands . . . a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible."

The same conclusion was reached in *Whalley* v. *Lancashire & Yorkshire Rw. Co.*, 13 Q. B. D. 131; where the defendants, to protect their embankment from damage from an accumulation of water, owing to an unprecedented rainfall, cut trenches in it through which the water flowed and reached and injured the lands of the plaintiff.

The circumstances of the present case are much the same as those in *Rylands* v. *Fletcher*, with the added fact that defendants not only brought upon their premises this large quantity of water and discharged it therefrom, to the

injury of the plaintiff, but by widening and deepening the ditch on Herkimer avenue, they turned it more directly, and in larger quantities on to plaintiff's lands.

I do not agree with the defendants' further contention that the plaintiff's remedy is against the municipality, and not against them, and that his proceedings should be under the Drainage Act and not by action in this Court. I am unable to see how defendants can escape liability.

Then as to the amount of damages. Plaintiff says his property has been depreciated in value from $12,000 (his statement of its value before the damage) to $2,000. This is certainly an extravagant estimate. The main elements of damage are the injury to and the destruction of his fruit trees, the almost total loss of his vegetable crop during the past year, as well as a loss in 1911, and the loss of some of his hay crop.

One of plaintiff's witnesses attributes part of the damage to the lye contained in the water from the ashpits. The plaintiff has also suffered injury from the water getting into and remaining in his cellar. The evidence shews that this became so serious at times as to necessitate its being bailed out to prevent its rising as high as the fire in the furnace. He was not, however, the sole owner of the property, at the time of the commencement of the damage. On the death of his father on March 28th, 1911, he became entitled to the southerly part of the lands, and his brother to the northerly part. By a conveyance of May 30th, 1911, these brothers became tenants in common of the whole of these lands; and on August 20th, 1912, the plaintiff procured from his brother a conveyance of his interest.

In arriving at the amount of damages I am not overlooking these facts. The evidence of several witnesses, whose knowledge of fruit trees is derived from an experience of many years, and the evidence of other witnesses similarly qualified to speak of the value of market garden lands and the products thereof, was put in. The lowest value placed by any of the witnesses (a witness called for the plaintiff) on the apple trees was $25 per tree. Others named a much higher value. The uncontradicted evidence of the plaintiff, is that his annual net return from his market garden produce and hay, has been reduced from $600 to $100. The evidence of other witnesses goes to corroborate this statement. Forty-one fruit trees have been killed or so far in-

jured as to put them beyond being saved, and others have been injured almost to the same extent, or to such an extent in any event as to render it highly improbable that they can be saved.

It was argued for the defence that the plaintiff was inactive in protecting his property; that when the increased flow of water came he took no means of having it carried off his lands, and that, therefore, any damage which he has sustained has been increased by reason of his own inactivity. It is true he took no steps for protection. I think, however, that this is accounted for by the character of his neighbours' lands into and through which the ditch is carried, and of the lands where the ditch discharges.

From the evidence and from a view of the locality which I made at the request of counsel for both parties, these lands are all low-lying, and there would be great difficulty in doing what would be necessary to carry the increased quantity of water through and away from plaintiff's lands. Moreover, it was pointed out by more than one witness that while so large a quantity of water is being discharged on to these lands, it is practically impossible to clean out the ditch or to remove the water-cress and other vegetable matter which has grown there since December, 1910.

Taking all the facts into consideration, I estimate the damage sustained by the plaintiff at $1,525.

Judgment, therefore, will be in his favour for that sum, and for an injunction restraining defendants from permitting the water, other than surface water by natural flow, from their premises and works, to come upon and overflow plaintiff's lands. Plaintiff is also entitled to the costs of the action.

The judgment, so far as it relates to the injunction, should not, I think, issue for, say, four months, so that the defendants may have ample time to make provision for properly taking care of the water and removing the cause of the trouble. This, however, is to be without prejudice to any proceedings by the plaintiff for the recovery of any damage that he may in the meantime suffer.

HON. MR. JUSTICE LATCHFORD. FEBRUARY 13TH, 1913.

SATURDAY NIGHT v. HORAN.

4 O. W. N. 832.

Deed—Action to Set aside—In Defraud of Creditors—Evidence—Costs.

LATCHFORD, J., in an action by a creditor to set aside a mortgage, a deed of the equity of redemption of certain lands, and two chattel mortgages alleged to have been given by the debtor with intent to defraud his creditors, found upon the facts that the deed of the equity of redemption was fraudulent and set it aside, but dismissed the action as to the other instruments.

Plaintiffs given one-third costs of action, no costs to defendants, who were all represented by one solicitor.

Action by plaintiffs, unsatisfied creditors of the defendant James Horan, under a judgment for $397.25 and costs, recovered against him on the 4th November, 1911, for the printing of an appeal book in the case of *Horan* v. *McMahon*, 17 O. W. R. 376; 18 O. W. R. 674.

Claiming that a mortgage, a deed, and two chattel mortgages made by the said defendant James Horan should be declared fraudulent and void as against the plaintiff and all his other creditors.

J. J. Maclennan, for the plaintiffs.

J. Fraser, for the defendants.

HON. MR. JUSTICE LATCHFORD:—One of the chattel mortgages—that dated 5th September, 1911—was in force when the writ herein was issued. Owing, however, to some inadvertence, it was not renewed within a year from its date, and, therefore, lapsed as against the plaintiffs.

The other chattel mortgage, which has been duly renewed, is dated the 27th, and the mortgage of lands attacked, the 31st October, 1910—the day preceding the trial of *Horan* v. *McMahon*. That action arose out of a dispute regarding one of the boundaries of a farm which Horan had bought in 1908 for $2,800. At the time he purchased, he had but little money—only $500 or $600. He borrowed $1,300 from one Taylor, by mortgaging the newly-acquired farm, and obtained an additional loan of $1,200 from his mother, the defendant, Elizabeth Horan, partly in cash and partly by a promissory not for $900 in which he joined. This note he discounted. His mother subsequently paid the note out of the proceeds of the crop on her own farm.

I find that at the time his mother advanced him the $1,200, he agreed he would secure her by a second mortgage upon his farm.

After the suit against McMahon began, Mrs. Horan sent word to her son that she required him to carry out his agreement. It may be that she feared the costs of the litigation were likely to amount to more than her son could bear. The suit was, even in the stages preceding the trial, a very expensive one. The plaintiff's ready money was quickly exhausted; and on the eve of the trial he sought assistance from his brother Eugene, who agreed to advance $325 on the security of the plaintiff's chattels.

A solicitor at Tottenham was consulted. The chattel mortgage of October 27th, 1910, was then prepared and executed, and the consideration paid over to the plaintiff, who took advantage of the occasion to have the mortgage made which he had promised two years previously to give to his mother.

James Horan was undoubtedly solvent at the time. His liabilities were small. While the farm had not increased in value, there was a slight equity in it, and the chattels were worth $1,100 or $1,200 and unencumbered. The determination which he manifested in carrying on the suit indicates that he was sanguine as to the result.

As the mortgage from James Horan to his mother was, upon evidence which I have no reason to doubt, made in good faith, when he was solvent, in pursuance of the prior agreement with her and without any fraudulent intention, it cannot be successfully impeached.

The chattel mortgage also stands, because executed in good faith, and to secure an actual advance of $325, which James Horan required to carry on the suit against McMahon. He paid to his counsel $75 out of the amount borrowed, and large sums to witnesses—to one, a surveyor, no less than $95.

Judgment was reserved at the trial, on November 1st, 1910, of *Horan* v. *McMahon*. On November 10th, Mr. Justice Riddell handed out his reasons for dismissing Horan's suit. An appeal was taken to the Divisional Court. The case was argued on the 26th January, 1911; and on March 10th, 1911, judgment was rendered, dismissing the appeal with costs.

Although the value of the land in dispute was less than $200, and the plaintiff at this period was out of pocket

nearly $800—$325 at least of which had been paid to his solicitors—he continued the litigation, and appealed to the Court of Appeal. On the 10th April, he sent $200 additional to his solicitors, which they duly paid into Court as security for costs. An order was made in Chambers on the 22nd of April, extending the time delivering reasons for the appeal and giving directions regarding the further conduct of it.

It appears that the defendant had in the meantime learned of the chattel mortgage of October 27th, and the mortgage of October 31st, 1910. The fact being stated to the Court, the order desired was only made upon Horan's counsel undertaking that there should be no further dealing with the plaintiff's goods and lands pending the ultimate disposition of the appeal. Liberty was given to the defendants o tax their costs up to the appeal to the Court of Appeal, and to proceed, if so advised, to set aside the mortgage to Horan's mother, and the chattel mortgage for $325 to his brother Eugene. Horan, by a letter, dated June 30th, was informed of the terms of the order, and of his counsel's undertaking. He was also asked for an immediate remittance of $200.

A reply is in evidence, dated August 19th. Horan complains that he does not know how he can raise the money asked for, if he cannot give security for it. He suggests that he might thresh out his grain, and concludes by asking how much more the case is likely to cost. He does not remit the $200 to his solicitor.

Horan declared before me that he understood the appeal book would cost about $160. In fact it cost $397.25, as the judgment in this case shews. He does not appear to have become aware of the amount of his own costs of the appeal until about the end of September. Requests had in the meantime been made by his solicitors for remittances. Some, if not all were by letter; but none of the letters is in evidence. Horan's undated reply to one was filed as an exhibit. It was received on October 2nd, by his solicitors.

Horan states that he does not see any use in going further with the case. Although the appeal book had cost $400 instead of $165, he could have got the price of the book; but as $600 is required, he had within the last few days concluded to abandon the appeal. The amount required this time is too large. "I cannot," he says, "get or stand it unless I was made of money, and I positively am not," etc.

On 27th September, a few days before this letter was written, he had conveyed by the deed attacked herein, his equity in the farm to his brother William in consideration of $140.80—the difference between the amounts due upon the mortgages to Taylor and Elizabeth Horan, and $2,800, the cost and estimated value of the farm.

I credit the evidence of both James Horan and Eugene Horan, that the chattel mortgage of the 5th September, for $275, was given to obtain money to prosecute the appeal, and without advertence on the part of one brother or knowledge on the part of the other of the undertaking expressed in the order of June 27th.

But the conveyance to William Horan, was I consider, made after it had been decided that the appeal should be abandoned. That decision, James Horan states in his letter written on September 30th or October 1st, was arrived at within "the last few days."

The consideration of $140.80 was not in fact paid. A note for the amount was given, but there is no evidence that the note was discounted. It may have been paid subsequently. James, however, continued in possession of the farm. His intention when he borrowed the $275 was to use the money to carry on the appeal. But the $140.80 was not used, or intended to be used for any such purpose.

It is inconceivable that William Horan was not aware at the time he obtained the conveyance of September 27th, that his brother had not been involved by the litigation in liabilities far beyond his means of satisfying them. There had been decisions adverse to James both at trial and upon the first appeal. A case regarding a farm boundary, especially after trial, is a favourite subject of gossip or discussion among the friends and neighbours of the parties. Then late in September had come the request for $600. I am satisfied that William Horan knew his brother was insolvent on the 27th September, 1911, and procured the execution of the deed of that date in fraud of his brother's creditors.

I accordingly direct that this deed be set aside, and the registration thereof vacated.

All four defendants have employed the same solicitor and have been represented by the same counsel. In the circumstances, Mrs. Horan should not be awarded costs. There should be no costs for or against Eugene Horan, who succeeds as to one transaction, while failing as to the other.

The plaintiffs have succeeded in setting aside the deed from James Horan to William Horan, and are in my opinion entitled to recover against James and William, one-third of the general costs of this action.

HON. MR. JUSTICE BRITTON. FEBRUARY 14TH, 1913.

ROSE v. TORONTO RW. CO.

4 O. W. N. 833.

Negligence—Street Railways—Collision between Street Cars—Injury Denied—Evidence—New Trial Costs.

BRITTON, J., in an action for damages for personal injuries alleged to have been sustained by plaintiff, a dental surgeon, while a passenger on defendants' street railway, by reason of a collision between two of defendants' street cars, entered judgment for plaintiff for $650 and costs in the second trial of the action.

Costs of former trial to plaintiff, no costs of appeal to Divisional Court to either party.

Action by dental surgeon for damages for personal injuries caused by the collision of two of defendants' street cars while a passenger on one of said cars. This was the second trial of the action, Divisional Court having set aside a former verdict of a jury for $850 and directed a new trial of the action without a jury.

J. W. McCullough, for the plaintiff.

T. H. Lennox, K.C., for the defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff is a dental surgeon residing at, and practising his profession in Toronto.

His statement is, that on the evening of the 28th day of May, 1911, between 10 and 11 o'clock he boarded a car of the defendants' on Gerrard street, going west. The car was what is known as a trailer, drawn by a motor car of defendants'. The route of the car was westerly, along Gerrard street to Parliament street, then north on Parliament to Carlton, and westerly along Carlton street. At the corner of Carlton and Parliament streets there was a collision between the car in which plaintiff was, and an east-bound Carlton street car. The impact was on the west side of the trailer—the side upon which plaintiff was seated.

The trailer was badly smashed, and the plaintiff says he was injured on the thigh—a slight injury also to the foot and knee.

After the collision and the alleged injury, a member of the police force called, took the names of some of the passengers, and made enquiries to ascertain who were hurt. The plaintiff did not then complain of any injury, but handed his card to the police officer, and said in substance that he would be found at his office should he be wanted. When the wreck was somewhat cleared away, and the cars were ready for business, the plaintiff continued his trip by taking the west-bound car along Carlton to College and along College to Huron street, where he alighted, and walked southerly on Huron street to Baldwin street, where plaintiff at that time had his residence rooms. He has some knowledge of the use of applications for sprains, bruises, etc., and he applied iodine. So far as appears, the plaintiff did not consult a doctor until the 6th of June, when, by telephone, he spoke to Dr. Simpson. On the 13th June he consulted Dr. Simpson in reference to the matter.

On the morning of the 21st of June, 1911, the plaintiff was thrown from a bicycle on which he was riding, and his left hand was quite badly injured. In addition to the local injuries the plaintiff was considerably shaken. Immediately upon reaching his office after this accident the plaintiff called up the agent of the accident insurance company and notified him of it. He also called up the office of defendants and notified them of his alleged injury by the collision on May 28th.

Mr. Forrest, defendants' claim adjuster, received the message, and directed Mr. Macpherson to make enquiry. Mr. Macpherson went at once to plaintiff's office and there met Mr. Kerr, agent of insurance company and the plaintiff. Mr. Macpherson seemed to assume that as plaintiff was looking to the insurance company, nothing further was required of him; and he intimated in substance that plaintiff, after getting his claim settled with the insurance company, could see Mr. Forrest, and Mr. Forrest would do what would be right.

The plaintiff did subsequently settle with the insurance company, and received $40 as compensation for his damage. by the bicycle accident. The plaintiff did not at once see Mr. Forrest, or any other officer of defendants', and so far

as appears nothing was done by him in regard to this claim until November 7th, 1911, when plaintiff wrote to Mr. Forrest, stating his claim, referring to the Macpherson interview, and inviting negotiations.

Mr. Forrest did not reply to this letter. On the 2nd March, 1912, the plaintiff again wrote to Mr. Forrest, notifying him of plaintiff's intention to go to Preston for treatment and again inviting negotiations. To this Mr. Forrest made no reply.

The plaintiff's solicitor's letter followed in due course and on 30th April, 1912, this action was commenced. It was tried by the Chancellor with a jury and resulted in a verdict for the plaintiff for $750. That verdict was set aside and a new trial without a jury was ordered. The defendants admit negligence, and so admit liability, if plaintiff were really injured in the collision mentioned; but this they dispute. Their defence is that plaintiff did not sustain any injury or actual loss, or, if any, not to the extent claimed by plaintiff. The defendants further say that if the plaintiff did suffer, or does now suffer, from any injury, it is because of the bicycle accident, and not the accident on 28th of May. The defendants go further and say that, at least, the real cause of the plaintiff's injury is in doubt; and so he ought not to recover in this action.

It is clear upon the evidence that the plaintiff, at the time of the collision, was in the trailer, and seated in a position in which he could have received precisely such injury as he says he did receive. There is evidence that before the collision he was a well man, quite fond of, and accustomed to walking, and that he did not use a cane. After the collision and before the bicycle accident he walked lame and used a cane. The dates of the plaintiff's use of the cane are clearly and satisfactorily established. Reasons for remembering dates were given. It may be said the plaintiff did this for the purpose of making evidence for himself; that he walked lame for that purpose, but he was not then making a claim. It is singular that the plaintiff did not at once make a claim. He knew his rights and how to protect them. Plaintiff thought at once of the accident policy when hurt by the bicycle. Why not think of his policy and also of defendants' liability when hurt by collision? The plaintiff's explanation is, that at first he did not think himself so seriously hurt as to make any claim. The injury by the

bicycle accident was of a somewhat serious character, but entirely different in kind from that charged to the collision. The question is not whether such an accident as that on the 21st June could produce all that the plaintiff complains of; but it is, whether, upon the facts, the injury was occasioned by the collision. The plaintiff starts with it from the moment of the collision, although, not then thought serious, and continued down to the time of his giving evidence in the box.

After the 21st June, the plaintiff thought—that is my finding, warranted by the evidence—that some offer of a settlement would be made by defendants. The defendants evidently believed from the first, upon Mr. Macpherson's report, that there was nothing in plaintiff's claim, and acted accordingly. I must find that notwithstanding the plaintiff's conduct, he was in fact, injured by the collision of 28th May, 1911, and that he is entitled to recover. It is a case of real injury sustained in the way plaintiff states; or, the plaintiff has been tempted and has yielded to the temptation, of seizing the opportunity afforded by his presence when the accident occurred and of putting forward a false and fraudulent claim against the defendants, and of swearing it through. I have weighed the evidence to the best of my ability, and may conclusion, without doubt, is as above stated. It only remains to enquire what amount the plaintiff should receive.

His principal injury was at or in the region of the hip-joint. The usefulness of that joint was impaired. He suffered considerable pain, and he has not fully recovered. He has not suffered any permanent injury. There will probably be complete recovery in about a year, so that there will be, in all, over 2½ years of more or less of pain, trouble, and impairment resulting to the plaintiff from the accident in question. That means some loss from plaintiff's inability to do work in his profession as he could if well. I cannot say that there has been any damage measurable with certainty from loss of income in his profession by means of this accident. The medical evidence, assuming the plaintiff's statement to be true, is not against plaintiff's right to recover. The evidence, in part, is that if plaintiff was injured, as he says by the collision of the cars, then the bicycle accident might aggravate that former injury and retard recovery. That does not relieve the defendants.

The report of Dr. Primrose is in evidence. Again assuming plaintiff's statement to be true, that evidence is not against plaintiff's right to recover. I regard the evidence of Dr. Primrose as fair and candid. It goes without saying that it would be so. When the plaintiff was under examination as a witness he was in a highly nervous condition, but I thought him truthful. There is not, in my opinion, in the statements made from time to time by the plaintiff, any such discrepancy as to his pain and suffering and as to his disability, as would disentitle him to recover.

Apart from any injury the plaintiff sustained by the bicycle accident for which he received compensation the plaintiff should recover from the defendants for the damage and loss occasioned by the accident, on the 28th May, 1911, the sum of $650, and I assess damages at that amount. The defendants should pay to plaintiff all costs of former trial, and of this trial—all costs except the costs of appeal to a Divisional Court. As to these Divisional Court costs, none shall be payable by either party to the other. Judgment accordingly. Twenty days' stay.

HON. MR. JUSTICE BRITTON. FEBRUARY 18TH, 1913.

O'NEIL v. HARPER.

4 O. W. N. 841.

Way—Obstruction of Highway—Injunction Restraining—Public User over 30 Years—No Special Damage to Plaintiff.

Action for a declaration that a certain road was a public highway and for an injunction restraining defendant from obstructing same.

BRITTON, J., *held*, that as there had been clear public user for over 30 years, the road had become, through dedication, a public highway.

Mytton v. *Duck*, 26 U. C. Q. B. 61, followed.

Dunlop v. *York*, 16 Gr. 216, distinguished.

That, however, as plaintiff had failed to prove special damage to himself, beyond that suffered by the remainder of the public, he was not entitled to bring the action.

Drake v. *Sault Ste. Marie*, 25 A. R. 256, followed.

Action dismissed without costs, or without prejudice to a fresh action.

Action for a declaration, that a road which crossed the south half of lot 7 in the 2nd concession of the Gore of Chatham, was a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon

that highway; (3) for an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by defendant upon plaintiff in attempting to prevent plaintiff from travelling upon that highway.

Tried at Chatham without a jury.

J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., for the defendant.

HON. MR. JUSTICE BRITTON:—The plaintiff owns that part of lot 8 in the 2nd concession of the Gore of Chatham, lying north of Running creek.

The defendant owns the south half of lot 7 in the same concession.

The plaintiff alleges that Running creek commences in the 3rd concession of the Gore of Chatham, flows southerly and easterly through the said Gore of Chatham, and along the north side of the town of Wallaceburg, to the river Sydenham.

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

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

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

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

As to dedication, this case is governed by *Mytton* v. *Duck*, 26 U. C. Q. B. 61. In that case Draper, C.J., decided that as against the grantee of the Crown, and those claiming under him, the public user for 30 years, without objection or interference on their part, would furnish conclusive evidence of dedication.

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

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

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

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

It is a fact that the town of Chatham assumed, by by-law, to close a portion of it; and the town of Wallaceburg, by by-law, assumed to close a short part at the eastern end.

It is difficult to connect the Wallaceburg by-law with this road, as the by-law described it as "the original allowance for road."

However, of the intention of the municipality to close a part of the road in question, there is no doubt.

These by-laws do not either assist the plaintiff or prejudice him in his contention.

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

The case of *Dunlop* v. *York* (1869), 16 Grant 216, does not conflict with *Mytton* v. *Duck*, 26 U. C. Q. B. 61.

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

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

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

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

The Canada Company, grantors of the lands of the defendant, had other lands in the vicinity.

The inference is warranted, that they knew of this road, and of its user by the public, if not before, very soon after the grant to them.

If the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway.

The defendant pleads that the plaintiff cannot maintain this action. without either the Attorney-General, or the Municipal Corporation of the township of Chatham, and North Gore being a party thereto.

The plaintiff simply joins issue upon this statement.

The question is upon the evidence in this case, as laid down in *Drake* v. *Sault Ste. Marie* (25 A. R. at p. 256) "Can the plaintiff be said to have suffered damage peculiar to himself beyond that suffered by the rest of the public, who were also entitled to use the road for any purpose?"

I am met at once with the absence of evidence that the plaintiff has suffered damage peculiar to himself beyond that suffered by the rest of the public, who were entitled to use the road.

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

The defendant in his pleading denies the assault, and in his evidence does not admit it.

He admits preventing plaintiff, on a Sunday, from going through a gateway upon the alleged road.

The defendant said that the plaintiff crossed this part of the alleged highway only twice in eighteen months.

The plaintiff was not called to deny or explain this evidence of the defendant.

Even if the plaintiff, in erecting the gate on the highway, has created a public nuisance, I am unable to find that

plaintiff suffered particular injury—so as to bring the case within *Fritz* v. *Hobson* (L. R. 14 ch. D. 542).

The objections that the municipality was not a party to the action, and that no particular private injury to the plaintiff had been proved, were made upon the argument.

The plaintiff did not ask for any postponement to endeavour to get the municipality to intervene, or to supplement the evidence as to assault or private injury.

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

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

HON. MR. JUSTICE BRITTON. FEBRUARY 13TH, 1913.

SINGLE COURT.

LECKIE v. MARSHALL.

4 O. W. N. 826.

Judicial Sale—Order of Court—"Forthwith"—To Satisfy a Vendor's Lien—Order of Court—Former Nugatory Sale—Necessity of Reserve Bid—Early Date for Sale—Costs.

Certain mining properties were, under a judgment of the Court of Appeal, directed to be sold, under the direction of the Master-in-Ordinary, forthwith, to satisfy a vendor's lien. The Master-in-Ordinary fixed a reserve bid, and offered the properties for sale on December 23rd, 1912. Substantial bids were received, but, as the reserve was not reached, the properties were withdrawn from sale, and, later, the Master directed that they be re-offered for sale on June 16th, 1913, subject to another reserve bid. On appeal,

BRITTON, J., *held*, that, as plaintiffs were entitled to a sale *ex debito justitiæ*, the sale should be held earlier, on May 5th, 1913, if possible, and without any reserve bid.

Costs of appeal to plaintiffs.

Motion by plaintiffs by way of appeal from the interim certificate of the Master in Ordinary dated 14th January, 1913, whereby he directed that the properties in question in this section, should be again offered for sale by public auction, on the 16th June, 1913, and that such sale should be subject to a reserve bid, to be fixed by him, and for an order directing the said Master to proceed to sell the said properties forthwith pursuant to the judgment of the Court of Appeal for Ontario, herein, 22 O. W. R. 870, dated 28th

June, 1912, and without reserve. The formal judgment of the Court of Appeal, in so far as material to the matters now under consideration is as follows; 2 (a) "And this Court doth further order, and adjudge that in default of payment into Court on, or before the 12th October, 1912, by the said defendants Wm. Marshall, and Gray's Siding Development, Limited, or either of them of the monies aforesaid, the mining properties in question in this action, be forthwith sold, with the approbation of the Master in Ordinary, of this Court, to answer the lien of the plaintiffs, as unpaid vendors for purchase money."

Jas. Bicknell, K.C., for plaintiffs.

Geo. Bell, K.C., for defendants.

HON. MR. JUSTICE BRITTON:—These mining properties were offered for sale on 23rd December, 1912. That attempted sale, although held only a little over two months from the date on which the money was to be paid into Court, was not abortive by reason of an entire absence of bidders, but because the bidding did not reach the reserve bid. The properties must again be offered, but when and whether subject to another, or any reserve bid, are the questions.

The sale is to be with the approbation of the Master, and must therefore be conducted as a judicial sale, and so far as reasonably possible, the sale must be conducted in such a way as to protect the interests of all parties—but all this is subject to the fact, that the sale is necessary to enable the plaintiffs to get the money, to which they are entitled, and which the defendants did not pay into Court—money for plaintiffs' properties—which properties are in a way being held up by defendants. To enable the plaintiffs to get their money they are entitled to a sale of the properties forthwith, which at least means without unnecessary—or unreasonable delay.

The reserve bid, on the 23rd December, has already prevented the plaintiffs for a considerable time from getting their money. That reserve bid is not now complained of.

The learned Master, in my opinion wisely exercised the wide discretion vested in him by then fixing a reserve bid—but considering what took place at the attempted sale, and upon all the facts there is no reason why there should be any further reserve.

Another, may block the way again, and if a second reserve bid is named why not a third. Further reserve bids

are not consistent with a sale to be made forthwith to realize a vendor's lien, a sale that the plaintiffs are *ex debito justitiæ*, entitled to have carried out.

I have not been able to find any cases upon the question of repeated reserve bids. It must be dealt with upon the facts of each case. In this case, the terms and limitations of the judgment are important. It is also important that the bidding on the 23rd December last, was only $25,000 less than original purchase price of $250,000. That seems to me not a large deficiency on mining properties not being worked at time of attempted sale. The defendants, were and are unwilling to take the properties at the purchase price. A fair inference from the facts is that there are persons possessed of, or who command large means, who have an eye on the properties, and who may bid if they know there will be a sale to the highest bidder. All the parties are allowed to bid. Again as this is a judicial sale, the Master will report, and the report must be confirmed. If any fraud or collusion, or improper practice on the part of a purchaser, the sale will not be confirmed. For these reasons, I am with great respect of opinion that sale should be without reserve.

It is suggested by the plaintiffs that thirty days will be sufficient to give intending purchasers time to make necessary enquiries. I do not agree, but on the other hand the delay should not be so long as the 16th of June. In fixing the time—the judgment must be looked at, and the fact of the former offering should be considered. Men likely to buy or bid, are those who will get information from persons already more or less acquainted with the properties. If, however, personal inspection is required, it can be made in two months. The time of sale should be Monday, 5th of May, 1913. If any objection to that day, the Master should name a day not later than 12th May, nor earlier than 30th April, next.

Appeal allowed as above, and order accordingly.

Costs of plaintiffs of this appeal to be added to plaintiffs' claim.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 13TH, 1913.

PALLANDT v. FLYNN.

4 O. W. N. 821.

Interpleader—Issue Directed—Plaintiff Therein—Security by Claimant—Practice—Leave to Appeal.

BRITTON, J., refused (23 O. W. R. 964; 4 O. W. N. 681), to interfere with the terms of an order of the Master-in-Chambers, directing an interpleader issue between a claimant and the execution creditor, on the ground that it was no moment which party was plaintiff, and the requirement that the claimant should pay into Court the alleged market value of the stock, $8,000, as security, failing which the stock would be sold, was in accordance with the well-established practice.

MIDDLETON, J., *held*, upon a motion for leave to appeal, that the requirement as to security was unreasonable.

Leave to appeal granted.

"No matter what the form of the issue, the real test is whether or not the stock in question shall be taken in execution."

Motion by the Canadian Bank of Commerce for leave to appeal from judgment of HON. MR. JUSTICE BRITTON, dated 24th January, 1913. (23 O. W. R. 964.)

R. C. H. Cassels, for the Canadian Bank of Commerce.

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

J. Jennings, for the execution creditor.

HON. MR. JUSTICE MIDDLETON:—The execution creditor caused a seizure to be made of some three thousand shares in a mining company, standing in the books of the company, in the name of the execution debtor. Before the stock was brought to a sale, the bank served notice upon the sheriff, claiming that the stock had been transferred to the bank as security for advances, and that there was some two thousand dollars due thereon.

Subsequently, one Albert Freeman claimed the stock, on the ground that it had been assigned to him as security for advances to the extent of over eight thousand dollars.

Upon an application being made for interpleader, the Master in Chambers made an order directing the trial of an issue, in which the Bank of Commerce are to be plaintiffs, and the execution creditors defendants; reserving directions with reference to any claim between the defendant Freeman, and the execution creditor until after the trial of this issue.

The execution creditor does not admit either the making of the transfer of the stock to the bank, or that there is any-

thing due to the bank, and moreover contends that the assignment, even if executed, was inoperative because the stock was transferable only upon the books of the company, and the alleged transaction was by an endorsement upon a stock certificate not recorded; the contention being that until recorded the title does not pass.

The merits of this contention are not ripe for discussion, upon the present motion. The bank contends first that an interpleader issue ought not to have been directed, because the Sheriff is not in possession. I agree with the learned Judge, that this objection is not well taken, and that, a claim having been made to property which has been seized in a manner authorised by statute, the Sheriff is entitled to interplead.

A more substantial question will arise upon the trial of the issue, as to which I express no opinion. It may be that the only matter which will be open upon the trial of the issue, will be the existence of the assignment, and the ascertaining of the amount due to the bank. See *O'Donohoe* v. *Hull*, 24 S. C. R. 683, and *Keenan* v. *Osborne*, 7 O. L. R. 134.

The second complaint by the bank is that the bank is made plaintiff in the issue. As pointed out in *Kinnee* v. *Bryce*, 14 P. R. 509, if the bank has a transfer of stock as alleged, on proving the document, and the date the onus will be shifted; so this point is not of importance.

The third point urged is this; by the order it is provided that the bank do, within fourteen days, pay into Court $8,000, or give security in the sum of $15,000 for the payment of $8,000 according to any direction that may hereafter be made, and upon such payment or security the Sheriff do withdraw his seizure, but in default of such payment or security, the Sheriff do sell the stock. This, the bank contends compels them to purchase this stock at $8,000, a sum which is said to be ascertained from a newspaper report of the market quotations, or to submit to the stock being sold by the Sheriff.

This provision appears to me to be entirely unauthorised, and unfair. I can see no reason why the bank should be compelled to submit to a sale of the stock at the present time. It would seem more reasonable to require the execution creditor to put up enough to answer the bank's claim, if any, and take the stock if he desires to sell it, or to provide that

the stock should not be sold for less than enough to pay the bank in full if it succeeds.

The Bank is ready to submit to either of these alternatives, but the execution creditor refuses his assent. Of course, if the stock can be sold for any such sum as eight thousand dollars, the bank is not concerned; but the bank fears that the placing of as much stock as this upon the market, for a sale without any reserve, may result in the stock bringing much less than the amount necessary to satisfy the bank's claim.

The principle, which it seems to me ought to guide, is that laid down in England, with respect to the sale of property under an execution where there is a mortgage. The sale of an equity of redemption is not provided for there, as here. The property must be sold free from the charge, and the execution creditor is required to give security to the mortgagee against any loss.

As I think the order ought to be reviewed with respect to this matter, and as the matter is obviously one of importance, I give leave to appeal, and as the matter is to be reviewed, I think it better not to handicap the parties by restricting the leave in any way. The appellants may confine their appeal as advised.

There is another matter, not argued, but outstanding on the face of the papers. The course pursued by the Master, with reference to the claim of Freeman, seems to me inexplicable. If the assignment to Freeman is good, then the execution creditor has no right to the stock. No matter what the form of issue, the real test is whether this stock shall be taken to satisfy the execution. In *Merchant's Bank* v. *Herson*, 10 P. R. 117, Sir Adam Wilson thought that there should be one issue, in which all the executions should be on one side, and all the claimants on the other.

The proceedings are for the guidance of the Sheriff, and not for the adjustment of the rights of the claimants as between themselves. If the appellant desires to argue this question also, leave is granted to introduce it.

Proceedings may be stayed meantime.

HON. MR. JUSTICE LENNOX. FEBRUARY 17TH, 1913.

BINDON v. GORMAN & MURRAY.

4 O. W. N. 839.

Partnership—Accounting—Denial of Agreement—Statute of Frauds —Evidence—Meaning of "Division" of Profits.

LENNOX, J., in an action to establish a partnership in certain realty transactions, and for an accounting, *held* the partnership proven, and, on the evidence, gave judgment for plaintiff against defendant Gorman, for $1,700 and costs, and for defendant Murray against defendant Gorman for $1,000 and costs.

"A verbal agreement to divide profits of transactions in lands is valid, at all events, where no specific lands are referred to."

Gray v. *Smith*, 43 Ch. D. 208, and *Re De Nicol*, 1900, 2 Ch. 110, followed.

Action for dissolution of partnership and taking of accounts, tried at Ottawa, on 15th and 16th, and at Toronto, on the 25th January, 1913.

G. E. Kidd, K.C., for the plaintiff.

J. J. O'Meara, for the defendant Gorman.

M. J. O'Connor, K.C., for the defendant Murray.

HON. MR. JUSTICE LENNOX:—I am asked to pronounce upon the rights, if any, of both the plaintiff and the defendant Murray, against the defendant Gorman, and if there is judgment against Gorman, to apportion the money between Bindon and Murray. I do not think that R. S. O., 1897, ch. 338, and the various cases referred to have any bearing upon this case. It is not a question of an interest in land, it is simply as to certain services, and a division of profits, and a verbal agreement to divide profits of transactions in land is valid at all events, where no specific lands are referred to. *Gray* v. *Smith* (1889), 43 Ch. 208; *Re De Nichols, De Nichols* v. *Curlier*, [1900] 2 Ch. 110, and cases there referred to. If the evidence of the plaintiff, and his witnesses is true the defendant Gorman should pay over a portion of the profits he received in certain transactions to the plaintiff and Murray, and he is keeping the whole of it. The only evidence is that called by the plaintiff, and what is furnished from the exhibits, for, so far as Gorman is concerned, unfortunately, he has practically no memory at all. It is a good deal worse than idle, for it is improper to have a witness swear to the

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

On the other hand there are discrepancies in the evidence of the plaintiff and Murray—they contradict each other in some particulars, and I believe they are both mistaken as to the date at which the telegram instructing Murray to invest was sent, if it was sent. But these differences do not at all go to the root of the matter. I was particularly impressed by the manner in which Murray gave his evidence, and I believe the evidence of this witness and the plaintiff was substantially accurate. I believe that the defendant Gorman sent a telegram to Murray authorizing him to invest $10,000, and speaking of a division of profits between the parties to this suit. I am satisfied from the references to Gorman in the correspondence, from Gorman's own telegram and letter from Kansas City, from Currie's evidence as to Murray's determination to have Gorman in the syndicate, and upon the testimony of the plaintiff and Murray, that before Murray went out west, the defendant Gorman agreed to furnish as much as $10,000 for profitable speculation, and agreed to divide the profits between himself, and the plaintiff Murray. The west was the main outlook, but the moving cause was profits, and the money was to be available for any proposition of which Gorman, when submitted, approved. I am not sure that it was stated that the profits would be divided equally, and after some hesitation, I have come to the conclusion that division of profits simply does not necessarily mean an equal division. I have no doubt at all that at the time these transactions were going through, Gorman fully expected to have to share up with the plaintiff and Murray.

It is very probable too, that later on he told the plaintiff there were no profits, and in the condition he is, he might say this quite honestly. I will take no account of interest down to the date of the action—it would increase the liability of the defendant Gorman if I did.

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

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

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 14TH, 1913.

McMENEMY v. GRANT.

4 O. W. N. 802.

Boundary—Alleged Encroachment—Tearing Down of Fence—Original Survey—Error in—Injunction—Damages.

Second Appellate Division gave judgment for plaintiff for $25 damages, an injunction and costs in an action for damages for removal of a fence which defendant claimed encroached upon his land some four feet, but, as to which, the Court found the contrary. Judgment of WINCHESTER, Co.J., York, reversed.

Appeal by plaintiff from judgment of WINCHESTER, Co.J., York, in favour of defendants in an action to establish a boundary line, and for trespass.

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

Shirley Denison, K.C., for the plaintiff.

F. W. Carey, for the defendant.

HON. MR. JUSTICE RIDDELL:—In 1876, Adam Wilson laid out part of lots one and two in the first, and B. F. concessions of the township of York, and filed a plan No. 406. Such part of the plan as is material, I attach a copy of, it will be noted that the course of Pine avenue is given definitely as N. 74° E. while that of Beech avenue is given quoted (" ") indicating it is said, that the line of Beech has not been in fact run, but taken for granted.

But there is no dispute or question that the line of Beech avenue, is the well-known N. 16° W., it consequently follows that on the plan Pine and Beech avenues, run at right angles. There is no dispute as to the correct position of the west line of Beech, as to the correct position of the N. W. corner of Beech and Pine, or of the S. E. corner of lot 99, these points are all fixed and agreed upon.

The plaintiff bought a part of the S. W. portion of lot 99, from her brother Frankland Terry, in 1909, having had an agreement for purchase from the spring or the summer of 1905, her husband having built a pair of houses on the western portion of the lot, one for a neighbour who owned the land north of hers, and one for Terry on his land.

The land had been theretofore vacant, but a fence of posts and wires ran along, what was taken for the south line of lot 99—an old fence, which the plaintiff says ran from a stake on Balsam avenue through to Beech. Edward Heffernan says that in 1902, a surveyor, Mr. Brown planted a stake on Balsam avenue, and that he built the post and wire fence in 1904, to this stake, and one (undisputed) on Beech, which indicated the north line of lot 98.

In 1910, Heffernan, who owned that part of lot 98, now the property of the defendant, and the plaintiff agreed to put up a board fence as the boundary of their lots; and they did so on practically the line of the former post and wire fence.

The defendant bought the north part of lot 98, from Heffernan, in 1911. The owner to the south of him "moved him up" about 4 feet; and he then claimed four feet from the plaintiff. She refused to give this up: he tore down the fence, and she brought this action in the County Court of the County of York. The Judge of that Court gave judgment for the defendant, and the plaintiff now appeals.

The whole case of the defendant is based upon two assumptions (1) the north line of Pine avenue, is not at right

angles to Beech avenue, and (2) the boundary line between 98 and 99, is necessarily parallel to this north line.

I am not at all satisfied that Pine avenue, as originally laid out, was not run on the course laid down definitely, and not with " " that is N. 74° E., much assumption must be made before that can be accepted.

But supposing that Pine avenue was not made at right angles to Beech, it by no means follows that the other lines are not at right angles to Beech. The course that would be followed if a blunder had been made at the junction of the two avenues, is to measure along the course N. 16° W., the proper number of feet, and then turning the instrument through 90°, from this course run the course to the westerly, then going another distance pursue the same course.

No original stakes have been found on Balsam avenue, and there is absolutely nothing to indicate that this course was not followed in the original laying out. We have no radii for the curves on Balsam, and the scale 100 feet to an inch makes it impossible to determine accurately a small distance like 4 feet (which would take up only 1/25° of an inch on the plan).

If Pine were at right angles to Beech, the assumption of the surveyors that all the lot-lines were parallel to Pine, would be sound: but only so because, they as well as Pine were at right angle to Beech.

Quite irrespective of the evidence of Heffernan, that the board fence ran from surveyor's stake to surveyor's stake, I think the defendant has wholly failed to prove that his land goes beyond the fence. He went on land in which the plaintiff was in quiet possession, and which he has not proved to be his; he was a trespasser, and he should pay damages. The "cash amount" of such damages are about $16. I think as he acted under claim of right, though with a high hand, the damages should be moderate.

The plaintiff should have a verdict for $25 damages, an injunction, and costs on the County Court scale, here and below.

HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE KELLY. FEBRUARY 13TH, 1913.

RE FELIX CORR.

4 O. W. N. 824.

Administration—Report as to Next-of-kin—Appeal—Evidence—Costs.

KELLY, J., dismissed appeal by one, Mary E. Donnelly, from the judgment of the Master-in-Ordinary, to whom it was referred, to find and report upon whom, if anyone, were the next-of-kin of Felix Corr, deceased, declaring that the said appellant was not one of such next-of-kin.

Appeal by one Mary Elizabeth Donnelly, from a judgment of the MASTER-IN-ORDINARY, finding against her contention that she was one of the next of kin to Felix Corr, deceased.

G. Hodgson, for the appellant.

J. R. Cartwright, K.C., for the Attorney-General.

J. P. Crawford, for the administrators, The National Trust Company.

HON. MR. JUSTICE KELLY:—In this matter an order was made referring it to the MASTER-IN-ORDINARY, to ascertain and report what parties, if any, are entitled as next of kin to share in the distribution of the estate of Felix Corr, who died intestate, in Toronto, on May 3rd, 1910.

Several persons put forward claims to be such next of kin, and the Master has found that none of these persons have substantiated their claims. One of these claimants, Mary Elizabeth Donnelly, brings this appeal from the Master's report. After a careful perusal and consideration of the evidence, I have come to the conclusion that the Master's finding is correct in so far as it applies to the appellant. The evidence on which she particularly relies, is that of a number of persons residing in Ireland, which is intended to prove the identity of the deceased with the father of the appellant, from an examination of a portrait sketched by Mr. Smith, who knew him for about fifteen years prior to his death.

These witnesses had not seen the Felix Corr, who is claimed to be the father of the appellant, since 1867. Some of them had not seen him since an earlier date. There were in that part of Ireland several persons named Corr, more than one of whom bore the name "Felix."

Another circumstance upon which the appellant relies, is the similarity of the occupation of her father, to that followed by deceased in Toronto. The former is said to have been a wheelwright before his disappearance from his home in Ireland; deceased was a waggon maker.

Then, too, it is said by some of these witnesses that the Felix Corr, whom they knew, was somewhat of the same height and size as the deceased. They also say that the man of whom they speak, had one brother and one sister; that he was married in Ireland in January, 1866; that before the end of that year a son was born of that marriage; that he left home in Ireland, in April, 1867, and that a daughter was born of the marriage in October, 1867. The appellant claims that she is this daughter.

As against this, there is the evidence of the person who knew the deceased in Toronto, one from the year 1866, and others from later dates, from which it appears that deceased came to, and took up his residence in Toronto, not later than 1866; that he spoke at times of his family consisting of one brother and two sisters, but whose names, as he mentioned them, do not at all correspond with the names of the brother and sister of the Felix Corr, of whom these other witnesses speak.

The witness, Margaret Hodgkinson, who knew him in Toronto, in 1866, tells of a visit made to Toronto, about that time by her cousin, who knew the deceased in Ireland, and whose conversation with him corroborated his account of the number and names of the members of his family; but no mention was made in any such conversations of his having been married.

Another witness says deceased stated to him he had been married. This, even if accepted, does not as against the other evidence, help the appellant.

I have referred to some only of the facts brought out in the evidence; in other parts also there is not a little conflict.

Whatever may be the real facts concerning parentage of the appellant, the evidence taken as a whole, does not establish the indentity of the deceased with the person she claims was her father, and I think the Master was right in finding as he did, and that on the evidence the appellant has not established her claim to be the next of kin of the deceased.

The appeal is therefore dismissed, and with costs if demanded.

NON-JURY TRIAL, TORONTO.

HON. MR. JUSTICE LENNOX. FEBRUARY 14TH, 1913.

DENISON & STEPHENSON v. GILLETT COMPANY, LTD.

4 O. W. N. 833.

Contract—Moneys Paid at Defendants' Request—Clerk of Works—Construction of Factory—Evidence.

LENNOX, J., gave judgment for plaintiffs for their full claim and costs, in an action brought against defendants for moneys paid a clerk of works, engaged on the construction of a new factory of defendants, which moneys were alleged to have been paid at defendants' request.

Action by architects for $1,100, alleged to have been paid by plaintiffs, at defendants' request for the services of a clerk of works, at a new factory erected by defendants.

Gordon Waldron, for the plaintiffs.

G. M. Clark, for the defendants.

HON. MR. JUSTICE LENNOX:—Counsel for the defendants argued that this action should be decided upon the question of credibility. Determined by this standard, my judgment is unhesitatingly in favour of the plaintiffs. Even leaving out the important factor of probability—taking the naked testimony, and the manner of giving it alone—I am convinced that Mr. Dobie instructed the plaintiff Denison, to engage a clerk of works for the defendant company, and agreed that the company would bear the expense. The evidence of the other plaintiff, uncontradicted, while he does not go to the length of saying that Dobie gave instructions at that time, shews that he was interested in the wages to be paid, and is strongly corroborative of Mr. Denison's evidence. I am satisfied too, that whether from the discussion on the 15th of June, 1911, when the plaintiffs were retained on the terms of exhibit 20, clause (c), Mr. Dobie realised all along that it was for the company to decide whether there would be a clerk of works, and if employed, employed at the company's cost.

The probabilities, however, are peculiarly cogent in this case. The defendant company had engaged a Chicago architect, Mr. Beman, and were to pay him 5 per cent. com-

mission and his travelling expenses. The oftener Mr. Beman came to inspect, the greater the cost. He was not to provide a clerk of works. Both Beman and defendants found that it would be better to have an associate architect in touch with local conditions, and necessary as a matter of law, and consequently, as defendants allege an arrangement was come to between Beman and the plaintiffs, to which the defendants were not parties, that the plaintiffs would perform for Beman, the professional work which had to be done in Toronto, on a division of fees. It was no part of Beman's contract to engage or pay for a local superintendent or clerk of works. This is shewn by clause (c) of exhibit 20, and is sworn to, and it might have been done with a good deal better grace by Mr. Beman. How then could Mr. Dobie imagine that the plaintiffs were to undertake this charge? As it was they visited the works at least 100 times, and presumably relieved the defendants from paying the travelling expenses of Mr. Beman, for as many trips from Chicago. Even if Mr. Dobie's manner of giving evidence had been more satisfactory than it was, I would find it difficult to believe that for weeks before there was any work to oversee, he and Mr. Craig were time and again enquiring about a clerk of works, anxiously, and repeatedly asking who was to pay for him, and always answered in the same way "we pay," and the more so as at the same time, it is sworn that the plaintiffs were bound to keep a man constantly there.

There will be judgment for the plaintiffs for $1,100, with interest from the 22nd of November, 1912, and the costs of this action.

SECOND APPELLATE DIVISION. FEBRUARY 14TH, 1913.

SMITH v. BOOTHMAN.

4 O. W. N. 801.

Division Courts Act—10 Edw. VII., c. 32, s. 106—Action over $100—Evidence not Taken Down—New Trial—Costs.

SUP. CT. ONT. (2nd App. Div.), on an appeal from the judgment of the Division Court, Wentworth County, directed a new trial, inasmuch as the evidence had not been taken down by the trial Judge as directed by 10 Edw. VII., c. 32, s. 106. The Division Courts Act. Costs of former trial and appeal to be costs in cause.

An appeal by the defendant from a judgment of the Junior Judge of the county of Wentworth. in favour of the plaintiff in an action to recover $176.70, the amount claimed to be owing upon a promissory note for $175, made by defendant, and $1.70 interest thereon. The action was tried without a jury.

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

L. E. Awrey, for the defendant (appellant).

H. S. White, contra.

HON. SIR WM. MULOCK, C.J.Ex.D.:—On the appeal first coming before us for argument, it was found that the appeal case was incomplete, the evidence not having been certified to this Court. Accordingly, it was impossible to hear the appeal which was stood over in order as provided by sub-sec. 2 of sec. 128, of the Division Court Act, to enable the Clerk of the Division Court to amend the appeal case by certifying the evidence. On the motion again coming on for argument the Registrar of this Court produced a letter from the Judge who tried the case, wherein, it was stated, that "the Division Courts here are not supplied with a stenographer, and therefore the evidence was reduced to writing only on a memorandum, which, probably no one but myself would understand;" and the letter then proceeded to add the facts, which the learned trial Judge says were proved at the trial.

The Division Court Act, 10 Edw. VII., ch. 32, sec. 106, declares that in all actions in which the sum sought to be recovered exceeds $100, unless the parties agree not to appeal "the Judge shall—take down the evidence in writing and leave the same with the clerk;" and in the event of an appeal, sec. 127 of the Act, enacts that at the request of the appellant the clerk shall—"certify to the clerk of the central office at Osgoode Hall, Toronto, the summons with all notices endorsed thereon; the claim and any notice of defence; the evidence and all objections and exceptions thereto," etc.

Thus it was the defendants right under the statute to have the evidence at the trial taken down in writing by the trial Judge, and certified to this Court. This has not been done, and in the absence of the evidence, we are unable to

have any opinion as to the correctness or otherwise of the judgment appealed from. Without questioning the view of the learned trial Judge as to what facts were in his opinion proved at the trial, the statement embraced in his letter as to what was proved is not admissible as evidence on this appeal, nothing less than the complete evidence itself meeting the requirements of the statute. The defendant cannot be held responsible for the evidence not being forthcoming, and the Court being unable in its absence, to determine the rights of the parties in connection with the issue involved in the case, the only way out of the *impasse*, is to direct a new trial, which we accordingly order. The costs of the former trial and of this appeal to be costs in the cause.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

MASTER IN CHAMBERS. FEBRUARY 18TH, 1913.

BECHER v. RYCKMAN.

4 O. W. N. 848.

Discovery—Further Discovery—Amendment of Statement of Claim—No Substantial Change in Claim.

Master-in-Chambers refused to order further examination of defendant for discovery after an amendment of the statement of claim where no substantial amendment of the relief claimed had been made.

Motion for further examination of defendant Ryckman for discovery after amendment of statement of claim.

E. C. Cattanach, for the plaintiff.

K. F. Mackenzie, for the defendant.

CARTWRIGHT, K.C., MASTER:—The only amendment to the statement of claim of any importance is to make (a) the first claim of the plaintiff one of being entitled to a tenth interest in any profits arising from the dealings of defendants with the lands in question, and (b) asking as an alternative for a transfer of a tenth interest in the mining claims, and (c) for payment for services of plaintiff from November, 1908, to May, 1909, in the matter. On his former examina-

tion defendant declined to answer questions as to the present ownership of these properties and other similar questions on the ground that plaintiff had not as yet shewn any right to such enquiry. He produced on that examination a copy of a letter written by himself to a third party in which he stated that he and his co-defendant were intending to give plaintiff a tenth of any net profits resulting to them from the then existing option on the claims. He said, however, later on in his examination, that the option had never resulted in anything but a loss.

This being so, there does not seem any ground on which further examination could be ordered—defendant denies any employment by him of the plaintiff though he will not say what his co-defendant may have done. In his opinion plaintiff was being employed by the vendors. Defendant denies any contract with the plaintiff whatsoever. It is clear that the plaintiff has nothing in writing of any kind addressed to himself. I think it was admitted that this is the case.

If plaintiff can succeed on the strength of the letter written to a third party above mentioned, it will then be time enough to enquire as to profits, if defendant's denial of any profits is doubted.

The defendant has shewn his good faith and confidence in the defence by producing the letter, which speaks of the 10 per cent. of the net profits being intended for plaintiff. He seems to have answered all questions at this stage, and the motion will be dismissed—costs to defendants in the cause.

HON. MR. JUSTICE BRITTON. FEBRUARY 19TH, 1913.

FITCHETT v. FITCHETT.

4 O. W. N. 844.

Alimony—Rate of—Custody of Children—Right of Defendant to Visit—Costs.

BRITTON, J., in an action for alimony, gave plaintiff judgment for alimony at the rate of $5 per week, gave plaintiff custody of the two children of the marriage, and made provision for the defendant visiting them at stated hours, upon notice.

Action for alimony, tried at Toronto without a jury.

C. M. Garvey, for the plaintiff.

W. A. Henderson, for the defendant.

HON. MR. JUSTICE BRITTON:—At the close of the trial I gave my decision upon the questions of fact.

I held my formal judgment for further consideration, and to see what arrangement, if any, could be made in regard to the children of plaintiff and defendant, now in the custody of the plaintiff.

The plaintiff, by reason of the assault committed upon her by the defendant on the 25th August, 1912, is entitled to judgment for alimony.

After that assault the defendant decided to leave the plaintiff, and the plaintiff was willing the defendant should go.

The plaintiff was the lessee of the house, and had not defendant decided to go, the plaintiff would have been justified in refusing to live with him.

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

The plaintiff desires to keep their two children, and she is willing that defendant should, as permanent alimony, pay only an amount that would be reasonably sufficient to enable her to maintain the children.

The defendant is not in very good financial circumstances.

Five dollars a week will be sufficient for him to pay, and sufficient for the purpose for which the plaintiff asks money.

Owing to costs having been incurred, there may be loss and inconvenience by delay in plaintiff's receiving any money.

The judgment will be for alimony, and the defendant must pay the costs, which I fix at $80.

The plaintiff incurred some unnecessary costs in having witnesses, who appeared to know nothing of facts material to the issues herein.

These costs will be payable, $5 each week to plaintiff's solicitors, commencing on Saturday the 8th of March, and on each Saturday thereafter, until 16 payments have been made of $5 each.

Then the payment of alimony will commence—on Saturday the 28th of June next, and continue weekly thereafter until otherwise ordered, so long as the plaintiff has the custody of, and is maintaining the children, as above mentioned.

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

There will be an order in reference to the custody of the children.

They are to remain in the possession and care of the plaintiff, to be maintained by her until further ordered, free from any interference or attempted control by the defendant.

The defendant will be allowed to see the children, or either of them, on any afternoon at a time to be named, between 2 and 5 o'clock in the afternoon; but not more frequently than once every two weeks, and the interview is not to exceed thirty minutes in duration.

No attempt is to be made by the defendant at any interview to influence them, or either of them, against their mother or to make them or either discontented with their home.

Notice of the time when the defendant wishes to see the children must be given 24 hours before the interview, and the plaintiff is to produce the children for their father's visit, at Lippincott barracks of the Salvation Army.

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

HON. MR. JUSTICE MIDDLETON. FEBRUARY 17TH, 1913.

REX v. LAPHAM.

4 O. W. N. 838.

Criminal Law—Extortion by Peace Officer—Threats of Prosecution—Bona Fides—Certiorari.

MIDDLETON, J., refused to quash the conviction of a constable for extortion under threats of prosecution, holding the evidence warranted the conviction.

Motion on return of *habeas corpus* and *certiorari* in aid to quash conviction and for discharge.

The applicant was found guilty of an offence against sec. 454, in extorting $45 from one Susan McCoppin by

accusing and threatening to accuse one William McCoppin her husband of stealing a fox terrier. Lapham a county constable of Simcoe county had placed in his hands a warrant for the arrest of McCoppin on the charge of stealing the dog in question from one Hastings. He also received from Hastings written authority to settle with McCoppin. Armed with these documents he saw Mrs. McCoppin and extorted $45—said to be $35 the value of the dog and $10 for expenses.

McGregor, for the accused contended among other things that what was done was only a threat to execute the warrant in his hands and not an accusation of the offence.

E. Bayly, K.C., for the Crown, contra.

HON. MR. JUSTICE MIDDLETON:—This question would be difficult if the facts required its determination. It may be that a constable armed with a warrant who extorts money from any person by the mere threat to arrest upon a warrant in his possession for an offence of which the informant accuses that person is not within the statute. If so, the statute should be amended so as to make it plain that no peace officer can use his office and his duty to arrest under process a means of extortion.

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

Notwithstanding Mr. McGregor's strong plea based upon the well-meaning ignorance and stupidity of this constable who, it is said, was really playing the part of a peacemaker I cannot interfere. That was a question for the magistrate and I incline to the same view. The conduct of Lapham seems to me to have been high-handed as well as stupid. That astute observer Bunyan long ago remarked that the town of Stupidity was not far from the city of Destruction.

The motion is refused and the prisoner is remanded.

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

RE KETCHUM AND OTTAWA CITY.

4 O. W. N. 828.

Arbitration and Award—Municipal Arbitrations Act—R. S. O. c. 227, s. 7—Appeal not Brought in Time—Taking up of Award.

KELLY, J., quashed an appeal from an award of the Official Arbitrator of the city of Ottawa, upon the ground that the same was not launched within one month of the taking up of the award, as required by section 7 of the Municipal Arbitrations Act, R. S. O. 1897, c. 227.

Motion by claimants for an order quashing an appeal from the official arbitrator of the city of Ottawa on the ground that the same was not launched within one month from the taking up of the award as required by sec. 7 of the Municipal Arbitrations Act.

T. A. Beament, for the applicants.

Taylor McVeity, for the city, contra.

HON. MR. JUSTICE KELLY:—The corporation of the city of Ottawa, on January 26th, 1912, appealed from the award made by an official arbitrator in an arbitration instituted under the provisions of the Municipal Arbitration Act, R. S. O. (1897) ch. 227.

The present application is for an order quashing the appeal on the ground that it was not, as required by sec. 7 of the Act, brought on until one month after the award was taken up.

On December 21st, 1912, the appellants' solicitor received from the respondent's solicitors a written communication asking for payment of the amount found due by the arbitrator, and their costs of the arbitration. It has been suggested by the appellants that notice of the taking up of the award should have been served on them, and that the time allowed for the appeal should run only from the giving of such notice. Section 7 says that "the award of the official arbitrator . . . shall be binding and conclusive upon all parties thereto, unless appealed from within one month after the taking up of the same."

Notice of the filing of the award was given to the appellants' solicitor on November 29th. On the argument it

was admitted by counsel that the award was taken up not later than December 4th, and the appellants' solicitor states in his affidavit that the letter which he received on December 21st was the first notice or intimation which he received that the award had been taken up; so that even if notice of the taking up were necessary—and that is not expressly required by the Act—he had such notice on December 21st, and the appeal, therefore, was not taken within the time required.

The application is granted with costs.

MASTER IN CHAMBERS. FEBRUARY 15TH, 1913.

CARTER v. FOLEY O'BRIEN.

McINTOSH v. FOLEY O'BRIEN.

SMYTH v. FOLEY O'BRIEN.

4 O. W. N. 835.

Evidence—Commission—Refusal of one Defendant to Attend Trial—Terms.

MASTER IN CHAMBERS granted plaintiffs a commission to examine a defendant at Reno, Nevada, who had formerly agreed to attend the trial, but, latterly, had refused to do so.

Motion by plaintiff in each action for a commission to examine as a witness on their behalf defendant Geddes at Reno, Nevada, or elsewhere as he may be found.

H. S. Murton, for the motion.

H. Macdonald (Day F. & O'S.), for the defendant Foley.

R. W. Hart, for the other defendants.

CARTWRIGHT, K.C., MASTER:—I have read the examination of defendant Geddes for discovery. In the light of the statement of claim his evidence is material. He had agreed to come to the trial and plaintiffs are willing "to pay his expenses and a reasonable fee for his time"—the best possible proof of their good faith and desire to save delay and expense. After the trial had been fixed for 20th January, he notified his solicitor that he would not come.

In this state of affairs it seems proper to make the order asked for unless his examination is allowed to be taken as

his evidence at the trial. I had some doubt at the argument as to whether I should accede to the defendants' request for security. Further reflection satisfies me that this should not be granted as plaintiffs did everything in their power to procure Mr. Geddes' presence at the trial, which he would naturally be expected to attend at his own expense.

If a commission is necessary the usual order will issue when details have been agreed on by the parties—otherwise they will be disposed of on the settlement of the order.

MASTER IN CHAMBERS. FEBRUARY 15TH, 1913.

AUGUSTINE v. DE SHERBININ.

4 O. W. N. 834.

Judgment — Summary Judgment — Con. Rule 603 — Prima Facie Defence Shewn—Counterclaim.

MASTER IN CHAMBERS refused to give summary judgment upon a promissory note admittedly made, where defendants set up a counterclaim for damages, alleging deceit.

Neck v. Taylor, 1893, 1 Q. B. 560, referred to.

An action on a promissory note the making of which was not denied. The plaintiff moved for judgment under 603 after cross-examination of defendant on affidavit in answer filed in October last. The delay in proceeding with the motion was explained on the argument.

W. J. Elliott, for the motion.

J. T. White, contra.

CARTWRIGHT, K.C., MASTER:—The defendants were engaged as agents of the plaintiff company in selling their machines and were successful to a certain extent. Afterwards it appears from the affidavit of defendant abovementioned, that the machine was not satisfactory and defendants allege that they were misled by the plaintiff company and intend to counterclaim for damages or to set up the company's deceit whereby they were induced to give the note and incur expense and loss of time, as a defence to the action.

This, I think, is a sufficient answer to the motion which which will be dismissed with costs in the cause.

In *Neck* v. *Taylor*, [1893] 1 Q. B. 560, at p. 562, Lord Esher, M.R., said: "Where the counterclaim arises in respect of the same matter or transaction upon which the claim is founded . . . the Court . . . will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim whatever form in point of strict law and of pleading it may take." This language seems pertinent to the present motion, though used in disposing of a different question.

As to the scope and application of C. R. 603, see *Smyth* v. *Bandel*, 23 O. W. R. 798, affirmed 20th December, 1912.

MASTER IN CHAMBERS. FEBRUARY 13TH, 1913.

HAY v. COSTE.

4 O. W. N. 831.

Discovery — Further Affidavit on Production — Insufficiency of Material.

MASTER IN CHAMBERS dismissed a motion for a further and better affidavit on production, upon the ground that the material filed in support of the motion, an affidavit of plaintiff's solicitor, was clearly inadequate.

Ramsay v. *Toronto Rw. Co.*, 23 O. W. R. 513, referred to.

Motion by the plaintiff for a further affidavit on production by the defendant, who had filed an affidavit sufficient according to the Rules. The defendant had not been examined for discovery.

M. Lockhart Gordon, for the motion.

C. A. Masten, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The motion is supported only by an affidavit of plaintiff's solicitor which is clearly insufficient in its contents, even if allowable at all. It gives no grounds for supposing that the affidavit is defective, nor does any appear in the pleadings or in what has been produced.

What is necessary on such a motion was considered in a late case of *Ramsay* v. *Toronto Rw. Co.*, 23 O. W. R. 513.

The motion may perhaps be successful at a later stage, *e.g.*, after examination for discovery of defendant. See

McMahon v. *Railway Passengers*, 22 O. W. R. 32, 196, at p. 199. It is not necessary to consider this now.

The motion must be dismissed with costs to defendant in any event.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 17TH, 1913.

WALL v. DOMINION CANNERS.

4 O. W. N. 848.

Pleading—Statement of Claim—Motion to Strike out Portion—Relevancy—Embarrassment—Appeal—Costs.

MIDDLETON, J., struck out, as embarrassing, a paragraph of a statement of claim, alleging an offer when the contract ultimately entered into between the parties was set out in another paragraph of the pleading.

Costs of motion and appeal in cause.

Judgment of MASTER IN CHAMBERS, 23 O. W. R. 183, reversed.

Appeal by defendant from order of Master in Chambers, 23 O. W. R. , refusing to strike out paragraph 6 of statement of claim (see also 23 O. W. R. 183).

F. R. Mackelcan, for the defendant.

F. McCarthy, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—Paragraph 6 seems to me embarrassing; it does not allege a contract, but merely an offer—the allegation of the contract is found in paragraph 4.

If it is intended to assign reasons which induced Grant and Nesbitt to make the promise charged, the paragraph is immaterial, as the consideration for the promise is shewn in paragraph 4.

If it is intended to allege that the stock was to form part of that "voted" to Grant and Nesbitt, then the company are not concerned unless the stock is still under its control, which is not alleged. If intended, this can be shewn under the allegation in paragraph 4.

The plaintiff may amend if leave is necessary, but paragraph 6, as it now stands, must be struck out.

Costs here and below may be in the cause.

HON. MR. JUSTICE LATCHFORD. FEBRUARY 22ND, 1913.

STUART v. BANK OF MONTREAL.

4 O. W. N. 846.

Deed—Absolute in Form—Alleged to have been by way of Security only—Evidence.

LATCHFORD, J., dismissed plaintiff's action to have it declared that a certain deed from his father to his grandfather, of certain lands in Hamilton, was, in reality, a mortgage, being by way of security for certain advances, and that the defendants, subsequent purchasers, had notice and knowledge of that fact, finding against both of plaintiff's contentions as above.

An action brought by a son of the late John Jacques Stuart, of Hamilton, for a declaration that a conveyance dated 30th October, 1900, of certain lands in Hamilton, known to the parties as "the north end property," for the expressed consideration of $12,000, though absolute in form was given to the plaintiff's grandfather, John Stuart, by John Jacques Stuart, merely as security for the repayment of moneys advanced upon account of the said lands by the father to the son; and that the defendants, Braithwaite, Alexander Bruce, Wilgress, and R. R. Bruce, to whom the lands were subsequently transferred in trust for the defendant bank, took with notice that John Stuart was merely a trustee of the lands for his son, and not their absolute owner.

The plaintiff asked, therefore, that upon payment to the bank of what John Jacques Stuart owed to John Stuart upon the said lands, the plaintiff should be allowed in to redeem. Shortly, the plaintiff's contention was that the conveyance was in fact a mortgage and not a deed, and that the defendants, because aware of the fact, were is no better position than the assignees of a mortgage would be in the circumstances.

Douglas K.C., and Elliott, K.C., for the plaintiffs.

Hon. Wallace Nesbitt, K.C., and Burbidge, for the defendants.

HON. MR. JUSTICE LATCHFORD:—The questions for determination are: Was the deed taken as security only? If so, were the defendants aware that it was so taken? To entitle the plaintiff to succeed, both questions—if the defend-

ants were purchasers for value—must be answered in the affirmative.

The plaintiff, under the will of his late father and various assignments and transfers, has the same rights against the defendants that his father would have, if now living.

In 1891, John Stuart was maintaining his son in Hamilton. He had previously supplied capital to enable the son to engage in business, but the son had not been successful. About the time mentioned the business was liquidated, resulting in considérable loss to the father, who was carrying on an extensive trade as a wholesale grocer, was president of an important financial institution, the Bank of Hamilton, and a director of the Canada Life Assurance Co. His credit was good, and his capital at the time considered large.

John Jacques Stuart and John G. Scott—a solicitor and barrister—of Hamilton, in 1891, jointly appear as purchasers of a block of forty acres within the city limits for $33,675. A loan of $26,000 was obtained from the Canada Life Assurance Co., on the security of the land, and on a collateral guarantee executed by John Stuart in pursuance of an agreement which he had previously made with his son and Mr. Scott. The defendant Alexander Bruce acted as solicitor for the mortgagees, and was aware that the title to the land was in John Jacques Stuart and J. J. Scott. By the agreement referred to, John Stuart undertook the carriage of the whole undertaking for a term of five years, and was given by way of indemnity a lien and other recourse against the land, which was to be subdivided and sold in parcels. If at the end of five years John Jacques Stuart and Mr. Scott should not have paid off all the loans and interest effected on the credit of John Stuart, the part of said lands remaining unsold should belong to John Stuart, subject to redemption within one month.

An additional sum of about $10,000, required to complete the purchase, was obtained from the Molsons Bank, by John Stuart, by discounting a note made by the purchasers, which he endorsed.

The son at this time had no financial resources. His family as well as himself were maintained by his father; and the father admits that not a dollar of the son's money went into the purchase. Nor did the son subsequently pay anything upon the note discounted at the bank, or upon the renewals, which from time to time it became necessary to

give. The father, doubtless, was willing and anxious to assist his son with his credit; though for reasons, which appear unmistakably throughout the evidence, he was not disposed to place much capital in his son's control.

In December, 1892—the date is not stated—an agreement supplemental to that of April, 1891, was made between the same parties. The terms of the prior agreement are extended for a period of five years from December, 1892, and that agreement is "varied and explained," by a declaration that the intention of the parties is that John Stuart, "shall not become entitled to the said lands otherwise than as security for money which he may advance or for which he may be liable as guarantor." John Stuart further agrees to pay half of all moneys which his son and Scott may be called upon to pay in connection with the purchase. The inference which might be drawn in the circumstances—that John Stuart was himself the purchaser—is intended to be met by this declaration of intention. "He could not be called a trustee for me," his father says. "I did things for him, but I do not know about acting as trustee. The purchase was made by him and Scott on their own behalf." The agreements were not registered. The only inconvenience resulting from registering them would be that John Stuart would be a necessary party to every deed.

By 1900, the advances which John Stuart had made in connection with his son's interest in the property amounted to a large sum. Mr. Scott had protected his share.

John Jacques Stuart had not improved his financial position. He was in Chatham, New Brunswick, acting as manager of the Maritime Sulphite Fibre Co., in which his father was the largest shareholder. The venture there was not a successful one. Some of its vicissitudes may be followed in the reports of *Stuart* (*Jean Jacques*) v. *Bank of Montreal* C. R. [1911] 1 A. C. 1. Whatever salary was paid the son by the company was supplemented to the extent of $2,000 or $3,000 a year by the father.

In 1900, John Stuart learned that his son had determined to leave Canada for South Africa. He was not, his father says, connected with any of the expeditions then leaving the Dominion to take part in the Boer War.

The conveyance of the 30th October, 1900 from the son to the father, is in evidence. It was prepared, like the agreements of 1891 and 1892, by the legal firm of which Mr.

Scott was a member, and was executed at Chatham by John Jacques Stuart and his wife. It is probable that letters passed between Mr. Scott's firm and John Jacques Stuart, or between father and son in regard to this conveyance. There is, however, no contemporary document produced which throws any light on the conveyance or its execution. The only evidence regarding the transaction is that given *de bene esse* by John Stuart who is now in his 84th year, a paralytic, and unable to appear in Court.

Mr. Stuart was asked:—

"Why did you want to get the deed? A. For security.

101. Q. Security for what? A. For the advances that I had made on the property.

102. Q. Did you ask him for it? A. Yes, I did. He was straightening up things generally, and that was part of it before his going away, puting things in proper shape.

103. Q. Before this deed was actually sent down to him at Chatham, you had a discussion with him? A. Yes, I had been in Chatham and explained the whole thing to him."

Then comes his evidence that the transaction was not an absolute sale:—

"106. Q. Do you know why it was taken in the form of a deed instead of in the form of a mortgage? A. It was supposed to be the most satisfactory way of taking it, the same as a mortgage—there was no other reason. It was not taken as an absolute and complete assignment, not as a sale, but by way of security.

107. Q. But was there any particular reason why it was put in the form of a deed instead of in the form of a mortgage? A. It must have been on the advice of the solicitor. I do not think I cared which, I cannot tell at this moment. It was never an absolute sale and conveyance to me, it answered the purpose of a mortgage.

108. Q. It was taken by you as security? A. Yes."

To establish that the deed was taken as security upon the advice of Mr. Alexander Bruce, Mr. Stuart is asked:—

"Do you remember at the time you discussed this with your son—as to giving you security on the property whether you were advised by any solicitor? A. I cannot tell you. If it was it would be Mr. Bruce.

110. Q. Do you remember whether he had anything to do with the taking of that document? A. I cannot recall

anything at this moment that would identify him with the actual transaction at that time. He advised me all through."

It will be observed that the only material evidence here is in answer to suggestive or leading questions put by counsel for the plaintiff. Evidence so elicited has, of course, little probative value with a Judge, especially when, as in this case, it stands alone and unsupported.

The agreements of 1891 and 1892 gave John Stuart a lien for all his advances, and might have been registered at any time. He thus had security for both his liability as guarantor and for his advances in connection with the property. I think it is a fair inference that he made an additional payment to his son when obtaining the deed. The son had no means. His father had been contributing thousands annually to maintain him at Chatham. The young man was leaving wife and family upon a needless and costly voyage. His wife and children would have to be maintained in his absence. His father was the only source of financial supply.

"I might," he says (Q. 97) "have paid some other money—that I do not remember—but the $12,000 was arrived at approximately."

It is, therefore, probable that a sum in addition to the actual advances made on account of the property was then paid by the father. But apart from the question as to whether any additional sum was paid or not, the deed, I find, was intended to be, and was in fact, an absolute conveyance of the half interest, for which the son had paid nothing, to the father, who had paid all.

I accept Mr. Alexander Bruce's evidence that until recently he had no knowledge of the agreements of 1891 and 1892, and that he gave no advice regarding the conveyance of September 30th, 1900. If his advice had been sought, it is not improbable that he and not Mr. J. J. Scott would have been instructed to prepare the conveyance. Mr. Bruce learned of this document only in the next year—just when does not appear. Mr. Stuart says Mr. Bruce advised the registration of the deed. Mr. Bruce has no recollection of having done so. The point is not important. When the deed was registered on the 7th January, 1901, it was again Mr. J. J. Scott and not Mr. Bruce, who acted for John Stuart.

I find the deed of the 30th October, to be what it purports to be—an absolute conveyance—not only because I decline to credit the slight evidence of Mr. Stuart, as being improbable in the circumstances and unsupported by any document, but also because his subsequent conduct is wholly inconsistent with the contention which the plaintiff now endeavours to maintain.

A letter dated October 2nd, 1902, was tendered in evidence and admitted subject to objection, which is depended on to shew that the father considered himself a trustee of the property for his son, who, after a year spent in Africa, has gone to the Canadian West, where he passed drafts upon his father which Col. Steele of the North West Mounted Police honoured, but which the father refused to pay. The letter in question was written in reply to Colonel Steele's request to be reimbursed. Mr. Stuart says that he is very sorry he cannot remit. All he can do at present is to assure Col. Steele that he will get his money "sooner or later." The son should not have said that he had money of his own in his father's hands. "He may excuse himself for saying so by reference to a property in Hamilton in which he was interested, but which I had to take over and hold subject to encumbrances for money paid for it, and I am still paying. It is, however, improving in value and some time there will be a surplus, and I do not mind saying to you that when a surplus is available I will see that you are paid out of it."

Then after stating that he has sent a small sum through the Bank of Montreal "to be paid weekly to my son so as to save him from the dire fate you hint at," the letter concludes by bespeaking a continuance of Col. Steele's good offices, promising that his kindness shall not be forgotten, and adding as a postscript, "I do not mean to say that you will not be repaid without depending on the property mentioned, but you may regard it as an ultimate security."

There is, it will be noticed, no assertion that at the time the son had any interest in the property. On the contrary it is stated that the son "*was* interested," that the father had taken it over and then held it. It was subject to incumbrance, but improving in value, and would produce a surplus "sometime," when the Colonel would be repaid. Not a word in the letter points to any legal obligation on the part of John Stuart in connection with his tenure of the property. He merely expresses a benevolent intention of devoting some

of the proceeds—the surplus—whether over the encumbrances, or over the encumbrances and his outlay, is not clear, in repayment of moneys obtained by his son from a confiding friend under false pretences. Had the facts warranted it, a much stronger statement, I have no doubt, would have been made when Mr. Stuart was seeking to excuse the reprehensible conduct of his son.

There is not a suggestion anywhere in the evidence that the letter to Colonel Steele was ever brought to the knowledge or notice of any of the defendants until discovery was had in the present action.

Within a few weeks after the letter to Col. Steele was written—on October 24th, 1902—John Stuart, writing to Mr. Alexander Bruce, who was acting for the defendant bank in obtaining security for the large indebtedness of Stuart to the bank, says: "I should mention that I have a half interest in a piece of land mortgaged for $19,000, the value of which is uncertain, but which may realize something over the mortgage at some future time." The reference is to the "north end property."

Here again there is no pretence that the son has an equity in the property, and there is an unequivocal statement that John Stuart now owns the half interest which was formerly his son's.

No reference to this property appears in the correspondence of the year 1903. In 1904, the bank was still pressing Stuart for a settlement of its claims against him. On January 19th Mr. Bruce writing to Mr. Macnider, the chief inspector of the bank, says, "you will remember that besides the blocks mentioned in my memorandum, he (John Stuart) told you at one time, of having an interest in some property at the north end of our city, which his son had purchased along with Mr. J. J. Scott, and there is probably something more in it than was supposed until quite recently, but I do not suppose it is a great deal." The manager of the defendant bank at Hamilton, Mr. Braithwaite, in writing to Mr. Macnider on March 16th, 1904, estimated the value of this interest to be $10,000.

The mill at Chatham had in the meantime been put up for sale and bought in for the protection of the bondholders. The bank was then in a position to ascertain the liability of John Stuart and other guarantors of the indebtedness to the bank of the Maritime Sulphite Fibre Company.

Mr. Alex. Bruce was one of the guarantors. He was acting as solicitor for the bank, and was pressing Stuart for a transfer of all his assets, other than his household furniture and the pension of $5,000 which he received—mainly through Mr. Bruce's efforts—on retiring from the presidency of the Bank of Hamilton. The interest of Mr. Bruce, both as one of the guarantors and as representative of the bank in the negotiations for the transfer, was opposed to the interest of Mr. Stuart and his wife; as Mr. Stuart, at least, fully realized. Stuart was keenly alive to his own interests. No one can read the correspondence which he conducted without being impressed with his thorough comprehension of the situation. He says that he trusted Mr. Bruce. He might well trust that gentleman, though aware that Mr. Bruce was himself liable upon a guarantee, and was acting for the bank. Anyone who knew Mr. Bruce as Mr. Stuart knew him would trust him, in any circumstances. No lawyer of this province ever had a deservedly higher reputation than Mr. Bruce enjoyed, and still enjoys.

But it is shewn by the bills of costs in evidence rendered that after June, 1903, Mr. Bruce acted as solicitor for Mr. Stuart only in two small transactions, both in January, 1904. Mr. Stuart says, in answer to his counsel:—

"165. Q. Now was Mr. Bruce connected with these negotiations? A. He was.

166. Q. Was Mr. Bruce the solicitor? A. It was then I discovered I had to part with him.

167. Q. But during the negotiations he was acting as your solicitor? A. I thought so."

Little as this is, the witness had to be led to say it. But any confidence Mr. Stuart reposed in Mr. Bruce was with the knowledge that Mr. Bruce had adverse interests; and that confidence was not misplaced. Stuart shews himself throughout, as capable as Bruce, of transacting the business on hand; and Mr. Bruce appears to have always have acted fairly, honestly, and honourably.

In June there are indications that Stuart and Bruce were beginning to draw apart. The "My dear Mr. Stuart" of May 31st becomes "Dear Mr. Stuart" on June 15th, and "Dear Sir" on June 24th, when Mr. Bruce sent him a draft of a proposed settlement with the bank.

In John Stuart's letter to Mr. Bruce of July 1st, 1904, reference is made to the draft agreement, and to a memoran-

dum which had been prepared some time previously. Mr. Stuart says that in the list of assets comprised in the memorandum, the north end property and another property were not included. He thinks it only fair—he objects—that as those properties did not at any time form the subject of more than cursory or incidental mention the proposed transfer to the bank should not include them. But he does not say that interest in the north end property is not the half interest expressed in the deed of 1900.

Here was the occasion to state—if the facts warranted the statement—that he was interested in the north end property only as mortgagee, and that there was an outstanding right—his son's equity—preventing him from making good title. His silence on the point at this juncture is incompatible with the position he seeks to establish by his oral evidence. Apart altogether from what is sworn by Mr. Bruce, that gentleman was too careful a solicitor to neglect the bank's interest, if he had the knowledge of the imperfection in the title which John Stuart says he had.

Replying on the next day, Mr. Bruce says that the north end property was included in a list—which Mr. Stuart had furnished to Mr. Scott—(not J. J. Scott, but Sumner Scott, a brother-in-law of John Jacques Stuart), when that gentleman was going to Montreal to discuss the matter of settlement with the head office of the bank.

On July 5th, Mr. Stuart again writes Mr. Bruce objecting that the north end property should be left to him in order that he should out of the sales be able to repay his son's wife a sum of $8,000, which he had received as proceeds of a sale of property owned by her. In the same letter he announces that he will seek advice elsewhere. Mr. Bruce answers on the same day that he will be very glad if some one else is consulted, and insists that the matter be closed without further delay.

From this date, July 5th, 1904, until after July 28th or 29th, when Mr. Stuart executed the conveyance, dated July 20th, of his half interest in the property, to Mr. Bruce and Mr. Braithwaite as trustees for the bank, Mr. Bruce was beyond question not advising or acting in any capacity for Mr. Stuart, who was represented throughout by Mr. S. F. Washington, K.C.,

The real ground of Mr. Stuart's objection to the inclusion in the settlement of the north end property is disclosed

in Mr. Braithwaite's letters of July 15th and 19th, and Mr. Stuart's reply. Lots were being sold and Mr. Stuart was receiving and insisting on retaining the proceeds—not indeed on the ground that his son or his son's wife and family were entitled to any of the moneys—but because the sales were made before anything was said about the bank having anything to do with the properties—the north end and another sold by Stuart.

The settlement was deferred until the bank's patience became exhausted, and a writ was issued at the instance of Mr. Bruce. Finally, towards the end of July, the necessary documents were executed and delivered. Subsequently, in June, 1906, when Mr. Braithwaite was leaving Hamilton, he and Mr. Alexander Bruce conveyed to the defendants Wilgress and R. R. Bruce, the half interest derived by them under the conveyance, dated July 20th, 1904.

I credit the evidence of Mr. Bruce that he had no knowledge that Mr. Stuart ever pretended that his half interest in the property was held merely as security from his son.

It is alleged that the late Sir Edward Clouston, then general manager of the Bank of Montreal, Mr. Macnider the superintendent, and Mr. Braithwaite, had knowledge that John Stuart held the north end property as trustee for his son.

The evidence relied on in support of this contention is contained in Mr. Stuart's examination *de bene esse* and certain letters filed as exhibits.

Mr. Stuart says he frequently had interviews with Sir Edward Clouston and must have "had discussions with him as to the conveyance to the bank," but "cannot tell particularly." He was asked (p. 24): "Was the north end property ever mentioned to Mr. Clouston? A. Yes. Q. And did you state everything to Mr. Clouston about the position of that property? A. I never withheld anything from him, I gave him the fullest information about everything, and he was always apparently satisfied. Q. I am confining myself to the north end property, did you give him full information about that? A. Yes, undoubtedly. Q. Was he aware of the interests you had in that property? A. In respect of advances on it? Q. Yes, he was aware of that undoubtedly, and Mr. Bruce, who was acting for him, knew all about it. Q. Was Mr. Macnider aware of that? A. Yes, but not so minutely perhaps, but he was the main medium

of intercourse with the Bank of Montreal with respect to all of my affairs. Q. You had an interview with Mr. Macnider personally? A. Yes, over and over again. Q. Have you ever told Mr. Macnider what interest you had in the north end property?"

Mr. Nesbitt: "You know that is an improper form of question Mr. Douglas, it is out of all bounds, you should not take advantage of the fact that you are examining this witness *de bene esse* to examine him in this way."

"Q. Did you ever discuss this north end property with Mr. Macnider? A. I did on more than one occasion. Q. What did you tell him about it? A. I told him what the facts were. Q. What facts did you tell him? A. I told him how I was interested, that I had become security and paid the money for him, and that there was a certain amount of money in that property, and I think he was told and knew what interest I had, I was prepared to give as security to the bank—nothing beyond that—my interest to the extent that the property was indebted to me."

There is nothing in Mr. Stuart's testimony attributing knowledge to Mr. Braithwaite that the north end property was subject to any right of redemption by John Jacques Stuart. The letter of January 16th, 1904, from Mr. Braithwaite to Mr. Macnider states that John Stuart "has an interest in some property in the north part of the city." Similar language was employed in a letter of January 19th, 1904, from Mr. Bruce to Mr. Macnider: "He (John Stuart) told you at one time of having an interest in some property at the north end of the city."

The word "interest" correctly describes the right acquired by John Stuart from his son under the conveyance of October 30th, 1900, which was an undivided half interest in the lands, subject to the existing mortgage. It would also describe the interest John Stuart had, were that interest subject not only to the mortgage, but to the right of John Jacques Stuart to redeem. But to ascribe to it the latter meaning only, when it is used by persons who had no knowledge of the pretended right of redemption, is to subject the word to a strain it cannot bear.

Mr. Macnider, who has been sixty years in the service of the bank, has no recollection of having any such statements made to him regarding the north end property as Stuart swears to. He knew, he says, only the name of the property.

It is argued that because Mr. Macnider does not contradict Mr. Stuart, the latter's evidence must be accepted. There are undoubtedly many cases in which a statement made by one witness and not denied by another, must be credited; but in view of Mr. Stuart's silence when the transfer of his interest in the north end property was the subject of discussion, and at the critical moment when he was objecting to transfer it, I must once again decline to credit him. I have scrutinized the evidence, oral and written, carefully, and I am unable to find a single unequivocal suggestion that his half interest in the north end property was subject to any limitation, except the mortgage to the Canada Life Assurance Company.

That the trustees for the bank were purchasers for value is clear. In consideration of the transfer, the bank abandoned its claim against the Nelson property and the household furniture of "Idlewild," and gave Mr. Stuart a release.

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

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

It is difficult to avoid the inference that the present action is based on an afterthought of John Stuart following on the successful termination of the suit of his wife against the defendant bank.

The reason of the decision in that case has, however, no application to this.

The action fails, and is dismissed with costs.

HON. MR. JUSTICE LENNOX. FEBRUARY 26TH, 1913.

SCOBIE v. WALLACE.

4 O. W. N.

Vendor and Purchaser—Rescission of Contract—Sale of Lots in "Glenelm Park," Regina — Fraud and Misrepresentation — Liability of Principal for Fraud of Agent.

LENNOX, J., rescinded a contract for the purchase of certain lots in "Glenelm Park," Regina, Sask., and ordered a return of the moneys paid thereon, on the ground of fraud and misrepresentation as to the location of such lots.

Action by a purchaser of certain lots in Glenelm Park, near Regina, Sask., for rescission of the contract and for the return of the moneys paid thereon, upon the ground that the contract was induced by fraudulent misrepresentation. Tried at Ottawa without a jury on the 8th and 9th January, 1913.

A. E. Fripp, K.C., for the plaintiff.

G. F. Henderson, K.C., for the defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff is entitled to the relief sued for. He has not proved all the allegations of his statement of claim, but he has clearly established that he was induced to sign the agreement in question by representations and statements made to him by the defendant's agent, Michael Bergin, to wit: (a) that the lots he was purchasing were "inside lots" in the city of Regina; (b) that they were within one and a half miles of the city post office; (c) that the city was actually built up as far out as these lots; (d) that Bergin had recently visited Regina and could be depended upon to give reliable information; (e) that the plaintiff entered into this agreement relying upon the truth of these representations—as the agent knew—and (f) that they were false, and were knowingly and fraudulently made. The plaintiff was a rather easy victim, as he had only recently came into the control of some money. The agent is an adroit young man, and inspired the plaintiff's confidence by

telling him that he was a son of an old acquaintance, and by assuring him that he could go out and see the land, and if not right, he would get his money back. So great was the plaintiff's faith that he signed the agreement in blank, I believe, without reading it.

Well, there is told again the story so often heard in these cases: "No, I did not say the lots were within a mile and a half, I said the property, meaning the park was within one and a half miles of the post office;" but "the property" surely means the lots the man was buying, and even as to this, as I recollect it, the agent stumbled pretty badly upon cross-examination.

The evidence of the defendant does not shake my faith in the truthfulness and substantial accuracy of the plaintiff's statements.

It does not surprise me at all that the defendant, deluging the plaintiff with pamphlets, maps and photographs, and pouring out his rapid and plausible explanations and assurances, as reproduced at the trial, was able to, temporarily, allay the plaintiff's anxiety on the 3rd of August, and get his consent to let the cheque go through. But the plaintiff had been assured, and the defendant says upon good foundation, that the defendant was worth $100,000, and at that time the plaintiff had made no investigation, and as he says, knew no more than upon the night he signed the agreement. And it no doubt tended to smooth away difficulties that a disinterested gentleman, Mr. Charles Marshall, happened to come in, in time to join the defendant in assuring the plaintiff that he had "made no mistake in buying this property"—the groundwork of Mr. Marshall's information, as it turns out, being gleaned from newspapers.

In the absence of information from the west, and with the assurances of the defendant that all that Bergin had told him was true, the plaintiff went away on the 3rd ~~of~~ August, silenced if not convinced.

Weighing the evidence of the defendant against the statements of the plaintiff and his brother, my conclusion of fact is that upon the all important point of distance or location, the defendant led or left the plaintiff to believe—and knew that he believed—that the lots were within one and a half miles of the post office. The defendant swears otherwise, and says he told him and shewed where the lots were and the distance from the post office; but the omission

to state this in his letter of the 30th of September, 1912, written in reply to the specific statements in the plaintiff's letter of the 20th of September, cannot be readily reconciled with his evidence, and the defendant was unable to explain it. If he told the plaintiff the distance on the 3rd of August, as he swears he did, why did he not in his letter say: "I told you all this last August."

This is another instance of western land dealing in which the prearranged method of procedure is to be severely condemned. The practice of inducing farmers and others to sign long and intricate agreements wholly in blank and to be filled up and sealed at the office of the vendor, is a dangerous and intolerable practice. And this is another instance too in which the principal cannot shift even the moral responsibility from himself by saying it was the agent who did it, for we have here again a familiar form of fraud in the papers placed in the agent's hands for distribution.

Glenelm Park is not in Regina, and the lots sold are not within a mile of the city limits, but this did not prevent the defendant from describing them as in "Block 51, Glenelm Park, Regina, Saskatchewan." Another document which the defendant sends out, endorsed with his name and "Compliments," is a "Map of the City of Regina," and on it Glenelm Park appears to be a part of and well within the city; and it is only if you are aware that this is not the case—and then only by an intent microscopic examination—that you discover "City Boundary" printed upon one of the lots in almost invisible ink. And following in the same line, for the guidance of prospective purchasers, is another map embellished with fascinating pictures of Regina, and teeming with statistics of its phenomenal growth and assured future; and upon this, in many places, so that the hesitating purchaser will readily realize that he is buying himself right into the centre of all this wealth, Glenelm Park is described as "the most attractive subdivision in the City"—as "Regina's finest subdivision," and as "A beautiful subdivision in a beautiful city." Can the principal who sends his agent out into the country laden with this literature say that he intended him to act honestly or tell the truth?

There can be no question of waiver or confirmation in this case. The plaintiff was quieted for the time, but only half convinced by the defendant. He had an investigation made which was reported upon in the latter part of Sep-

tember. He thereupon repudiated the transaction, demanded back his money and threatened suit.

There will be judgment declaring; that the agreement in the pleadings mentioned is null and void and directing it to be delivered up to be cancelled; and that the defendant shall pay to the plaintiff the sum of $1,225, with interest thereon from the 3rd August, 1912, and the costs of this action.

And dismissing the defendant's counterclaim with costs to the plaintiff.

HON. MR. JUSTICE KELLY. FEBRUARY 26TH, 1913.

VANDEWATER v. MARSH.

4 O. W. N.

Building Contract—Action by Contractor—Location of Building—Duty as to—Mistake by Contractor—Power of Clerk of Works to Bind Employers—Certificate of Architect not Obtained—Condition Precedent—Action Premature—No Evidence of Mala Fides on Part of Architect.

KELLY, J., dismissed an action by contractors against the owners of certain buildings and the architect thereof, for the price of certain excavations and concrete work done for the said buildings, upon the ground that as the contract provided for payment to be made upon the certificate of the architect, which had not been obtained, and, as no collusion or improper motives had been shewn to have actuated the latter, the action was premature.

"The power of a clerk of works is only negative, his power being only to disapprove of material and work, and not to bind the owner by approving of them."

An action brought to recover the contract price and extras for the excavation and concrete work in the erection of certain buildings for defendants, Marsh & Henthorn, Ltd., in the city of Belleville, of which defendant Herbert was the architect.

The contract was dated May 10th, 1912; the price to be paid for the work contracted for was $2,400, and in addition thereto the plaintiff claimed $761.65 as extras for additions and alterations which he claimed he made at the request of the defendants.

At the time of the trial nothing had been paid to the plaintiff, either on the contract or for extras, but the work was not then fully completed. The contract called for the buildings being rectangular in form, and difficulties arose by reason of plaintiff having so constructed some of the con-

crete foundations, as to make a deviation from rectangular, of about three feet, six inches, in a distance of about one hundred and twenty-two feet. Not only would this affect the appearance of the building, but there would be increased expense on the part of the contractors, for other works on the building—such as the contractor for the steel work, and the bricklayer—if the buildings were completed on the foundations so built.

E. Gus. Porter, K.C., and Carnew, for the plaintiff.

Morden & Shorey, for the defendants, Marsh & Henthorn Ltd.

Tilley, for the defendant, Herbert.

HON. MR. JUSTICE KELLY:—The error in the construction resulted from an improper locating of the lines of the buildings, and concerning which, much evidence was given at the trial. Plaintiff contends that it was the duty of the defendants to lay out the ground, and that he was misled by stakes driven in the ground, and which he claims were placed there by the defendants, the owners. No such duty, however, devolved upon the defendants, either by contract or, as the evidence shews, by usage.

He further contends that John Marsh, who in the interests of Marsh & Henthorn, Ltd., was on the ground during the building operations, and whom the plaintiff calls the clerk of the works, designated to him the location of the foundations. That I do not find to be the fact, but even were it so, and even if John Marsh were the clerk of the works, that, in my view, would not protect the plaintiff. The powers of the person holding the position of clerk of the works, is only negative, that is to say, his power is only to disapprove of material and work, and not to bind the owner of the building, by approving of them. Halsbury, vol. 3, p. 163. There is no evidence that defendants authorized John Marsh to locate the buildings, or to instruct plaintiff where to place them.

Defendants provided plaintiff with a block plan, and other plans of the property, and proposed buildings, shewing the general location thereof, and while it was not the duty of the defendants to otherwise locate the lines of the buildings, the evidence shews (part of it being that of a witness called for the plaintiff) that the proper location could, with-

out difficulty, have been ascertained from the plans and data, which defendants furnished.

Plaintiff had had but little experience with buildings of this character, and his error, or mistake in the laying out, is largely attributable to that fact. After it had come to the knowledge of the architect that the walls were not being built on the true lines (and at that time a very considerable part of the concrete foundations had been put in), he discovered that if they were allowed to remain in the position which plaintiff had constructed them, changes would be necessary in the working drawings of the steel work which was to be placed on these foundations, and that it would otherwise occasion increase of expense.

As a compromise, and to avoid delay, and the additional expense which would result therefrom, defendants, the owners, were prepared to leave the foundations as they were constructed by plaintiff, provided that these changes were made without increased cost to them, and that the buildings would not suffer in appearance.

In the course of the correspondence between the architect on the one side, and the plaintiff and his solicitors on the other, a proposition made by the defendants for such compromise was rejected.

At the time of this correspondence, plaintiff was asking for a certificate for payment on account; but this was refused until some compromise, or settlement was arrived at, respecting the error in the foundations. The architect in one of his letters, intimated that unless the proposed compromise were entered into, he would have no other recourse but to have the foundations taken out, and placed in their proper position according to the plans. He did not, however, resort to this course; to have done so, would have caused such delay, as would have resulted in serious loss to the owners, not only because the time when they could get possession, and make use of the buildings, would have been postponed, but also because of the liability they would incur to contractors for other parts of the works, through being delayed in their contracting operations.

Defendants, to avoid this loss and delay, allowed the building to proceed, relying for their remedy on the other terms of the contract, by which they claimed the right to have the architect assess the damage for any inferior, or im-

perfect material, or inferior workmanship, instead of having same removed.

I do not think that what the defendants did, operated as a waiver of any of their rights under the contract, or that it constituted a new contract with the plaintiff. The parties are still bound by the terms of the written contract.

Plaintiff admits that part of his contract was not completed at the time of the trial. The plastering, mentioned in the specifications, was not done, and in his evidence, he said he was prepared to do it when ordered by the architect.

The written contract, made the production of the architect's certificate, a condition of the plaintiff's being entitled to payment. No certificate was issued. The certificates were not withheld, either through fraud or collusion on the part of the defendants, or with any intent to injure plaintiff, but rather in an effort to bring the whole matter to as satisfactory a conclusion as possible, and so that the architect might be in a position to deal with the contract, and the rights of both owners and contractor, having regard to the error or mistake, and the consequences thereof.

The situation was an unfortunate one for all concerned, and one not easily disposed of to the satisfaction of any of the parties, and I believe defendants endeavoured to bring about a solution of the difficulty, with as little loss as possible all around.

The plaintiff has shewn no right of action against the defendant Herbert, and I think the action as against the other defendants, is premature.

With regard to the extras, if it is proper that I should deal with them on the evidence submitted, I find that they are largely for labour and material in carrying some of the foundations to a greater depth, than the plaintiff originally contemplated, and for increased depth of concrete work consequent thereon. So far as I can make out from the evidence (the plaintiff himself, is not very clear on the matter), a charge of $85.75 is made for the extra excavation, and another for $603.90 (made up of $286.50 and $317.40) for increased depth of concrete.

The specifications which were made part of the contract, expressly provide that "the contractor before figuring upon this work, will be required to make himself acquainted with the ground, and its earth, and rock formation, and no question must afterwards arise as to his lack of knowledge in re-

gard to the situation," and "the contractor will be required to make his own levels and soundings" so as to obtain a knowledge of the depth of the rock, from the surface of the grade. The elevation will shew, only approximately, the different levels, but the contractor will be required to verify these levels and grades, and be responsible for same."

He was also required to dig down until he came to solid rock in every part of the various buildings, upon which the concrete would be set up to the base line.

A very considerable amount of evidence was given as to what was "solid rock," to which the specification required the contractor to dig. The evidence convinces me that plaintiff went to no greater depth than the contract called for, and that therefore, the three items above mentioned are not chargeable as extras.

Moreover clause 6 of the contract is fatal to the claim for these extras. That clause provides that no claim is to be allowed for any work different from, or in addition to that shewn in the drawings, or mentioned in the specifications, unless such work shall have been sanctioned by the architect in writing previous to its having been done.

No such sanction was obtained in respect to any of the above items.

The remaining item of $72 in the account for extras, though not sanctioned in writing by the architect, is admitted by the owners, and must be taken into account in a settlement between the parties.

The effect of this judgment is not to disentitle to payment, of whatever may be found due him, under the terms of the contract when the work is completed, and when the architect has performed his duties as referred to him by the contract, and when he has dealt with the matter fairly between the contractor and the owners.

MASTER IN CHAMBERS. FEBRUARY 24TH, 1913.

REGAN v. McCONKEY.

4 O. W. N.

Pleading—Reply—Motion to Strike out—Embarrassment—Function of Reply Considered.

Motion to set aside a reply as embarrassing or to have same amended. The action was brought for breach of a contract to employ defendant at a certain wage. The defence, in effect, was that plaintiff was incapacitated by illness from such employment and that defendant was, therefore, justified in terminating the same.

Plaintiff, in his reply, set up that the main consideration for the contract was not the agreement to perform the services specified, but the sale of a business, formerly owned by plaintiff, to defendant, for a certain price.

MASTER IN CHAMBERS, *held*, that the reply in question was not only proper, but necessary, as shewing the real contention between the parties.

Hall v. *Soe*, 4 Ch. D. 341, and *McLaughlin* v. *Lake Erie*, 2 O. L. R. 151, referred to.

Costs in cause.

Motion to set aside, or have amended the reply delivered herein upon the grounds of embarrassment.

H. S. White, for defendant.

H. E. Irwin, K.C., for plaintiff.

CARTWRIGHT, K.C., MASTER:—Prior to 11th April, 1908, the plaintiff and defendant were in partnership as merchant tailors, as "Regan & McConkey."

On that day, they entered into an agreement, whereby the plaintiff sold all his interest in the assets, good-will, etc., of the firm to the defendant for $4,000, which has been paid as agreed. By this agreement plaintiff covenanted "to perform the duties, and do the work of a cutter" for the defendant for a period of ten years, at a weekly wage of $40. The defendant agreed to employ the plaintiff as above, reserving only "his right to dismiss (plaintiff) from his employ, in the event of his being negligent in his duty, or disobedient to the proper orders of the" defendant.

All went on smoothly until plaintiff fell ill—a contingency not apparently in the contemplation of the parties, and not expressly provided for in the agreement in question.

It is common ground that plaintiff was ill on 18th May 1912, and was dismissed by defendant on that date, and paid up to 25th May. The statement of claim alleges these facts,

and claims wages at $40 a week, from 25th May, being $1,000, or in the alternative, damages for wrongful dismissal.

The statement of defence admits the agreement, which is produced on this motion, but says, that for many months prior to 18th May, 1912, plaintiff was by reason of illness, not able to do the work of cutter, as agreed, and that by reason of this inability, defendant was compelled in self defence to dismiss him—he "being still wholly incapable of performing his duties under the said agreement."

The plaintiff delivered a reply, the purport of which, was explained on the argument, when the defendant moved as above,

What the plaintiff wishes to bring before the Court, is, that in his view of the agreement, it was primarily, and chiefly for the purchase by defendant of the business of Regan & McConkey, and the right to use the firm's name, and have the advantage of the good will; that the defendant has had full enjoyment of these benefits; and that this was the consideration for the employment by the plaintiff of the defendant—and that therefore, the plaintiff is still entitled to the $40 a week in the present circumstances, whatever might be the case if he refused to work when able to do so. This is the only point in dispute in this case, so far as appears—and the true construction of the agreement on this point, will be determined at the trial, or by the Court at some later stage.

The only question at present is whether the reply is properly pleaded. It is not open to the objection of being a departure from the statement of claim. What is now set up, could not have been properly pleaded, until it was seen on what ground the defendant would justify his dismissal of the plaintiff, which the statement of claim had alleged "was wholly unwarranted, unjustified, a breach of the terms of the said agreement, and without any effect in law."

As soon as it appeared from the statement of defence, that defendant relied on the plaintiff's physical incapacity it was time enough to contest this view by setting up what plaintiff asserts, are his rights under the agreement, as he understands it.

Defendant treats the action as one for wrongful dismissal. The plaintiff now rather puts his claim on the ground of a breach of contract, as in *Caulfield* v. *National Sanitarium*, 4 O. W. N. 592, 732; 23 O. W. R. 761. Had the plaintiff

simply joined issue on the statement of defence, it would not have been shewn what was the point really in controversy between the parties. Far from denying his inability to work through illness, the plaintiff says that this forms no ground for defendant's refusal to pay him $40 a week, for the whole remaining period of the ten years. As the pleadings now stand, this is clearly brought out as being the point to be decided. Putting the matter briefly, the plaintiff says "I am entitled to $40 a week from 25th May, under our agreement." "No," says defendant, "I paid you as long as you could work, as you had agreed to do, and longer." "No," replies the plaintiff, "the consideration for my weekly wage of $40, was not my working, but the sale of the assets, and good-will of our previous firm to you." In this view the reply is not objectionable, and the motion is dismissed. Under the peculiar facts of the case, the costs may properly be in the cause. See *Hall* v. *Eve*, 4 Ch. D. 341, where the function of a reply is considered and explained. This case was cited and followed in *McLaughlin* v. *Lake Erie*, 2 O. L. R. 151, as pointed out by counsel for plaintiff.

HON. MR. JUSTICE KELLY. FEBRUARY 25TH, 1913.

REX v. DUROCHER.

4 O. W. N.

Criminal Law—Procedure — Motion to Quash Indictment — Crim. Code, s. 164—Disobedience to Statute—Municipal Act—3 Edw. VII., c. 19, s. 193 (1) (b)—Putting Unauthorized Papers in Ballot Box—Penalty Fixed by Subsequent Clause of Statute—Act not Illegal at Common Law—Motion Dismissed.

KELLY, J., *held*, that where a clause of a statute contains a distinct absolute prohibition, making an act illegal which was not illegal at common law, and a later separate and substantive clause imposes a penalty for the doing of such act, an indictment will lie therefor under s. 164 of the Criminal Code, which makes wilful disobedience to a Dominion or Provincial Statute an indictable offence.

Rex v. *Meehan*, 3 O. L. R. 567;
Reg. v. *Buchanan*, 8 Q. B. 887, and
Russell on Crimes, 7th ed., p. 11 *et seq.*, referred to.

Motion for prohibition to the police magistrate at Ottawa, forbidding him to try defendant for an alleged breach of s. 193 (1) (*b*), of the Consolidated Municipal Act, 3 Edw. VII., c. 19, dismissed with costs.

Motion by the defendant for an order prohibiting the Police Magistrate for the City of Ottawa, from proceeding on an information laid against the defendant, under sub-sec.

1 (b) of sec. 193, of the Consolidated Municipal Act, 3 Edw. VII, ch. 19, on the ground of want of jurisdiction to deal with the charge either under that Act, or as an indictable offence.

Sub-sec. 1 (b) of sec. 193, provides that no person shall "fraudulently put into any ballot box any paper, other than the ballot paper, which he is authorized by law, to put in." By sub-sec. 3, of sec. 193, it is provided that a person (other than the Clerk of the Municipality), guilty of any violation of this section, shall be liable to imprisonment, for a term not exceeding six months, with or without hard labour.

J. A. Ritchie, for the Crown and for the Police Magistrate.

Henderson, K.C., for the defendant.

HON. MR. JUSTICE KELLY:—The act prohibited by sub-sec. 1 (b) of sec. 193 is not indictable *per se*. It is urged on behalf of the defence, that sec. 164 of the Criminal Code, cannot be applied, as sec. 193, under which the proceedings are brought, names a punishment, and that therefore, the police magistrate has no jurisdiction. Section 164 of the Criminal Code, declares everyone to be guilty of an indictable offence, and liable to one year's imprisonment, who, without lawful excuse, disobeys any act of the Parliament of Canada, or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

There are many cases dealing with acts done in contravention of statutes, prohibiting the doing of such acts. The subject and the application of numerous decisions, are discussed in Russell on Crimes, 7th ed. (1909), at p. 11, *et. seq.* It is there stated, that where an act or omission, which is not an offence at common law, is made punishable by a statute, the questions arise, whether the criminal remedies are limited to the particular remedy given by the terms of the statute, or, in other words, whether the remedy given by the statute is exclusive of, or alternative to other remedies given by other statutes, or the common law; and that where an act, or omission, is not an offence at common law, but is made an offence by statute, an indictment will lie where there is a substantive prohibitory clause in such statute, though there

be afterwards a particular provision, and a particular remedy given. The author cites from *Clegg* v. *Earby Gas Co.*, [1896] 1 Q. B. 592 (at 504): "Where a duty is created by statute, which affects the public as the public, the proper mode, if the duty is not performed, is to indict, or take the proceedings provided by the statute." When a new offence is created by statute, and a penalty is annexed to it, by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanour *Rex* v. *Harris*, 4 T. L. R., at p. 205.

In Russell on Crimes, 7th ed., p. 12, it is said: "Where the same statute, which enjoins an act to be done, contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie." The author, however, adds "but all that the authorities establish on this point is that where there is a substantial, general prohibition, or command in one clause, and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded."

The question was gone into by the late Mr. Justice Robertson, in *Rex* v. *Meehan*, 3 O. L. R. 567, both as to the power of the legislature to enact the Municipal Act, and to regulate elections thereunder, and to prescribe the penalty, or forfeiture for a wilful breach thereof, and also, as to the cases where indictment will lie; some of the authorities there cited, have a hearing on the present case.

Lord Denman, C.J., in *Regina* v. *Buchanan*, 8 Q. B., at p. 887, declares that wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. He agrees, however, that where in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued; but he explains this by saying that the case is then, as if the statute had simply declared that the party doing the act, was liable to the particular punishment; and he adds "but where there is a distinct absolute prohibition the act is indictable."

In the present case there is in one clause of the statute, a distinct absolute prohibition, the penalty being provided by a separate and substantive clause.

It appears to me that these authorities are applicable here, and that they are distinctly opposed to the defendants contention. In that view the application must be dismissed.

I see no reason for relieving the applicant from payment of costs, and the dismissal is therefore with costs.

MASTER IN CHAMBERS. FEBRUARY 20TH, 1913.

HARRIS v. ELLIOTT.

4 O. W. N. 849.

Pleading—Particulars—Statement of Claim—Action upon Alleged Verbal Promise—Necessity of Particulars of Consideration—Costs.

MASTER IN CHAMBERS, *held*, that in an action upon an alleged verbal promise to pay a sum of money upon the happening of a condition alleged to have happened, particulars of the consideration for the alleged promise must be given by plaintiff.

Motion by defendant for further particulars of plaintiff's statement of claim.

The statement of claim, alleged that on 14th September, 1911, the defendant promised to pay to the plaintiff $1,000 on the happening of a certain event, which had happened. Particulars were demanded as to whether this promise was in writing, and if so, whether by deed, or otherwise, and the consideration if any.

Particulars were thereupon furnished as follows:

"The defendant's promise to pay alleged in paragraph 2, of the statement of claim was verbal, and not in writing."

The defendant then made this motion for further particulars as to shew the consideration relied on, to support the verbal promise to pay $1,000 as claimed.

G. S. Hodgson, for the defendant.

J. Grayson Smith, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—It may be true that on this statement of claim, as now in effect, amended by the particulars, the defendant might have moved under C. R. 261, to set it aside, as shewing no cause of action, because no consideration is alleged. But there is much force in the answer to

this objection to the present motion, that, if that course had been taken, the Court would have asked defendant's counsel why he had not moved for particulars, and would have directed plaintiff to amend, by alleging consideration. As the plaintiff has complied with the demand to some extent, I think he should state what, if any consideration is relied on. Then if there is none, or one which defendant thinks is insufficient in law, then he can move under C. R. 261 if so advised.

It therefore follows that plaintiff should furnish some answer to the demand as to consideration. And that the time for delivery of statement of defence be enlarged meantime.

In Odgers on Pleading, 7th ed., at p. 91 (p. 88 of 5th ed.) it is said: "The consideration for any contract not under seal, is always material, and should be correctly set out in the statement of claim, except in the case of negotiable instruments."

The present statement of claim, therefore, does not conform to C. R. 268.

The costs of the motion must be to defendant in the cause in any event.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 25TH, 1913.

RE MARA & WOLFE.

4 O. W. N.

Will—Construction of—Vendor and Purchaser Application—Gift of Life Estate and Absolute Power of Appointment—Gift over on Default—Time of Vesting in Appointee.

An estate was given to trustees, and a devisee given a life estate and a general power of appointment by will or deed, the executors being directed to convey in accordance with the appointment in the event of the devisee dying. By subsequent clauses, gifts over in default of appointment by the devisee on her death, were made.

MIDDLETON, J., *held*, that the devisee and the trustees could make a good title of an absolute interest in the property by a properly drawn deed.

Motion under Vendors and Purchasers Act, to determine a question arising on the will of the late Ann Mara, as to the ability of Charlotte S. Mara, with the concurrence of the surviving trustee under the will to make title.

The estate was given to trustees, and the daughter, Charlotte S. Mara was given a life estate, and a general power of appointment by deed or by will and the executors were directed to convey in accordance with the appointment "in the event of my daughter C. S. dying."

Proudfoot, for the vendors.

Singer, for the purchaser.

HON. MR. JUSTICE MIDDLETON:—If she has made no appointment, either by will or deed, and dies unmarried there is a gift over, and if she dies married, and leaving children, or their issue, there is a gift to them.

The power of appointment being general and exercisable either by will or deed, the daughter is in substance the sole person beneficially entitled, and when she conveys her life estate, and executes a deed of appointment she is entitled to call upon the trustees to convey in pursuance of her appointment. They hold in trust for her, and her appointee.

The only difficulty arises from the direction in the will that the executors shall convey at her death. There is nothing to prevent the appointment being made at any time, and I think nothing to prevent a conveyance of the legal estate at any time to the appointee, who is solely beneficially entitled. What was really in the testator's mind, was the fixing of the death of Charlotte as a time when a new duty would arise in the executors, if she had not made an appointment, either by deed or will.

I think a good title can be made by a properly drawn conveyance.

MASTER IN CHAMBERS. FEBRUARY 24TH, 1913.

SHANTZ v. CLARKSON.

4 O. W. N.

Discovery—Further Examination—Relevance—Mental Condition of Plaintiff.

MASTER IN CHAMBERS refused to order plaintiff to attend for further examination for discovery, holding that all relevant questions had been sufficiently answered.

Motion by defendant to oblige plaintiff to attend for further examination, and answer questions previously refused.

R. H. Parmenter, for motion.

M. A. Secord, K.C., contra.

CARTWRIGHT, K.C., MASTER:—The action is brought by plaintiff as a creditor to set aside a sale of the assets of an insolvent estate, on the ground that one of the inspectors (a brother of the plaintiff) was interested in the purchase and that such sale was not authorised by the creditors, and was made at an undervalue. The statement of the defence alleges sufficient instructions to sell, and that the inspector in question took no part in the arrangements for the sale, and that if he had any interest in the purchase, the defendant was not aware of it.

It also says that plaintiff has no status to maintain the action. I have read the plaintiff's examination. He is plainly mentally affected though all relevant questions were sufficiently answered. Except as to his own status as a shareholder he could not be expected to give any useful information on the issues in this case.

As notice of trial has been given for 4th March, and defendants are anxious to have it disposed of then, no good purpose will be served by ordering plaintiff to be further examined. He must attend and give evidence at the trial, and can then be fully examined.

At present the motion will be dismissed with costs in the cause.

MASTER IN CHAMBERS. FEBRUARY 25TH, 1913.

CANTIN v. CLARKE.

4 O. W. N.

Pleading—Statement of Defence—Motion to Strike out Paragraphs—Relevancy.

MASTER IN CHAMBERS refused to strike out certain paragraphs of the statement of defence, holding them to be relevant.

Motion by the plaintiff for particulars of paragraph 15 of the statement of defence, and to strike out paragraphs 16, 17 and 18 of statement of defence as embarrassing and irrelevant.

J. M. McEvoy, for the plaintiff.

H. J. Martin, for the defendant.

CARTWRIGHT, K.C., MASTER:—It was agreed on the argument that particulars of paragraph 15 would be given. Paragraph 16, together with paragraphs 10, 12, 13 and 14, are set up by way of counterclaim, which would render it difficult or perhaps impossible to strike it out. As pointed out in *Bristol* v. *Kennedy*, 23 O. W. R. 685. "Under our present system of pleading it is difficult to maintain an order striking out a part of a pleading," per Middleton, J. After reading the pleadings, I cannot say that these paragraphs may not, as against paragraphs 5, 6, and 7, of the statement of claim, be available as matter of defence. On their face they seem to be allegations of facts, which may assist the defendant if proved, and allowed by the trial Judge, or on a reference if one is hereafter directed.

The motion (having been partly successful) is dismissed with costs in the cause.

MASTER IN CHAMBERS. FEBRUARY 26TH, 1913.

BADIE v. ASTOR.

4 O. W. N.

Costs—Security for—Motion for Further—Security Ample to Date—Dismissal of Motion.

MASTER IN CHAMBERS refused to order further security for costs in an action where the costs incurred up to the date of the motion were amply secured by the original bond given for security. *Stow* v. *Currie*, 13 O. W. R. 997, followed.

Motion by the defendant for an order for further security for costs.

Beatty (Kilmer & Co.) for the motion.

R. McKay, K.C., contra.

CARTWRIGHT, K.C., MASTER:—Plaintiff succeeded at the trial. On appeal this judgment was set aside with costs of trial, and appeal to defendant in any event, and a reference directed to take accounts.

Nothing has been done further.

A bill of costs down to the trial, and instructions for appeal has been submitted, which would not exceed on a liberal estimate $150. No bill for the appeal has been suggested. But if this was put at an equal amount, the defendant would still have ample security in the bond for $400 given by plaintiff under the *præcipe* order. For the reasons given in *Stow* v. *Currie*, 13 O. W. R. 997, and cases cited, there should not be any order at present. If at a later stage the defendant thinks well to do so, he can renew the motion. At present, the motion will be dismissed with costs to plaintiff in the cause on the final taxation.