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DIVISIONAL COURT.

OCTOBER 26TH, 1912.

BURNEY v. MOORE.

4 O. W. N. 173.

Way — Private — Vendor and Purchaser — Conveyance of Land-locked Parcel — Agreement to Convey Right of Way when Survey Made — Who Shall Make Survey — Tender of Conveyance — Waiver.

Action for specific performance or damages for breach of an agreement to convey a right of way. By an undisputed agreement under seal between the parties the right of way was to be granted "when and as soon as the same shall be surveyed." Defendant claimed that plaintiffs should make the survey and offered in the pleadings to execute a conveyance if one was tendered him, but the evidence shewed that he had verbally stated to plaintiffs that he would not make the grant and that he had sold the land comprised in the right of way without making any reservation of the same.

LEASK, CO.C.J., *held*, that it was essential to plaintiffs' case to prove a tender of a conveyance, and if a survey was necessary it should be made by them. Action dismissed with costs.

DIVISIONAL COURT *held*, that as the evidence shewed that if a tender of a conveyance had been made it would have been refused, it had been waived by defendant and plaintiffs need not prove same. *McDougall* v. *Hall*, 13 O. R. 166, followed.

That it was the vendor's duty to have a survey made on general principles of law, and his refusal to make one was a further waiver of tender.

Clark v. *Rugge*, 2 Roll. Abr. 60, p. 17, referred to.

Appeal allowed and specific performance decreed. Costs of action and appeal to plaintiffs.

An appeal by the plaintiffs from a judgment of His Honour Judge Leask, of Nipissing District Court.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

R. McKay, K.C., for the plaintiffs, appellants.

G. F. Shepley, K.C., for the defendant, respondent.

HON. MR. JUSTICE RIDDELL:—In April, 1906, the defendant entered into an agreement with the plaintiff Thomas Burney for sale to him of a part of lot 10, con. 5, of the township of Burke, which is wholly landlocked. The agreement—it is under seal—concludes "The party of the first part further agrees to give the party of the second part a right of way across lot number eleven . . . from the Haileybury and New Liskeard road to the property above described, and agree to make a grant of such right of way when and as soon as the same is surveyed."

The agreement was transferred by Burney to his wife, the other plaintiff—and the defendant duly conveyed the land to her, 6th April, 1907.

Before the conveyance was made and shortly after the execution of the agreement, the parties agreed as to the location of the way—the only convenient location, it would seem, on the servient tenement. No survey was made and no conveyance given.

Some time thereafter the defendant sold part of the land, over which ran the way, to one Gillies; but the continual use of the way by the defendant was not interfered with by Gillies. It would seem that the female plaintiff has attempted to sell the property, but failed as the proposed purchasers objected that she "had no legal right to the right of way;" the property is worth about $500, if the right of way be secure, and it is not far from Haileybury.

According to the evidence of Mrs. Burney, the plaintiff, which is not contradicted, in the spring of the year 1910, the defendant absolutely refused to give her a grant. He said: "I can't give you the right of way now, because I sold it, but later on I will give you the right of way over another portion of the land." I told him then that what he proposed to give at a future date was also Mr. Gillies'. "This was in May last, after I threatened action, but before the writ was issued."

This action was begun in May, 1910; both husband and wife suing as plaintiffs—they set up the agreement that the defendant in 1906, laid out the right of way pursuant to the agreement and placed them in possession thereof; that they had daily used it; that they have requested him to have it "surveyed and conveyed as agreed," but the defendant neglects and refuses so to do, and on the contrary has sold it, but admits that he has the power to obtain it from his

grantee. They claim a survey and grant or damages. The defendant admits the agreement, the setting apart of the right of way and the use thereof by the plaintiffs with his assent—but alleges that the obligation to survey rests upon the plaintiffs, and that he is not called upon to make a grant until after the survey has been made. He says he was not tendered a deed, but is willing to execute a proper deed if tendered to him.

The case came on for trial before His Honour Judge Leask, in the District Court of Nipissing, 6th October, 1910. The learned Judge reserved his decision until May, 1912, when he gave judgment dismissing the action with costs.

The plaintiffs now appeal.

The ground of the decision is that "the plaintiffs could not . . . be excused from the duty of preparing and tendering a conveyance of the right of way for execution by the defendant before action could be brought, and if it were necessary for the preparation of such conveyance that a survey be made then the survey should be made by them."

I am of opinion that the judgment is wrong on both points.

Assuming, without deciding, that this conveyance of the right of way should have been prepared by the purchaser, I think that as matters were at the date of the writ—and in strictness that is what we most consider—the tender of the conveyance was waived. *McDougall* v. *Hall* (1887), 13 O. R. 166, decides that where if a tender had been made it would have been refused, the tender should since the Judicature Act be considered as waived—at least if that appear from the pleadings. I do not think there is any need to wait for the pleadings to determine whether it is safe to proceed without formal tender if it sufficiently appear that a tender would have been a mere useless formality.

In the present case, too, the defendant should not be allowed to be in better case than he would have been had his representations upon, or at least, after which the action was brought been true. He said that he could not give a deed because he had sold the land. If he had sold the land so as to incapacitate himself from giving the deed, it is plain that no tender of the conveyance was necessary before bringing an action on the agreement.

Knight v. *Crockford* (1794), 1 Esp. 190; *Lovelock* v. *Frankly* (1846), 8 Q. B. 371.

But there is more in the case. The agreement provides for the defendant giving a deed of the right of way "when and as soon as the same is surveyed." It is plain that the survey was required, not that the parties should know the position on the ground, but that a proper conveyance could be made, and it is equally plain that no proper conveyance could be made without a survey. The parties might have agreed to define the extent of the right of way by fences, stakes, or other marks on the ground, but they chose—and wisely chose—to have the right of way defined by survey.

Where one person is entitled to a right of way over the land of another, the precise location not having been determined, it is the grantor who has the right and duty to select the precise location, to "define" the way.

This is so in rights of way by necessity.

Clarke v. *Rugge*, 2 Roll. Abr. 60 p. 17, where it is said: "The feoffor shall assign the way where he can best spare it."

Packer v. *Welsted*, 2 Sid. 111; *Pearson* v. *Spencer*, 1 B. & S. 511, 3 B. & S. 761; *Bolton* v. *Bolton* (1879), 11 Ch. D. 968, and also in cases of contract: *Deacon* v. *S. E. R. Co.* (1889), 61 L. T. n. s. 377; *Metropolitan, etc., Rw.* v. *G. W. R.* (1900), 82 L. T. n. s. 451; and once the way is "defined," it cannot be changed by the grantor.

Deacon v. *S. E. R. ut supra.* It is to my mind clear that the parties agreed that the way should be "defined" by a survey—this I think made it the duty of the defendant to have the survey made. When he refused, I think an action lay at the instance of the female plaintiff. Moreover, a survey being a prerequisite to a conveyance, the refusal to make a survey was a waiver of the conveyance.

We need not consider whether the defendant should have the deed prepared, as the plaintiffs express their willingness to have that prepared at their own expense.

I think the defendant must have a proper survey made of the way already agreed upon (which is said to be 16 feet wide), and furnish the correct description to the plaintiffs and pay the costs of the action and appeal. He must also execute a proper deed of conveyance, if and when tendered him on behalf of the plaintiffs—if the parties cannot agree the conveyance to be settled by the Judge.

Some argument was advanced—perhaps it is better to say some regret was expressed that the Court should be troubled with this matter, which was described as petty. For my

part I have no sympathy with the suggestion. It should not be considered beneath the dignity of the Court to consider on its merits any question properly before it—and contracting parties should not be allowed wilfully to break their contracts because the damage is small.

Leave should be reserved to the plaintiffs to bring an action for damages if for any reason the defendant fail to make title.

HON. MR. JUSTICE BRITTON:—I agree.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

HON. MR. JUSTICE MIDDLETON. OCTOBER 26TH, 1912.

STODDART v. OWEN SOUND.

4 O. W. N. 171.

Elections — Municipal — Declaration of an Election to be a Nullity by Trial Judge — Right of Ratepayer to Appeal when Municipal Council Refused to Appeal.

MIDDLETON, J., *held*, that there was no principle nor authority which would permit the Court to allow a ratepayer to intervene and appeal from a decision of a trial Judge declaring a certain municipal election a nullity where the municipal council had decided not to appeal, municipal action or inaction being decided by the council alone.

Motion by F. W. Millhouse, a ratepayer of Owen Sound, for leave to intervene and appeal, either in his own name or in the name of the defendants, and upon proper terms as to indemnity, from a judgment of the HON. MR. JUSTICE LENNOX, 4 O. W. N. 83; O. L. R. .

W. E. Raney, K.C., for the applicant.

H. S. White, for the plaintiff.

Joseph Montgomery, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The action was brought by a ratepayer for the purpose of having it declared that the submission of a by-law to repeal a local option by-law in January last was, by reason of the failure to observe the provisions of the Municipal Act, a nullity, and does not operate to prevent the submission of a repealing by-law in January next, if the municipality sees fit.

At the trial judgment was given in the plaintiff's favour for the relief indicated.

The municipal council have considered the question of appealing from the judgment, and have determined to accept the decision. There is no suggestion that the decision of the council was arrived at from any other than proper motives. The resolution to acquiesce in the decision of the Court was moved by a member of the council, who is an open and strong supporter of local option, and was passed without any opposition.

No authority was cited which would authorize the making of the order now sought. *Mace* v. *Frontenac*, 42 U. C. R. 70, manifestly falls very far short of what is now desired.

Upon principle, I think the motion fails. Under our municipal system the municipality is represented by the municipal council. Municipal action or inaction must be determined by its voice alone; and where a municipality has by its municipal council determined upon the course to be taken in connection with a particular piece of litigation, that determination binds all the ratepayers.

There is nothing unique or peculiar in this particular action to take it out of the general rule. The council, elected by a majority of the electors, has determined against an appeal. It is not open to an individual ratepayer or to a group of ratepayers, even if they constitute a majority, to overrule the decision of the constituted authority. The whole idea is repugnant to the established system of municipal government. If I allowed intervention here, why might I not allow a ratepayer to intervene in a damage action where he thought the verdict against the municipality was unjust—if the council determined not to appeal?

The motion fails, and must be dismissed with costs.

HON. MR. JUSTICE RIDDELL. OCTOBER 26TH, 1912.

McLARTY v. TODD.

4 O. W. N. 172.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors — Preferential Claims on Estate for Wages—Extent of—10 Edw. VII. c. 72, s. 3.

RIDDELL, J., *held*, that a preferential claim for wages under 10 Edw. VII. c. 72, s. 2, was not confined to the balance due upon the last three months of employment but extended to any balance due so long as the same did not exceed three months' wages during the employment.

An action brought by the assignee of a claim for wages against two companies and their assignee for the benefit of creditors.

L. Heyd, K.C., for the plaintiff.

J. P. MacGregor, for the defendants.

Hon. Mr. Justice Riddell:—I held that the plaintiff had established by evidence that his assignor had been duly employed by the companies, and I gave judgment for the amount of the balance of the claim.

As against the assignee of the companies the question arose as to the amount for which the said claim is a preferential claim under R. S. O. (1897), ch. 156, sec. 2, now 10 Edw VII., ch. 72, sec. 2. I should not have thought it necessary to write a judgment had I not been informed by counsel that it has been by Referees, etc., more than once ruled that the amount of the preference is to be found by taking the amount of the last three months' wages and deducting therefrom the amount of wages paid during the same time. This I think an error; the assignee is to pay "the wages of all persons in the employ, etc., not exceeding three months' wages . . ." It is not the balance of the last three months' wages; but "the wages . . . not exceeding three months' wages." In other words the servant may venture to leave in the master's hands a balance on his wages so long as that balance does not exceed three months' wages.

The wages were $35 per week—3 months—13 weeks at $35 per week—$455.

Accordingly of the amount $873.77 found due at the trial, the plaintiff will have a preference to the amount of $455, and a claim for the remainder.

The plaintiff is also entitled to his costs as against the defendant assignee although the assignee on the facts before him was justified in disputing the claim.

Zimmerman v. *Sproat,* O. L. R.

HON. MR. JUSTICE CLUTE. OCTOBER 25TH, 1912.

HALLIDAY v. CANADIAN PACIFIC RW. CO.

4 O. W. N. 162.

Master and Servant — Wrongful Dismissal of Servant — Contract of Hiring — Right to Notice — Damages — False Imprisonment — Malicious Prosecution — Costs.

Action against the C. P. R. and James H. Hughes, for wrongful dismissal of plaintiff by the railway company from his employment as a conductor and for false imprisonment and malicious prosecution.

CLUTE, J., allowed $480 damages for plaintiff's wrongful dismissal, being equivalent to three months' wages, dismissed plaintiff's claim on the other branches of the case and allowed full costs of action.

Action was tried at Sudbury, without a jury, on September 30th, 1912.

R. R. McKessock, K.C., for the plaintiff.

W. H. Williams, K.C., for the defendants.

HON. MR. JUSTICE CLUTE:—I disposed of the action at the trial in so far as the issues were concerned arising out of the charge for false imprisonment and malicious prosecution. I further found that the plaintiff had been wrongfully dismissed. The plaintiff had been in the employ of the defendant company for some 12 years, and during that period had borne a good character. His engagement with the company had been continuous, and as stated by the superintendent, he was during all that period in the employ of the defendant company. Under the custom and practice of the company with their men an employee in the grade of the plaintiff was not to be dismissed without inquiry. The occasion of his dismissal was on account of liquor having been found in the caboose of the train of which he was conductor. This train started from Cartier to White river. There was a collision and the train was delayed. At the place where the collision occurred the debris arising therefrom had to be removed, and a number of workmen, 20 or 30, were engaged in this work. The night was very cold, some 50 degrees, it was stated, below zero, and the men were constantly in the habit of going into the caboose to get warmed. The plaintiff, as was his duty, was at the station

to be ready to start his train when the road was clear. One of the cars of the train was broken into at this time, and a case of liquor taken therefrom. The plaintiff had been without sleep for over 50 hours. It was discovered that the car had been broken into and some bottles extracted, and the superintendent searching the plaintiff's caboose found one bottle and part of another bottle in the caboose. The plaintiff was arrested and charged with stealing liquor, and immediately suspended. The case was tried before Judge Kehoe, and the plaintiff honourably acquitted. He was, however, dismissed the day before the Judge had appointed to give his decision.

Upon the evidence before me I was satisfied that the plaintiff was not guilty of the theft, and did not know that the liquor had been secreted in his caboose. In my opinion, under the evidence disclosed he was wrongfully dismissed, under such circumstances having regard to his hiring, as to entitle him to three months' notice. *African Association* v. *Allen*, [1910] 1 K. B. 396; *Harmwell* v. *Parry Sound Lumber Co.*, 24 A. R. 110; *Bain* v. *Anderson*, 27 O. R. 369, 27 A. R. 296, 28 S. C. R. 481; *Gould* v. *McRae*, 14 O. L. R. 194; and see *Green* v. *Wright*, 1 C. P. 591, *Speakman* v. *Calgary*, 1 Alta. L. R. 454; *Henderson* v. *British Columbia Saw-Mills*, 12 B. C. R. 294.

The certificate given by the defendants to the plaintiff shewing the time he had served the company, without which it was difficult to get employment in another company as conductor, was worse than useless, as it contained a statement that he was dismissed on account of liquor having been found in his car.

I suggested on the trial that the plaintiff having been honourably acquitted by the County Judge, the company might so modify the certificate as to shew the facts, and thus enable an engagement with another company.

Upon the whole case, I think, the conduct of the company towards the plaintiff was harsh and unfair in dismissing him the day before judgment was to be given. The costs in the case were not appreciably increased by the other issues raised, and under all the circumstances of the case, I do not think the defendants should have the costs of the issues in which they were successful, viz., those arising out of the charge of false imprisonment and malicious prosecution.

Having regard to the plaintiff's earning power while with the defendant company, I assess the damages at $480, with full costs of action. Any amendments that may be necessary to meet the case as disclosed in the evidence may be made.

HON. MR. JUSTICE KELLY. OCTOBER 29TH, 1912.

STURGEON FALLS v. IMPERIAL LAND COMPANY LIMITED, ET AL.

4 O. W. N. 178.

Assessment and Taxes — Lien on Land for Unpaid Taxes — Action for Declaration of Lien and Enforcement by Sale — Assessment Act, s. 89—Effect of — Declaratory Judgment — Consequential Relief — Acceptance of Promissory Notes for Taxes — Abandonment of Other Remedies — Validity of Assessments — Non-compliance with s. 22 of Act — Description of Properties — Registered Plans — Subdivisions — Evidence.

Action by a municipal corporation for a declaration that taxes for the years 1906-10 upon a large number of parcels of land belonging to defendants were a special lien upon such land in priority to every other claim, privilege or incumbrance of every person (including the defendants) save the Crown, and for payment of the said taxes and in default thereof for an order that the lien be enforced by sale. For the taxes for 1906-7 plaintiffs had accepted promissory notes from defendant company which had not been paid and on two of which plaintiffs had recovered judgment.

KELLY, J., *held*, that sec. 89 of the Assessment Act, 4 Edw. VII. c. 23, providing that the taxes on lands in a proper case should be a special lien on such lands in priority to any person, save the Crown, was not intended to give municipalities a new nor additional means of realizing which might have the effect of accelerating the time for selling, shortening the time for redemption by the owner or otherwise interfering with such right.

That the declaration asked did not provide for consequential relief and that therefore it should not be granted by the Court.

Mutrie v. *Alexander*, 23 O. L. R. 395, followed.

That plaintiffs having accepted defendants' promissory notes for taxes for the years 1906-7 were restricted to their remedy thereon.

That where the assessments did not properly identify the lands assessed they were invalid and there were no "taxes due" on the lands in question in respect thereof, the making of a valid assessment being an imperative requirement.

Flakey v. *Smith*, 20 O. L. R. 279;
Cox v. *Roberts*, L. R. 3 A. C 473;
Love v. *Webster*, 26 O. R. 453, and
Waechter v. *Pinkerton*, 6 O. L. R. 241, followed.

Action dismissed with costs.

Action tried at North Bay, without a jury.

G. H. Kilmer, K.C., and J. M. MacNamara, K.C., for the plaintiffs.

S. H. Bradford, K.C., and J. Bradford, for the defendants, the Imperial Land Co. Limited, and E. R. C. Clarkson.

H. W. Mickle and A. D. Armour, for the defendant, The Trusts and Guarantee Company, Limited.

HON. MR. JUSTICE KELLY:—This action is brought for a declaration that taxes to the amount of $9,531.30, for the years 1906 to 1910, both inclusive, on a very large number of parcels of land, are a special lien upon these lands in priority to every other claim, privilege, or encumbrance of every person (including the defendants), except the Crown, and for payment by the defendants or some of them of that sum and interest and $32.50 costs of an order permitting the action to be brought, and that in default of payment the lien be enforced by sale of the lands; and also for payment by the defendants the Trusts & Guarantee Co., Limited, and the liquidator of the Imperial Land Company, Limited, of all sums received by them for rents and profits, insurance or purchase money on any of the lands in question.

On June 25th, 1909, on petition of the plaintiffs, an order was made for the winding up of the defendants, the Imperial Land Co., Limited, and defendant Clarkson was appointed liquidator of that company.

The defendants, the Trusts and Guarantee Co., Limited, are trustees under a mortgage deed of trust to secure bonds issued by defendants the Imperial Land Company Limited.

Amongst the defences set up are, that no taxes are due as claimed by the plaintiffs, that the assessments for the various years for which the claim is made were not valid, and that the imperative requirements of the Assessment Act and Municipal Act have not been complied with.

On September 1st, 1908, the plaintiffs accepted from the defendants, the Imperial Land Company Limited, their promissory notes of that date, as follows: $500 at 3 months; $500 at 6 months; $500 at 9 months; $500 at 12 months; and $957.93 at 12 months; all of which notes bore interest at six per cent. per annum. These notes were given and accepted for the taxes on the lands in question for the years 1906 and 1907.

On February 1st, 1909, plaintiffs obtained judgment against the defendants, the Imperial Land Company Limited, for the amount of the first note, and on March 30th, 1909, judgment for the amount of the second note.

Defendants contend that even if the plaintiffs became entitled to a lien in respect of the taxes, they have lost their

right thereto for the years 1906 and 1907, by accepting the notes.

On October 5th, 1908, plaintiffs passed a resolution instructing the tax collector to mark as paid all taxes owing by defendants, the Imperial Land Company Limited, on the collector's rolls of 1906 and 1907, as the same had been settled by notes, and entries were made in the collector's rolls for 1907 accordingly. The collector's roll for 1908 does not shew any arrears for these properties.

Defendants set up, too, that such other parties as may be owners of or interested in any of the lands in question should be added as parties to these proceedings.

On the opening of the trial, counsel for plaintiffs agreed that if it should be found that any of the lands in respect of which plaintiffs claimed a lien, were owned by any other person or persons not parties to these proceedings, plaintiff's claim for lien on the lands so owned by others should be abandoned in this action, plaintiffs reserving their rights to proceed against such other person or persons, and the lands owned by them by separate actions or proceedings.

In the first place, is this a case where the Court should be asked to make a declaratory order in respect of the special lien claimed by plaintiffs?

Plaintiffs not only ask a declaration as to a lien, but also that in default of payment of the amount claimed, the lien should be enforced by sale of the lands. They rely for relief on sec. 89 of the Assessment Act, 4 Edw. VII., ch. 23, which is as follows: "89. The taxes due upon any land with costs may be recovered from the owner or tenant originally assessed therefor, and from any subsequent owner of the whole or any part thereof, saving his recourse against any other person, and shall be a special lien on the land, enforceable by action, in priority to every claim, privilege, lien, or encumbrance of every person except the Crown, and the lien and its priority shall not be lost or impaired by any neglect, omission or error of the municipality, or of any agent or officer, or by want of registration."

This cannot be taken to mean that the municipality having such lien has the right to enforce it by sale in such manner as to interfere with, or deprive the owner of, the right of redemption given by the Act, in event of sale for taxes.

The Assessment Act has provided a means of realizing for taxes which are three years in arrear, and has also given the owner the right to redeem within a year after such sale.

The intention of the Legislature in making the "taxes due" a special lien on the lands was not to give a new or additional means of realizing, which might have the effect of accelerating the time for selling, shortening the time for redemption, or otherwise interfering with such right, if not altogether depriving the owner of it, but rather to give the municipality security for such taxes in priority to other claims and encumbrances as mentioned in the Act, until a tax sale or until payment before such sale.

This is not a case where, if a declaratory order were made, consequential relief could be given. Following what was laid down in *Mutrie* v. *Alexander* (1911), 23 O. L. R. 396, and for the reasons given at p. 401, and in the authorities there cited, I refused the declaration asked by plaintiffs.

As to the claim for payment by defendants of the taxes said to be due and the costs of the order, on the evidence submitted, I think the plaintiffs must fail.

So far as the years 1906 and 1907 are concerned, plaintiffs accepted the company's promissory notes and relied upon that form of payment, and whatever remedy they have against defendants for the taxes for these years is upon the notes and the judgments obtained thereon.

Defendants, too, deny that any taxes are due for any of the years for which plaintiffs make claim, on the ground, amongst others, that the description of the lands contained in the various assessment rolls and collectors' rolls "are ambiguous, erroneous, indefinite and incapable of being identified upon the ground."

Apart from other objections and apart also from any other errors or irregularities which may have occurred in making the assessments for these years (the effect of which I am not now taking into consideration), the evidence submitted by plaintiffs does not shew that there was a compliance with the provisions of sec. 22 of The Assessment Act.

Clause (c) of sub-sec. 1 of sec. 22, is:—

"(c) Land known to be subdivided shall be designated in the roll by the numbers or other designation of the subdivisions with reference where necessary to the plan or survey thereof; land not subdivided into lots shall be designated by its boundaries or other intelligent description."

Clause (d) of that sub-sec. is as follows:—

"(d) Each subdivision shall be assessed separately, and every parcel of land (whether a whole subdivision or a portion thereof or of the whole or portion of any building

thereon), in the separate occupation of any person shall be separately assessed."

The registered plans shewing the subdivisions of the property were not produced at the trial. The only guide before the Court as to these subdivisions being what was said to be a copy of the registered plans or subdivisions, but this copy was not proven or admitted to be correct, nor is it shewn that the lots or subdivisions mentioned in the assessment rolls are those shewn on the registered plans.

In the absence of some positive evidence that the lots and subdivisions referred to in the assessment rolls are according to the registered plans, I am unable to say that the assessments comply with the requirements of the above sub-sections of sec. 22 of the Act.

After the trial, opportunity was given counsel to produce the original plans or in some satisfactory way prove the correctness of the copy produced at the trial. This, however, was not taken advantage of, and I have been left to deal with that part of the evidence in its unsatisfactory and incomplete form.

Even assuming that the copy of the plan produced at the trial shews correctly the subdivision into lots and blocks, there is clearly in many instances a want of compliance with the requirements of sec. 22, as, for example, where two or more lots or parcels were included in one assessment, or where the lands intended to be assessed were not designated with such certainty as to enable them to be readily defined or identified, or where the assessment refers to a part of a lot or parcel without designating that part by its boundaries or other intelligent description.

The effect of this non-compliance, or the failure or neglect to prove that there was a compliance, is to render invalid the assessments on the properties intended to be assessed: *Flakey* v. *Smith* (1909), 20 O. L. R. 279. Failure or neglect to shew a compliance with the Act in this respect makes it impossible to hold that there are "taxes due" upon these lands which "may be recovered" from defendants.

What plaintiffs are seeking to collect from defendants is taxes for the years mentioned. To legally impose a tax there must have been a valid assessment. A taxing Act must be construed strictly: *Cox* v. *Roberts* (1878), L. R.

3 A. C. 473. The making of a valid assessment is an imperative requirement.

In *Love* v. *Webster* (1895), 26 O. R. 453, Armour, C.J., held a tax sale to be invalid when an imperative requirement of the Act had not been complied with; and the decision of the Divisional Court in *Waechter* v. *Pinkerton* (1903), 6 O. L. R. 241, is to the same effect.

Section 89 of The Assessment Act, presupposes that taxes exist and are due upon the lands, and in order to shew that taxes have been properly imposed and do exist and are due, there must have been a valid assessment and the fixing of a tax. It cannot be said that a tax exists or is due unless it is shewn that in making the assessment the imperative requirements of the Act have been complied with.

I, therefore, dismiss the action with costs. This, however, is not to be taken as affecting whatever rights plaintiffs may have to recover upon the notes given for the taxes of 1906 and 1907, or the judgments which they have obtained on any of these notes.

The defendants, the Trusts and Guarantee Company, Limited, claim payment to them of such rents as the plaintiffs may have received from tenants of any of the properties, under the order of Mr. Justice Middleton, of 17th May, 1911. If any such rents have been received, they will be paid over to such of the defendants as the Official Referee, before whom the proceedings for liquidation of the defendants, The Imperial Land Company Limited, are pending finds entitled thereto. He will also ascertain the amount to be so paid, if the parties fail to agree.

HON. MR. JUSTICE MIDDLETON. OCTOBER 29TH, 1912.

CAMPBELL v. VERRAL.

4 O. W. N. 177.

Solicitor — Cross-examination on Affidavit — Made in Cause — Right of Solicitor to Professional Fee — Item 119 — Tariff of Disbursements.

MIDDLETON, J., *held*, that a barrister or solicitor when subpœnaed to give evidence by cross-examination on his affidavit filed on a motion is entitled to the full professional fee of $4.

Semble, that where the proper fee is not tendered, a witness can refuse to be sworn.

Motion by the plaintiff for an order for committal of Mr. Phelan, a solicitor, for his failure to submit himself for cross-examination upon an affidavit made by him in this action.

J. McGregor, for the plaintiff's motion.

J. M. Godfrey, for Mr. Phelan.

HON. MR. JUSTICE MIDDLETON:—The real question is the right of Phelan to demand payment of a professional witness fee, and I propose to deal with the motion upon that basis.

Mr. McGregor argued, that the objection was taken prematurely, and that Mr. Phelan ought to have been sworn before demanding the fee in question. I do not agree with this, but even if Mr. McGregor be right, this defect in Mr. Phelan's conduct is more than offset by the fact that the subpœna served was not in any authorized form and merely commanded attendance before "John Bruce, special examiner, on Friday, 4th October, 1912, at half past nine o'clock in the forenoon," without specifying, as it should, the purpose for which attendance was to be made. The subpœna did not require more than "attendance."

The right to a professional fee seems clear. Evidence upon a motion may be given by affidavit (Consolidated Rule 489), but the deponent may be cross-examined (Consolidated Rule 490), the witness being "required to attend in the same manner as, and his examination shall be subject to the same rules as apply to the examination of a party for discovery," Consolidated Rule 492.

The examination, may, therefore, take place when the witness is "served with a copy of the appointment and a subpœna and upon payment of the proper fee." Consolidated Rule 443. The proper fee is indicated by the tariff item 119. "Barristers and solicitors . . . other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them . . . per diem $4." The affidavit upon which examination is sought is an affidavit made by a solicitor as solicitor relating entirely to the proceedings in this cause and another cause in which the plaintiff herein was plaintiff and the defendants were "Taxicabs Verrals Limited," 23 O. W. R. 6, 4 O. W. N. 28. All the solicitor's knowledge was acquired by him in the course of the rendering of profes-

sional services and manifestly his evidence is given by reason of professional service rendered by him.

Before the examiner the position taken was that when a solicitor made an affidavit "he is only entitled to the ordinary fee of $1." This is clearly untenable.

The motion must be dismissed with costs which I fix at $15. If the applicant desires she may have an order directing that upon payment of the costs and the proper witness fee $4, Mr. Phelan do attend and submit to examination at a time to be appointed.

MASTER IN CHAMBERS. OCTOBER 29TH, 1912.

DELAP v. CANADIAN PACIFIC Rw. CO.

4 O. W. N. 213.

Pleading — Statement of Defence — Extension of Time for Delivery — Special Grounds.

Application by defendant for a three months' extension of time for delivery of a statement of defence on account of the magnitude and complexity of the case and the facts involved.

MASTER-IN-CHAMBERS extended time for delivery of the statement of defence a little over six weeks.

Motion by the defendants for extension of time for delivery of statement of defence, for three months from 12th October, 1912.

Angus MacMurchy, K.C., for the defendants' motion.

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

CARTWRIGHT, K.C., MASTER:—The action is for an account and other relief in respect of transactions arising out of dealings between plaintiff and defendant company leading up to the control or absorption by that company of the Great North West Central Rw. Co. These transactions began in 1898. In February of that year the plaintiff was approached by the late Judge Clark, who was at that time the company's general solicitor—and negotiations took place resulting in an agreement of considerable length dated 11th February, 1898, and set out in the statement of claim covering over 10 typewritten pages. All subsequent negotiations and arrangements necessary to carry that agreement into

effect were carried on by Judge Clark until his death about eight years ago. Certain important conditions as to 500 of the 5,000 shares of the Great North West Central Rw. Co. to be retained, and still in the plaintiff's possession or control, were made with Judge Clark verbally only.

It is apparently out of that verbal agreement or understanding that the action arises.

Several important matters required attention so that it was not until June, 1900, that the ground was cleared for putting into operation the alleged verbal agreement as to the purchase from plaintiff of his 10 shares. Then application was made to the Canadian Pacific Rw. Co. to have that agreement carried out as plaintiff understood it. Thereupon negotiations took place and a voluminous correspondence passed between the solicitors. A compromise was suggested and as far back as February of this year plaintiff's solicitor forwarded a draft statement of claim, setting out the grounds of this action, and offering to accept $300,000 in settlement.

This, however, was not accepted—and finally a writ was issued on 24th September, and statement of claim delivered on 7th October, instant.

The negotiations above referred to were carried on by the general counsel of the Canadian Pacific Rw. Co., resident at Montreal, and by another solicitor and a counsel both resident here. But the defence of the action has been given to the company's Toronto solicitor. He has made no affidavit of the reasons for the motion and supported his motion very vigorously.

Considering the large amount of the plaintiff's claim, the death of Judge Clark—the mass of correspondence and other documents necessary for consideration in order to prepare a full and definite statement of the grounds of defence, a reasonable time should be granted.

Three weeks have now passed since the delivery of the statement of claim during which time the company's solicitor has not been idle. It cannot be thought unreasonable or unfair to either party to require the statement of defence to be delivered not later than November 23rd prox.

The costs of the motion will be in the cause.

HON. MR. JUSTICE RIDDELL. OCTOBER 29TH, 1912.

TORONTO NON-JURY.

KENNEDY v. HARRIS.

4 O. W. N. 183.

Mines and Minerals — Interest in Option for Purchase of Mining Claims — Release — Partnership — Right of Action — Time of Accrual — Money Payment — Penalty.

Action by a mining prospector to recover $5,000 and interest due under a contract entered into with defendant by the terms of which he was to receive a half interest in all profits to be made under an option for the purchase of a certain mining claim of which option defendant was the grantee, in consideration of his releasing a certain claim he had to the ownership of the property in question. One of the terms of the contract provided that in case the option should not be taken up plaintiff was to receive $5,000 from defendant. The option was not taken up and this action was brought. Defendant urged that the $5,000 was not recoverable as it was in the nature of a penalty and the plaintiff had suffered no damages.

RIDDELL, J., *held*, that the $5,000 was not a penalty.

McManus v. *Rothschild*, 25 O. L. R. 138, followed.

Judgment for plaintiff for $5,000 and costs.

N. W. Tilley, for the plaintiff.

J. E. Day, for the defendant.

HON. MR. JUSTICE RIDDELL:—The plaintiff had set up a claim in good faith to a certain mining property, and had commenced and was prosecuting an action to enforce it. The land was also claimed by a company. On the 30th March, 1911, the company and the defendant entered into an agreement, which provided for the defendant obtaining a release of the plaintiff's claim and a discharge of his action—and the company in consideration thereof gave the defendant an option for $14,000 worth of work to be done on the property and $50,000 cash as well as paid-up stock to the amount of $300,000 in a company to be formed by the defendant, with a capitalization of not more than $2,000,000. The defendant was to spend $2,000 on development work, etc., before June 30th, and $2,000 in each of the months of July, August, September, October, November, and December—or he might pay in cash to the company $500 for each of the months of June and July. The cash $50,000 was to be paid on or before January 1st, 1912, and the stock not later than February 1st. Time was made of the essence of the contract—and the defendant was given also an option to purchase for money payable in stated instalments.

On the same day the plaintiff and defendant entered into a contract which contained recitals of the plaintiff's claim, the agreement with the company, and continued:—

"And whereas one of the considerations of the said option is that the said Kennedy shall release his caution and all his claims on the said lands, it being agreed that he shall be a partner with Harris in obtaining the said option and entitled to a one-half of all the profits, benefits, and advantages derived or to be derived by the said Harris, under and by reason of the said option or by reason of acquiring, selling or dealing with the said lands.

And as a further consideration for the said Kennedy this day releasing the said lands from his caution and his other rights in an action now pending . . . which action shall be dismissed without costs, Harris is to agree with Kennedy that he shall in case the annexed option is not carried out and completed, that he will on or before the first day of June, 1912, pay to Kennedy the sum of five thousand dollars." The contract then provides that (1) the parties shall be partners; (2) the defendant should be the selling agent while not in default "but no sale . . . is to be had or made by Harris without Kennedy's written consent, unless Kennedy's share of the profits shall equal $7,500, which shall be guaranteed by Harris in the ultimate result of the transaction."

"3. Harris is to furnish all the moneys required for the purpose of carrying out the said option, and in case he fails to carry out the said option and complete the purchase, he is then, within one month after default, on or before the first day of June, 1912, to pay to Kennedy the sum of five thousand dollars. 4. Harris shall make the election and make each of the payments called for by the annexed option, at least one month prior to the date named for such payment, work, or notice or election, and shall at once notify Kennedy in writing, where and when such payment was made. If Harris fails in carrying out the said option or in doing the work or making the election, or in making the payments called for thereby or thereunder as herein set out, Kennedy shall thereupon be entitled to exercise the said option for his own benefit, as to him seems best, and Harris shall have no rights or interest in said option or thereunder." 5. Kennedy agreed to release his caution and dismiss his action. "6. If it becomes necessary in carrying out this proposed purchase, and the parties shall mutually consent to any

changes, or if they cannot agree in the changes the dispute between them shall be settled by W. N. Ferguson, and his decision shall be final as to what changes shall be made." There are other provisions not material to be mentioned.

The plaintiff discharged his caution and action; the defendant went on with his option. In July he asked the plaintiff to permit a change in the work, which by the contract between them was to be done in July, but by the "option" could be done in August. The defendant refused unless $2,000 were paid into the bank as security that the work would be done—the plaintiff refused this—Mr. W. N. F. being spoken to said he thought the plaintiff's condition perfectly fair. F. was never applied to, to make or decide any changes in the contract under clause 6, above quoted. It would be difficult, but not at all impossible, for the defendant to have done the work in July, as agreed, the evidence of the plaintiff is to be fully accepted. All parties know that the company rued their bargain, and would get out of it if they could. Accordingly when the defendant failed to do the work in July, the plaintiff made up his mind to do it and took tools on the ground for that purpose —this, of course, under clause 4. He also tried to sell, but failed—and he did not in fact do the work required or any of it. The company cancelled their option, and the plaintiff sues for $5,000 and interest from October 20th, 1911—the writ is issued 29th March, 1912. The statement of defence sets up that it became necessary to make changes in the contract, but the plaintiff refused to submit the matter to Mr. W. N. F.—that the defendant was prevented from doing the work by a conflagration—that the $5,000 is a penalty—that the plaintiff suffered no damage, and that in any case there is nothing payable till June, 1912, and, therefore, the action is premature. The plaintiff joins issue.

I find upon the evidence that there was no refusal or request to submit to Mr. W. N. F.; no prevention of the work by the conflagration, and the questions of law now remain.

In addition to those set up in the defence another was raised at the trial, viz., that the provisions of clauses 3 and 4 are alternative—and the plaintiff has taken that relief given by clause 4.

An examination of the contract shews its purpose—the defendant was to do the work, etc., a month before the time that his option with the company called for, so that in case

he failed the plaintiff might do it and keep the option alive. In that case, however, he would keep it alive for his own advantage only, and while the language is used in clause 4: "If Harris fails in carrying out the said option, etc.," it is obvious what is meant is the acts necessary to keep the option alive during its contemplated currency up to the end of December—otherwise the provision that on such default Kennedy was to exercise the option for his own benefit, would be wholly nugatory. But clause 3 contemplates something quite different. In the recital it is provided that the defendant is to agree with the plaintiff that "he shall in case the annexed option is not carried out and completed, that he will . . . pay to Kennedy the sum of $5,000." There is in clause 3 an agreement which is inserted to implement this. But the express agreement goes further and provides that the defendant shall "in case he fails to carry out the said option and complete the purchase . . . within one month after default, on or before the 1st day of June, 1912, to pay to Kennedy the sum of five thousand dollars." I think this contemplates the final failure of the defendant to complete the purchase: and that it is quite independent of the provisions of clause 4. Whether had the plaintiff succeeded in selling the defendant would still have been liable is a curious question, but we need not consider it here.

I do not think that the liability of the defendant to pay the $5,000 arose so long as the option was in existence, but that the right of action accrued one month after the company cancelled their option—which was well before this action began.

Nor do I think that this sum is due only on the 1st June, 1912, the clause 3 is perfectly specific.

Nor is it a penalty—the Divisional Court has so recently dealt with the question of penalty *aut non*, that I need not further discuss it.

McManus v. *Rothschild* (1911), 25 O. L. R. 138.

The plaintiff will have judgment for the sum of $5,000 (without interest) and costs.

In case of conflict, the evidence of the plaintiff and of Ferguson is to be given full credit.

MASTER IN CHAMBERS. OCTOBER 30TH, 1912.

WALL v. DOMINION CANNERS.

4 O. W. N. 214.

Pleading — Statement of Claim — Motion to Strike out Portions — Irrelevancy — Embarrassment — Motion for Particulars before Pleading — Practice — Affidavit — "Arrangement" for Transfer of Shares — Particulars of Time, Place, Persons, etc.

Motion by defendants for particulars of certain paragraphs of the statement of claim and for an order striking out certain other paragraphs. The action was brought against defendant company and two of its directors on an alleged agreement to give plaintiff 100 shares of defendant company's common stock for services rendered by him.

MASTER-IN-CHAMBERS ordered that particulars of the time and place and the persons negotiating the alleged agreement should be given and refused to strike out portions of the statement of claim which set out facts which would make the alleged agreement natural and convenient.

Costs to plaintiffs in cause, as motion was launched without awaiting an answer to the demand for particulars served.

An affidavit in support of a motion for particulars should be made by the party moving or its officer and not by a solicitor's clerk and should shew that the particulars sought are necessary for pleading not for preparation for trial.

Smith v. *Boyd*, 17 P. R. 463, and

Todd v. *Labrosse*, 10 O. W. R. 772, referred to.

This action was brought by plaintiff against the company and two other persons requiring "the defendants to transfer to him 100 shares of common stock in the defendant company." The company moved, before pleading, for particulars of the statement of claim—to strike out paragraphs 5, 6 and 7 as embarrassing.

M. Lockhart Gordon, for the motion.

Frank McCarthy shewed cause.

CARTWRIGHT, K.C., MASTER:—The motion is supported only by an affidavit of a clerk in the office of the defendant company's solicitors. This states that the deponent has charge of this matter, that he has read over the statement of claim, and has been advised by counsel and verily believes, that it would be impossible for the defendants to proceed with the trial or to have a fair trial of the action until the said particulars have been delivered. He is also advised by counsel and verily believes that paragraphs 5, 6 and 7 are embarrassing and should be struck out. There are two serious objections to the sufficiency of this affidavit.

In the first place, as was said in *Smith* v. *Boyd*, 17 P. R. 463, a motion for particulars, at this stage, should be based on the defendants' inability to plead. To say that they are necessary for the trial is premature; all such particulars can be obtained on discovery.

In the next place, I repeat what I said in the analogous case of *Todd* v. *Labrosse*, 10 O. W. R. 772, that such an affidavit should be made by one of the defendants' officers in the present case, or by a defendant in an ordinary action, and not by a clerk of his solicitors, who can know nothing except what he has been told.

Had these objections been pressed on the argument they would probably, if not necessarily, have resulted in its being refused. The plaintiff is anxious to have a speedy trial and, no doubt, for this reason, did not wish to cause any avoidable delay. I, therefore, proceed to deal with the motion on its merits.

The substance of plaintiff's claim is, that two years ago he was induced to continue in the service of the defendant company at their request and that of the individual defendants who are, and were at that time, two of its directors. As a consideration for so doing "it was arranged between the plaintiff and all three defendants that he should be granted 100 shares of the common stock of the defendant company," paragraph 4. "But the defendants, although they have several times promised to grant the stock, have refused to do so." (Paragraph 7.)

The defendant company now asks for particulars of when and where such arrangement was made, and whether it was verbal or in writing. Considering the lapse of time and the fact of the defendant being a corporation, I think these facts should be given—and also by whom these shares were to be granted—and at what date.

Particulars shewing "who were present at the time such arrangement was made," should not be given unless they were officers or agents of the company, as they would then be material facts on which plaintiff could rely. The notice of motion asks to have paragraphs 5, 6 and 7 of the statement of claim also struck out as embarrassing.

This was, probably by inadvertence, expressed too broadly, as, on the argument, this was limited to certain portions of those paragraphs. Even as so limited I do not think the motion should prevail.

Those parts of paragraphs 5 and 7 only state that plaintiff has not received the 100 shares though defendants have frequently promised to give them.

The part of paragraph 6 objected to as embarrassing states the reasons of the desire of the defendants to retain the services of plaintiff and why it was easy and natural for the individual defendants to make the alleged offer as they had been allotted a large block of the common stock for work which was mostly all done by plaintiff himself.

I see nothing irrelevant or embarrassing in these statements, to warrant their excision. The order will, therefore, be as above indicated. The costs of the motion will be in the cause to the plaintiff only, as well for the reasons already given and because, after serving a demand for particulars on the Toronto agents of plaintiffs' solicitors, the present motion was launched without waiting for any reply to that demand.

DIVISIONAL COURT.

OCTOBER 21ST, 1912.

BOLAND v. PHILP.

4 O. W. N. 166.

Vendor and Purchaser — Contract for Sale of Land — Absence of Authority from Owner — Contract with Husband — Correspondence — Establishment of Contract.

KELLY, J., 22 O. W. R. 849; 3 O. W. N. 1562, dismissed without costs action for specific performance of an alleged agreement to sell certain lands, holding that no authority had been given by defendants to their agents for the sale, and that there was no sufficient note or memorandum in writing to satisfy the Statute of Frauds.

DIVISIONAL COURT dismissed plaintiff's appeal with costs.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, 22 O. W. R. 849; 3 O. W. N. 1562.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, on 21st October, 1912.

W. R. Smyth, K.C., for the plaintiff, appellant.

J. J. Gray, for the defendants, respondents.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

HON. MR. JUSTICE RIDDELL. OCTOBER 30TH, 1912.

CHAMBERS.

RE GOLDWIN SMITH AND MRS. SMITH ESTATES.

4 O. W. N. 188.

Interpleader—Adverse Claims to Valuable Chattel—Form of Issue.

Application to the Court to determine which of two applicants was the owner of a certain autograph album. It was the property of either Mr. or Mrs. Goldwin Smith, who resided together at "The Grange," Toronto, and who both died leaving wills, Mrs. Smith predeceasing her husband. One T. F. H. D. claims under the will of Mrs. Smith, and it was admitted that if the book was the property of Mr. Smith it passed under his will to the Art Museum of Toronto.

MASTER-IN-CHAMBERS directed an issue to be tried as to whether the book in question was the property of Mr. Smith at the time of his death, in which T. F. H. D. was to be plaintiff and the Art Museum of Toronto, defendant.

Costs to be in discretion of trial Judge.

RIDDELL, J., amended the above order by directing that the issue should be as to whether the book in question was the property of T. F. H. D. as against the Art Museum of Toronto, as T. F. H. D.'s rights under Mrs. Smith's will were not admitted.

Costs of appeal to appellant and executors in any event.

An appeal by the Art Museum of Toronto from an interpleader order made by the Master-in-Chambers.

R. C. H. Cassels, for the appellant.

McGregor Young, K.C., for Thomas Fraser Homer Dixon, the respondent.

G. Larratt Smith, for the executors.

HON. MR. JUSTICE RIDDELL:—The late Goldwin Smith lived with Mrs. Smith at "The Grange." At the time of the death of Mrs. Smith, there was at "The Grange" an autograph book containing a collection of autographs of various persons of distinction. The book continued in the drawing room of "The Grange" until the death of Mr. Smith. Mrs. Smith made a will whereby she appointed her husband and others executors, and her husband and Mr. G. L. Smith, took out letters of probate. In this will such provisions are to be found that it may be that T. F. H. D. is the legatee of this valuable book, if it were in fact the property of Mrs. Smith. Mr. Smith also made a will under which, it is admitted, the book became the property of the Art Museum of Toronto, if it were in fact the property of the late Mr. Smith. The executors of the

two estates stand neutral; but apply for an order to have the matter determined, as both T. F. H. D. and the Art Museum claim the book.

The Master-in-Chambers made the following order:—

"1. It is ordered that the said claimants do proceed to the trial of an issue at the non-jury assizes of this Court to be holden at the city of Toronto in the county of York, to inquire whether the autograph book bequeathed by the last will and testament of the late Goldwin Smith was the property of the said Goldwin Smith at the time of his death.

2. And it is further ordered that in such issue, Thomas Fraser Homer Dixon is to be plaintiff, and the Art Museum of Toronto is to be defendant, and that pleadings be delivered by the respective parties in the same manner as in an action going to trial, and that the question of costs and all further questions be dealt with by the Judge before whom such issue shall be tried.

3. And it is further ordered that, upon the consent of both claimants, the said autograph book remain in the joint custody of the applicants pending the decision of the Court on said issue.

4. And it is further ordered that there be no costs of this application to the applicants.

James S. Cartwright."
M. C.

The Art Museum of Toronto now appeals.

I do not think the issue directed by the Master is the proper one. If the book was the property of Mr. Smith, it is admitted that the Museum is entitled to it. It was in Mr. Smith's possession after his wife's death—and not as executor apparently—it was not administered by the executors as being of Mrs. Smith's estate. In the absence of other evidence, Mr. Smith must be taken to have been the owner at the time of his death, and the Art Museum its present owner. Accordingly, if an issue is to be directed at all, it is right that the Art Museum should be a party, and the party defendant. But T. F. H. D. stands in a different position, he has no right to the book at all, unless (1) it belonged to Mrs. Smith, and (2) he is entitled thereto under her will. He would not have any locus standi in the premises at all unless he could prove that if the book were Mrs. Smith's, he would be entitled to it; the matter could not be determined by simply deciding "whether the autograph book . . . was the property of the said Gold-

win Smith at the time of his death." Such an issue might be sufficient if the executors of Mrs. Smith were asserting a claim, but the present is quite a different case.

What T. F. H. D. must take upon himself to establish is, that he — not simply the estate of Mrs. Smith — is entitled.

The appeal must be allowed, with costs, to the appellant (and the executors) in any event. The order will be amended by striking out in paragraph 1 all the words after the words "Goldwin Smith" where they first occur, and substituting the following "is the property of T. F. H. D. as against the Art Museum of Toronto."

DIVISIONAL COURT.

SEPTEMBER 27TH, 1912.

KARCH v. KARCH.

4 O. W. N. 65.

Husband and Wife — Alimony — Quantum of Allowance — Custody of Children — Desertion.

Action for alimony for custody of children and order for their maintenance by defendant. Defendant, an industrious, thrifty man, addicted to no bad habits, and with a yearly income of some $900, left home on account of the quarrelsome tendencies and lack of interest in his welfare by plaintiff. At the trial of the action he refused to return.

KELLY, J., *held*, 22 O. W. R. 534; 3 O. W. N. 1446, that while plaintiff's conduct was not blameless, it was not such as to disentitle her to alimony, defendant refusing to live with her.

Nelligan v. *Nelligan*, 26 O. R. 8, and *Forster* v. *Forster*, 14 O. W. R. 796, referred to.

Judgment for plaintiff for $5 per week alimony, with costs of action. Defendant to have custody of children, plaintiff to be allowed to visit them weekly.

DIVISIONAL COURT dismissed plaintiff's appeal without costs.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, 22 O. W. R. 534; 3 O. W. N. 1446.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, on 27th September, 1912.

H. Guthrie, K.C., for the plaintiff, appellant.

W. E. S. Knowles, for the defendant, respondent.

THEIR LORDSHIPS (V.V.), dismissed the appeal without costs.

DIVISIONAL COURT.

SEPTEMBER 25TH, 1912.

FEE v. MACDONALD MANUFACTURING CO.

4 O. W. N. 63.

Charge on Land — Registration — Cloud on Title — Action for Removal from Registry — Damages.

Action for declaration that a certain agreement registered by the defendant company was a cloud on the title of the plaintiff, and for $200 damages for defendant company's refusal to release. Plaintiff had purchased the lands in question from one Lang, had registered the purchase agreement and partially carried out the purchase and stood ready to complete. Defendant campany after the registration of this purchase agreement, sold Lang some machinery and in the agreement for its purchase, Lang purported to charge the lands in question, which he described as belonging to him, unencumbered. When Lang made default in payment, the defendant company, without searching the register, registered their agreement and refused to remove it at the plaintiff's request, causing him considerable trouble and inconvenience in respect of a loan which he was procuring on the lands.

SUTHERLAND, J., 22 O. W. R. 314; 3 O. W. N. 1378, granted the declaration sought and fixed the damages at $50, either party to be at liberty to take a reference at his own risk. Costs of action to plaintiff.

DIVISIONAL COURT varied above judgment by declaring that defendant company had no right to any money coming to Margaret Lang. Defendant company to pay plaintiff's costs of action as against defendant Henry Lang.

Action dismissed without costs. Defendant company to pay costs of appeal.

Appeal by the defendant company from a judgment of HON. MR. JUSTICE SUTHERLAND, 22 O. W. R. 314; 3 O. W. N. 1378.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, on 25th September, 1912.

R. S. Robertson, for the defendant company, appellants.

A. E. H. Creswick, K.C., for the plaintiffs and the defendant, Henry Lang.

THEIR LORDSHIPS (V.V.), varied above judgment by declaring that the defendant company had no right to any money coming to Margaret Lang. The defendant company to pay the plaintiff's costs of the action. As against the defendant, Henry Lang, the action was dismissed without costs. The defendant company to pay the costs of the appeal.

HON. MR. JUSTICE RIDDELL. OCTOBER 30TH, 1912.

CHAMBERS.

HOODLESS v. SMITH.

4 O. W. N. 190.

Parties — Joinder — Action for Damages to Land — Non-joinder of Joint-tenant as plaintiff.

Motion for an order dismissing action on the ground that plaintiff's wife was a joint tenant with him of the land in respect of which he sued as owner and that she had not been made a party plaintiff to the action. The action was against a grantee of the plaintiff's grantor to restrain him from breaking certain alleged covenants common to the lands of both plaintiff and defendant.

MONCK, Co.C.J., ordered that plaintiff's wife be joined as plaintiff within one week and if not action be dismissed with costs.

RIDDELL, J., varied above order by substituting for the clause providing for the dismissal of the action in default of amendment a clause providing that the action do not come on for trial unless and until the amendment be made.

Costs of order and appeal in cause on account of delay in moving.

The circumstances of the case shew a most objectionable case of non-joinder, which would probably defeat the action if brought to trial.

Stafford v. *London*, 1 P. Wms. 428.

Nobels v. *Jones*, 28 W. R. 726, and

Lydall v. *Martineau*, 5 Ch. D. 780, referred to.

An appeal by the plaintiff from an order of HIS HONOUR JUDGE MONCK, at Hamilton.

J. G. O'Donoghue, for the plaintiff's motion.

E. D. Armour, K.C., for the defendants, contra.

HON. MR. JUSTICE RIDDELL:—The pleadings set up that one C. B. was the owner of a certain park lot which he laid out in 54 lots, registering the plan; he sold 35 of these to the C. L. Co., the company, in the deed, covenanting for themselves, their successors and assigns, not to build any building with the front wall within less than 6 feet from the line of S. street. The C. L. Company sold certain lots to A. M., who entered into similar covenants; A. M. sold these to "the plaintiff and his wife, K. H., as joint tenants and not as tenants in common," part of this property, and the plaintiff and his wife entered into similar covenants. A. M. sold thereafter to the defendant other parts and adjoining the property of the plaintiff and his wife, and they entered into similar covenants.

The defendant in April, 1912, commenced to excavate a cellar, and this to a depth below the plaintiff's brick house, and also out to the margin of Sophia street, and

have erected a store there. The plaintiff claims a mandatory injunction, etc.

The defendant, M. D. S., denies the allegations, and submits that the plaintiff is not the sole owner, denies any covenant but one he did not break, etc., etc.; his wife's defence is the same.

Notice of trial was served for the assizes at Hamilton, beginning October 7th, 1912, and the case was postponed by Mr. Justice Kelly to the non-jury sittings, November 18th.

The defendants moved, October 24th, for an order dismissing the action, on the ground that the plaintiff is suing for damages to land of which he and his wife are joint tenants, without joining her as a party. The motion was heard by Judge Monck, Local Judge in Chambers, and an order made that the plaintiff's wife be joined within one week, and if this were not done, that the action be dismissed with costs.

The plaintiff now appeals.

There can, I think, be no doubt that this is a case of nonjoinder, which is most objectionable: Daniels Ch. Practice, 7th ed., vol. 1, p. 182; *Stafford* v. *London*, 1 P. Wms. 428.

But it is argued that the application should be made at the earliest possible moment, and that is true: *Sheehan* v. *G. E.*, 16 Ch. D. 59; *Scane* v. *Duckett*, 3 O. R. 370.

Nevertheless, I cannot see how the plaintiff is hurt, and all rules of practice must, of course, be elastic.

The defendants raise, in their defence, that the plaintiff is not the sole owner of the land. This is probably a sufficient objection, and the plaintiff would proceed at his peril: *Nobels* v. *Jones*, 28 W. R. 726; *Lydall* v. *Martineau*, 5 Ch. D. 780; and the Court, while it would not perhaps dismiss the action, Con. Rule 206 (1), would certainly not proceed in the absence of the co-tenant; but would order that the wife be made a party, Con. Rule 206 (2).

I think that the order was properly made now, that she be made a party—but the penalty should not be (on default) that the action be dismissed—it will be sufficient that the order be made that the action do not come on for trial unless and until the amendment be made.

I think, too, that the costs, both here and below, may be in the cause, in view of the delay in moving.

HON. MR. JUSTICE RIDDELL. OCTOBER 30TH, 1912.

CHAMBERS.

McDONALD v. TRUSTS & GUARANTEE CO.

4 O. W. N. 192.

Costs — Action — Reference — Trustees — Conduct of.

Motion by defendants for costs of action and reference taken by plaintiffs at their peril as to costs pursuant to the judgment of Divisional Court herein 16 O. W. R. 507. The Local Master's report on the reference which had become absolute, found nothing due from defendants to plaintiffs.

RIDDELL, J., gave defendants costs of action and reference and of motion.

This is the aftermath of the appeal reported in (1910), 16 O. W. R. 507.

M. Lockhart Gordon, for the motion.

A. F. Aylesworth, contra.

HON. MR. JUSTICE RIDDELL:—There the Divisional Court disposed of all the issues in favour of the defendants; but it was rather suggested than claimed in evidence that the defendants, as trustees, had made charges against the fund which were improper. Accordingly, the Court said: "If it be desired to press such a claim the plaintiffs may have a reference to the Master at Cornwall to take the accounts. This will be taken by the plaintiffs at their own peril as to costs. If this reference is taken the general costs of the action and of the reference will be reserved to be disposed of by a Judge in Chambers after the report . . ."

The plaintiffs took the option given them; a reference was proceeded with, and the Master found that "the defendants being chargeable by the plaintiffs with a sum of $13.97 less than the amount the defendants are entitled to credit for, the plaintiffs are not entitled to participate further in the proceeds of the sale of the mortgaged property . . ." The report has been filed and has become absolute. The defendants ask that the costs may now be disposed of.

The Divisional Court held that there was no impropriety in the conduct of the defendants so far as was made to appear on the evidence then before the Court; the Master has found that in the other matter, the plaintiffs have nothing to complain of.

I think that the plaintiffs must pay all the costs so reserved as well as the costs of this motion forthwith after taxation—all the costs over which I have any control.

HON. MR. JUSTICE MIDDLETON. OCTOBER 31ST, 1912.

RE RYAN & McCALLUM.

4 O. W. N. 193.

Municipal Corporations — Building Restrictions — By-law Requiring Issue of Permit Ultra Vires — Apartment House — Building By-law — Refusal of Permit — Alterations in Plans.

Motion for a mandamus compelling the architect of the city of Toronto to approve of certain plans submitted by the applicant. Applicant was defendant in *Holden* v. *Ryan*, 22 O. W. R. 767, and after that decision amended his plans and submitted them to city architect for approval in conformity with the building by-law of said city. Said architect had formerly granted applicant a permit to build according to his original plans, but since date of permit and date of new application certain city by-laws had been passed to which the plans as altered did not conform and the architect accordingly refused to assent thereto.

MIDDLETON, J., *held*, that this application was substantially an application for a new permit and the architect was justified in refusing to issue a permit, the issuing or refusing to issue a permit, being entirely discretionary with him.

That there is nothing in the Municipal Act which authorises the passing of a municipal by-law requiring any person to obtain a building permit. Sec. 542 of the Municipal Act authorises the passing of a by-law "for regulating the erection of buildings," which enables municipal councils to lay down certain requirements to which buildings to be erected must conform but that does not authorise the granting of a permit.

Motion dismissed with costs.

Motion by Bridget Ryan for a mandatory order directing the city architect to issue a certificate approving of the alterations of certain plans for an apartment house now in course of erection at the intersection of Palmerston boulevard and Harbord street.

W. G. Thurston, K.C., for the applicant.

C. M. Colquhoun, for the respondent.

HON. MR. JUSTICE MIDDLETON:—Prior to the passing of the by-law prohibiting the erection of apartment houses in residential districts, and prior to the passing of by-law 6023 hereinafter mentioned, the applicant had applied for a permit for the erection of an apartment house. The

city architect, being of opinion that the application ought to be considered by him with reference to the law, municipal and otherwise, as it was on the date of the application, granted a permit. After the building had progressed to some extent, an action was brought by the owner of an adjoining parcel of land, to restrain the erection of the building as being a violation of certain building restrictions in respect to lands upon Palmerston boulevard.

The action was tried before the Honourable Mr. Justice Teetzel, who found that the building did infringe the restrictions; and an injunction was granted restraining its erection unless the structure was so modified as to make it conform to the restrictions.

The applicant then prepared modified and amending plans, supposed to comply with the building restrictions. These plans were submitted to the city architect with a request for approval. This approval has been declined, and the present motion is the result. I am not now concerned with the question whether the plans conform to the restrictions, as that matter is not before me in any shape.

There is nothing, so far as I can see, in the Municipal Act, which authorises the passing of a by-law requiring the obtaining of a building permit. The Municipal Act, sec. 542, authorizes the passing of a by-law "for regulating the erection of buildings." As I understand the law, this would enable the council to lay down certain requirements to which buildings to be erected must conform; but I cannot see that it authorizes the granting of a permit.

Neither counsel desired to take this position. They asked me to deal with the motion upon the assumption of the validity of the building by-law.

This by-law, in the first place, provides by sec. 2, that the erection of any building must not be commenced until the owner obtains a permit from the city architect. Plans of the proposed building are to be deposited, and when the architect finds that they are in conformity with all civic requirements he shall officially stamp the plans and issue the permit. Sub-section 4 provides, inter alia, "If during the progress of the work it is desired to deviate in any essential manner from the terms of the application, drawings or specific notice of such intention to alter or deviate shall be given in writing to the inspector of buildings, and his written assent must first be obtained before such alteration or deviation may be made." It is con-

ceded that the alterations sought are alterations which require the assent of the architect.

On the 15th April, 1912, a by-law was passed amending the building by-law by requiring an open space or yard area of not less than five hundred square feet for each and every suite of apartments or dwellings situated on any floor of the building. The proposed building does not comply with this requirement, and the architect takes the position that he is justified in refusing to grant what is in effect a new permit, based upon the application made on October 4th, 1912, for permission to alter the plans.

It is also contended that although the applicant had a vested right to erect the building, by reason of the granting of the original permit of April 20th, 1912, notwithstanding the passing of by-law 6061 on the 13th of May, 1912, prohibiting the erection of apartment houses in the district in question, as I held in *Toronto* v. *Wheeler*, 22 O. W. R. 326, yet when the building for which the permit was granted cannot be erected by reason of the judgment referred to, the architect is justified in treating this application as substantially a new application for a building permit for an apartment house, which he is, by reason of the by-law of May, 1912, justified in declining to issue.

In the third place, it is said that while the by-law imposes a duty upon the architect to issue a permit when the plans conform to the requirements of the building by-law, no duty is imposed to permit alterations, the written assent of the architect required by sub-sec. 4 being entirely discretionary with him.

I am of opinion that the first two grounds relied upon by the architect are sufficient to dispose of this case. The application is for a building substantially different from that originally proposed; and, though in form an application for leave to alter the plans of the original building, it is in truth an application for a building permit, and the architect rightly applies to that application the civic by-laws and regulations in force at its date. He was, therefore, justified in refusing to grant the permit sought under either by-law 6023 or by-law 6061.

If I am right in the view that I have indicated, that the provision of by-law 4861, requiring the issue of a permit, is *ultra vires*, the refusal of this application should not prejudice the applicant if she has the right to complete the building in any way which she pleases, so long

as it is in conformity with the requirements of the building by-law at the time she commenced its erection on the 10th October last, this aspect of the case, by reason of the nature of the present application, not being open for consideration.

I can see no reason for withholding costs.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 1ST, 1912.

JOHNSTON v. CLARK & SON.

4 O. W. N. 202.

Negligence — Person Killed by Electric Wire — Contractors Erected Pile Driver Which Came in Contact with Electric Wires — Negligence of Contractors — Liability of Municipality and Electric Light Company.

Action under the Fatal Accidents Act by a father for the death of his son killed by an electric shock alleged to have been caused by defendants' negligence. Deceased was in the employ of defendant Clark who had contracted with the town of Meaford for the construction of a certain bridge over a river. The work involved pile-driving, and the pile-driving machine, containing much metal, had been placed by the contractor in a grossly negligent fashion near the high voltage wires of an electric light company. The superintendent of the latter company saw the situation, pointed out the danger and received an assurance from the contractor that precautionary measures would be taken to prevent the possibility of accident. Such measures were not taken and as a result thereof deceased met his death. The action was brought against the contractor, the town and the electric light company, and the jury found negligence on the part of the contractor only, assessing the damages at $500. They also found that the contractor was an employee of the town.

MIDDLETON, J., *held*, that the company could not be held liable under the doctrine of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, as urged by plaintiff, as this was not a non-natural user of their property.

Dumphy v. *Montreal Light, H. & P. Co.*, [1907] A. C. 200, referred to.

That the contractor was as a matter of law not an employee of the town, in spite of the jury's finding, even though his remuneration had not been definitely ascertained, as the town had no control over his actions.

Judgment for plaintiff for $500 against defendant Clark with County Court costs and no set-off. Action against other defendants dismissed with costs.

Action tried at Owen Sound on the 17th October, 1912. The plaintiff sued to recover damages under Lord Campbell's Act for the death of his son on 18th of July, 1912.

D. Robertson, K.C., for the plaintiff.

W. H. Wright, for the defendants, Clark & Son.

G. G. Albury, for the defendant, the Meaford Electric Light & Power Co.

Glyn Osler and J. S. Wilson, for the defendant municipality.

HON. MR. JUSTICE MIDDLETON:—Clark & Son made a contract with the town of Meaford for the construction of a concrete bridge across the Big Head river. After some preliminary work had been done, it was found necessary to place piling as a foundation of one of the piers, because, instead of finding a rock bottom, quicksand was encountered.

Some negotiations took place between the contractors and those representing the town—which it will be necessary to discuss more at length—resulting in an arrangement by which a pile driver was constructed and erected by Clark.

The leads of this pile-driver were thirty-five feet high, and when it was placed in position the head of the leads was immediately under two of the Electric Light Company's wires, which carried a current of 2,200 volts. The upright leads had been raised against these wires, lifting them and subjecting them to considerable strain. An iron bolt passed through the head of the leads, midway between the two wires, which were eighteen inches apart. This iron bolt extended some four inches above the head, and rested upon an iron washer four inches in diameter, so that it was about six inches from the live wire on either side. The bolt supported an iron pulley or sheave, over which passed a steel cable used in raising the hammer. This cable ran through a sheave at the base of the leads, through another sheave at the rear of the machine and some ten feet to one side, thence to the winding drum of the hoisting machine.

It passes one's comprehension how the apparatus could have been erected in this fashion without fatal injury to some one; but so dense was the ignorance of the contractor Clark and his son, a young man who said that he had successfully passed his third year examination at the School of Practical Science, that no one up to this time seems to have appreciated the danger of the situation.

The manager of the Electric Light Company was sent for. He was indignant at what had been done, pointed out the danger of the situation, and finally acquiesced in what was proposed by young Clark, namely, that a board should be nailed upon the head of the leads, sufficiently high to

carry the wires above the iron bolt. The manager then left the place, assuming that this would be adequate protection.

For some reason this board was not placed. The hammer of the derrick, weighing a ton, had been put on the ground some feet below the foot of the leads. The cable was attached to it, and the engine was started, with the intention of hoisting the hammer so that it would swing below the leads and then be placed in position. The pile-driver was not weighted nor braced; it was merely chained to the main beams upon which it rested, these in turn resting at one corner upon some loose blocks placed on some old piles which had been cut off at a lower level.

When the strain came upon the cable, it caused the derrick to move far enough to bring the bolt above in contact with the electric wire. The electricity passed immediately, followed the cable, and killed the man operating the hoisting drum. The hammer jammed at the foot of the leads, and, as the engine was not stopped, the whole machine was pulled over to one side and the blocks fell out below. Johnston, who had been below, attempting to get the hammer into position, started to escape by climbing up the bank. As the pile-driver swung over, the cable came in contact with an old iron stay or bolt running from one of the old piles into the bank as an anchor. Johnston grasped this rod, and received a shock which instantly killed him.

Upon these facts, those responsible might well have been prosecuted for manslaughter.

At the trial, most of the facts were not controverted, and counsel agreed upon a series of questions to be submitted to the jury, to determine matters upon which there was dispute. The jury have found negligence against Clark & Son in the erection of the pile-driver upon insecure foundations, and in working it so as to come in contact with the electric wires, and in not having it properly guyed or weighted, and in leaving the driver in contact with the wires after the conversation with the superintendent of the Electric Light Company. They have assessed the damages at five hundred dollars. Upon these findings judgment must go against the defendants Clark & Son for that amount.

I submitted a question to the jury asking them whether, in their opinion, there was "negligence on the part of the

power company in failing to remove their wires or to cut off the current after they knew of the erection of the driver." This they have answered in the negative. I take it that this means that they thought the manager of the company was justified in leaving the power on after Clark had agreed to place the board above the dangerous bolt so as to prevent a metallic contact with the wires.

Notwithstanding these findings, the plaintiff's counsel asked for judgment, basing his claim upon the theory that the Electric Light Company, being in control of a dangerous electric current, and knowing that a condition of peril existed by reason of the unauthorized and entirely improper conduct of Clark, owed a duty to all who might be brought in contact with that dangerous current by reason of this unauthorised act, to see that such precautions were taken as would secure safety.

I do not think that this is a case falling within the doctrine of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, this not being the case of a non-natural user by the plaintiffs of their own property and premises. It is, on the contrary, carrying on an undertaking authorized by the law of the land; and there is no liability unless negligence can be affirmatively found. The jury have found that there was no negligence. I do not think that I am in a position to say that upon the undisputed facts there was negligence. The case is very much like *Dumphy* v. *Montreal Light, H. & P. Co.*, C. R., [1907] A. C. 200, and cannot be distinguished unless the mere fact of knowledge imposes an additional obligation.

As to these defendants, the electric company, I think the action fails, and should be dismissed with costs.

It is sought to make the town of Meaford liable upon the theory that in the pile-driving Clark & Son were not contractors, but merely servants of the municipality. At the hearing I thought that this was a question of law, and that in no possible view of the evidence could Clark & Son be regarded as other than contractors. Counsel, however, thought that in one aspect of the evidence Clark & Son should be said to be employees, or that it would be open to the jury to so find; and as a precautionary measure I submitted a question to the jury, in answer to which they found that Clark & Son were not contractors but were employees.

I retain the impression that this was a matter of law for me, and that in no possible aspect of the case is the answer of the jury justified. There was a contract for the construction of the bridge. Under this contract the contractors probably had to do all work necessary for the completion of the structure. At any rate, they ultimately assumed the task of doing the piling. Some difficulty arose as to the remuneration. Under the contract this had to be agreed upon before the work was undertaken, or no allowance would be made. The engineer named a sum which the contractors thought inadequate. A conversation took place with the mayor, as the result of which the contractors went on with the work.

There is a difference in the recollection of the witnesses as to this conversation. Clark says that the mayor said "Go on, do the work, we will pay you what it costs, and allow you six dollars a day for your own time and for the use of your plant." This is as strong a way as it can be put in favour of the plaintiff; and, accepting it to the full, I think Clark & Son were still contractors, and that this can only be said to be a means of adjusting the price to be paid. Clark, not the municipality, retained dominion over the work. Clark could procure his material where he pleased and when he pleased. Clark could employ whomsoever he thought necessary, and pay such wages as he thought proper. The municipality had surrendered to him complete control of the whole undertaking, and this, it appears to me, is the true criterion.

In this view, the action fails as to these defendants, the municipality, and should also be dismissed with costs.

I was not asked to give a certificate to prevent a set-off of costs, as the amount recovered is within the County Court jurisdiction. After some hesitation, I conclude that I should certify to allow the plaintiff County Court costs without set-off. I think that the verdict of the jury is more than the plaintiff ought reasonably to have hoped to recover. The young man, at the time of his death, was 27 years old; had been away from home for five years; had, during that time, given his father $55 and some trifling presents. He seemed to have lost all interest in his home, as he worked near to it for two seasons and never troubled to go and see his parents. He was in receipt of good wages, yet when he died he had no money except the wages due to him for the few days since the last pay day. Had I

thought the damages assessed on an illiberal scale, I would have given High Court costs. I refuse the set-off because of the gross misconduct of Clark & Son, which disentitles them to any kind of consideration.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 1ST, 1912.

SEAMAN v. SAUBLE FALLS LIGHT & POWER CO.

4 O. W. N. 217.

Water and Watercourses — Injury to Mill by Flooding — Unprecedented Spring Freshets.

Action for damages alleged to have been sustained by plaintiff by the breaking of a dam on the Sauble river in the spring of 1912, whereby plaintiff's mill was flooded and a quantity of lumber carried away and lost.

MIDDLETON, J., found that the breaking of the dam was not due to the negligence of defendants but to an unprecedented flooding of the river and dismissed action with costs.

An action to recover damages sustained by plaintiff through the breaking of a dam on the Sauble river whereby plaintiff's mill was flooded and partially undermined, and a quantity of lumber was, it was alleged, carried away and lost.

W. S. Middlebro, K.C., for the plaintiff.

R. McKay, K.C., and C. S. Cameron, for the defendants.

HON. MR. JUSTICE MIDDLETON:—John C. Thede and Valentine Feick were, prior to March, 1905, the owners of a considerable tract of land on both sides of the Sauble river, covering the entire *locus in quo*.

On the 22nd March, 1905, Thede and Feick conveyed to N. D. Seaman the entire parcel, save ten acres upon the south side of the Sauble river opposite that portion of the north shore where the mills, race pond and lumber yard in question are situated. This deed also reserved to the grantors "the privileges of the water power at Sauble falls . . . with full privileges of raising, lowering, altering or changing the dam and water in the aforesaid river when found necessary, with free ingress, egress and regress to the said dam and water."

On October 5th, 1906—some eighteen months later—an agreement was come to between Seaman, Thede and

Robert Miller, then a partner of Thede's, by which Seaman agreed to sell to Thede and Miller a site for a power house on the north side of the river, south of the saw-mill. This agreement further provided "for the right to take water through the intake; you (i.e., Thede and Miller), agree to build a cement dam around the pond and enlarge the intake if necessary . . . you also agree to have the dam around the pond completed on or before the 1st of March, 1907."

To understand the meaning of this it will be necessary to describe the *locus in quo*. The river at this point flows almost due west. A dam was then constructed across the main channel of the river, between the south bank and what was, for convenience, called "the island." This dam raised the water in the river above the falls by about three feet. The race pond lies immediately north of the island. Water enters this race pond at the east through a head gate. At the time of this agreement, the water was discharged from this race pond through a race passing through the saw mill, which was situated at the west end of the race pond. This race discharged below the falls, which are on the south side of the island; and there is a head of about twenty feet. The power house site was immediately south of the saw mill; and a power house was erected in 1907 which took water from the race pond by a head race immediately south of the head race of the saw mill. At the same time a waste weir was constructed, running from the south-west angle of the race pond and discharging into the main river near the foot of the falls. The pond round which a cement dam was to be constructed was this race pond, not the mill pond proper.

The cement dam or wall was, in due course, constructed around the race pond; and at the same time a cement dam was erected immediately below the main dam across the river. This slightly exceeded the height of the original dam, and entirely closed the waste weir in it, thirty-five feet long and eighteen inches deep. It was not necessary to enlarge the intake to the race pond, as that was found sufficient to admit all water needed for the operation of both the saw mill and the power house.

All that was done met with the entire approval of Seaman, and no complaint was made by him of anything connected with the works, save in a letter of January 22nd, 1909, when complaint was made by this letter of the con-

dition of the waste weir, which it was said "causes the water to overflow the bulkhead in the saw-mill and do some damage to the mill." The exact nature of this complaint is not clear, nor do I think it material.

In 1911, the intake gate to the race pond was, to some extent, out of repair, and no doubt there was some conversation between the parties as to this. The gate was used mainly by the plaintiffs; they floated the logs to their mill through it. There was no obligation on the part of the defendants to repair it. The plaintiffs drew the defendant's attention to the condition of the gate, probably in the expectation that he would undertake its repair; but no arrangement was arrived at. The power house was only operated for lighting purposes, hence at night, and the flow of the water to the power house was readily regulated at the bulkheads and by manipulation of the waste gate.

In the spring of 1912, floods were unusually severe. The head gate, the waste gate, and a portion of the concrete wall of the race pond—at the north-west angle—were carried away. A large washout took place immediately north of the saw mill. The water flowing through this broken wall and washout undermined the saw mill to some extent and carried away some lumber from the lumber yard below the mill, and tore away a portion of the lumber dock on the north bank of the river. The mill owners now sue Thede and his partners, the defendants in this action, to recover for the injury to the mill and dock, and for the loss of the lumber.

It was abundantly proved at the trial that the floods of 1912 were unprecedented. Mr. McDowell, the plaintiff's first witness, on cross-examination, stated that the like had not been seen in that section of the country since it was opened up for settlement. The plaintiff did not really attempt to controvert this, but sought to shew that the disaster had taken place before the water reached a height which could be regarded as abnormal.

I think he failed in this contention. The order of events is pretty clearly made out by the evidence. Shortly after Saturday midnight the waste gate gave way. At four or five o'clock on Sunday morning the head gate went; and at about nine o'clock the wall collapsed, probably in consequence of the carrying of a crib and some wreckage into the waste weir. The old dam across the river, reinforced by the concrete structure, was sufficiently strong to

stand the strain, although the water flowed over its entire width to such a depth that it rose to the lower side of the bridge some little distance below the falls.

The evidence of the witnesses Rydell, Harris and McBride, is entirely reliable, and satisfies me that prior to this the flood had reached a point where it might well be described as "unprecedented."

Under the circumstances disclosed, I am unable to find any liability on the part of the defendants. The plaintiff is the owner of the entire property covered by the dam and pond, subject only to the superior right of the defendant to draw water. The head gate of the race pond formed no part of the dam which Thede undertook to repair. Thede had the right to raise or lower the dam as he saw fit. It was open to the plaintiff, and, probably, also to Thede, to reconstruct and repair the waste gate; but neither was under any obligation to the other to do this. The rights of the parties were more analogous to those in party-wall cases than any I have been able to find.

Having arrived at this conclusion upon the facts, it is not necessary that I should deal with the numerous cases cited upon the argument. I should, however, mention that I arrived at this conclusion with the less regret because, I think, there was an altogether unjustifiable attempt on the part of the plaintiff to inflate his claim for damages. As indicated upon the argument, the amount that should be allowed to him, if he succeeds, is very much less than the amount claimed. I would allow—and I think I would be liberal in so doing—five hundred dollars to cover the damage done to the mill, including the cost of repairing it and all material that went into its reconstruction; this item covering all structural damage or damage by reason of the mill not being now as rigid as before the flood.

Damage was claimed by reason of the mill being shut down so that lumber could not be shipped until late in the season. This item was entirely displaced upon the facts.

The small items, aggregating $48.86, were for repairs done at the south end of the dam, where, clearly, there is no obligation on the part of the defendant to repair, and where no suggested negligence caused the break.

The item of four hundred dollars, cost of refilling the washout, was abandoned at the hearing.

Eighty-five dollars would be a fair sum to allow for repairing the dock.

A claim is made for four hundred dollars for lumber lost. That this amount of lumber was lost is probably sufficiently proved, but I do not think that the loss is sufficiently connected with the negligence charged.

It is, probably, the fact that if the head gates had been more strongly constructed, the water might have all been diverted over the main dam, and that no harm whatever would have happened. But the condition of these gates was known to both parties; and, even if the defendants were under obligation to repair, the plaintiff was not justified in allowing the gates to remain in a condition of disrepair whereby he would suffer the injury now complained of, if indeed this could be regarded as a natural and probable consequence of leaving the gates as they were. The plaintiff himself could have repaired at trifling cost, and, in that event have looked to the defendant for reimbursement.

While the action fails, and must be dismissed with costs, I think the defendants went to more expense than necessary in having so many witnesses present to testify to the serious nature of the spring floods, and that they should not, on taxation, be allowed for more than three witnesses called to give general evidence of this kind.

MASTER IN CHAMBERS. NOVEMBER 1ST, 1912.

STUART v. BANK OF MONTREAL.

4 O. W. N. 218.

Discovery — Examination of Plaintiff — Particulars — Statement of Claim — Full Disclosure Already Made.

Motion by defendants for particulars of statement of claim and for further examination of plaintiff for discovery, after issue joined.

MASTER-IN-CHAMBERS *held*, on the facts that plaintiff had disclosed all the facts within his knowledge and that he was bound to ascertain and that in any case the delay in moving was sufficient to defeat the motion.

Motion dismissed, costs to plaintiffs in cause.

Motion by the defendants for particulars of statement of claim and for further examination of plaintiff for discovery.

H. A. Burbidge, for the motion.

W. M. Douglas, K.C., and W. J. Elliott, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The cause was at issue before vacation. A demand for particulars of statement of claim was served on 6th May. This was not complied with —and nothing further was done about it by defendants at that time. The case was set down on the non-jury list here, on 4th September, and was, therefore, liable to be put on the peremptory list on or after 26th September.

Plaintiff was examined for discovery on 21st October and made what seem to have been full and candid answers to the questions asked.

The action is brought in effect to redeem the one-half share of plaintiff's deceased father in certain lands which in October, 1900, were conveyed by the deceased to his father. The deed though absolute in form is alleged to have been only by way of security for moneys advanced—and it is said this was within the knowledge of the bank and its officers at the time when these with other lands in July, 1904, were conveyed by plaintiff's grandfather to the bank in satisfaction of his own liabilities to that institution.

The statement of claim necessarily alleges in paragraph 8 as follows:—

"During the negotiations for the transfer of his property the said John Stuart notified the defendant bank that he was not the owner of the property (in question in this action and called) 'the Stuart & Scott survey,' but had only an interest in the same by way of security. The "defendants Braithwaite and Bruce had the like knowledge before such negotiations for transfer began."

In the 9th paragraph, it is alleged that for several years prior to July, 1904, defendant Bruce had been solicitor for John Stuart, and until 5th July, 1904, acted as solicitor for him as well as for the Bank of Montreal. The demand for particulars was in the usual detailed form asking when and where and under what circumstances John Stuart notified the bank as alleged in paragraph 8, and the name of the person or persons to whom such notice was given. This is repealed as to Braithwaite and Bruce—and also as to Bruce, as alleged in the 9th paragraph.

Numerous letters are produced between the parties, and it is apparently on that of July, 5th, 1904, from John Stuart to Bruce, that plaintiff mainly relies, taken together with the correspondence as a whole (see question 108 *et seq.* of plaintiff's examination). He also says (question 115 *et seq.*), that his grandfather notified the bank "verbally—just directly

before the settlement." Of course, as to these facts plaintiff must rely on his grandfather's evidence at the trial. I do not think he is bound to get all these details from him beforehand and communicate them to defendants. They have denied any notice. It will, therefore, be a matter for the trial and for the ultimate tribunal that hears the case to say whether the defendants had notice as plaintiff alleges and what effect is to be given to it.

The plaintiff has apparently given all the information on the matters in question that he has or ought or is bound to have. There is no fiduciary relationship between himself and his grandfather—it may be that they are adverse though plaintiff must rely on his evidence, if any, is thought necessary beyond the correspondence and the fact of the dual position of Mr. Bruce.

I think the motions fail on the merits—and also it may be that the defendants were too late after doing nothing since 6th May last. The delay is said to have been caused in part by the plaintiff having obtained an order on 10th July for examination *de bene esse of* John Stuart, which was never acted on. But this does not account for the previous two months' inaction.

The motions will be dismissed—and with costs to plaintiff in the cause.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOVEMBER 1ST, 1912.

PETTIT v. BARTON.

4 O. W. N. 200.

Bills of Exchange and Promissory Notes — Action on — Defence no Value Received — Evidence — Onus.

Action on a promissory note. Defence was that defendant received no value or consideration in respect thereof and that the note was intended as a mere evidence of debt or receipt.

FALCONBRIDGE, C.J.K.B., *held*, that the evidence did not substantiate defendant's contention and that the parties intended that defendant should be liable on the note.

Judgment for plaintiff for $2,000 and costs.

Thirty days' stay.

Action on a promissory note. Tried at Picton without a jury.

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

E. M. Young, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The second paragraph of the statement of defence is bad in law, bearing a strong family resemblance to the original defence in *Clark* v. *Union Stock Underwriting* (1906), 13 O. L. R. 102; affirmed in appeal, 14 O. L. R. 198.

But, treating paragraph 2 as a matter of inducement only, paragraph 3 says (eliminating some allegations which are also bad in law), that the defendant received no consideration, value, benefit or profit from the said transaction, and that he signed said note only as evidence of debt and as an accommodation to the plaintiff, etc.

I received all the evidence in the case subject to objection, and I find that, apart altogether from the legal difficulties in defendant's way, he has failed in proof of the facts, the onus being, of course, upon him. The plaintiff swears that he refused to lend the money to Wilson, but was willing to do so to Barton. Defendant contradicts this, but defendant's contradiction involves the contradiction of the two writings, the note sued on and the cheque for $2,000 given by plaintiff to defendant. Defendant is a man of intelligence, and apparently an alert man of business, so that one would expect him to refuse to give his note as a mere temporary arrangement when his receipt would answer every purpose. The large amount of interest agreed upon (twenty per cent. for four months), made no difference to the defendant as he expected Wilson, who was his brother-in-law, to make it good.

Then eight days after the making of the note, defendant brought to plaintiff what he calls "a short form of receipt," exhibit 6, which would, if defendant's account of the transaction were accurate, entitle him to have his note delivered back to him. Plaintiff refused to accept the receipt, saying that he had defendant's note and that was all he wanted. That was surely the time for defendant to insist on getting back his note, but he apparently accepted the situation, and allowed that position of affairs to remain until this action was brought.

There were efforts made to get the money from Wilson. This is not at all inconsistent with plaintiff's position, as he would, admittedly, prefer to save the defendant harmless. The defendant sued Wilson in the Manitoba Court and got judgment against him in his own name, for this debt. Wilson is now an undischarged bankrupt.

When plaintiff threatened suit, the defendant apparently offered no repudiation of liability, but went to plaintiff and to his solicitor, and offered security.

Defendant entirely fails to shew absence of consideration.

There will be judgment for plaintiff for $2,400, with interest from the 11th day of August, 1911, and full costs of suit.

Thirty days' stay.

As to the law, counsel referred to *Porteous* v. *Muir* (1884), 8 O. R. 127; *Woodbridge* v. *Spooner* (1819), 3 B. & Ald. 233; Falconbridge on Banking and Bills of Exchange, p. 431; *Abrey* v. *Crux*, L. R. 5 C. P. 37; *McNeill* v. *Cullen* (1904), 37 N. S. 13.—Ed.

HON. MR. JUSTICE LATCHFORD. NOVEMBER 1ST, 1912.

JAMIESON v. GOURLAY.

4 O. W. N. 216.

Contract — Breach — Damages — Reference — Contradictory Evidence — Finding of Master — Appeal — Costs.

Appeal and cross-appeal from report of Local Master at Ottawa assessing the damages suffered by plaintiff through breach of contract by defendant at $248.83.

LATCHFORD, J., dismissed both appeals. Costs of reference to be to plaintiff, no costs of action to either party.

Appeal and cross-appeal from a report of the Master at Ottawa, upon a reference by the trial Judge to ascertain what damages, if any, the plaintiff had suffered by any breach by the defendant of the contract between the parties, as construed by the Court. There was a breach by the defendant of the contract, and the resulting damages were found to be $248.83.

J. R. Osborne, for the plaintiff.

R. J. Slattery, for the defendant.

HON. MR. JUSTICE LATCHFORD:—The amount of damages is not affected by a clerical error stating the number of feet—board-measure, evidently—in the 8 rafters not supplied to be 43 instead of 430. The extension at $22 per M.—$8.60, is based upon the larger and proper quantity. The plaintiff appeals to have the damages increased, the defend-

ant to have them diminished. I have read the voluminous evidence. Upon the reference as at the trial it is contradictory upon almost every point in issue. The very able Judge, who tried the case expressed his difficulty in arriving at a satisfactory conclusion where "either the plaintiff or the defendant was stating what was untrue, and doing so deliberately." The position of the Master was one of equal difficulty. His conclusions are upon matters of fact, and I can see no ground for disturbing them. It may well be that the cause of the breach of the contract was the insistence of the plaintiff that the defendant should supply timber not called for by the agreement as interjected by the Court. But the defendant was not thereby justified in failing to deliver what the contract required him to furnish. I think the plaintiff should have the costs of the reference. As success at the trial was divided, there should be no costs of the action to either party.

DIVISIONAL COURT.

NOVEMBER 2ND, 1912.

GRAY v. BUCHAN.

4 O. W. N. 220.

Broker — Purchase by Customer of Shares on Margin — Contract —Terms—Failure to Keep up Margin—Resale by Broker.

Action by customer against brokers for rescission of certain contracts for the purchase of mining stock and for a return of the moneys paid on account of such purchase or for damages for the wrongful resale of the shares. Plaintiff, who was a solicitor, accustomed to stock transactions, purchased the stock in question on margin, one of the terms of the contract being that margins were to be kept up by the purchaser. The stock declined in price and plaintiff on being asked to put up further margins to protect it, neglected to do so, whereupon defendants sold out the stock at the market price and credited his account with the proceeds. Plaintiff set up lack of familiarity with the usage of the Exchange and with the terms of the orders executed by him.

KELLY, J., 22 O. W. R. 830; 3 O. W. N. 1620, dismissed action with costs and allowed defendants their counterclaim of $18.10.

DIVISIONAL COURT affirmed above judgment, with costs.

An apeal by the plaintiff from the judgment of HON. MR. JUSTICE KELLY, 22 O. W. R. 830; 3 O. W. N. 1620.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. G. Godfrey, for the plaintiff, appellant.
G. T. Ware, for the defendants, respondents.

HON. MR. JUSTICE RIDDELL:—The plaintiff is a solicitor who at the time of the transactions in question had an office at South Porcupine as well as in Toronto. The defendants are two partners, Buchan and Simms, brokers, at Haileybury; there being no stock exchange at that place they have as correspondents A. E. O. & Co., in Toronto, who are members of the Standard Stock Exchange here.

The plaintiff had a "tip" that Dome Extension was a good buy and made up his mind to try his luck in that stock. Dealing in stocks was not new to him.

He went to the defendants' office and gave an order—or rather three orders—for 3,000 shares in all. It was at the time explained that it would be necessary to put 25 per cent of the purchase price; the price was 42 cts.—$1,260, 25 per cent. of this is $315, and Gray put up $300 "roughly speaking, 25 per cent.," as Simms puts it.

The orders are made on the defendants' printed forms and the first reads thus:—

Buchan & Simms, brokers, 15/1/12.
Haileybury, Ont.

Buy for my account and risk, 1,000 shares
Dome Ext.
at 60 days, subject to your usual terms and conditions
deposit 42 cts.
$100.43

This order good till .....
..... J. J. Gray.

All orders expire on date hereof unless otherwise stated.

"It is hereby agreed and understood that on all marginal business Buchan and Simms have the right to close transactions where margins are in danger of exhaustion without further notice, and to settle contracts accordingly.

"This order is subject to your usual rates of commission and "I hereby agree to accept delivery of stock on arrival of same or when same is tendered to me and in case of non-acceptance on my part Buchan & Simms are hereby empowered to sell same" (sic).

In the second (I put in only what is not in print).

15/1/12.

Buy 1,000

Dome Ext.

42

60 days

$.....

3. p.m. to-day.

J. J. Gray.

and the third

Jan. 15/12.

Buy 1,000

Dome Extension

42

60 days J. J. Gray.

Simms explained to the plaintiff that the 25 per cent. must be maintained against depreciation; the plaintiff said: "Well, if there is any necessity of putting up more deposit, I will put some up"—and the other defendant said: "Well we will communicate with you and we will wire you through C. of Porcupine," who was a telegraph operator at the K. G. hotel at Porcupine, at which hotel the plaintiff was staying when at that place.

The stock was bought through A. E. O. & Co., it is sworn—and a bought note was handed to the plaintiff; this is said to have been filed in the central office, and while produced at the trial, is not before us on this motion. No doubt neither party considered it of any importance.

On January 22nd, C. told the plaintiff that he had a message from the defendants "they want $300 on some stock you purchased"—the plaintiff replied as he swears "I am agreeable to putting up a certain amount of money, but that is not a proper sum. I am not going to put up that amount." He says he suggested $200, and said "Find out from B. & S. if that would be all right"—that shortly after C. told him that was all right and the plaintiff said: "Well I will come in during the day and give you a cheque on Toronto for $200." C. says this did not happen—that he demanded the sum which B. & S. mentioned—and which beyond question was $300—and that the plaintiff said: "I will try and get it and bring it to you." C. reported to B. & S. that the plaintiff had promised to bring him a cheque. The message is said to have been as follows: "Gray just in is going to give me a cheque on Toronto $200 will let you know when I get it." This was not what had been demanded;

and the defendants wired their correspondents in Toronto to sell—which they did (complaint was made upon the argument that it was not proved strictly that A. E. O. & Co. did sell this stock—perhaps not, but it was taken for granted at the trial, and if necessary we should allow it to be proved by affidavit).

The result was that the purchase-price obtained did not equal the amount still due from the plaintiff by $18.10.

The plaintiff says that after he had suggested to C. that he would put up $200, and was told by C. that that was all right, he went to C. in the afternoon and said, "I don't want to give $200 unless I have to; would you see if $150 would be enough," and C. telegraphed away (as the plaintiff thought at any rate), and said that would be all right, and the plaintiff then gave him a cheque on Toronto, a bank in Toronto, for $150. At that time the plaintiff had no funds in the bank at Toronto, but the bank had cashed cheques before for him of considerably more than that.

C. does not admit the truth of the allegations of the plaintiff. He says: "I simply accepted the cheque on behalf of B. & S., and advised them and mailed it to them the same evening." He denies saying that the cheque was satisfactory.

At all events the cheque was sent to the defendants by C. —apparently received by them two days later, by them sent to Toronto and through a clerk of A. E. O. & Co.'s presented for payment and the bank refused to pay "not sufficient funds."

At some time, when does not sufficiently appear, the plaintiff gave a cheque for $95 to C. for the defendants. Had the plaintiff produced this cheque it may be that much of the chronology would have been been cleared up—but he did not do so and we must do the best we can with the material we have.

This cheque was apparently on another bank, it was sent on to the defendants and by them cashed—the proceeds being placed to the plaintiff's credit.

Upon action brought, Mr. Justice Kelly dismissed the action and gave judgment for the defendants' counterclaim.

The learned Judge finds on sufficient evidence "a full explanation of the defendants' methods, terms, conditions, and rules of business in dealing in such stocks, the amount of deposit required on the purchase and the amount of margin required to be maintained was given to "the plain-

tiff "before he entered in the purchase. He knew the character of the stock he was dealing in; that it was subject to rapid and serious fluctuation in value and that unless the margin agreed upon was kept up, the stock was liable to be promptly sold."

On the findings of fact it is plain that as the plaintiff did not in fact comply with the demand for the margin made through the agreed channel, he cannot complain that the stock was "promptly sold"—it is just what anyone dealing in these stocks expects and must provide against.

I do not, therefore, think there is any need of considering the application (if any), to this case of *Corbett* v. *Underwood* (1876), 83 Ill. 324.

I think the motion must be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and HON. MR. JUSTICE BRITTON, agreed.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 2ND, 1912.

CARTWRIGHT v. WHARTON.

4 O. W. N. 210.

Copyright — Contempt of Court — Disobedience to Judgment Restraining Infringement of Copyright.

Motion for an order committing defendant for contempt for alleged breach of the injunction granted by Teetzel, J., (25 O. L. R. 357; 20 O. W. R. 853), restraining defendant from publishing material derived or copied from plaintiff's law list or from defendant's own list of 1911 found to have been improperly obtained.

MIDDLETON, J., found on the facts that there had been no serious breach of the injunction order, the only breach established being based on an erroneous interpretation by defendant of the scope of the said order.

Motion dismissed. Three-fourths of the costs to go to defendant.

Motion for an order committing the defendant for contempt in infringing the injunction granted by HON. MR. JUSTICE TEETZEL in 25 O. L. R. 357; 20 O. W. R. 853.

This injunction restrained the defendant from publication in his law list of any lists derived or copied from the plaintiff's list or from the defendant's own list published in 1911, which, according to the finding of the learned trial Judge, was improperly derived from the plaintiff's list of 1910.

J. H. Moss, K.C., for the plaintiff.

D. T. Symons, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The material in support of the motion is an affidavit by the plaintiff, who bases his belief that the defendant's edition of 1912 has been produced in violation of the terms of the injunction, from the repetition in the 1912 edition of numerous misprints and errors, said to exist in the 1911 edition. Fifty-four such errors or misprints are particularized.

At the time of the pronouncing of the judgment—4th January, 1912—the defendant had a 1912 edition well under way with his printers, Warwick Brothers and Rutter. This edition was in a large measure derived from and based upon the 1911 edition. When the judgment was pronounced and the defendant learned of his failure in the action, and of the fact that all further use of the 1911 edition was prohibited, he determined to compile anew the material necessary for the publication of a new edition. The injunction in no way prevented this, so long as the compilation used in 1912, was based upon the result of original enquiry and work. He accordingly, on the 5th January—the day after the pronouncing of the judgment—telegraphed to his correspondents in each of the provinces, other than Ontario, to have prepared a complete new list of barristers, also Judges. Court officials, etc., for the respective provinces. He followed these telegrams by letters advising of the holding of the trial which necessitated the preparation of new lists without reference to the plaintiff's book or the defendant's 1911 edition. This correspondence is produced. The original lists furnished by the different correspondents are also produced; and the majority of the errors or alleged errors said to be common to both editions, and upon which the plaintiff's charge is now based, are found to exist in the material so furnished.

I am satisfied, from the material produced. that the list published in 1912 is substantially based upon the new material so obtained.

Upon the argument this was practically conceded by the plaintiff's counsel; but he still urges that on close scrutiny enough remains to indicate that some improper use must have been made of the prohibited material. This necessitates a somewhat careful scrutiny of the 54 cases alleged. Fortunately these admit of some classification.

In the first place, items 1, 2, 3, 4, 28, and 40, relate to the misspelling of the names of towns. The defendant contends, and I think rightly contends, that this is not

within the scope of the injunction granted. Secondly, items numbers, 32, 33, 34, 35, 36, 37, 38, 39, and 42, relate to numbers placed opposite the names of solicitors by way of reference to the Toronto agents. This the defendant contends is not within the scope of the injunction; and I think he is right.

A large number of other objections relate to mistakes in the initials of solicitors, the omission of the title "K.C.," in a number of cases, and the fact that solicitors in partnership are reported as practising separately. The great majority of these alleged errors appear to exist in the original material derived from the sources I have indicated. This applies to items No. 5, 6, 7, 8, 9, 10, 11, 13, 15, 17, 18, 22 23, 25, 27, 29, 30, 31, 41, 42, 43, 44, 45, 46, 47, 48, and 49.

In the preparation of the list Mr. Wharton has had access afforded him to other lists which are probably the common source from which both lists have in some measure been derived; hence the existence of the common errors.

In reference to some individual names, further explanation has been given. In the case of objections Nos. 12 and 14, sufficient original information was acquired to make the list accurate, but the accurate information was changed to its erroneous form by the defendant, owing to his belief that correction was needed.

Number 19, the name of the junior Judge of Elgin, is given as "C. O. Ermatinger," instead of "C. O. Z. Ermatinger." The name of the learned county Judge is given in the same way in the Canada Law Journal almanac, which is used by Mr. Wharton by the permission of its authors, and I may say that in years gone by I have personally addressed many letters to the learned Judge, and until now did not know of his third initial.

More difficult to deal with is the case of the name of "W. T. McMullen, Local Master, Woodstock"—No. 20. This in the interdicted list is spelled "McMullin;" and in the 1912 list appears in the same incorrect form. The explanation given limps. The material said to have been given to the printer was the official list published by the Inspector of Legal Offices. This list was no doubt in Mr. Wharton's possession. The name is there correctly spelled; and it is said that the error was that of the printer. After giving the matter the best consideration I can, I do not think I could find against Mr. Wharton's sworn statement, by reason merely of this one coincidence. I have the less hesitation in

adopting this view because manifestly much labour was gone to in order to obtain independent lists. The inspector's list of county officers for Ontario was in Mr. Wharton's hands, and was in a convenient form for use. There would be a complete absence of motive.

The only other similar case is No. 16, that of "S. D. McLellan," whose name appears as "McLennan." Again the printer is blamed. The coincidence is at least singular; but, as accurate independent material was at hand, motive is again wanting.

Number 21, Mr. Ross, whose name is erroneously given as "A. W. Ross," instead of "A. G.;" I think the explanation is satisfactory. The initial was erroneously given in a card, and was from this carried into the list.

Number 24, W. H. Warke, erroneously spelled "Wark;" the information was sought from Mr. Warke, and the original slip in his own handwriting is produced, and it is easy to see how an error might occur.

Number 26 "Cronyn & Betts & Coleridge"—the explanation given as to this is also satisfactory.

These I think cover all the cases except the list of Quebec bailiffs. This list it is admitted was copied from a list in the former book. Mr. Wharton contends that this is not one of the interdicted lists, because bailiffs are not Court officials. The only evidence before me upon the point is that of a Quebec advocate, who says that they are. I can quite readily accept the statement of the defendant as indicating his *bona fide* belief; and I do not think that this matter is sufficiently serious to warrant any action on the part of the Court.

In the result I do not think that any order should be made. The question of costs has given me more difficulty and anxiety than the rest of the motion. I have come to the conclusion that the motion ought to be regarded as having substantially failed, and I think I should give to the defendant three-fourths of his costs.

HON. MR. JUSTICE RIDDELL. NOVEMBER 4TH, 1912.

WEEKLY COURT.

CARTWRIGHT v. WHARTON.

4 O. W. N. .

Copyright — Infringement — Law List — Copying — Damages — Reference.

RIDDELL, J., dismissed with costs defendant's appeal from report of Master-in-Ordinary assessing the damages herein at $1,400 upon the reference awarded by the judgment of Teetzel, J., 25 O. L. R. 357; 20 O. W. R. 853.

Judgment having been given for the plaintiff (25 O. L. R. 357; 20 O. W. R. 853), a reference was had before the Master in Ordinary. The Master in Ordinary found the plaintiff entitled to $1,400 damages and so reported. The defendant appealed.

D. T. Symons, K.C., for the defendant.

J. H. Moss, K.C., for the plaintiff.

HON. MR. JUSTICE RIDDELL:—I have read all the evidence and have had the advantage of the Master's reasons for his decision. On the whole, while the damages may be somewhat higher than I should myself have been induced to award, I cannot say that the Master is wrong.

The appeal will be dismissed with costs.

MASTER IN CHAMBERS. NOVEMBER 2ND, 1912.

ROGERS v. NATIONAL PORTLAND CEMENT CO.

4 O. W. N. 217.

Discovery—Examination of Plaintiff—Default—Failure to Justify—Con. Rule 454.

Motion by defendant under Con. Rule 454 to dismiss action for failure of plaintiff to attend for examination for discovery. Plaintiff had no reasonable excuse to offer for non-attendance.

MASTER-IN-CHAMBERS ordered that plaintiff attend at his own expense on 48 hours' notice to his solicitors. Costs of motion to defendants in cause.

J. Grayson Smith, for the defendants.

F. R. MacKelcan, for the plaintiff.

CARTWRIGHT, K.C., MASTER:—The default is admitted and also, that plaintiff had no legal or technical ground for non-attendance. It was said, as stated to the examiner, that plaintiff's solicitors thought they were being unfairly dealt with by plaintiff's solicitor, and that he was trying to prevent or delay the examination of Calder, an officer of the defendant company. I have read and considered the correspondence. It may be open to this construction, especially in view of Mr. Lavelle's affidavit filed in answer to the motion. But there was no undertaking as to Calder, nor was it necessary to have inspection of defendants' productions before plaintiff submitting to examination.

The only course open is, therefore, to direct plaintiff to attend again at his own expense, on 48 hours notice to his solicitors.

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

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 2ND, 1912.

HOLMAN v. REA.

4 O. W. N. 207.

Criminal Law — Criminal Procedure — Theft — Police Magistrate —Criminal Code ss. 665, 668, 707, 708 — Police Magistrates Act 10 Edw. VII. c. 36, ss. 24, 31 — Place Where Offence Committed.

Motion by one Holman, the complainant in a charge of theft for prohibition to the police magistrate at St. Mary's in the county of Perth, to prevent his hearing and disposing of the charge. The warrant was issued at Stratford in the same county and the accused apprehended there, brought before the police magistrate there, admitted to bail and directed to appear before the police magistrate at St. Mary's the next day. The complainant was not notified of the hearing at Stratford and was not present and claimed that the magistrate had controverted the provisions of s. 665 of the Criminal Code which provides that where a magistrate before whom an accused person is brought has no jurisdiction he may after hearing both sides order his appearance before a magistrate having jurisdiction.

SUTHERLAND, J., *held*, that a magistrate had jurisdiction throughout the whole county and therefore the section referred to had no application.

That the magistrate at Stratford acted properly in giving the accused a preliminary hearing and, in his discretion, committing him for trial before another magistrate having jurisdiction.

Motion dismissed with costs.

Motion on behalf of N. J. Holman, for an order prohibiting G. D. Laurier, police magistrate of the town of St. Mary's, in the county of Perth, from proceeding further in connection with a certain information or complaint laid

by Holman on 26th September, 1912, before James O'Loane, police magistrate at the town of Stratford in the same county, against Edgerton Rea, in which it was charged that at St. Mary's, on the 14th September, 1912, he, Rea, sold a horse, the property of one William J. Rea.

Featherston Aylesworth, for the applicant.

R. C. H. Cassels, for the respondent.

HON. MR. JUSTICE SUTHERLAND:—The ground set out in the notice of motion is that the said magistrate had no jurisdiction in respect of the matter. A civil action is pending with reference to the sale of a horse in which William J. Rea is plaintiff and Holman and one Guest, are defendants.

An examination for discovery has been had in the civil action and the defendant Holman thereafter laid the information. The alleged theft was charged to have been committed at the town of St. Mary's. A warrant was issued on the 26th September, 1912, for the arrest of Edgerton Rea, and he was arrested on that day. He appeared before police magistrate O'Loane in Stratford, was admitted to bail and directed to appear the next day before police magistrate Laurier at St. Mary's.

Police magistrate Laurier, in an affidavit filed in answer to the motion, states that the accused, on the 29th September, 1912, appeared before him and surrendered himself into custody on said charge, elected to be tried before him, and pleaded not guilty. The trial was then fixed by police magistrate Laurier for the 30th September at St. Mary's, at 10.30 a.m., and the Crown Attorney was notified to appear and prosecute the charge.

On the 30th September, shortly after the hour appointed, the accused again appeared in St. Mary's before said magistrate and was surrendered into custody, but the complainant, Holman, did not appear, nor any witnesses on his behalf. It appears from the affidavit of a constable that, on the 27th September, Holman had been informed that the trial was fixed for the 30th, and the hour and place of trial. On that day, after Court had adjourned, police magistrate Laurier received a telegram from Holman's solicitors in the following terms: "Complainant Holman disputes your jurisdiction in *Rea Case.*"

On the 3rd October, at the opening of Court at 10.30 a.m., the notice of motion herein was served on police magistrate Laurier, and counsel on behalf of Holman appeared and "disputed the jurisdiction of the Court to hear the charge."

The complainant, Holman, though subpœnaed to attend, did not do so. The magistrate thereupon proceeded with the case and, after hearing evidence, acquitted the accused.

The complainant says that police magistrate O'Loane directed the accused to appear before police magistrate Laurier without any notice to him and without his knowledge, and that he neither heard the complainant in person nor by solicitor, counsel or agent before making such direction. Under these circumstances he asks for the order mentioned.

Section 665 of the Criminal Code reads as follows: "The preliminary enquiry may be held either by one Justice or by more Justices than one.

"(2) If the accused person is brought before any Justice charged with an offence committed out of the limits of the jurisdiction of such Justice, such Justice may, after hearing both sides, order the accused, at any stage of the enquiry, to be taken by a constable before some Justice having jurisdiction in the place where the offence was committed."

If this section applies, then the police magistrate at Stratford did not comply with its terms, since he plainly did not hear both sides before ordering the accused to be taken before the other Justice. As I understand the counsel for the applicant, he contends, in the first place, that there was no preliminary enquiry at all under the section before the magistrate at Stratford, and, consequently, the magistrate could not make the order permitted by the section. He further, however, contends that even if what was done by the magistrate amounted to a preliminary hearing, it was not regular in that he did not hear both sides. But does this section apply? I am not clear that it does. Was the alleged offence committed out of the jurisdiction of the police magistrate at Stratford who took the information? By 10 Edw. VII., ch. 36, sec. 24, it is provided, that "Every police magistrate shall be, *ex officio*, a Justice of the Peace for the whole county or district for which or for a part of which he is appointed."

The police magistrate of Stratford is, therefore, *ex-officio*, a Justice of the Peace for the whole county of Perth, and the alleged offence was committed at the town of St. Mary's in that county. He must, as it seems to me, have been proceeding under some other section.

It is provided by sec. 708 of the Criminal Code that "Any one Justice may receive the information or complaint and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if, by the statute in that behalf, it is provided that the information or complaint shall be heard and determined by two or more Justices." He could properly proceed under this section. Even if he desired to hear a case outside the limits of the town for which he was police magistrate and had the power to do so, he could not be compelled to do so. See sec. 31 of the same, ch. 36.

Under sec. 708 the police magistrate of Stratford therefore, as a Justice of the Peace for the county of Perth, might receive the information in this case and issue his summons or warrant thereon. He did this. He could, also, under that section, do all other acts and matters necessary preliminary to the hearing. He could also admit the accused to bail unless sec. 18 of ch. 36 applies. The alleged offence having been committed in the town of St. Mary's, it was natural and proper that it should be disposed of by the police magistrate for that town, either by way of preliminary hearing, or if the accused elected to be tried by him, by trial and disposition.

Section 668 of the Criminal Code is as follows: "When any person accused of an indictable offence is before a Justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the Justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." The police magistrate at St. Mary's found the accused before him after being apprehended, as already indicated, or else voluntarily. He should thereupon proceed, and I think it was his duty to do so, to inquire into the matter: *Regina* v. *Mason* (1869), 29 U. C. Q. B. 43; *Regina* v. *Burke*, 5 C. C. C. 29.

On the accused electing to be tried by him he could proceed under sec. 707 of the Criminal Code to hear and dispose of the case. The informant had been told of the time and place, when and where, and the police magistrate before whom the accused was directed to appear. He did not appear then, nor on the morning first fixed for the trial. He was, thereupon, served with a subpœna to attend the trial on the day finally fixed therefor. He was not present in person, but was represented by counsel, attending to object to the magistrate's jurisdiction. He cannot complain that full opportunity to appear and give evidence, or assist in securing a conviction, if that were possible, in the circumstances of the case, were not given to him. I think, under the circumstances, the police magistrate at St. Mary's did what he did rightly, and that this motion must be dismissed with costs.

DIVISIONAL COURT.

OCTOBER 10TH, 1912.

McGUIRE v. TOWNSHIP OF BRIGHTON.

4 O. W. N. 137.

Drains—Municipal Corporations—Natural Watercourse—Drainage of Surface-water into — Exceeding Capacity of Watercourse — Overflow — Injury to Land — Liability — Damages.

Action against a municipality for alleged damages resulting from the flooding of plaintiff's lands said to have been caused by defendants' diversion into a creek of more water than it could take care of according to its natural capacity. Defendants claimed that in its natural state the creek overflowed.

ROGERS, Co.C.J., awarded plaintiffs $350 damages and costs.

DIVISIONAL COURT *held*, that if the evidence shewed the creek overflowed in its natural state, it was convincing proof that defendants' diversion increased the overflow and rendered them liable in damages.

That where an action for damages arises out of the doing of violence to another man's rights, the amount of damages is not to be weighed in scales of gold.

Appeal dismissed with costs.

(For a discussion of the law applicable see *Moore* v. *Cornwall*, 23 O. W. R. 113)—ED.

An appeal by the defendants, the corporation of the township of Brighton, from a judgment of His Honour Judge Rodgers, the junior Judge of the County Court of the united counties of Northumberland and Durham, award-

ing the plaintiffs, Archibald McGuire, Frank McGuire, and Patrick McGuire, the sum of $350 damages in perpetuity, in lieu of an injunction, in an action to restrain the defendants from bringing on the plaintiffs' land a greater volume of water than naturally came thereon, which, as the plaintiffs alleged, had been done by a drain or ditch constructed by the defendants and a double culvert crossing the road opposite the plaintiffs' farm.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE RIDDELL, on the 9th and 10th October, 1912.

E. Gus. Porter, K.C., for the defendants.

W. F. Kerr, for the plaintiffs.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex.D. (V.V.):—Mr. Porter relies on what is, we think, a correct statement of the law, the proposition of law that the defendants have the right to drain surface-water into the creek in question, it being a natural watercourse, provided that no greater volume of water is turned into the creek than, according to its natural capacity, it can take care of. He did not elaborate the proposition thus fully, but what I have said is a fair paraphrase of the proposition.

According to Mr. Porter, the evidence shews that, before the defendants drained any surface-water into the watercourse, it periodically overflowed its banks. It is still in its normal condition, having never been deepened or had its capacity increased. It, therefore, must follow that, when the defendants brought into it a larger volume of water, they increased the overflow; and, thus increasing the overflow, they are liable for doing what they have no right to do, namely, turning into this watercourse a volume of water in excess of its natural capacity—thus having committed a wrong for which they must answer in damages or by injunction.

As to the amount of damages, the learned trial Judge has named a very moderate sum. In actions for damages arising out of the doing of violence to another man's rights, the amount is not to be weighed, as my brother Riddell correctly observes, in scales of gold. A man who

commits a wrong against the property of another must take the consequences, and cannot complain if the damages awarded should slightly exceed the actual damage sustained. The situation is brought about by his wrongdoing.

If the defendants here had been influenced by a due regard for the plaintiffs' rights, they might have negotiated with them for the deepening of the watercourse and put it into such condition that it would have taken care of the drainage, whereby all this litigation would have been avoided. Instead of so acting, they proceed in a lawless way to act without reference to the plaintiffs' rights. There is no evidence controverting the estimate made by the plaintiffs as to the damages; and the amount awarded is a moderate capital sum for the probable annual damage. Mr. Porter prefers damages to an injunction. Therefore, we will not disturb the finding of the learned trial Judge as to the amount awarded; and dismiss this appeal with costs.

HON. MR. JUSTICE LATCHFORD. NOVEMBER 2ND, 1912.

RE COLLINS ESTATE.

4 O. W. N. 206.

Will — Construction — "Balance" — Discretion of Executor — Unused "Balance" Falling into Residuary Estate.

Motion by three of the heirs-at-law of the late Agnes Collins for an order under Con. Rule 938 construing her will. Testatrix gave her property to her executor to convert into money, to pay certain specific legacies and the balance "according to the will" is to be paid to my husband, Anthony Collins, by my executor, at such times and in such amounts as to my said executor may seem necessary for the proper maintenance of my said husband." The husband survived testatrix two years and the amounts paid him did not exhaust the residue. The question for decision was: "Who was entitled to the balance?"

LATCHFORD, J., *held*, that the balance formed part of the undisposed residuary estate of the testatrix.

Re Rispin, 19 O. W. R. 269, affirmed 21 O. W. R. 308 referred to.

W. M. Douglas, K.C., for the applicants.

G. B. Burson, for the executor.

T. F. Battle, for the devisees of Anthony Collins.

HON. MR. JUSTICE LATCHFORD:—The testatrix devised all her property to her executor upon trust, to convert the

same into money, and out of the proceeds to pay to her daughter "$400 absolutely" and to a son "$400 absolutely." "The balance" the will proceeds, "is to be paid to my husband, Anthony Collins, by my executor, at such times and in such amounts as to my said executor may seem necessary for the proper maintenance of my said husband."

Anthony Collins died about two years after the testatrix. He had been paid certain small sums which did not exhaust the residue. The plaintiffs, who are three of the heirs at law of the testatrix, now ask for the construction of the will. The clause referring to the legacy to the husband of the testatrix is the only one open to question.

I think the husband was entitled not to the whole balance or residue of the estate, but only to so much thereof as the executor thought proper to pay him. The general word "balance" is controlled by the explicit direction which follows, limiting the sums to be paid from time to time to so much as to the said executor should seem necessary for the proper maintenance of the legatee. To adopt the words of the learned Chancellor in *Re Rispin*, 19 O. W. R. 269, at p. 270, affirmed C. A., 21 O. W. R. 308, "the whole benefit was contingent on the bona fide judgment and volition of the executor." There will be a declaration that the undisposed of "balance" forms part of the residuary estate of the testatrix. Costs out of the estate—those of executor as between solicitor and client.

DIVISIONAL COURT.

OCTOBER 31ST, 1912.

THOMPSON v. McPHERSON.

4 O. W. N. 216.

Mining Contract — Sale of Interest in Mining Company — Abandonment — Rescission — Registration of Caution Against Company's Claim.

KELLY, J., 21 O. W. R. 646; 3 O. W. N. 791, dismissed with costs plaintiff's action for specific performance of an agreement to sell an interest in the Mac Mining Co., or in the alternative for damages in the sum of $14,666.66, and interest from the due dates mentioned in the agreement holding that the agreement was indefinite and incomplete, the interest and sale price not being ascertained.

DIVISIONAL COURT affirmed above judgment.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, 21 O. W. R. 646; 3 O. W. N. 791.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE MIDDLETON, on 22nd October, 1912.

R. C. H. Cassels, for the plaintiff, appellant.

A. D. Crooks, for the defendant, McPherson.

W. N. Tilley and G. W. Mason, for the defendant Lobb.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

DIVISIONAL COURT.

APRIL 29TH, 1912.

LEAKIM v. LEAKIM.

4 O. W. N. 214.

Husband and Wife—Marriage—Action by Husband for Declaration of Nullity — Grounds Impotency of Wife — Jurisdiction of High Court — Con. Rules 261, 617.

RIDDELL, J., *held*, 21 O. W. R. 855, 3 O. W. N. 994, that the High Court has no power to declare a marriage a nullity on the grounds of impotency.

T. v. *D.*, 15 O. L. R. 224, followed.

DIVISIONAL COURT affirmed above judgment.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE RIDDELL, 21 O. W. R. 855; 3 O. W. N. 994.

The appeal to Divisional Court was heard by HON. MR. JUSTICE LATCHFORD, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE MIDDLETON, on the 29th April, 1912.

L. F. Heyd, K.C., for the plaintiff.

H. C. Macdonald, for the defendant.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

DIVISIONAL COURT.

OCTOBER 22ND, 1912.

SUNDY v. DOMINION NATURAL GAS CO.

4 O. W. N. 167.

Contract — Construction — Supply of Natural Gas — Breach — Continuing Breach — Damages — Costs.

Action by plaintiffs for an order compelling defendants to supply them with gas for use in their private dwellings for domestic purposes, free, and for damages for breach of their contract to do so. Plaintiffs, who were the original owners of certain gas wells situate at Attercliffe Station, Ont., had sold their interests to certain predecessors in title of defendants, taking from them an agreement to supply them with gas free, "for ordinary purposes for use in their private dwellings at or adjacent to Attercliffe Station." Defendants and their predecessors in title had supplied plaintiffs with gas, free, down to April, 1911, but ceased at this date, claiming, that as the operation of the Attercliffe Station gas field was no longer profitable or possible, from a commercial standpoint, any obligation to plaintiffs was at an end.

SUTHERLAND, J., *held*, 22 O. W. R. 743; 3 O. W. N. 1575, that, "when a party, by his own contract, creates a duty or charge upon himself he is bound to make it good, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract," and that, therefore, the commercial failure of the gas wells did not absolve defendants from their obligation to plaintiffs.

Clifford v. *Watts*, 40 L. J. C. P. 36; L. R. 5 C. P. 586, and other cases referred to.

Judgment for plaintiffs for $60 and High Court costs, same to be without prejudice to plaintiffs' right to bring other actions in future for future damages.

An appeal by the defendants from a judgment of HON. MR. JUSTICE SUTHERLAND, 22 O. W. R. 743; 3 O. W. N. 1575.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE MIDDLETON, on the 22nd October, 1912.

J. Harley, K.C., for the defendants, appellants.

J. A. Murphy, for the plaintiffs, respondents.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.