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HON. MR. JUSTICE MIDDLETON. FEBRUARY 3RD, 1913.

WARREN v. FORST.

4 O. W. N. 770.

Broker—Balance due by Customer—Counterclaim—Alleged Conversion—Purchase on 90-day "Spread"—Tender—Few Minutes Late—Refusal—Reasonableness—Custom—Rules of Exchange—Application—Evidence.

Action by brokers, members of the Toronto Stock Exchange, against other brokers, non-members of the exchange, to recover $2,082, balance due upon certain stock alleged to have been purchased by them for defendants, which the latter refused to accept when tendered. Defendants counterclaimed for $10,000 damages for alleged conversion of the stock in question. The facts were in dispute, but appeared to shew that defendants had purchased the stock in question upon a 90-day buyer's option, called a "spread," under which the buyers had to accept delivery at the expiry of 90 days, but could call for delivery at any time within that period by giving due notice. This notice, according to the custom of the exchange and of brokers generally, is a 24-hour notice. There was dispute as to when the notice was given, but defendants claimed that the time expired at 3 o'clock on a certain day, and as plaintiffs could not deliver at that time, refused to take delivery thereafter. Plaintiffs had the stock for delivery a few minutes after 3 p.m. on the day in question (being late through the delay of a messenger), and tendered same, but defendants refused to accept it.

MIDDLETON, J., found the facts in favour of plaintiffs, that the tender was made in a reasonable time, and that the refusal of defendants to accept was unreasonable, having regard either to the nature of the transaction or the terms of the contract between the parties, as defendants had suffered no loss, the exchange being closed at 3 p.m. until the following day.

Judgment for plaintiffs for $2,082 and counterclaim, dismissed, both with costs.

Action by brokers against other brokers for balance due in respect of certain stocks alleged to have been purchased by defendants and of which they refused to take delivery. Defendants counterclaimed for the price of the shares alleging conversion.

The action, which had been tried before HON. MR. JUSTICE SUTHERLAND in March, 1910, 17 O. W. R. 339, was tried

again pursuant to an order of Divisional Court of 17th December, 1910, 17 O. W. R. 780; 22 O. L. R. 441; affirmed 19 O. W. R. 645; 24 O. L. R. 282; affirmed 23 O. W. R. 311; 46 S. C. R. 642.

The second trial was on 23rd December, 1912, and 29th January, 1913. In the meantime the evidence of two witnesses, who were about to leave Ontario, had been taken *de bene esse* on 9th November, 1912.

F. Arnoldi, K.C., and E. F. B. Johnston, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., and A. McL. Macdonell, K.C., for the defendants.

HON. MR. JUSTICE MIDDLETON:—The transactions giving rise to this action may be summed up as follows:

Warren, Gzowski & Co., the plaintiffs, were brokers upon the Toronto Stock Exchange. S. G. Forst, the defendant, was a broker carrying on business at Toronto under the name of S. G. Forst & Co., but was not a member of the exchange.

Forst, desiring to deal somewhat extensively in Temiskaming, an unlisted mining stock, approached the plaintiff firm—represented throughout in this transaction by Norman G. Gzowski—with a view of obtaining financial assistance. There is conflict upon the evidence as to the exact nature of the transaction.

Forst contends that it was a loan of $10,000. This is denied by Gzowski.

Gzowski gave Forst $10,000 and received from Forst 10,000 shares of the stock. The transaction was evidenced by the exchange of bought and sold notes. Forst sent to Gzowski a sold note, stating that he had sold to him 10,000 shares for $10,000. Instead of sending a corresponding bought note Gzowski sent a sold note, stating that he had sold 10,000 shares of stock for $10,000 on account of Forst.

It had been agreed that for the use of this $10,000 for 90 days Gzowski should receive $900. To evidence this, he sent to Forst a bought note, stating the purchase on account of Forst of 10,000 shares at $1.09, a total of $10,900; and Forst on his part sent a corresponding bought note.

The true transaction, I am satisfied, was this: The stock was at that date selling upon the market at $1.22 or more. Forst sold the 10,000 shares to Gzowski at an arbitrary price of $1 per share; this price being fixed sufficiently below the

market value of the stock to insure him safety. Gzowski then agreed to sell to Forst a corresponding amount of stock at $1.09, being the arbitrary price, plus the sum which Gzowski was to receive as profit in the transaction; be it called interest or not. This cross agreement for repurchase or re-sale protected Forst, as it entitled him to receive an equivalent amount of stock at the arbitrary price plus his profit.

I find against the contention made by Forst that the transaction was intended to be a loan. I take it that the intention was to sell, with a contemporaneous agreement for re-sale, not of the stock sold but of an equivalent amount of the same stock. Forst's rights and liabilities are, I think, to be found in the bought note signed by him, and not in the corresponding sold note.

By this bought note, exhibit "3," the stock was purchased upon what is known as a buyer's option 90 days; in the language of the exchange, a "spread." Under it the purchaser is bound to take the stock at the expiry of the 90 days, and is entitled at his option to call for it at any time earlier than that date. This enables him to take advantage of the market and to call for the stock at a time when he thinks it will be possible for him to do so. He is then bound to pay the price stipulated, even though the contract had run but one day. The vendor may "sell short," or at his discretion may at all times hold stock in readiness to answer a call. His obligation is to have the stock ready at any time when a call is made.

Thus far I have no hesitation in accepting the evidence of Gzowski as against that of Forst; and I entirely discredit the evidence of Miss Slough and of the witness Hogg. I do not attach any value to the evidence of the witnesses Crawford and Gamble. I do not think they intended to state anything untruthfully; but their memory is, I think, largely a statement of their recollection of the conversation with Forst. The book, exhibit "13," is, I think, absolutely discredited; and I find as a fact that the words "given for a loan on $10,000" were not in the book when Gzowski signed or initialled the entry.

I can quite understand that at the time Forst may have regarded the transaction as a loan and may have spoke of it as such; not having present to his mind the real nature of the transaction he had entered into, nor at that time regarding it as in any way material. Like most borrowers, he was ready

to let the transaction take the shape the lender desired; and when the transaction, as I have outlined it, was suggested by Gzowski, he at once assented. It may well be that he did use the expression which he said he did, that he did not want Gzowski "to play ping pong" with the stock, and that Gzowski assented to this. What he meant by that was that he was upon the market attempting to control the market both as a buyer and a purchaser, and he did not want Gzowski to enter into competition with him by throwing this stock on the market in such a way as to unduly inflate or depress the price. This, however, formed no essential part of the transaction, as the conversation in which it was mentioned took place after the bargain was arrived at.

Gzowski had not sufficient to enable him to himself carry the stock, and I think this was well understood by Forst. When Gzowski received the stock he dealt with it in precisely the same way. He sold 10,000 shares and agreed to re-buy upon a "spread" at $1.08; so that his net profit would be one hundred dollars only. The history of the stock was not followed in the evidence, but it is altogether likely that it was again hypothecated or in some way dealt with, until it reached the hands of those whose credit was sufficient to obtain a loan from a bank.

The real difficulty in the case arises when an endeavour is made to ascertain when in fact a call was made by Forst, and what the rights of the parties were upon the making of the call. Here again there is direct conflict between Gzowski and Forst and here again Forst seeks to corroborate his story by the evidence of the two witnesses whom I have already discredited.

Forst now says that on the morning of Monday, the 28th June, he called the stock and contemporaneously offered to sell the stock to Gzowski for $10,000, paying the $900 in cash. He gave Gzowski this option good till 3 p.m. At three o'clock he telephoned Gzowski, who declined to take the option, as the stock was then selling upon the market at .95; and he then again called the stock; that Gzowski said he would have it ready for him; that on the next morning, Tuesday, the 29th, at ten o'clock, he telephoned Gzowski and reminded him of the call, saying that he desired to have the stock that day, whereupon Gzowski promised it by three o'clock.

Gzowski, on the other hand, says that the stock was not called until ten o'clock on June 29th, and that Forst then said

that he wanted the stock by three o'clock and that he, Gzowski, then replied that he had 24 hours in which to deliver, but would do his best to let Forst have it by three o'clock. Gzowski gives an entirely different account of what took place on the 28th. He says that then Forst telephoned him in the morning advising him that some day he would want the stock and would want it in a hurry; that this was a mere prelude to an offer to sell at a dollar a share; that in the afternoon there was no call but an inquiry as to his, "Gzowski's," intention to accept or his ability to place the stock at a dollar, accompanied by a further warning that the stock might be wanted some time shortly.

After much consideration I have concluded that I ought to accept Mr. Gzowski's evidence. I do this not only because he impressed me favourably and Forst impressed me unfavourably, but because the unfavourable impression created by Forst's own evidence was much fortified by the finding already made as to the evidence of the stenographer and the tampering with the receipt exhibit "13."

The only matter which has caused me any hesitation is this. Gzowski knew, as he says, that he had 24 hours in which to find the stock, but both parties evidently contemplated the closing of the transaction on Tuesday at three o'clock. That would be consistent with a call having been made on Monday at three. It is also consistent with Gzowski's explanation that he was endeavouring to oblige Forst by letting him have the stock at an earlier hour than he was strictly obliged to.

It is not without weight in this connection that this is no new story told by Gzowski, as he consulted his solicitors on the same day, and the solicitors' letter states the fact in exact accord with Gzowski's unshaken testimony.

At three o'clock on Tuesday Forst attended at Gzowski's office. Gzowski had then all the stock ready except a comparatively small sum, and he was momentarily expecting a messenger with certificates for the balance. The stock was then selling freely at much less than the stipulated price, so that Gzowski had no inducement to break his contract, while Forst had every inducement to escape liability from his obligation if he could find an excuse.

Immediately after three o'clock, when he found that the messenger had not arrived, Forst refused to complete the transaction, because of Gzowski's alleged default. The mes-

senger almost immediately came in and Gzowski went to Forst's office with the stock. Forst was not there, but he had been there and had left instructions with his stenographer to refuse it. This she did. The stock was again formally tendered to Forst shortly after four o'clock, and was again refused by him. This was followed by the solicitor's letter, exhibit "6," but Forst stood his ground and refused to accept, whereupon the stock was sold upon the market for some $2,000 less than the contract called for.

Forst has really nothing to complain of as he suffered no damage by the delay, even if he is right in his contentions, because the stock could not have been dealt with upon the exchange after three o'clock.

There is much confusion upon the evidence as to what the rights of the parties were under the contract regarding the time that must elapse after a call before the vendor is in default. The conflict upon the evidence of the expert witnesses is extraordinary, although each of them is entirely reliable. I do not think that I am called upon to deal with the case upon the expert evidence, which, I must confess, I find great difficulty in understanding.

The rule produced and relied upon is said by Mr. Ferguson to apply only to dealing between brokers who are members of the exchange, and I think he is right; for it provides for notification in case of default. This refers to the provisions found in the rules at page 29, *et seq*, requiring notice to be given in case of default and providing a remedy to the members.

Both the parties to the litigation agree that the vendor has twenty-four hours from the call before being in default, and I think it not unreasonable to hold them to this at any rate unless there is clear evidence that they were wrong. No such evidence is forthcoming.

If upon the true construction of the contract the real test is found to be the reasonableness of the time, then I think the stock was tendered within a reasonable time.

If the question turned upon what took place between the parties I do not think the precise hour was fixed with such exactness as to place the vendor in default and to justify the purchaser in refusing to accept the stock when it was actually tendered.

Under these circumstances I think there should be judgment for the amount claimed, $2,082, with interest thereon, from the 29th of June, 1909, to this date, and costs.

No costs former trial or appeal to D. Ct.

HON. MR. JUSTICE KELLY. JANUARY 31ST, 1913.

MAPLE LEAF PORTLAND CEMENT COMPANY, LIMITED, ET AL v. THE OWEN SOUND IRON WORKS COMPANY, LIMITED, ET AL.

4 O. W. N. 721.

Evidence—Estoppel—Passivity—Contract for Sale of Machinery—Repudiation of Agent by Principal—Laches.

KELLY, J., *held*, that defendants were precluded from denying their liability upon a contract for the sale by them of certain machinery, or that one Moyer had been their agent in the making thereof, where they had received acceptances from plaintiffs of the proposal to sell bearing on their face a statement that they were subject to confirmation by defendants, had held plaintiffs' note payable to their order, and had twice drawn on plaintiffs in respect thereof, and where the whole correspondence between the parties shewed that plaintiffs thought they were dealing with defendants, and defendants had never repudiated the idea until the machinery sold proved worthless.

Keen v. *Priest*, 1 F. & F. 314; *Wiedemann* v. *Walpole* [1891] 2 Q. B. 534, referred to.

[See, also, *Meikle* v. *McRae*, 20 O. W. R. 308, at p. 310.—Ed.]

Action for damages for breach of a contract alleged to have been entered into with the defendants for the sale and delivery of certain machines, an Emerick Pulverizer and an Emerick Separator, for use in the plaintiffs' cement business at Atwood, Ont.

The defence of the defendant company was, that there was no contract between them and plaintiffs, that plaintiffs' dealings were with the defendant Moyer only, who, they alleged, had a contract with the defendant company to do certain work upon such machines as were sold to plaintiffs, and that Moyer was not their agent. Moyer's defence as set up in the statement of defence, was in effect that the contract for the sale and delivery of the machinery in question, had been fulfilled. He was unrepresented at the trial.

W. G. Thurston, K.C., for plaintiffs.

R. McKay, K.C., for defendants.

HON. MR. JUSTICE KELLY:—Moyer, who held himself out as representing the defendant company, had several interviews with plaintiff Pearson, president of the plaintiff company, with a view to inducing that company to purchase machines such as were afterwards purchased, and of which he stated the defendant company were the makers.

On December 16th, 1910, he made a written proposal to Pearson to supply these machines for $3,000, the machines to be shipped on March 1st, 1911, payment to be made by promissory note for $1,000 at sixty days from January 1st, 1911, and a further note for $2,000 to be dated on date of the delivery of the machines and to be payable on May 20th, 1911.

Three copies of the proposal were made, one of which, (exhibit 1 at the trial) was signed by Moyer for himself and the defendant company, and the others (exhibit 13 at the trial) by the name of Moyer only. All these were accepted in writing by Pearson "subject to confirmation by the Owen Sound Iron Works Co., Ltd." Pearson then gave to Moyer his promissory note, dated January 1st, 1911, for $1,000, payable to the order of the defendant company at sixty days, on which was written "on account of one Emerick Grinder, to be delivered 1st March, 1911." Moyer took the three copies of acceptance to have them confirmed by defendant company.

On March 15th, the $1,000 note not having been paid, defendant company drew on Pearson for the amount, and he, on March 23rd, accepted the draft. That draft not having been paid, defendant company on March 27th again drew on him at thirty days. He did not accept this draft. On April 11th, the machinery about that time having been delivered at plaintiffs' works (but not installed), Moyer went to Pearson and received from him a cheque payable to defendant company for $1,000 expressed on the face to be "account Maple Leaf Portland Cement Company, Emerick Coal Grinder," in payment of his note of January 1st and his acceptance of March 23rd, Pearson also then gave to Moyer his promissory note to defendant company for $2,000, representing the balance of the purchase money.

Delay having occurred in the delivery of the machinery to the plaintiffs, Pearson, on April 6th, wrote to defendant company complaining that there was delay, and stating that "according to our arrangement" the time for delivery had passed, threatening to cancel the contract immediately if delivery was not made, and adding, "if you are not going to deliver the one you agreed to, just say so immediately." The reply of the defendant company dated April 7th was this:

Mr. Jas. Pearson, Toronto, Ont. Dear Sir,—We have yours of the 6th inst. to hand, and in reply would say that we

are shipping your pulverizer together with the separator on Monday, 10th inst.

We would say that we would have made the shipment weeks ago, were it not that we only received the steel parts from the Bethlehem Steel Co. only three weeks ago, and we have used every possible means to forward the construction of the outfit since the time the steel parts came to hand.

We remain, yours truly,

The Owen Sound Iron Works Co., Ltd.

Per . . Wilson.

Letters were sent by Pearson to defendant company on April 21st, April 29th, and May 10th, to none of which was any reply made. In the letter of April 21st he again complain of the delay in delivery and drew attention to the serious loss plaintiff company would sustain through not being able to fill their customers' orders, for which loss he declared his intention of holding defendant company liable, and he referred to a statement made by "your Mr. Moyer when selling the mill."

In the letter of April 29th he asks defendant company to send him "one ocpy of the agreement that was signed between us," mentioning that Moyer had taken both away on the understanding that they were to be returned signed by the defendant company.

The letter of May 10th again complains of the delay and notifies defendant company of his intention to claim against them for damages; he also draws attention to their not having returned the copy of agreement, and their not having replied to his former letter asking for it.

About this time the machinery was installed, and its operation being unsatisfactory, Pearson, on May 27th, again wrote the defendant company referring to this and to the damage he claimed plaintiffs were sustaining, and adding: "I think your conduct in refusing to send me back one copy of the agreement is reprehensible," etc. This brought from defendant company a letter of May 25th (the first communication of any kind from them to plaintiffs from April 7th), in which they, in effect, repudiated any liability to plaintiffs on the ground that they were working under a contract with Moyer to supply him with cement grinders and separators and had nothing to do with the sale or installation of machinery, and assumed no responsibility for its operation to anyone but Moyer.

The offer and acceptance by Pearson (exhibit 10) were not returned to him until after May 27th, when it was brought to him by Moyer. The other copies (exhibit 13) were left with the defendant company by Moyer about the end of December, 1910, and remained in their possession until the time of the trial. The managing director of the company admits they were left with them for the purpose of their being confirmed by the company, and that no notice was sent to plaintiffs of the neglect or refusal to confirm.

The machines which were delivered were "second-hand" and not manufactured by defendants; they were not such as the contract called for and were unfit for the purposes for which they were intended; they were useless in plaintiffs' business, and for that reason they were discarded after having been subjected to a test of several weeks, during which they were under the control of Fry, who for vendors superintended their installation and their operation for several weeks afterwards. He failed to make them work and the evidence further establishes that it was impossible for anyone to make them work properly. It became necessary for plaintiffs to replace them by others. It is under these circumstances that defendant company now seeks to escape liability to the plaintiffs.

Some evidence of damages was given at the trial, but that branch of the case was not fully gone into until the question of liability should be determined.

I am unable to see how defendant company can escape liability in view of the combination of circumstances which is found in these dealings. When it is considered that that company, from December, 1910, until after the machines were delivered and installed, had in their possession Pearson's acceptances of the proposal to sell which were stated to be subject to confirmation by the company, that the company at the time they received the proposal and acceptances also received Pearson's $1,000 note payable to their order, and bearing on its face the statement that it was on account of machinery agreed to be purchased; that the draft for $1,000 was made upon Pearson by defendant company; that the $1,000 payment made by Pearson was by cheque payable to them; that the $2,000 note also was made payable to them; that the several letters clearly intimated that the plaintiffs believed they were dealing with defendant company; and that there was no repudiation of contractual relationship, or even a reply

to many of these letters, until it became apparent that the machinery was not satisfactory, no other conclusion can be reached but that defendant company must have known, and did know, that plaintiffs were dealing on the understanding and in the belief that they were contracting with the defendant company.

It is beyond belief that any business man could be so obtuse as not to have realized from plaintiffs' course of dealings and Pearson's correspondence, that plaintiffs believed their contract was with defendant company. I think, too, that until the position of vendor became undesirable owing to the unsatisfactory working of the machines, defendant company was quite satisfied to be a party to the contract with plaintiffs and so intended it; they were satisfied to take the benefit without bearing the burden.

On these facts the defendant company is in my opinion liable.

In *Keen* v. *Priest* (1858), 1 F. &. F. 314 (at p. 315) Bramwell, B., says:—"Silence may sometimes be conduct," the meaning of which I assume to be that there must be some act or circumstance which can be considered in connection with silence. This is borne out by what is said in *British Linen Co.* v. *Cowan* (1906) 8 F. 704 (at p. 710):—"Passivity can never constitute an unreal obligation into a real, can never make a man into a debtor who has neither said nor done anything to make him a party to the obligation, which has no existence apart from some action on his part. What action might be sufficient is a different question. It is possible that very little in the way of overt action, if it was unmistakable, might be sufficient."

Kay, L.J., in *Weidemann* v. *Walpole*, [1891] 2 Q. B. 534 (at p. 541), lays it down that "the only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission."

Reference may also be made to *Freeman* v. *Cooke*, 2 Ex. 653 (particularly at 663); *Carr* v. *London & North Western Railway Co.*, L. R. 10 C. P. 307 (at 316 and 317).

In the present case there was much more than mere passivity, there were positive acts of the defendant company which have estopped them from denying liability.

The manager of the defendant company stated that he turned over to Moyer all communications which were received from plaintiffs; Moyer did not in any way communicate this to plaintiffs, and did nothing to remove any impression they had that they were contracting with defendant company. I think I am not going too far in holding Moyer liable as well as his co-defendants.

There will, therefore, be judgment in favour of plaintiffs for re-payment of the $1,000 paid by Pearson to defendant company, and interest thereon from the date of such payment; for a return of the $2,000 promissory note made to defendant company, with costs of the action to the present time; and a reference to the Master in Ordinary to ascertain the damages sustained by plaintiffs. Further direction and further costs are reserved until the Master shall have made his report.

HON. MR. JUSTICE KELLY. JANUARY 31ST, 1913.

SMITH v. BENOR.

4 O. W. N. 734.

Deed—In Trust—Refusal to Reconvey—Fraud—Statute of Frands no Defence—Amendment—Set-off—Reference.

KELLY, J., *held*, in an action for a declaration that certain property conveyed by plaintiff to defendant was conveyed to him as trustee only and for a reconveyance and damages, gave effect to plaintiff's claim and ordered a reconveyance and $5 damages, with costs.

"The Statute of Frauds does not prevent proof of a fraud." *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, and *McMillan* v. *Barton*, 20 S. C. R. 404, followed.

Action for a declaration that a certain deed from plaintiff to defendant, and the registration thereof, was void, and for a reconveyance of the property purporting to be conveyed thereby and damages for refusal to reconvey, tried at Belleville, without a jury.

McGregor Young, K.C., for the plaintiff.

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

HON. MR. JUSTICE KELLY: — Plaintiff is the son of Charles Smith, who, in his lifetime, carried on a milling business at Campbellford. Charles Smith died on March 12th, 1907.

By his will provision was made for his sons, the plaintiff and Charles William Smith, continuing the milling business in partnership for a time, and on terms therein stated.

The partnership was entered into soon after the father's death, and was carried on for some years, when differences arose between the partners, and also between the plaintiff and the executors of his father's will, the plaintiff being under the impression that the executors were favouring his brother.

The plaintiff had dealings with a firm of brokers in Toronto, he says, buying grain for his business. In February, 1912, plaintiff met, at the office of these brokers, the defendant, whom he had known for many years, and told him of his difficulties, and that he thought he could get on more successfully if he had the business under his own personal control. The discussion led to the suggestion of defendant aiding plaintiff in overcoming these difficulties, and defendant proposed a scheme for the incorporation of a company with large capital, which would issue bonds, the proceeds of which would be used to enlarge and extend the business, and carry it on with greater success.

In March, 1912, at defendant's request, plaintiff submitted to him his father's will, the partnership agreement with his brother, and a statement of the partnership business as at January 19th, 1912.

There were a number of interviews then about the proposed incorporation and issue of bonds, the defendant having prepared a statement giving figures to shew that the operations of such a company would be profitable. This statement was produced at the trial.

Various offices—of brokers and others—were visited, with a view to floating the proposed bonds.

Plaintiff had told the defendant that the relationship existing between himself and the members of his family was such that he could not effect a settlement which he desired to make with them and the executors, and the conclusion was arrived at to have plaintiff's assets placed in defendant's name with the object of inducing the members of plaintiff's family to believe that future dealing in regard to his affairs would be, not with him, but with a stranger, the defendant.

For his protection plaintiff asked defendant for a letter which would shew the true nature of the transaction be-

tween them, viz., that if the assets were so transferred the defendant would hold them for plaintiff. Defendant made no objection, and offered the obligation of himself and his wife for a re-conveyance of the property if the proposed scheme did not go through. Plaintiff's evidence of this understanding is corroborated by Mr. Porter who was present at an interview between plaintiff and defendant in Toronto.

Following this, plaintiff and defendant went to the office of Mr. Eastwood, a solicitor in Toronto, and defendant instructed the solicitor to prepare the obligation mentioned. The solicitor raised some objection to the giving of such a document on the ground that if its existence became known it would be apparent that the proposed sale and transfer were not bona fide, and the plaintiff was assured he had nothing to fear from the absence of such a document.

Other interviews took place at the solicitor's office, and at a later day a conveyance was prepared by him from plaintiff to defendant of all the estate devised to the plaintiff by his father's will; the consideration named in the conveyance was $500. At no time was any mention made of the necessity or advisability of plaintiff's wife joining in the conveyance; nor was she made a party to it. Plaintiff signed the deed on March 23rd in Campbellford, and it was then registered, after which the $500—which had been given by the defendant to Mr. Payne, a solicitor of Campbellford—was paid by cheque to plaintiff. Plaintiff sent the cheque to Erickson, Perkins & Co., the brokers in Toronto with whom he had been doing business and where he continued afterwards to do business, and it was there placed to his credit. On April 8th, plaintiff instructed the brokers to transfer his account to defendant, and on April 9th, defendant in writing accepted the transfer.

To settle the partnership difficulties between plaintiff and his brother, arbitration was, in March, proposed under the terms of the partnership agreement; defendant offered to act as plaintiff's arbitrator, and plaintiff signed an appointment to that effect.

From the time of the making of the conveyance to defendant, and the payment of the $500, defendant took no further interest in the proposed incorporation.

Plaintiff having made satisfactory terms of settlement with the members of his family, he saw the defendant in Toronto in May. The latter declared that it was useless to

proceed with the incorporation or the issue of bonds, and that he could do nothing further about it. Plaintiff offered to pay him for his services, and suggested that he accept $100 or $200, but defendant said he wanted nothing.

In June 1912, plaintiff succeeded in effecting a sale of the milling property to another party, and in order to make title to the purchaser, he submitted to the defendant at Toronto for his signature re-conveyance of the property so sold, at the same time shewing to defendant a copy of the agreement with the purchaser. Defendant refused to sign, and informed the plaintiff that he was to be considered in the matter; plaintiff in reply again offered him $200 as compensation for his services. Then defendants for the first time claimed that he was the real owner of the property, and that he wanted half the profits on the sale.

His contention now is that the conveyance from the plaintiff to him was intended to carry out an actual *bona fide* sale for the consideration of $500, a sum very much less than the real value of the property he claims to have purchased.

There is no doubt whatever that there was no intention on the part of the plaintiff to make an absolute sale to the defendant, and that the transfer to the defendant was in pursuance of an arrangement by which the members of plaintiff's family were to be made to believe that the defendant was the owner so that a settlement with them might be more readily reached. The defendant could not have believed, and I am confident that he did not believe, that the arangement was to have any other effect or that it was entered into for any other purpose.

Plaintiff was, to some extent at least, under the control of the defendant, and relied upon him.

It is true that if the proposed scheme for incorporation and floating the bonds had been carried into effect defendant was to receive a percentage of the proceeds; this, however, was not carried out, and defendant from the time he obtained the conveyance from the plaintiff, not only made no attempt to carry it out, but expressly declared that he had abandoned the project.

The plainiff's account as to what took place at the various stages in the progress of the proceedings is borne out by many circumstances, and in important respects is cor-

roborated by Mr. Porter and Mr. Payne, as well as by Pearce who was examined by commission.

Defendant was not a satisfactory witness, and I am not prepared to accept what he says when he is contradicted by any of the three witnesses above mentioned.

It is significant that though he obtained the conveyance before the end of March, he did not, down to the time in June when plaintiff asked for a re-conveyance, give notice to the executors of the estate, or to plaintiff's brother, or to any member of the family, that he had acquired plaintiff's interest.

These circumstances are not consistent with what might reasonably be expected from a *bona fide* purchaser. Letters written by him to plaintiff after the conveyance in March, do not indicate that he then believed in the claim he now sets up. In these letters he suggests and advises legal action by the plaintiff against members of his family and others interested in the estate, at the same time warning plaintiff to destroy the letters so that his wife might not become aware of what was happening.

If he was the owner why did he expect plaintiff to involve himself in litigation, or interfere in matters in which only the defendant, if we are to believe him, was concerned? The conclusion is irresistible that the conveyance was given for the purpose stated by the plaintiff; that defendant deliberately evaded giving the letter which plaintiff asked for, declaring in effect that defendant was only a trustee for the plaintiff, and that he is improperly withholding the property from plaintiff.

I have not overlooked the evidence of Mr. Eastwood, who refers to the transfer as a *bona fide* sale. He was not present at all the interviews, and while there may have been at his office, some conversation about a *bona fide* sale, this was, I think, brought about by the result of the objection raised to giving the declaration of trust.

At the opening of the trial an application was made to amend the statement of defence by pleading the Statute of Frauds, and I allowed the amendment. Defendant, however, cannot protect himself behind that Statute.

In *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, it is laid down that "the Statute of Frauds does not prevent proof of a fraud, and it is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed,

to deny the trust and claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him."

The same conclusion was arrived at in *McMillan* v. *Barton*, 20 S. C. R. 404. The present case comes clearly within these authorities.

Plaintiff is entitled to judgment declaring the conveyance from him to defendant void, and that it be delivered up to be cancelled; that the registration thereof in the registry office be vacated; that defendant re-convey to plaintiff the property and assets transferred by such conveyance; and that the plaintiff recover from defendant $5 as damages for his refusal to re-convey.

As plaintiff was willing to compensate defendant to the extent of $200 for any services he performed in connection with the proposed incorpration, and though defendant refused to accept it, I think it not unreasonable, under the circumstances, that defendant should now be allowed that sum by plaintiff, and I direct that such allowance be made.

Costs of the action will be paid by the defendant.

It was not made clear at the trial whether the $500 paid by the plaintiff, about the time of the conveyance, to defendant is now in his hands, or whether it or any part of it has been returned to and retained by the defendant; as to this, if the parties cannot agree, there will be a reference to the Master at Belleville; defendant will be entitled to such part of it as may be found not to have been so returned and retained, the amount so found, if any, and the above mentioned $200 to be set off against plaintiffs' costs. The costs of such reference are reserved until after the Master's report.

HON. MR. JUSTICE KELLY. JANUARY 23RD, 1913.

FARAH v. CAPITAL MFG. CO., ET. AL

4 O. W. N. 680.

Fraud—Lease—Subscription for Shares—Managing Director's Acts—Liability of Company—Rescission—Return of Moneys Paid.

KELLY, J., gave judgment for plaintiff for rescission of a lease to defendant company, and of an application for shares of the company, and for the return of all moneys paid, on the ground that plaintiffs had been induced to enter into the transactions so set aside by the grossest misrepresentation and fraud of the company's managing director, for which the company was responsible.

Hilo Mfg. Co. v. *Williamson*, 28 T. L. R. 164, followed.

Action against a company and its directors for rescission of a certain lease to the company and of a subscription for stock of the company and for the return of all moneys paid on the ground of fraud.

W. L. Scott for the plaintiffs.

R. V. Sinclair, K.C., for the defendants.

HON. MR. JUSTICE KELLY:—The plaintiff, Sadie Farah, resides at New Liskeard and is the owner of certain property on York street in Ottawa; her husband, the plaintiff Kalil Farah, is her agent in dealing with this property.

The defendant company has its head office in Ottawa. At the time of the occurrences in respect of which this action is brought, defendant Brethour was the managing director, defendant Blackburn the president, and defendants Gourdeau, Shannon, and Walsh the other directors of defendant company.

Brethour and one Laugelier, prior to the incorporation of the company, were the owners of a business which was purchased by and taken over by the company in October, 1911. Brethour proposed to plaintiff, Kalil Farah, that defendant company rent the upper flat of the York street premises, and also the store on the ground floor thereof, and correspondence passed and interviews took place between them, as a result of which an agreement was entered into by which these premises were to be so rented; the rental for the first two years for the upper flat to be $4,000, to be paid by eighty shares of the par value of $50 each of capital stock of the defendant company.

It was further proposed that plaintiff, Kalil Farah, should purchase at par and pay for in cash 50 shares of this stock. This he was willing to do, but on condition that each of the directors should subscribe and pay for a number of shares equal to the amount of stock he then held.

During these negotiations, representations were made by Brethour, and on which plaintiffs relied—as to the character and financial condition of the business carried on by the company. These representations were grossly false, to the knowledge of Brethour, and the evidence indicates that they were made for the purpose, and with the intention of inducing plaintiffs—and they did induce them —to enter into the agreement.

Without going into details of these representations, I may mention they consisted of statements to the effect that the stock already subscribed and paid in was very much less than the amount actually so subscribed and paid for, that the volume of business done by the company was far in excess of what the facts shewed it to be; that the company had orders for their goods to the extent of at least $100,000, while as a fact no such orders existed; that the company were making an actual profit of from 35 to 40 per cent., whereas it had never paid any dividends; and that the liabilities of the company were small, the fact being that they were much in excess of the amount so stated. Amongst these liabilities was a promissory note for more than $4,000, for payment of which the directors had made themselves liable. During the time that negotiations were in progress between the plaintiffs and Brethour, a chattel mortgage was made by the company to the directors on the company's goods and chattels to secure the directors against their liability for this note; this liability having been incurred several months before making the mortgage. No information of this was given to the plaintiffs. The other directors were made aware of the proposal that they should subscribe for further stock; but it is not clear that they knew that the agreement for Kalil Farah's subscription for the $2,500 of stock was made conditional on the directors taking further stock.

Following this, Kalil Farah came to Ottawa, and a meeting took place between him and the directors for the purpose of completing the arrangements for the lease. Defend-

ants and Farah do not in their evidence altogether agree as to what took place at that meeting. They all do agree, however, that the question of stock subscription was discussed, some of the defendants saying that Farah proposed that the directors should subscribe as an evidence of their good faith in the business. A subscription list was then produced and subscriptions were taken. This list was not produced at the trial, and its absence was not satisfactorily accounted for.

About two weeks after this meeting, viz., on December 12th, 1911, Kalil Farah paid in his $2,500, and a stock certificate was issued to him for 130 shares, representing the 50 shares so paid for, and the 80 shares for the rent of the upper floor of the premises for the first two years of the term. Though the books of the company shew that some of the directors then subscribed for stock, it does not appear that each subscribed for an amount equal to what he already held; nor were the payments made on the new subscriptions as was intended. Blackburn, the president, who subscribed for 60 shares, paid nothing thereon; but the amount of his subscription was credited to him on his liability for the above mentioned note of the defendant company. Other directors say they subscribed at the meeting but made no payments then. It is not clear that all the subscriptions have been paid in. The evidence given from the company's books does not explain to my satisfaction the subscriptions and payments.

Soon after Farah had paid the $2,500, he discovered the condition of the company had been grossly misrepresented to him. The lease had then been drawn up and signed by the lessee; but on learning the real condition of affairs, plaintiffs refused to sign it, and demanded that the bargain be rescinded and the monies refunded. Kalil Farah asserts that during the negotations with Brethour, he was not given an opportunity of making an investigation of the company's affairs. Brethour does not agree with this, and Dell, the secretary of the company, says that Farah before he made payment had access to the books and did see them. This Farah denies, and points out that pending the removal of the business from the place in which it was then carried on, the books were not all accessible, and Brethour gave him this as an excuse for their non-production. This, I think is the true explanation of what happened.

Brethour's testimony I disregard. I think he is unworthy of belief; and his conduct in his dealings with the plaintiffs cannot be too strongly condemned. It is regrettable that there can be found anyone so wanting, as he has been shewn to be, in that straightforwardness, and fair dealing which should be observed in business transactions.

Plaintiffs were prompt in repudiating the agreement when they learned the real condition of the company, and without any unnecessary delay they demanded a refund of the money paid, and a cancellation of the lease. Defendant Blackburn was willing to return the money; he admitted that the transaction was not a "fair deal," and he had a cheque ready to return to the plaintiffs, but on further consideration declined to pay it over until the matter was submitted to a meeting of the directors. Following this, namely on February 5th, 1912, a letter was sent by the company to Kalil Farah, referring to the demand for a return of the money, and stating that while the president and directors, as far as they were concerned, "are willing to comply with your request;" in fairness to the other shareholders they where unable to do so until they had consulted the company's solicitors.

The next written communication was on March 1st, from Dell, as secretary of the company, to Kalil Farah, notifying him that the board of directors had decided that no further steps could be taken in regard to his request until the lease of the premises had been duly executed. On March 6th, this action was commenced.

On the facts revealed in the evidence there can be no doubt that the plaintiffs were induced to enter into the agreement by the false and fraudulent misrepresentations of Brethour, made knowingly, and with intent to deceive. I have some doubt as to the extent of the knowledge of the other directors of Brethour's conduct towards the plaintiffs, or to what extent they were party to it, and so far as their personal liability for a return of the money was concerned, I give them the benefit of that doubt. The impression I formed was that some of them, at least, were themselves misled by Brethour into becoming associated with the defendant company. But the defendant company is bound by what Brethour did; *Hilo Manufacturing Co., Ltd.* v. *Williamson*, 28 Times Law Reports, 164, a case much resembling this.

Had the directors given due consideration to plaintiffs' demand to be relieved from the transaction, this action would, no doubt, have been unnecessary.

Plaintiffs are entitled to judgment for payment by defendant company and defendant Brethour to plaintiff, Kalil Farah, of $2,500 paid for the 50 shares of stock, and interest thereon from December 12th, 1911, and cancelling the subscription for these shares; for rescission of the agreement and of the lease; for cancellation of the certificate for the 130 shares of the stock; for recovery by plaintiff, Sadie Farah, of the premises referred to, and payment to her by defendant company, and defendant Brethour for use and occupation thereof, at the rate of $166 per month from November 15th, 1911, for the upper part of the premises until delivery of possession and at the rate of $50 per month for the other part of the premises intended to be leased, from November 15th, 1911, until May 1st, 1912, and thereafter and until delivery of possession at the rate of $60 per month.

Under the circumstances set out above, plaintiff is entitled to the cost of the action against all the defendants.

HON. R. M. MEREDITH, C.J.C.P. JANUARY 30TH, 1913.

CURRY v. PENNOCK.

4 O. W. N. 712.

Landlord and Tenant — Forfeiture of Lease — Breach of Covenant against Sub-letting—No Relief against—Evidence—Judgment for Possession.

MEREDITH, C.J.C.P., gave plaintiff judgment for possession of certain premises demised by a lease, on the ground that defendants had broken the explicit covenants in the lease against assigning or sub-letting.

Action to recover premises demised on account of breach by defendants of covenants in the lease contained and for an injunction and damages.

T. J. W. O'Connor, for the plaintiff.

J. L. R. Starr, for the defendant.

HON. R. M. MEREDITH, C.J.C.P.:—If this Court had power to relieve the defendants from the effect of their conduct, which, over their own signatures and seals, they

have plainly provided shall be a loss of their rights in the property in question, I would be in favour of giving them another chance to live up to the terms of their agreement, because nothing that they have done, beyond their rights, has been proved to have injuriously affected the plaintiff in any way; but there is no such power; the plaintiff has a right to exact that which the agreement in question provides shall be the effect of a breach of its provisions.

The statute-law has given to the Courts much power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between landlord and tenant, but has expressly excluded a condition or covenant against under-letting or parting with the possession of the leased land; and this case is one, in substance, to which such exception is especially applicable. The personality of the occupiers of the property in question, under the writing in question, was and is necessarily a matter of much concern to the plaintiff, as well as to anyone else in his position. Though the defendants may well be persons who might confidently be interested with the rights conferred upon them by the writing in question, those to whom they might transfer their rights, in whole or in part, even in good faith, might not be, and might very injuriously affect the plaintiff's rights and interest in the land. It was and is essentially a case in which the interests of Wolf and of those claiming through him required and require that he and they should have reasonable control over the power of the defendants to substitute for themselves anyone else in the exercise of the substantial rights conferred upon them in the writing in question; and so, by agreement between the parties to it, expressly and plainly set out in it, it is provided that the defendants should have no power to sublet, or to permit any person to have any interest in, or to use, any part of the property in question for any purpose whatever without the consent in writing of the other party to it; and that the defendants' rights under it should continue only so long as they strictly observed, complied with and performed the terms of the writing.

In the autumn of the year 1911, the defendants entered into an agreement with one Brooker which plainly provided for a breach of the terms of the writing in question. That which was provided for in that agreement was, substantially, a subletting of their rights, under the writing in question,

for a rental of $1,500. It was in no substantial sense the mere appointment of a manager for them. All the profits were to be Brooker's and a fixed sum was to be paid to them. Brooker was to have possession, and the defendants were to be out of possession of the property and profits, except an oversight of the property and business which a landlord, under such circumstances, might well, and indeed ought to, have to protect his own interests as landlord; and this agreement was carried out accordingly during the year 1912; and an agreement for the continuance of it during the present year has been entered into; and $300 has been paid on this year's rent.

All this is quite in the teeth of the plain words of the writing in question against permitting anyone to have any interest in, or use of, any part of the property; as well as, substantially, against subletting it; and no attempt to procure the consent of anyone concerned was made; and it was all done with the knowledge that the plaintiff would take advantage of any and every opportunity he could grasp to turn the defendants out—being now able to obtain a much higher rent than they have contracted to pay.

I am unable to perceive anything, of any weight, in the contention made in the defendants' behalf, that the plaintiff is not entitled to evict because the writing in question was not made with him as a party to it, but only with one through whom he claims. The condition broken, the defendants' right of possession ended, and the person entitled to the property, subject to their rights, may assuredly re-enter; see 1 Geo. V. ch. 37, secs. 4 and 5.

The minor points involved in the action were disposed of during the argument, judgment on the main point being withheld at the request of counsel for the purpose of enabling them to refer to some cases which were not accessible to them then; that has now been done without, however, throwing any obscurity upon that which seems to me to be a very plain case.

Those minor points were dealt with thus:

The defendants had no right to erect the brick verandah wall without the plaintiff's consent. They might have repaired the wooden verandah; and could have done so without violating the by-law against erections and alterations without the permission of the municipality. But no substantial, or even appreciable, damage was caused to the

plaintiff by this wrong; and it would at most be a case for merely establishing the plaintiff's right, and nominal damages.

There was no exceeding the defendants' rights in serving refreshments on the verandah; it was part of the house; refreshments had always been served there, and could not be satisfactorily served in any other part of the cottage. And there was no evidence that the sale of peanuts was not within the business of the keeper of restaurant, or "lunch counter."

There was no breach of any of the terms of the writing in question in the defendants' permitting some of their servants employed in the restaurant or at the lunch counter to occupy rooms in the cottage while so employed nor in deducting from their wages an agreed amount for such occupancy; it was tantamount to paying so much less wages because they were lodged by the master.

The occupation by the Wolfs and a partner of Wolf, of some of such rooms, before Wolf assigned to the plaintiff, gave no right of action to Wolf who was a party to it; and consequently the plaintiff can have no such right.

Some testimony given in contradiction of the writing, or perhaps with a view to proving consent by Wolf not in writing I gave no credence to; and so would give no effect to it if it could be considered admissible in any manner or for any purpose.

The Landlord and Tenant Act, 1 Geo. V. ch. 37, was not relied upon or referred to on either side. Section 23, is obviously, for more than one reason, inapplicable.

Judgment for the plaintiff, for possession of the land in question with costs, will, substantially, give the plaintiff all that he is entitled to, and no more than that; there will be judgment accordingly; but with a stay of proceedings for thirty days if either party desires it.

HON. MR. JUSTICE BRITTON. FEBRUARY 1ST, 1913.

CHAMBERS.

MITCHELL v. DOYLE.

4 O. W. N. 725.

Prohibition — Division Courts Act—10 Edw. VII. c. 32, ss. 72, 78 and 79—Amendments to Act — Lack of Jurisdiction — Default—Judgment—Good Defence Shewn—Reason for Non-attendance—Discretion—Laches—Improper Affidavit—Costs.

Motion by defendant for prohibition to the 9th D. C. of the united counties of Durham and Northumberland, and the 2nd D. C. of the county of Bruce. An action was brought in the former Court for the sum of $43.50, alleged due on the sale of a heifer. Defendant filed a notice disputing the jurisdiction and also a notice of defence, but did not attend the trial, and judgment was entered against him on plaintiff's statements. A transcript of this judgment was sent to the 2nd D. C., Bruce, and execution issued there which was afterwards stayed by order of the County Judge. It was clear, from the material filed, that the action should have been brought in the county of Bruce, and that defendant had a good *prima facie* defence on the merits. Defendant's excuse for not attending the trial was that he thought the action had been abandoned and that he had done all that was necessary to protect his rights. At the trial plaintiff had not stated to the trial Judge the facts which would have shewn that he had no jurisdiction.

BRITTON, J., *held*, that under 10 Edw. VII. ch. 32, it is no longer necessary to file an affidavit as to the want of jurisdiction, nor to apply to the trial Judge for transfer before applying for prohibition.

That defendant, under all the circumstances, had not been guilty of such laches as to disentitle him to the order asked.

Re Canadian Oil Companies v. *McConnell*, 4 O. W. N. 542; O. L. R. , referred to.

Order made as asked, costs of motion fixed at $15 to be paid to defendant forthwith.

Motion for prohibition to prevent further proceedings in the 9th D. C. of the united counties of Northumberland and Durham, and also in the 2nd D. C. in the county of Bruce, in this case.

The facts are as follows:—On the 2nd March, 1910, the plaintiffs left their claim for suit with the clerk of the 9th Division Court of the united counties of Northumberland and Durham.

The claim was:—

	May, 1910.
1 yearling heifer	$100 00
By paid	60 00
	40 00
Interest for 21 months at 5 per cent.	3 50
	$43 50

On same day, a summons issued, which was served on the 14th March, upon the defendant, who then resided, and now resides, in the county of Bruce. On the 15th March, the defendant instructed his solicitor to file a dispute notice, and on the 18th March, the clerk of said Court received the notice, disputing the plaintiffs' claim, and also disputing the jurisdiction. The defendant did not file any affidavit, nor did he apply to the County Judge to have case transferred, nor did he attend the trial. At the trial, one of the plaintiffs gave evidence of the debt, but gave no particulars as to where cause of action arose. The learned Judge, on 14th May, 1912, gave judgment for the plaintiffs for $35 debt, and $3.50 interest, and for costs.

On the 7th November, 1912, a transcript of judgment was sent to the 2nd D. C. of the county of Bruce, and an execution was issued thereon against the defendant. On application by defendant to the Judge of the County of Bruce, this execution and transcript were set aside, and that matter is not before me, other than as part of the history of the proceedings. The order of the Judge of the county of Bruce was made on the 2nd December, 1912, and on the 10th December, the notice of motion for prohibition was served upon the plaintiffs.

G. H. Kilmer, K.C., for defendant.

A. B. Colville (Campbellford) for plaintiffs.

HON. MR. JUSTICE BRITTON:—The defendant's only excuse for delay in moving is that he thought his attendance unnecessary, and that the action had been withdrawn or dismissed. Why he was not informed by his own solicitors that the case should be looked after, does not appear. The defendant states where his residence is, and has been, and states with full particularity what the plaintiffs' cause of action is, if any. Upon that statement if true there was no jurisdiction to bring this case in the 9th D. C. of the united counties of Northumberland and Durham. The defendant also states his defence—and if what he says is true he has a good defence upon the merits. The plaintiff Edwin Mitchell made an affidavit used upon this motion, and he does not deny anything as stated by defendant,—material to be considered. The plaintiff says, he thought he had done everything that possibly could be done.

I shall refer to plaintiffs' affidavit later. The proceedings are governed by 10 Edw. VII., ch. 32 (1910). Upon the facts before me, the plaintiffs had no right, under sec. 72 (subject to what is provided by secs. 78 and 79, to enter for suit, or have the case tried in the 9th D. C., of the united counties of Northumberland and Durham. The defendant gave the notice required by sec. 78, and that notice was transmitted to and received by the plaintiffs. Notwithstanding that, and with the knowledge the plaintiffs had of how the cause of action arose, they gave no information of it to the trial Judge. By sub-sec. 1 of sec. 79, there is power to transfer if it appears to the Judge that the action should have been entered in some other Court of the same or some other county. Apparently it did not so appear, and no order to transfer was made or asked for. The changes made in the law as it was in ch. 60 R. S. O., 1897, by the new Act of 1910, are very important. Section 91 of ch. 60, R. S. O. required that the party making application for transfer should satisfy the Judge by affidavit of the alleged want of jurisdiction. Section 205 of the same Act provided that prohibition would not be granted when notice disputing jurisdiction had not been given. That sec. 205 is in part contained in sec. 78 of ch. 32, 1910, but the affidavit is not required to support objection to jurisdiction—and the words in regard to prohibition are omitted. It is not, *lex scripta,* that a defendant must apply to the Judge of a Division Court for transfer before applying for prohibition.

Then, the question is, has the defendant been guilty of such laches that, as a matter of discretion, I should not make the order.

The cases, *Mayor of London* v. *Cox,* L. R. 2 H. L. 283, and *Broad* v. *Perkins,* 21 Q. B. D. 533, cited by my brother Middleton in *Re Canadian Oil Companies & McConnell,* 4 O. W. N., p. 542, shew when discretion should be exercised against an applicant.

Has the defendant shewn what amounts to a sufficient excuse for his delay in satisfying the Judge—that the action was not one within his jurisdiction.

Assuming that it was defendant's duty, it was not so explained to defendant. He thought he had nothing more to do unless further notified, and he received no notice. He has disputed the jurisdiction and he had disputed the plaintiffs' claim, and because he did not think it necessary,

he did not attend Court. On the other hand, one of the plaintiffs did attend Court. He knew all about the transaction, but gave no information to the Judge as to how the sale of the heifer was made. He simply spoke of it as if the sale was upon his own premises.

The Judge was not bound to cross-examine the plaintiff, and the facts as stated in defendant's affidavit and not denied by plaintiff, did not come out. This judgment was recovered on the 14th May. No notice of it was given to defendant, and he did not, in fact, know of it until 16th November, 1912, when the execution was issued in the county of Bruce.

As to merits, the plaintiffs, as I have said, do not contradict defendant upon anything material. Some of the statements, not of fact but of opinion, in the affidavit sworn by Edwin Mitchell, one of the plaintiffs, are grossly improper. He, probably, did not appreciate or understand the true meaning of part of this affidavit. The blame for it should fall upon plaintiffs' solicitor. I feel quite sure that upon the attention of the solicitor being called to the 12th paragraph of that affidavit, he will express his regret for its insertion. The order will go prohibiting any further proceedings in this action in the 9th D. C. of the united counties of Northumberland and Durham.

If the plaintiffs desire to bring suit in the 2nd D. C. of the county of Bruce, they can do so.

The order will be with costs to the amount of $15, payable by the plaintiffs to the defendant, at which amount I fix these costs.

MASTER IN CHAMBERS. JANUARY 30TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 731.

Libel and Slander—Security for Costs—Motion for—9 Edw. VII. c. 40, s. 12—Lack of Good Faith—Positive Malice—Justification—Public Interest—Criminal Offences—Violence of Language—Undue Publication—Motion to Consolidate.

MASTER-IN-CHAMBERS dismissed motion under 9 Edw. VII. c. 40, s. 12, for security for costs in an action for libel and conspiracy, although it was not denied that plaintiff had not sufficient assets to answer costs if unsuccessful, upon the ground that defendant's conduct had shewn an entire absence of good faith, they having attacked plaintiff violently and abusively without any proof that such an attack was justified or in the public interest, had accused him of criminal offences and had given all possible publicity to the publications complained of.

Motion by the defendants (other than Stair) for security for costs under 9 Edw. VII. ch. 40, sec. 12.

M. H. Ludwig, K.C., and A. R. Hassard, for the motion.

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

CARTWRIGHT, K.C., MASTER:—The fact that plaintiff is not possessed of property sufficient to answer costs if unsuccessful is not denied. It remains therefore to consider only if defendants have shewn at least *prima facie* that they have a good defence on the merits, and that the statements complained of were published in good faith. The affidavit on which the motion was based was scarcely sufficient under the decision in *Greenhow* v. *Wesley*, 16 O. W. R. 585, and *Duval* v. *O'Beirne*, 20 O. W. R. 884.

If the matter had rested there, then as I read those cases the motion must have been dismissed. The defendant Rogers, however, was cross-examined at great length under above sec. 12 sub-sec. (3), on this affidavit as appears in the judgment on a previous motion to be found in 23 O. W. R. 740.

The motion is now opposed on the grounds that that examination has clearly shewn that: (1) the plea of justification is based on a very slight foundation, viz., a letter from a lady speaking unfavourably of the plaintiff's conduct in seeking to get her to purchase something he had written and was attempting to sell: (2) that "good faith" was en-

tirely disproved by the unnecessarily violent and abusive language used and by the conduct of defendants in distributing gratuitously from a waggon in the public streets of Toronto copies of the paper—accompanied by "Sandwitch-men," and giving all possible publicity to the publications complained of; (3) that it is not shewn in any way how these attacks on plaintiff, even if true, could be in any sense in the public interest, and (4) that the libels complained of are capable of imputing a criminal charge—and do so by charging (1) that plaintiff "concocted a filthy report slandering owner, manager, chorus girl and every man attending the performance." The so-called "report" was printed and circulated," etc. In Odgers on Libel, 5th ed., p. 7, it is distinctly said: "A libel is a crime" citing the words of Lush, J., in *R.* v. *Holland*, 4 Q. B. D. at p. 46: "Libel on an individual is and always has been regarded as both a civil injury and a criminal offence" giving reasons for this definition. So too at p. 455 and at 665 of Odgers, *supra*. At the latter page he says: "To publish a libel is a crime." And while it is true, as he states at p. 455, that every publication which would be held libellous in a civil action cannot be proceeded against criminally, yet this cannot be enquired into at this stage. Under *Smyth* v. *Stevenson*, 17 P. R. 374, at p. 376, it is sufficient if the words complained of may imply a criminal charge.

(2) It was also pointed out that the statement in the letter already referred the words "people have told him plainly that they did not expect to see the magazine which they had paid for" might imply a charge of obtaining money under false pretences.

On this state of facts the motion must fail. If I am right in this it is unnecessary to say anything further. But in case this is is not correct, then I think that defendants have failed to shew good faith—which I take to mean the absence of any improper or indirect motive, the presence of which constitutes actual malice and shews absence of good faith. It is not shewn, nor indeed is it easy to see how it can be shewn, that the exposure of plaintiff's true character could be a matter of public interest. Suppose that a man convicted of almost every crime to be found in the Code came forward as the exposer of a flagrant breach of the law by some one else, how does it affect the truth of the charge, which is all that the public is concerned with?

Then the matters brought out by the plaintiff's counsel which it is unnecessary to set out, shewed a great and persistent violence of language, besides such facts as citing dicta of the Judges in the Court of Appeal who favoured the view of the defendants while those to the contrary were omitted. This one thing of itself seems sufficient to dispose of the motion at this stage. This will not prevent the whole matter being gone into at the trial, when the jury will be able to express their own opinion and may reach different conclusions from those expressed now on the case and on the defences set up by the defendants. Had the alleged libels on the plaintiff been published in any way under the direction of the defendant Stair and in defence of the theatre in question, this might have been pleaded in mitigation of damages. Even these would not constitute a defence, though such a state of facts might lead to nothing more than a nominal verdict for the plaintiff.

My conclusion of the whole matter is that the motion must be dismissed, and with costs in the cause, as the merits are not now properly in question.

Th plaintiff has brought another action for acts alleged to have been committed since those complained of in the first action. He now moves (1) to have first action stayed until the second is disposed of; or (2) to have the two actions consolidated; and (3) if first motion is granted, to be allowed to use the depositions in that action in the second action.

As there are not the same defendants in both actions it is plain that none of these courses can be taken against the will of any of the defendants, and they do not consent.

As to a stay of the first action plaintiff, if so advised, can let it rest and leave defendants to move to expedite if aggrieved thereby. As to (2) if both actions proceed in the usual course plaintiff can set them down together and make such application to the trial Judge as may seem likely to save expense and time.

At present the motion fails on all branches, and is dismissed with costs in cause to defendants.

COURT OF APPEAL.

JANUARY 27TH, 1913.

REYNOLDS v. FOSTER.

4 O. W. N. 694.

Vendor and Purchaser—Specific Performance—Action for—Statute of Frauds—Description of Land—Extrinsic Evidence as to Identity—Failure to Prove Charge of Fraud—Incomplete Contract—Parties Never ad Idem.

An action for specific performance of a contract for sale of the King George Apartments on Bloor street, Toronto, for $60,000, and in the alternative for damages for breach of contract. The defences chiefly relied upon were: 1. Fraud and misrepresentation by the plaintiff and his agents as to the income derived from the property.

2. No sufficient tender of conveyance by plaintiff, and

3. The whole agreement was not in writing, as required by the Statute of Frauds.

TEETZEL, J., *held*, 21 O. W. R. 838; 3 O. W. N. 983, that no fraud was practised by either plaintiff or his agents, but that the contract was incomplete, as it did not contain express provision for payment of principal money of a mortgage to be given, and incapable of enforcement. Action dismissed, but as defendant failed to support his charge of fraud, no costs were allowed.

COURT OF APPEAL affirmed above judgment, with costs.

Appeal by plaintiff from a judgment of HON. MR. JUSTICE TEETZEL, 21 O. W. R. 838; 3 O. W. N. 983, dismissing plaintiffs' action for specific performance of an agreement to purchase certain lands.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

C. A. Moss, and T. Moss, for the plaintiff.

Hon. Wallace Nesbitt, K.C., and E. C. Wallace, for the defendant.

HON. MR. JUSTICE MEREDITH:—The conclusion of the trial Judge, that there never was any concluded agreement between the parties as to the time for payment of the balance of the purchase-money—$4,000—the payment of which was to be secured by a mortgage upon the land in question, seems to me to be quite in accord with the evidence, and so ought to be accepted as the fact; and that being so there never was, expressly at all events, a completed agreement between the parties for the sale and purchase of the property. If one substantial part of an agreement be wanting

—one link missing—the contract is incomplete, and there is nothing binding, however well the parties may have been agreed in all other respects; that is, of course, where there is but the one contract and it is incomplete in an essential part.

But it is contended that the law supplies the missing part of this contract. That the law does sometimes make that certain which the words of the parties has not covered, is unquestionable. In many cases of contract in which no time has been expressed the law implies a reasonable time. But such an implication could hardly arise in such a case as this in which the time ought to have been specified and set out in the mortgage; the mortgage would be quite incomplete without it; and, in any case, who could say, what is a reasonable time in such a case; with what measure is it to be ascertained? But indeed this was not contended for in this case upon the argument here. That which was urged was, that, no time having been agreed upon, the mortgagor was at liberty to fix the time or times for payment as he chose—to elect as it was said.

But I am quite unable to see how there could be any such right in such a case as this; and, if there could, it is quite clear, upon the whole evidence, that the parties never intended that there should, or even thought that there could, be; that it was intended by each to be entirely a matter of agreement between them; as it plainly was a matter upon which they could subsequently easily agree if they still remained of the same mind, one anxious to sell and the other to buy; the difficulty arose entirely from its being an exceptional case, one in which the purchaser rued, and consequently has adopted every means in his power to be rid of, the purchase.

It does indeed seem from the case of *McDonald* v. *Murray*, 2 O. R. 573, at p. 581; and in appeal, 11 A. R. 101, at p. 122, that Wilson, C.J., and Patterson, J.A., thought that there was such a right in a case not unlike this in this respect, but that case went off, in each Court, on grounds which made it unnecessary to give effect to that view.

The ancient rule of law that where there be a condition, without a limitation of the time within which it is to be performed, he who has the benefit of it may do it at such time as he pleases, was doubtless the basis of the views of these learned Judges; but is it applicable to such

a case as this? Even assuming that, if a mortgage were given, in these days, without any limitation as to the time in which it should be paid off, and without any agreement on the subject, the rule might be applied, that is very far from giving any warrant for considering that in such a case as this any Court would decree specific performance in which the vendor would be obliged to accept a mortgage which might be paid off whenever the purchaser chose in his lifetime. To do so would be to enforce upon the parties that which they not only never agreed upon, but also something they never would have agreed upon, and something that every business man would consider absurd. In this case no one seems to have ever thought of a longer time than five years; it would seem that the vendor would have made it not more than three years, whilst the purchaser would have been content with five; but it is not proven that either, or any other, term, was actually agreed upon.

The trial Judge was therefore, I think, right in his ruling upon this point, though it is really a broader one than one merely resting—as he seems to have put it—upon the Statute of Frauds; it is a question of contract or no contract in fact; and also adding to, by parol, a written formal document; as well as of a violation of the provisions of that Statute; and in my opinion a judgment in the plaintiff's favour would be contrary to legal right in all these respects.

So too I think that, without reformation of the writing, the action fails, on the latter two grounds, in another respect.

The land described in the agreement is not that which was really sold; that is admitted on all hands and is shewn in the deed which the vendor prepared and intended to deliver. The particular description does not cover the whole of the property; a quite substantial part is not included in it; nor can I think that the general description "the premises situate on the north side of Bloor street west, known as King George Apartments, known as No. 568 and 570 Bloor street west, plan No. as registered in the registry office of the city of Toronto," is, in the entire absence of evidence as to any such plan, and as to what was known as the "King George Apartments" or as "No. 568 and 570," can be held to supply the omitted part and

rights. It would, of course, have been a very different case if the words were, all the vendor's property known as and used in connection with the King George Apartments, for the omitted parts are a part of, and rights used in connection with, the land upon which the apartments are built; but there is no evidence to identify them with the apartments, which are the buildings, nor with Nos. 568 and 570 which are only, as far as appears in evidence, the street numbers.

The vendor has resold the property and so specific performance and equitable rules, are out of the question; the parties are upon their strict legal rights in that which is now an action for damages for breach of contract only.

I would dismiss the appeal.

HON. MR. JUSTICE GARROW and HON. MR. JUSTICE HODGINS agreed.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 30TH, 1913.

BADENACH v. INGLIS.

4 O. W. N. 716.

Will—Testamentary Capacity—Evidence—General Paretic Insanity—Lucid Intervals—Onus not Discharged—Costs.

FALCONBRIDGE, C.J.K.B., dismissed plaintiff's action to set aside two certain alleged wills of the late E. A. Badenach, deceased, on the ground of lack of testamentary capacity, holding that plaintiff had not satisfied the onus upon him, and that the wills in question might have been made in lucid intervals of the disease of deceased, which was general paretic insanity.

Action to set aside two certain alleged wills of E. A. Badenach, deceased, on the ground of want of testamentary capacity.

C. H. Porter for the plaintiff.

A. F. Lobb for the defendant Inglis.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The plaintiff is a brother of Edgar A. Badenach deceased. The defendant Inglis, formerly Badenach, is the widow, and Sarah Badenach is the mother of the said Edgar Badenach.

Two alleged wills of the said Edgar Badenach were prepared. The first one was signed on the 24th day of August, 1908. It provided for the converting of the estate into money and the investment of the same, paying one-

quarter of the income to the mother during her lifetime, and the balance to the wife during her life, with provisions in case of the mother predeceasing the wife, or *vice versa*, and for the support and maintenance of children, if any.

The second will was signed on the 10th of June, 1909. It revoked all former wills and gave everything to his wife and constituted her his sole executrix.

The plaintiff alleges that at the time the alleged wills were executed, the said Edgar Badenach was not of testamentary capacity.

Edgar Badenach died on or about the 5th day of February, 1910.

On or about the 28th day of September, 1910, letters probate were granted by the Surrogate Court to the defendant Annette Blanche Badenach, now Annette Blanche Inglis, of the last will and testament, which was signed on the 10th day of June, 1909.

It is alleged that the deceased suffered from general paretic insanity, commonly known in the profession as G. P. I. The evidence, both of experts and laymen, is, as usual in such cases, contradictory and conflicting.

Without giving any close analysis of the same, I have come to the conclusion that the plaintiff has failed to satisfy the burden of proof which admittely lies upon him. The great contest between the different sets of medical witnesses is as to the possibility in this disease of a period of remission or what is commonly known as a lucid interval.

A medical witness for the defence, whose experience as an alienist is probably greater than that of almost any person in the province, testified that there might exist all the symptoms which the testator is said to have displayed, difficulty of walking, want of concentration, want of control of the sphincter of the bladder, and illusions of grandeur, and still there might be capacity to make a will—that there might be remarkable periods of remission when the mental irregularities would be quite in abeyance. In this statement he is strongly corroborated by the opinion of Dr. Mercier, of London, England, which was admitted without objection, and an extract from which here follows:—

Extract from ch. 12, vol. 3, "System of Syphilis" by Power and Murphy, p. 122.

"Lastly, the validity of a will made by a general paralytic may be in dispute. It is, of course, well established that a lunatic may make a will, which will be upheld by the Court. The question in every case is whether the testator was, at the time the will was made, of disposing mind; and the mere fact that he was then the subject of general paralysis will no more invalidate the will, than the fact that he was suffering from any other form of insanity. There are general paralytics in whom the prominence of delusions, and the confusion of mind, are so continuous, that at no time in the course of the disease are they of disposing mind; but, such cases are by no means the rule. Apart from the relatively prolonged periods of remittance and intermittence, during which the testator may be without question competent to make a will, the disease is, as has been described, a fluctuating one; and there may be, in the course even of the second stage, days on which he is quite capable of appreciating the amount and nature of his property, the claims of those whom he may or may not benefit by his will, and the nature of the business that he is transacting."

The legal practitioners who drew and witnessed the wills are men of good standing in their profession and men who are very well able to determine whether a man making a will appears to be of sufficient mental capacity. The solicitor who drew the first will was also well acquainted with the testator.

It is to be remarked also that the second will is a remarkably simple one. Nor is the first one at all complicated in its character. Neither of them is in any sense inofficious. It would not avail the plaintiff at all to destroy the second will and set up the first, because the defendant Inglis has effected a settlement with the mother of the testator and so Mrs. Inglis would be in as good a position as she is with the probate of the second will. Both are attacked, but there is of course less question about the first than the second will.

The action must, therefore, be dismissed but under all the circumstances without costs. I cannot possibly see my way to saddling the successful party with the plaintiff's costs.

There will be thirty days' stay.

COURT OF APPEAL.

JANUARY 27TH, 1913.

STEVENS v. CANADIAN PACIFIC Rw. CO.

4 O. W. N. 697.

Negligence—Railways—Loss of Foot—Caught in Track at Public Crossing—Evidence—Contributory Negligence.

Action for loss of a foot, taken off by a train of defendant company on November 29th, 1910, at a public crossing, owing to the foot in question having been caught between the track and the planking of the crossing. This was the second trial of the action, a new trial having been previously ordered by the Court of Appeal. (See 20 O. W. R. 331; 3 O. W. N. 221.

CLUTE, J., entered judgment for plaintiff upon the findings of the jury.

COURT OF APPEAL affirmed above judgment, with costs.

Appeal by defendants from judgment of CLUTE, J., at the trial in favour of plaintiff upon the findings of a jury in an action for damages for personal injuries alleged to have been caused by defendants' negligence. This was the second trial of the action, it having been ordered by the Court of Appeal. See 20 O. W. R. 331; 3 O. W. N. 221.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

I. F. Hellmuth, K.C., and W. L. Scott, for the defendants.

J. A. McIntosh, for the plaintiff.

HON. MR. JUSTICE GARROW:—This case has been twice tried and I am unable to agree that there are circumstances which would justify another trial. The issues are essentially upon questions of fact vitally involving the question of the credit to be given to the depositions at the trial of the plaintiff himself. For as carefully pointed out to the jury by Clute, J., in his charge unless the plaintiff is believed, the case utterly fails. We may doubt the plaintiff's story, or even go farther and say we do not believe him, but we have no right to substitute ourselves for the jury or our opinion for theirs upon such a question.

There is some confusion in the findings of the jury, but upon the whole I take it to be reasonably clear that it is found as a fact that the opening between the rail and the plank exceeded two inches and was therefore wider than

necessary. In this there was, I think, some evidence to support the finding.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MAGEE:—Two trials have now been had in this action, in which the plaintiff charged that the defendants negligently left an unnecessarily wide space between the planking and the inside of the north rail of their track at a highway crossing, whereby, while he was walking along the highway at night, he got his foot caught in the space, and, being unable to extricate it in time, it was cut off by the locomotive of a train. The jury at each trial have accepted the plaintiff's version of his misfortune, and have rejected the theory of the defendants that he was injured while intoxicated, not at the plank crossing, but some distance east of it.

Apart from the probable uselessness of a third trial I see no ground for disturbing the result of the second one. When the case was before this Court after the first trial the facts were more fully referred to. Some details then in evidence have been left out at the second trial and some additional ones proved. It was strongly urged before this Court that the plaintiff's story was incredible and that his foot could not have been cut off as he stated without some injury being caused to the boot; but the jury had before them what the defendants put forward as a fair reproduction of the track and planks and engine, and would be able to judge of the credibility or the reverse of the plaintiff's evidence; and the cross-examination of the plaintiff does not read as if the defendants had much hope of convincing the jury that it would be impossible for the boot to get down so far that the top would not be pressed between the wheel and the rail.

The plaintiff swears that in his struggles before the train reached him he threw himself so hard that his ankle went out of joint and that when he did so he screamed with the pain. This was brought out on cross-examination and is a circumstance not mentioned at the former trial, and would more readily account for the occurrence happening as the plaintiff says it did and the jury may well have considered that the plaintiff's account given to the doctor immediately after the accident was not likely to have been manufactured.

The two physicians who attended to the plaintiff that same evening were called by the defendants, but not a question was asked them or any other witness as to even the improbability of the injuries being received as he states or the insufficiency of the space to receive the boot if crushed down. His statement is undisputed that the wheel cut off the foot an inch or two above the ankle joint.

The evidence for the defendants shews that 1¾ or 2 inches is all the width of space necessary to be left between the plank and rail for the wheel flange. As to the actual width of the space the jury may very well have discounted the evidence of the section foreman, practically the only witness, as to its measurement and they may well have preferred the plaintiff's statement that his heel 2½ inches wide had gone into it as the best proof of the width, since the planks had been taken up and a new rail put down in the interval. The defendants' own witnesses, including the two physicians, say the plaintiff was sober.

The answers of the jury as ultimately brought in by them find the defendant company negligent in not having the crossing in proper order or the accident would not have happened because there was space enough for the plaintiff's foot to get caught between the rail and the plank, and that the plaintiff could not by the exercise of reasonable care have avoided the accident.

These answers are not inconsistent with answers previously made or the jurors' statements in Court. They were fully instructed and I do not think the judgment for the plaintiff upon their answers should be disturbed.

MASTER IN CHAMBERS. JANUARY 31ST, 1913.

WEDGERY v. DUDLEY.

4 O. W. N. 733.

Pleading—Statement of Claim—Motion to Strike Out Parts—Action for Deceit—Plaintiff Co-habiting with Defendant—Misrepresentations of Defendant—Damages—Good Cause of Action.

MASTER-IN-CHAMBERS, *held*, that a plaintiff could not be prevented from bringing an action for damages for fraud and deceit where she alleged she had been induced to go through a form of marriage with defendant, had lived with him as his wife, and had borne him a child, whatever the result of such action might be.

Millington v. *Loring*, 6 Q. B. D. 190, followed.

Motion to strike out paragraphs 5 and 6 of the statement of claim as embarrassing and as disclosing no cause of action.

T. N. Phelan for defendant.

H. E. Irwin for plaintiff.

CARTWRIGHT, K.C., MASTER:—As set out in the statement of claim the facts of this case are somewhat uncommon.

In the first four paragraphs the plaintiff alleges that in October, 1909, she was married as she supposed to the defendant at Detroit, though he had told her that while under 14 years of age he had gone through the form of marriage with a woman with whom as he said he had never lived, and that several lawyers whom he had consulted had advised him that such ceremony was null and that he was free to marry—and that relying on such representations she consented to said marriage. Afterwards she found out that defendant had lived with his first wife who had borne him a child, and that defendant had therefore wilfully deceived the plaintiff.

Paragraphs 5 and 6 state that in April, 1911, defendant was arrested on a charge of bigamy for his marriage with plaintiff: She thereupon refused to live any longer with defendant, but that again relying on representations made by defendant that proceedings were being taken to set aside this first pretended marriage which an eminent counsel had advised him would undoubtedly succeed speedily, she resumed marital relations with the defendant to whom she thereafter bore a child. Then in paragraph 6 she alleges that the representations set out in the preceding paragraph were untrue, and she therefore claims

1. Damages for false and fraudulent misrepresentations, or

2. Such further and other relief as may seem meet.

3. Costs of this action.

On the motion Mr. Irwin referred to an anonymous case in Skinners Reports, p. 119 where a similar action on the case was held by the Court of K. B. to lie under the Common Law.

I still think as stated on the argument that there is nothing in this statement of claim which is not within the principle of *Millington* v. *Loring*, 6 Q. B. D. 190, a case of

great authority and one found very useful in practice in getting settlements in similar actions.

Here the action is not one for breach of promise because the allegation is that defendant had a wife at the time he induced the plaintiff to consent to go through the form of marriage with him—her claim can only be as set out in the prayer for relief. There does not seem to be any law to prevent her from bringing an action for that purpose—what the result may be it is premature to enquire.

Nor do I understand that the plaintiff is bringing or attempting to bring an action for seduction—but only one for false representations which she believed and was induced to act on and which in consequence have resulted in the birth of a child. This under *Millington* v. *Loring supra* is perfectly well pleaded, for the reasons given there very fully.

In my opinion the motion must be dismissed with costs to plaintiff in the cause.

In Cyc. vol. 20 p. 14 under Fraud it is said: "The simplest and perhaps the most frequent case of fraud is that consisting of telling a deliberate and intentional falsehood as to a material fact. Where a person makes such a misrepresentation, intending that another shall act upon it, and the latter does act upon it to his injury, it is perfectly clear that an action of deceit will lie." This seems to fit the present case exactly as a matter of pleading.

HON. MR. JUSTICE LENNOX. FEBRUARY 3RD, 1913.

CHAMBERS.

BANK OF HAMILTON v. DAVIDSON.

4 O. W. N. 749.

Judgment—Speedy Judgment—Action against Alleged Partner on Partnership Judgment — Partner Outside Jurisdiction — No Appearance—Special Endorsement—Rights to—Con. Rules 138, 228, 603.

Motion under Rule 603 for speedy judgment against defendant in an action upon a judgment against a partnership of which it was alleged defendant had been a member. At the time the action against the partnership had been brought defendant had been outside the jurisdiction. He was not served with the writ, did not appear, and was not adjudged to be a member of the partnership, and claimed to have a good defence on the merits to the present action.

WENTWORTH, Co.C.J., granted speedy judgment against defendant.

LENNOX, J., set aside above judgment, holding that it was doubtful if defendant was liable at all under the plain terms of Con. Rule 228.

Quære, as to whether, in an action upon a judgment, the writ of summons can be specially indorsed.

Appeal from a judgment of Wentworth County Court, granting plaintiffs speedy judgment against defendant in an action upon a judgment obtained against a partnership of which it was alleged defendant was a member.

Wm. Laidlaw, K.C., for the defendant Chas. H. Davidson.

C. J. Holman, K.C., for the plaintiffs.

HON. MR. JUSTICE LENNOX:—The plaintiffs recovered judgment against the defendants, John Davidson & Sons in an action upon their promissory note on the 9th of June, 1892. The defendant, Charles Hilton Davidson, was at the time the writ issued in that action a member of the firm, but the plaintiffs shew that at that time this defendant was a fugitive from justice and out of Ontario. He was not served with the writ, did not appear, did not admit himself to be and was not adjudged a partner or member of the firm. The plaintiffs sue upon this judgment, the writ is endorsed for recovery of the judgment and interest, and purports, and is claimed to be, specially endorsed within the meaning of Rule 138. The plaintiffs applying under the provisions of Rule 603 have obtained judgment against the defendant Charles H. Davidson. This defendant claims

to have a good defence to this action upon the merits, duly entered an appearance, and desires to defend. With great respect I am of opinion that the learned local Judge erred in granting the plaintiff's application. I have not been referred to any case in which the Rule has received judicial construction, but to my mind the concluding part of Rule 228 is clearly sufficient to prevent the entry of judgment under Rule 603. The last clause of Rule 228 is as follows: "Except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of Ontario when the writ was issued and who has not appeared" adding—and these qualifications have no application here—"unless he has been made a party under Rules 162 to 167, or has been served within Ontario after the writ was issued." This is I think sufficient to bar the way to a summary judgment. Rule 603 is for clear cases, see authorities collected in H. & L. 3 ed. 802; *Jacobs* v. *Beaver*, 17 O. L. R. 496 at p. 501, *Bristol* v. *Kennedy*, 23 O. W. R. 685 at p. 539, and *Farmers Bank* v. *Big Cities R. and A. Co. Ltd.*, 15 O. W. R. 241, in which Mr. Justice Riddell says: "It must not be forgotten that Rule 603 is to be applied only with caution and in a perfectly plain case."

Reference may also be made to *Jones* v. *Stone* (1894), A. C. 122, in which Lord Halsbury delivering the judgment of the House of Lords and dealing with a similar provision said: "The proceeding established by that order is a peculiar proceeding intended only to apply to cases where there is no reasonable doubt, that a plaintiff is entitled to judgment and therefore it is inexpedient to allow a defendant to defend for mere purposes of delay."

But although resting my judgment, as I do, upon Rule 228, it is not the only point. Here again I am not referred to any authority and in the absence of authority to the contrary, I question whether a judgment can be made the subject of a special endorsement under Rule 138. If it can it can only be under sub-sec. (a) and this seems to be limited to a "simple contract debt" whether "express or implied." It is enough if it is doubtful—and every reasonable doubt is a reason for trial in the ordinary way.

The order and judgment of the learned local Judge will be set aside and the defendant Charles Hilton Davidson will be at liberty to defend the action, unconditionally.

The costs of the proceedings before the Local Judge and on this application will be costs in the cause.

On the judgment being vacated the plaintiff will have the option, before further costs are incurred by this defendant to dismiss the action as against him individually without costs.

MASTER IN CHAMBERS. JANUARY 27TH, 1913.

BROWN v. COLEMAN DEVELOPMENT CO. AND GILLIES.

4 O. W. N. 728.

Judgment — Default of Statement of Defence — Con. Rule 587 — Requirements — Writ of Summons not Specially Endorsed — Regularity—Defendant Allowed to Defend—Usual Terms—Costs.

MASTER-IN-CHAMBERS, *held*, that in order to sign judgment in default of the filing of a statement of defence under Con. Rule 587, it is necessary that the claim be one for which a writ of summons can be specially endorsed, but it is not necessary that it be so endorsed.

Star Life v. *Southgate*, 18 P. R. 151, followed.

Statement in Holmested and Langton's Judicature Act, 3rd ed., p. 779, disapproved.

Motion by defendants for an order setting aside a judgment and execution issued herein and for leave to defend the action.

The writ in this case was issued on 13th July, 1909, and appearance duly entered. Nothing further was done until 20th November, 1912, when plaintiff obtained on notice to defendants an extension of time for delivery of statement of claim until 26th November which was acted on. For some reason not disclosed on the present motion no statement of defence was delivered and judgment was signed for such default under C. R. 587 and execution issued against defendant Gillies as well as against the company.

H. S. White, for the motion.

S. W. McKeown, contra.

CARTWRIGHT, K.C., MASTER:—The only point of importance or interest is whether the judgment was properly signed under C. R. 587.

The writ had the following endorsement only:—

"The plaintiff's claim is for work done and services performed by the plaintiff for and at the request of the

defendants and for moneys paid and advanced by the plaintiff for and at the request of the defendants." The writ issued was one of what is called the "General" Form and does not comply with C. R. 139, so that plaintiff could not have availed himself of C. R. 575 if no appearance had been entered, nor of C. R. 603 after appearance. The statement of claim no doubt gives all necessary details of the plaintiff's claim and cannot be considered a violation of C. R. 288. The question therefore is—was judgment regularly signed under C. R. 587? In H. & L. 3rd ed., 779 it is said: "Judgment can be properly signed under this Rule only in respect of claims which can be *and are* specially endorsed on the writ of summons *Star Life* v. *Southgate*, 18 P. R. 151."

If the words italicised are within that decision, then the judgment now in question was irregular. But on reading the case as reported I have not discovered any such dictum. The case before the C. A. was one which it was held could not be the subject of a special endorsement.

Rule 587 itself does not mention the writ at all—it seems to contemplate a case such as the present where the statement of claim "is for a debt or liquidated demand."

The writ no doubt was not so endorsed, and gave no intimation of the amount or details of the plaintiff's claim, so that the defendants were not affected by Rules 575 or 603.

But when they allowed the further time for delivery of defence to elapse, I see no reason why the plaintiff could not avail himself of C. R. 587 as he did, and I feel bound to hold the judgment regular.

This being so the defendants can be let in to defend only on the usual terms—the judgment and execution shall stand as security for whatever the plaintiff may ultimately recover, but are not to be enforced without the leave of the Court. The costs of this motion will be to plaintiff in the cause, and defendants must consent to facilitate a speedy trial at Toronto N. J. Sittings—where I suppose plaintiff wishes to have the trial, though no venue is stated in the statement of claim, which must therefore be amended, for which reason I have disposed of the costs as above and the plaintiff should issue this order.

HON. MR. JUSTICE LENNOX. JANUARY 31ST, 1913.

CHAMBERS.

SCARLETT v. CANADIAN PACIFIC RAILWAY CO.

4 O. W. N. 718.

Negligence—Fatal Accidents Act—Apportionment of Damages—Wife and Mother—Deceased Living Apart from Wife and Contributing to Mother's Support—Rights of Each—Equal Division—Costs.

LENNOX, J., apportioned a sum recovered as damages under the Fatal Accidents Act, equally between the mother and the wife of the deceased, although the latter was living apart from the deceased for some years prior to his death, and receiving no support from him, while the mother received $10 a week from the deceased.

"The question is not so much what was being paid to the mother as what the wife and mother would relatively have a right to expect if the deceased had continued to live."

Application for apportionment under sections 4 and 9 of the Fatal Accidents Act, 1 Geo. V. ch. 33.

W. R. Frost, for the plaintiff, the widow of deceased.

W. A. Henderson, for Jane Scarlett, the mother of deceased.

HON. MR. JUSTICE LENNOX:—These are the only people entitled to share. The action was brought by the widow and administratrix of George Scarlett deceased and was settled out of Court before being set down for trial at $1,000 damages and $100 on account of costs. There are expenses in connection with obtaining letters of administration and the funeral. I am not informed as to whether the deceased left any estate. For three years or more before her husband's death the plaintiff was living apart from him and supporting herself. The husband during this time lived with his mother Jane Scarlett and paid her $10 a week. The plaintiff did not release her husband from liability for her support. The total damages recoverable in the action are to be "proportioned to the injury resulting from death" to the persons entitled, sec. 4; and the apportionment when it comes to be made is not to be upon any analogy to the Statute of Distribution, as was done in 1877 in *Sanderson* v. *Sanderson*, 36 L. T. N. S. 847, but in proportion to the damages sustained by each person entitled

to a share. *Bulmer* v. *Bulmer* (1883), 25 Ch. D. 409—at p. 413; *Burkholder* v. *Grand Trunk Rw. Co.*, 5 O. L. R. 428. The fact that the widow was separated from her husband does not appear to prevent recovery or shift the basis of apportionment, according to American cases cited in Sedgwick on Damages 9th Ed. p. 1121, nor would it appear on principle, to affect the question so long as he continued liable for her support. And so long as the wife continues entitled her husband could only contribute to his mother's support out of the surplus of his wages or other income after supporting and maintaining his wife. The question is not so much what was being paid to the mother as what the wife and mother would relatively have a right to expect if the deceased had continued to live. It is not made very clear as to why the husband and wife were separated. *Prima facie* the wife has the strongest legal claim.

The order will provide that the plaintiff's costs of the action as between solicitor and client over and above the $100 received on account of costs, and the costs of both parties to this application, shall be a first charge upon the $1,000 and that after providing for these sums the balance of the said $1,000 shall be equally divided between the plaintiff and the said Jane Scarlett. As at present advised, I do not see that the expenses above referred to affect this fund, but if the plaintiff has had to bear these expenses personally I should be spoken to before the order issues.

MASTER IN CHAMBERS. DECEMBER 21ST, 1912.

SHEARDOWN v. GOOD.

4 O. W. N. 553.

Pleading—Amendment—Statement of Claim—Reply Delivered—Leave to Amend Granted—Terms—Costs.

MASTER-IN-CHAMBERS permitted plaintiff to withdraw a reply filed, and amend his statement of claim, defendant to be at liberty to amend within 8 days thereafter.

Hunter v. *Boyd*, 6 O. L. R. 639, followed.

Motion for leave to amend statement of claim by rectifying a mistake and claiming *mesne* profits.

C. W. Plaxton, for the motion.

L. V. McBrady, K.C., contra.

CARTWRIGHT, K.C., MASTER:—In this case a new trial was ordered by the Divisional Court which gave liberty to defendant to amend the statement of defence and to plaintiff leave to reply thereto within a week after such amendment. The defendant amended on 9th inst., and plaintiff replied next day. He now thinks it desirable to amend the statement of claim as above.

This whole question was considered by me in the case of *Hunter* v. *Boyd*, 6 O. L. R. 639.

I see no reason to depart from that decision or to qualify the reasoning on which it proceeded.

An order will therefore be made allowing the plaintiff to withdraw the reply and amend his statement of claim as desired. The defendant must have 8 days thereafter to amend her statement of defence if so desired, and the costs of this motion as well as all costs lost or occasioned by reason of this order will be to defendant in any event.

This course commends itself as preferable to a reference of the motion to the trial Judge as suggested by Mr. McBrady. It sufficiently protects the defendant and makes the claims of both parties plain before they come to trial.

APPELLATE DIVISION.

FEBRUARY 3RD, 1913.

BINGHAM v. MILLICAN.

4 O. W. N. 739.

Guarantee—Moneys Paid Under—Account—Reduction of Judgment on Appeal—Costs.

SUP. CT. ONT. (2nd App. Div.), reduced the amount of a judgment of Winchester, Co.C.J., York, in favour of plaintiff, from $572.78 to $161.21, in an action for balances due for moneys paid under a guarantee.

Costs of appeal to defendant.

Appeal from a judgment of His Honour Judge Winchester, of York County Court, 3rd December, 1912, in favour of the plaintiff for the sum of $572.78.

The action was on a written guarantee, given by the plaintiff to the Imperial Bank of Canada, with reference to premiums payable by the defendant under policies of insurance assigned to said bank.

The plaintiff alleged that under said guarantee he "had been obliged to pay certain premiums and the policy having matured and the prior liens thereof, including the indebtedness to the Imperial Bank of Canada, having been deducted therefrom, the balance was paid to him but was insufficient to repay ihs advances and interest."

The appeal was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

A. C. Heighington, for the defendant, appellant.

J. W. Bain, K.C., and M. Lockhart Gordon, for the plaintiff, respondent.

HON. MR. JUSTICE SUTHERLAND:—During the argument on the appeal it was determined that the proper way to take the account between the parties was to ascertain what payments the plaintiff had made under his written guarantee and allow interest thereon at the rate of 7 per cent. being the rate payable by the defendant to the bank.

At page 5 of his evidence, at the trial, the plaintiff said that exhibit "3" contained a statement of such payments. It shews a total of $5,954.58, but upon the argument of the appeal, it was directed that two items should be struck out, namely, $3,668.69, the amount of a loan obtained by plaintiff on one of the policies, and $17,94 interest, in all $3,686.63. Deducting this the balance would be $2,267.95.

The matter was referred to Mr. Holmested to take the account and figure the interest upon the advances. He did this. It was agreed by counsel that the sum of $540.18 found by him to be the interest up to November 8th, 1909, was correctly computed. Adding this sum to the $2,267.95 would make a total of $3,808.13.

The plaintiff in a statement prepared by his solicitor, page 6, exhibit "10" admits that he received a cheque on account of the insurance policy, under date of November 8th, 1909, for $2,675.42 (72c). Deducting this amount, the net balance is $132,71. Subsequent interest on this has

been figured by Mr. Holmested at $28.50. Balance due plaintiff $161.21.

The judgment in favor of the plaintiff will therefore be reduced to this sum, with County Court costs of trial. The costs of the appeal will be to the defendants who have succeeded to a substantial extent.

The judgment will be stayed for the remainder of the six months mentioned in the judgment of the trial Judge to enable the defendant to proceed on his counterclaim, and in the event of his not doing so, it will then be dismissed.

HON. SIR WM. MULOCK, C.J., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE LEITCH, agreed.

MASTER IN CHAMBERS. FEBRUARY 3RD, 1913.

McALPINE v. PROCTOR.

4 O. W. N. 769.

Evidence—Commission to Take—Action for Commission on Sale of Lands—Disregard of Con. Rule 518.

MASTER-IN-CHAMBERS granted an application for a commission to St. John, N.B., to take the evidence of the purchaser and another in an action for a commission upon the sale of certain lands.

Comment upon the prevalent disregard of Con. Rule 518 in respect of affidavits by solicitor's clerks on information and belief.

Motion by defendant for a commission to take the evidence at St. John, N.B., of the purchaser of certain lands in respect of the sale of which plaintiff claims a commission from defendant, and also the evidence of another witness resident there who is alleged to be able to give material evidence.

M. Lockhart Gordon for defendant.

H. H. Davis for plaintiff.

CARTWRIGHT K.C. MASTER:—The affidavit in support of the motion is that of a clerk in the office of defendant's solicitors who speaks only of information and belief of which counsel is the source. This is not desirable even if it does not in substance contravene C. R. 518. I do not think that rule was ever intended to allow the practice,

which has become altogether too common, of supporting interlocutory motions by affidavits of the clerks in the office of the applicants' solicitors. Here the defendant resides in Toronto and there was no difficulty in getting him to make the affidavit. For this reason if the strict practice was followed the motion should be dismissed with costs.

But following the principle of C. R. 312 I will not apply the rigour of the rule. For this there are two reasons. The first is that the case is ready for trial and that it is not in the interest of either party that it should be delayed by requiring another motion to be made. The other reason is that in defendant's depositions he speaks of some arrangement between plaintiff and the purchaser which would have the effect if proved of defeating the plaintiff's claim. Under *Ferguson* v. *Millican*, 11 O. L. R. 35, an order for a commission is almost of right if the requirements there pointed out are complied with, as I think they have been here substantially.

The order will therefore issue for a commission returnable in ten days. The costs of this motion will be to plaintiff only in the cause—and the costs of the commission will be left to the Taxing Officer if not disposed of by the trial Judge.

Attention is called again to *Re Young*, [1900] 2 Ch. 753; *Nieminen* v. *Dome Mines*, 23 O. W. R. 405, and *Todd* v. *Labrosse*, 10 O. W. R. 773, as applicable to C. R. 518.

HON. MR. JUSTICE BRITTON. JANUARY 30TH, 1913.

CHAMBERS.

CAULFIELD v. NATIONAL SANITARIUM.

4 O. W. N. 732.

Pleading—Statement of Claim—Motion to Strike Out Paragraphs—Action for Wrongful Dismissal.

BRITTON, J., varied order of Master-in-Chambers (ante p. 761) by striking out paragraphs 5, 6, 9, 14 and 15 of the statement of claim, otherwise the appeal from the said order to be dismissed.

Motion by way of appeal from the Master in Chambers, 23 O. W. R. 761, who refused to strike out certain

paragraphs of plaintiff's statement of claim, objected to as tending to embarrass the defendant, and to prejudice it in a fair trial of this action.

R. McKay, K.C. for defendant.

D. L. McCarthy, K.C. for plaintiff.

HON. MR. JUSTICE BRITTON:—In view of the case of *Millington* v. *Loring*, 6 Q. B. D. 190, this case presents some difficulty—I am restricted to the consideration of the paragraphs objected to, being embarrassing or prejudicial to the defendant. It may well be that some of these statements instead of being embarrassing are in defendant's favour as shewing all that plaintiff can hope to bring forward in support of his action. The action is for alleged breach by defendants of a definite contract. The plaintiff seeks the bring before the Court the matters introduced into the statement of claim, for the double purpose, first, to assist the Court in interpreting the contract, and second, as the basis of a claim for special damages if he is entitled to recover at all.

The action is peculiar in this, that although the defendant had the right to dismiss—and the plaintiff had the right to leave after the expiration of six months—then there was no right even by payment of six months' salary to compel him to leave before. Having regard to that, many of the statements are not embarrassing or prejudicial.

With great respect, I think the paragraphs 5, 6, 9, 14 and 15 should be struck out. Appeal allowed as to those. Even if there may be something immaterial or irrelevant in paragraphs 3, 7, 8, 10, 11, 13, 16, 17 and 19, they are not embarrassing or prejudicial to the defendant. Paragraphs 4, 12, 18 are not objected to.

Subject to the above the plaintiff may amend statement of claim if he desires to do so—within five days.

Costs to be costs in the cause. Ten days to file defence.

HON. MR. JUSTICE LENNOX. JANUARY 31ST, 1913.

RE BEAIRD.

4 O. W. N. 720.

Executors and Administrators—Appointment of Receiver—Ex Parte Application—Refusal to Account—Residence out of Jurisdiction.

LENNOX, J., appointed a receiver of the assets of an estate on an *ex parte* application where the executor resided out of the jurisdiction and persistently refused to account.

Review of authorities.

Motion by beneficiary for the appointment of a receiver to the estate of William Beaird, deceased, on account of the alleged refusal of the executor to account and his absence from the jurisdiction.

W. J. Elliott, for the motion.

No one contra.

HON. MR. JUSTICE LENNOX:—I think the beneficiary Annie Regan has made out a case for the appointment of Union Trust Company a receiver in this matter. A receiver will be appointed where the executor has been guilty of misconduct, or has improperly managed the estate, or has been guilty of a breach of duty. *Middleton* v. *Dodswell*, 13 Ves. 266; *Gowthorpe* v. *Gowthorpe*, W. N. 1878, 91; *Evans* v. *Corentry*, 5 D. M. & G. 918.

The time which has elapsed without accounting, and without information and the executor's disregard of the proceedings in the Surrogate Court clearly brings him within these rules and principles.

So, too, a receiver should be appointed where it appears, as it does in this case, to be necessary in order to protect the interests of an infant. Kerr on Receivers, 6th ed., p. 15; and where a sole executor resides beyond the jurisdiction of the Court, *Noad* v. *Backhouse* (1843), 2 Young & Collyer 529; *Westby* v. *Westby*, 2 Coo. C. C. 210, and particularly if the beneficiaries are unable to get an account from the persons left in charge of the estate, *Dickens* v. *Harris*, [1866] W. N. 93, 14 L. T. 98. Here the case is stronger for there is no one left in charge and the executor wholly ignores the Surrogate Court when called upon to account. Generally speaking, however, the order should

not be made *ex parte*, but it may be where the property is in danger. *Rawson* v. *Rawson* (1867), 11 L. T. 595, and upon the ground of absence from the jurisdiction and other causes above stated.

I have not found in the papers filed anything to shew that Albert E. Knox renounced or is dead. Before the order issues there must be an affidavit filed shewing that John Beaird is, and how he became sole executor.

The order shall reserve the right to the executor to make application to be reinstated within twenty days after service upon him of the order.

HON. SIR G. FALCONBRIDGE, C.J.K.B. FEBRUARY 3RD, 1913.

MALONE v. HAMILTON.

4 O. W. N. 755.

Municipal Corporations — Mandamus — Supply of Water to Newly Annexed District—Order Ont. Ry. & Mun. Board—Jurisdiction of Court—6 Edw. VII. c. 31.

FALCONBRIDGE, C.J.K.B., *held*, that the Court had jurisdiction to order water to be supplied to a newly annexed district by a municipal corporation, where the order of the Ontario Ry. and Mun. Board, providing for the annexation, did not impose any obligations upon the corporation.

Waterloo v. *Berlin*, 23 O. W. R. 337, referred to.

Application for a mandamus compelling defendant corporation to supply water to a newly-annexed district, heard at Hamilton.

M. Malone, for the plaintiff.

F. R. Waddell, K.C., for the defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The only question submitted to me for adjudication was whether if plaintiff has any rights in the premises he can invoke the aid of this Court or whether his proper and only remedy is by application to the Ontario Railway and Municipal Board.

I am of the opinion, after review of the Statute, 6 Edw. VII., ch. 31, and of the cases cited that the plaintiff is *rectus in curia* on this point.

The order of the Board of 3rd September, 1908, annexing this section of the township of Barton to the city (3.7) did

not impose any obligation on the city. It simply provided that until the city introduces and has in operation a water supply for the section annexed, the city should not increase the amount of taxes above the rate fixed for 1908, but after water is introduced and ready for supply, properties in annexed section shall be assessed and taxes levied in same manner and at same rates as apply to property owners within original city limits.

Thus, I take it, the Board has never laid hold of the matter, to use the Chancellor's phrase in *Waterloo* v. *Berlin* (1912) 23 O. W. R. 337, so as to be seized of it for purposes of working out details.

There will be judgment for plaintiff on this issue with costs. Thirty days' stay—which is not to apply to the trial of other issues at the Court to be held on the 17th inst.—my intention being that there shall be only one appeal to the Appellate Division.

HON. MR. JUSTICE BRITTON. JANUARY 30TH, 1913.

CHAMBERS.

McDONALD THRESHER CO. v. STEVENSON.

4 O. W. N. 732.

Prohibition—Division Court Jurisdiction—10 Edw. VII. c. 32, s. 77.

BRITTON, J., dismissed motion for prohibition to the 1st D. C. Perth, in an action for the balance due upon a promissory note, payable at Stratford, holding that 10 Edw. VII. c. 32, s. 77, conferred jurisdiction.

Motion by the defendant for prohibition to the First Division Court of the County of Perth.

K. Lennox, for defendant.

R. S. Robertson, for plaintiffs.

HON. MR. JUSTICE BRITTON:—The action was brought to recover a balance of over $100 upon a promissory note made by defendant for $200, with interest at 7 per cent. until note due, and 10 per cent. after maturity until note paid. The note is made payable at the Bank of Montreal, Stratford.

Sec. 77 of ch. 32, 10 Edw. VII. (1910) applies, and the defendant's motion fails.

I reserved my decision supposing that the parties had arrived at an understanding, that if the defendant would produce, for inspection by plaintiffs' solicitor, the note sued upon, and which the defendant says he has paid, he, the plaintiffs' solicitor, would consent to a new trial either at Stratford or at the Division Court for the division where defendant resides. The defendant did produce from his own possession the note sued upon, and it was inspected by the plaintiffs' solicitor, but the plaintiffs' solicitor then said that he was misunderstood—that his consent was only in case the note when produced did not bear a certain number by which, according to affidavits filed, the note could be traced—I accept the solicitor's statement, and, therefore, cannot consider further the affidavits only having regard to costs of this motion.

As the defendant is not entitled to prohibition, I have not the power to order a new trial in the Court below.

The motion will be dismissed without costs.

HON. R. M. MEREDITH, C.J.C.P. JANUARY 30TH, 1913.

GERTZBEIN v. BELL.

4 O. W. N. 715.

Vendor and Purchaser—Specific Performance—Evidence—Interpretation of Agreement.

MEREDITH, C.J.C.P., in an action for specific performance, gave plaintiff the option of specific performance according to defendant's version of the agreement, without costs, or a dismissal of the action, without costs.

Action for specific performance of an agreement for the sale of certain lands.

E. V. O'Sullivan, for plaintiff.

J. Bicknell, K.C., and M. Lockhart Gordon, for defendant.

HON. R. M. MEREDITH, C.J.C.P.:—The plaintiff may have judgment for specific performance of the writing in question according to the defendants' interpretation of it, that is, price $7,000, $2,000 before deed given, with a mortgage for $5,000 payable as provided in the writing, without costs. Otherwise the action will be dismissed without costs.

I am unable to give any credence to the story that the writing was to be subject to changes to suit the defendant, but, on the other hand, it was prepared by the plaintiff, and prepared in such a manner as to leave room for want of understanding by the defendant and her son of the meaning which the plaintiff asserts it was meant to convey; and is, at least, not expressly definite on the important subject of a first mortgage.

I am quite sure that it was never intended by either party that the first mortgage might be such as the plaintiff might choose and be able to put upon the property; nor, on the other hand, that all that should be at the election of the defendant.

Very plainly, payment of the $2,000 before deed, and payment off of the mortgage now on the land, are provided for; the provisions as to a second mortgage for the rest of the purchase money—$5,000—and for the right to create a first mortgage, are by no means so clear.

The case is, therefore, one in which the Court may properly refuse to compel specific performance, whatever the very strict rights of the parties under the words of the agreement might be. See *Bullen* v. *Wilkinson*, 20 O. W. R. 346.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JANUARY 29TH, 1913.

AIKINS v. McGUIRE.

4 O. W. N. 730.

Vendor and Purchaser—Specific Performance—Revocation of Contract—Onus—Evidence.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiff in an action for specific performance of a contract to purchase certain lands, holding that defendant had not satisfied the onus upon him of proving the revocation of the contract which he asserted.

Action for specific performance of an agreement to purchase certain lands, tried at Toronto.

W. M. Douglas, K.C., for plaintiff.

W. N. Ferguson, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Defendant's solicitor asserts and John Percy denies that he (Percy) offered to "call the deal off" and that the solicitor assented to that proposition. Each one has a different recollection of a heated conversation.

The onus is distinctly on defendant to prove the revocation of the contract, and I must hold it to be not proven in fact.

Plaintiff was trustee for and co-owner with John Percy and two others, and even if I had come to a different conclusion on the above question of fact, defendant might have to encounter serious questions of law.

Poucher (another co-owner and *cestui que trust*) swears (and so does John Percy), that he, Poucher, never consented to revoke nor gave John Percy authority to do so.

There will be the usual decree for specific performance with reference to Master as to title, etc., with costs. Thirty days' stay.

MASTER-IN-CHAMBERS. JANUARY 31ST, 1913.

SHEARDOWN v. GOOD.

4 O. W. N. 768.

Pleading—Reply—Effect of Former Order—Withdrawal of Former Reply.

MASTER-IN-CHAMBERS, *held*, that former order herein (23 O. W. R.), gave plaintiff the right to deliver a reply to the amended statement of defence without further order.

On 20th December last plaintiff obtained an order to withdraw his reply and amend statement of claim. This was acted on and defendant delivered an amended statement of defence on 10th January inst. Four days later plaintiff delivered a reply to this statement of defence. Defendant moves now to set this aside as filed too late without an order allowing it to be delivered.

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

C. W. Plaxton, for plaintiff.

CARTWRIGHT, K.C., MASTER:—When the statement of defence was amended, this, in my view, gave a new right to plaintiff to reply thereto if so advised. Even if this was not so the first reply having been withdrawn by leave, no reply was in effect delivered.

Wright v. *Wright*, 13 P. R. 268, shews that such motions are not to be encouraged. That case was on a motion similar to the one now in question. It must, therefore, be dismissed with costs to plaintiff in any event, as was done in that case.

HON. MR. JUSTICE KELLY. JANUARY 31ST, 1913.

RE YEO.

4 O. W. N. 734.

Lunatic—Petition—Dismissal.

Application for an order declaring Wm. Yeo to be of unsound mind, and for the appointment of a committee of his person and estate.

KELLY, J., dismissed petition, with costs.

F. Aylesworth, for applicant.

Wallace, K.C., Woodstock, for Yeo.

HON. MR. JUSTICE KELLY:—A very careful consideration of this matter convinces me that the application should not have been made.

It is, therefore, dismissed with costs.

HON. MR. JUSTICE BRITTON. JANUARY 23RD, 1913.

HOLDEN v. RYAN.

4 O. W. N. 668.

Vendor and Purchaser—Building Restrictions—"One Building"—Contempt of Court—Motion to Commit—Amendment of Plans and Structure—"Front" of Building—Defendant given Benefit of Doubt.

Motion to commit defendant for breach of the injunction herein granted by TEETZEL, J. (22 O. W. R. 767). Since that judgment defendant had altered her plans and placed a permanent doorway in the vertical wall formerly dividing the building.

BRITTON, J., *held*, that the building was no longer two buildings, but one building, and that, therefore, the motion must be dismissed with costs.

Ilford Park Estates Ltd. v. *Jacobs*, [1903] 2 Ch. 522, 526, referred to.

Motion to commit defendant for breach of the injunction granted by the judgment of HON. MR. JUSTICE TEETZEL on the 9th July, 1912, restraining the defendants from proceeding with the erection of a building or buildings on the corner of Palmerston avenue and Harbord street in contravention of certain building restrictions to which that land—owned by the defendant—was liable.

A. C. McMaster, for plaintiff.

J. R. Roaf, for defendant.

HON. MR. JUSTICE BRITTON:—The judgment of Teetzel, J., is (1) that the building then in course of erection contravened the building restrictions; (a) in that the buildings of defendant being erected were two, and that one of these buildings, viz., the western one, has not appurtenant to it land having a frontage on Palmerston avenue of at least 33 feet—and (b) that this building not being a stable or outbuilding being upon the lot which has a frontage upon Harbord street as well as upon Palmerston avenue—not its front on Palmerston avenue—and by that judgment the defendant was restrained from proceeding with the erection of said building, unless and until the said buildings are altered so as to conform with the said building restrictions.

The reasons for the decision of the learned trial Judge are reported in 22 O. W. R. 767.

The defendant apparently accepted the decision and proceeded at once to alter the so-called buildings to make them conform with the restrictions.

The objections in short are that there are two buildings—and if so the western one does not conform to the restrictions—and that even if only one building it does not front upon Palmerston avenue, within the true meaning of and as required by the restrictions.

The fact of there being two buildings, as found by the trial Judge, was so found as then there was the vertical division wall running north and south, extending the whole height of the building, dividing it into two equal divisions . . . "There is no door or other opening in this division wall so that there is no means of access to or from the easterly halves of the building. Each half has its independent entrance facing upon Harbord street." That is now changed—there is a door-way through that vertical wall. It was made in good faith as a permanent door—or passage-way—to be furnished and to remain as part of the structure—with such an opening through a middle wall—called a fire wall—a fire wall required by the city—and in a building with the four enclosing walls, all under one roof, I am not able to say that this building is two buildings within the meaning of the restriction—and if not there is no violation of the injunction in that respect. The case, *Ilford Parks Estate Ltd.* v. *Jacob*,

[1903] 2 Ch. D. 522, relied upon by the learned trial Judge, was decided upon the facts summarized on p. 526 of the report, as follows:—

"Now in this case there is no question of one house being built and then used as two houses. In substance each building constitutes two houses, which are structurally separate in every respect, with separate approaches to the street, and no internal communication. It is quite different from a case where one building is erected containing separate flats. In that case there is internal communication between the flats by means of a common staircase. In the present case there is no internal communication whatever . . . .

Then, upon the best consideration I can give to the plans, and to the affidavit evidence before me, I am of opinion that this building will have its front upon Palmerston avenue.

It will not be as convenient or as imposing a front as perhaps should belong to so large and costly a building, but that is a matter between the plaintiff as owner and her tenants.

A comparatively narrow hall—a dark hall—leading from the street entrance to the stairways, and thence to the apartments does not determine the question of front or main entrance. This is a question between the Harbord street entrance and the Palmerston avenue entrance to the building as it stands as to which shall be called the front entrance, and a consideration of the plans and of the evidence that the front of the building will be on Palmerston avenue, and that the work now in progress is with that in view. The part fronting on Palmerston avenue will be the main entrance. The building is now, whatever the original intentions were, being so erected that the end fronting on Palmerston avenue will be the predominating front of the building—the main entrance end from the outside—to all the apartments.

That there may be a shorter and more convenient way for persons approaching the building from the west, and desiring to enter the western apartments or the westerly end of the easterly apartments, does not affect the question under consideration, nor is it material that the side facing Harbord street has two or more or less doors, or that the southerly side is more architecturally beautiful than the end fronting on Palmerston avenue.

That side of the building is the "frontage" on Harbord street, as the word frontage is used in restriction 3.

If I had any doubt as to the true construction of the meaning of the restriction that doubt should, upon a motion to commit, be resolved in favour of defendant.

The motion should be dismissed and with costs.

HON. MR. JUSTICE BRITTON. JANUARY 24TH, 1913.

PALLANDT v. FLYNN.

4 O. W. N. 681.

Interpleader—Issue Directed—Plaintiff Therein—Security by Claimant—Practice.

BRITTON, J., refused to interfere with the terms of an order of the Master-in-Chambers directing an interpleader issue between a claimant and the execution creditor, on the ground that it was of no moment which party was plaintiff, and the requirement that the claimant in possession should give security, was in accord with the well-established practice.

Appeal by the Canadian Bank of Commerce from an order of the Master-in-Chambers, directing an interpleader issue.

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

J. Jennings, for execution creditor.

R. J. Maclennan, for Sheriff of Toronto.

HON. MR. JUSTICE BRITTON:—The execution debtor was the owner of certain shares of stock in the McIntyre Porcupine Mines Ltd.

The execution creditor directed the sheriff of Toronto to seize and sell this stock.

The Canadian Bank of Commerce claim the stock by assignment or pledge of it by Flynn to the bank in the regular course of banking.

The Master has made an order directing an issue between the execution creditor and the claimants.

The appeal is upon the following grounds:

(1) That there ought not to have been an issue directed as upon the undisputed facts these shares are the property of the bank as against the execution creditor, and it should have been as declared.

(2) That if an issue is to be tried, the execution creditor should be plaintiff in that issue and not the claimants, and

(3) That the bank being in possession should not be required to give security as ordered.

The execution creditor is unquestionably entitled to have her claim tried. It does not appear that there are any facts which should be in dispute, and yet there was no formal admission by counsel for execution creditors of the allegations of claimants.

Con. Rule 1111 would, if the facts are not in dispute, permit me to dispose of the question of law without directing an issue, but I cannot do so upon the material before me. If the parties would consent a special case might be stated for an appellate division. That would be a satisfactory way of determining the matter.

There is practically no difference as to who is plaintiff in the issue. If any difference it is in claimants' favour as having the conduct of the case, the trial need not be delayed.

Upon the argument I had some doubt about the reasonableness of compelling the bank to pay $8,000 into Court or to give security as ordered, but further consideration satisfies me that the Master has followed the usual and settled practice and I should not interfere.

Appeal will be dismissed, costs in the cause in the interpleader proceedings.

MASTER IN CHAMBERS. JANUARY 22ND, 1913.

PHILLIPS v. LAWSON.

4 O. W. N. 679.

Discovery — Further Affidavit on Production — Materiality — Order made.

MASTER-IN-CHAMBERS, upon the facts as disclosed in defendant's examination as to the existence of certain documents not produced, ordered a further and better affidavit on production to be filed.

"The case of the party seeking discovery must be assumed to be true if the materiality of the discovery sought for is questioned."

Motion by plaintiff for further affidavits on production by one or more of defendants.

J. P. McGregor, for plaintiff.

C. A. Moss, for defendants.

CARTWRIGHT, K.C., MASTER:—The facts of this case appear in a previous report in 23 O. W. R. 646. The examination for discovery of one of the defendants and also of defendant Lawson have been since taken. That of the latter has been taken in three divisions, and the last was on 24th December, "adjourned *sine die* to be resumed at a time to be arranged by counsel." This adjournment was because plaintiff's counsel wished to move "to compel answers to the questions refused." This course has not been taken. Instead the plaintiff makes this motion—something new in my experience. It will be sufficient at present to deal with Mr. Lawson's affidavit.

The motion is based on the examination of defendant Lawson, which I have read. The only grounds on which an affidavit on production can be impeached are set out in the judgment in *Ramsay* v. *Toronto Rw. Co.*, 23 O. W. R. 513.

Mr. MacGregor was of opinion that Lawson's examination entitled plaintiff to the production of various documents which are no doubt relevant to the case. The only point for decision at present is whether they or some of them should appear in Lawson's affidavit.

This seems decided by the depositions of Mr. Lawson himself. He admits in answer to question 421 *et seqq.* that in other and contemporaneous transactions he appeared as the purchaser both in the agreements and in the deed, and in some cases he gave mortgages back (qu. 431); also that in some cases he gave his own cheques in payment (qu. 456), having first been furnished with funds for that purpose (qu. 457), though he says he does not know who supplied them. At qu. 476 he was asked why he had not included these cheques at least in his affidavit on production. His counsel answers: "Because they are not relevant." But that position cannot be successfully taken, in my view, when the questions were answered without objection which brought out the facts of their being in existence. This may not be conclusive, but counsel was in other matters prompt to object to what he thought irrelevant.

It would appear from the statement of claim and from the trend of Lawson's examination that plaintiff expects to shew that Lawson was not personally liable, as he says; but that on the contrary he was acting in these other matters as in the one in question, as agent for the undisclosed principal called

the syndicate (see *Blake* v. *Albion*, 4 C. P. D. 94), whoever might be the persons composing it.

After this it seems strange that Lawson's affidavit only mentions 3 letters from plaintiff's solicitors to himself in first schedule, and that second and third schedules are blank.

Without passing on the other affidavits at present I think Lawson should certainly make a further affidavit that the costs of this motion should be to plaintiff in any event.

The principle of discovery is well settled. What is relevant is determined by the rule given in Bray's Digest of Discovery (1904) sec. 6, p. 2 and Bray (1885) p. 18. "The case of the party seeking discovery must be assumed to be true" if the materiality of the discovery sought for is questioned, "otherwise a party might shut out his opponent from discovery" essential to support his case by simply denying that case."

The agreement out of which this action arose is said by Mr. Lawson in his first examination on 5th November last at qu. 4 to have been signed in his name, "to which I had no objection"—and to have been brought to him as would naturally be done—*prima facie* it belonged to him. On the principles regulating discovery and those which justify an order for a further affidavit by a litigant, I think it certain that this document should have been mentioned in some part of Mr. Lawson's affidavit on production which was filed on 16th December last. And that this omission of itself in his affidavit (and perhaps the same objection could be taken to the other affidavits) is a sufficient ground for the present order. The defendant will be wise to exercise care in framing the further affidavit to avoid the necessity of a renewal of the motion.

MASTER IN CHAMBERS. JANUARY 23RD, 1913.

WILSON v. SUBURBAN ESTATE COMPANY.

4 O. W. N. 679.

Discovery—Examination as to Conversations — General Questions—Relevancy.

MASTER-IN-CHAMBERS, *held*, that where an action was brought in respect of verbal misrepresentations alleged to have been made to plaintiff, defendant was entitled to enquire on plaintiff's examination for discovery as to the substance of the whole conversation, and was not bound to confine his examination wholly to the alleged misrepresentations.

Motion to have plaintiff attend for further examination for discovery.

J. Grayson Smith, for motion.

J. P. MacGregor, contra.

CARTWRIGHT, K.C., MASTER:—The action is to recover $590 as damages for the false representations made by defendants and their agents whereby plaintiffs, a brother and sister, were induced to pay $550 for two lots, 30 and 31, in Bay View Heights, town of Port McNichol, on 7th December, 1911.

The examination for discovery of Mr. Wilson took place on 16th inst. His counsel appears to have been suspicious of an attempt by the adversary to ask improper questions. As soon almost as the issue between the parties was touched the following was the course of the examination. Mr. Boulton had been stated by plaintiff to have been the agent of defendants, through whom the purchase was made.

"20. Q. When did the matter of the purchase first come up between you and Mr. Boulton? A. A few days previous to the day that we signed the agreement for purchase.

21. Q. How did it come up? A. He came to our office and said that he had a splendid investment to offer us."

At this point one is surprised to read the following:

"Mr. Macgregor. I here take the objection that my learned friend cannot ask for the general conversation that passed between them. He must enquire as to the representations that were made with reference to this property.

"Q. 22. What do you mean by us? A. This was addressed to myself personally at that time. 'Us' came in later.

Q. 23. What else did he say? A. I asked him what the investment was, and he told me that it was in Port McNicol, and he went on to describe the great work that was being done up there.

Q. 24. What did he say?

Mr. MacGregor—I again take the objection and advise the witness that he need not answer the question put in that shape. The witness offers to tell defendants' counsel now what representations were made to him by the defendants' agents and by the defendants themselves upon which he acted. But I object to the question put in this general form."

Thereupon the examination was adjourned *sine die* for the purposes of this motion.

On the argument Mr. MacGregor stated he thought plaintiff (1) could not be obliged to disclose his evidence, nor (2) examined in such a way as to lay the foundation for impeaching his credibility at the trial.

He cited Bray p. 445 *et seqq.* and *Coyle* v. *Coyle*, 19 P. R. 97. I have read these authorities but do not think they bear the interpretation sought to be given them.

Q. 24 was not improper in any sense. The exact words spoken at any time are not usually important to define except in an action for slander for reasons well understood.

Here the question would have been sufficiently answered by saying: "I do not recall the exact words spoken." Indeed seeing that plaintiff was being examined on a conversation that took place more than 14 months ago it might throw doubt on his candour or veracity if he assumed to repeat the exact words used by defendants' agent.

That would be for him to consider in answering the question, but I think some answer should be given and that he should speak on this to the best of his "recollection." That is all he can be asked to give—with that the examiner must be satisfied.

The plaintiff must attend again at his own expense for examination if required, and the costs of this motion and of the abortive examination will be to defendants in any event.

The examination of defendants will stand until plaintiff's examination has been concluded.

MASTER IN CHAMBERS. JANUARY 23RD, 1913.

SCULLY v. ONTARIO JOCKEY CLUB.

4 O. W. N. 678.

Costs—Security for—Con. Rule 1198 (d)—Former Action—Unpaid Costs—Identity of Claims—Only one Defendant in Common—Rule not Applicable.

MASTER-IN-CHAMBERS dismissed motion for security for costs under Con. Rule 1198 (*d*), by defendant Hendrie, on the ground that plaintiff had brought a similar action "for the same cause" against himself and three other defendants, which had been dismissed, and of which the costs had not been paid, holding that the claims in the two actions were, in fact, different, and, obviously, the parties were not the same.

Lucas v. *Cruikshank*, 13 P. R. 31, and *Bynnter* v. *Dunne*, 10 Ir. L. R. Com. Law, 380, referred to.

Motion under C. R. 1198 (d) for security for costs.

C. F. Ritchie, for motion.

J. P. MacGregor, contra.

CARTWRIGHT, K.C., MASTER:—In this action the Ontario Jockey Club (Limited), Joseph E. Seagram and E. D. Duhaine and George M. Hendrie are defendants.

The motion is made on behalf of Mr. Hendrie only, on the ground that so far as he is concerned this is "for the same cause" as an action by the same plaintiff against J. M. Madigan, George M. Hendrie, J. F. Monck and W. P. Fraser, which has been dismissed, and of which the costs have admittedly not been paid. The wrongs complained of in this latter action took place on 12th August, 1911. Those of which the plaintiff now complains occurred on 23rd September, 1912.

These facts, together with the fact that Mr. Hendrie is the only defendant common to both actions, shew *prima facie* that Rule 1198 (d) cannot apply.

In the first action Hendrie is described as president of the Windsor Driving Park Association, and is charged with having conspired with his co-defendants to exclude plaintiff from every race track in Canada over which they had any control. In the second action Hendrie is said to be the executive head of the Canadian Racing Association and president of the Windsor Company. The charge now is that the defendants in this second action are trying to get a monopoly

of race track gambling, and to this end claim unlawfully the right to exclude from all race meetings such persons as the plaintiff, who they think would, in some way, interfere with this monopoly.

In each instance a declaration is asked that such exclusion is unlawful, as well as damages. Though the parties are obviously different, the strictness of proof of the identity of the claim in a second action to give effect to C. R. 1198 (d) is shewn by the case of *Lucas* v. *Cruickshank*, 13 P. R. 31.

Mr. Ritchie was unable to point out any case in which a motion like the present had been successfully made by a defendant who has been joined with three other different defendants in two actions.

The only case that looks that way at all is that of *Bynnter* v. *Dunne* (1883), 10 I. R. L. C. L. 380 (which I had some difficulty in finding) which was between a single plaintiff and defendant. There, however, the motion was refused. At p. 383 it is said, "Where judgment has been given for the defendant an application similar to the defendants' here has (never) been granted. The defendant could plead the judgment recovered in bar of the new action so far as the causes of action are the same. We cannot undertake to decide on motion whether these causes of action are or are not the same. We must leave it to the proper tribunal to decide this question. There is a good deal in both statements of claim which is confessedly the same, but there is something further than was relied on in the first action in any of its paragraphs." The Court made the costs to defendant in the cause, but refused the motion for security.

While this case was decided under the former practice the reasoning seems still cogent.

In *May* v. *Werden*, 17 P. R. 530, the whole question was as to the validity of a document purporting to be a will. There too the order was made in the inherent jurisdiction of the Court (see at p. 332) to grant a stay where the cause of action is substantially the same. But that power is not given to the Master-in-Chambers. The motion will be dismissed with costs to plaintiff in the cause, without prejudice, however, to any application to the Court as in *McCabe* v. *Bank of Ireland*, 14 App. Cas. at p. 415, cited on p. 532, *supra*, which defendant may see fit to make.

HON. MR. JUSTICE KELLY. JANUARY 23RD, 1913.

LOVELAND v. McNAIRNEY.

4 O. W. N. 680.

Injunction—Receiver—Endorsement on Writ—Amendment of.

Motion for an injunction and a receiver and for leave to amend the endorsement on the writ of summons.

J. T. White, for the plaintiff.

R. McKay, for the defendant.

HON. MR. JUSTICE KELLY:—On the merits the plaintiffs are not, in my judgment, entitled to a receiver or an injunction, and their application fails.

In this view of the matter I see no reason for amending the endorsement on the writ of summons.

The motion will be dismissed with costs.

DIVISIONAL COURT.

DECEMBER 16TH, 1912.

POWELL-REES LIMITED v. ANGLO-CANADIAN MORTGAGE CORPORATION.

4 O. W. N. 499.

Contempt of Court—Motion to Commit—Refusal to Answer Questions on Examination—Order of Divisional Court—Scope of—Con. Rules 902, 910 — Officer of Corporation — Provisional Director.

Motion for an order committing one Reynolds, by reason of his alleged disobedience of an order of Divisional Court herein (see 26 O. L. R. 490), in refusing to answer certain questions put to him on his examination ordered by the said order.

Reynolds contended that the order should be given a very strict construction, as he claimed it was made under Con. Rule 910.

SUTHERLAND, J., *held*, 23 O. W. R. 456; 4 O. W. N. 352, that under the order of the Divisional Court, Reynolds could be examined as fully as if an officer of the company, and directed him to attend at his own expense and answer such questions as should be put to him.

DIVISIONAL COURT amended a previous order of Divisional Court so as to allow above examination.

An appeal by E. R. Reynolds from above order of HON. MR. JUSTICE SUTHERLAND, heard in Divisional Court by HON. SIR JOHN BOYD, HON MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

E. R. Reynolds, in person.

M. C. Cameron, for the plaintiffs.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR JOHN BOYD, C. (V.V.):—We think a declaration should be made that the order of the Divisional Court of September 23rd, 1912, should have been framed to provide that E. R. Reynolds was an officer of the defendant company, and, as such, can be examined, and that on such examination he make full discovery and production of documents, said order to be amended *nunc pro tunc*. There shall be no costs of the motion before Hon. Mr. Justice Sutherland, nor of this appeal.

HON. MR. JUSTICE SUTHERLAND. NOVEMBER 15TH, 1912.

CHAMBERS.

CAMPBELL v. VERRAL.

GIBSON v. VERRAL.

4 O. W. N. 355.

Action—Motion to Stay—Judgment Outstanding in Former Action—Res Judicata—Parties—Costs—Leave to Appeal Refused.

Motion by defendant to stay actions until a former judgment, recovered by plaintiff upon the same cause of action against Taxicabs Verrals Ltd., was got rid of in some way. After recovery of the judgments in the former action, it was discovered that defendant company, while incorporated, had no assets, and this action was then launched against George W. Verral, trading as the Taxicabs Verral Company.

RIDDELL, J., 23 O. W. R. 363; 4 O. W. N. 300, dismissed motion, costs to plaintiff in any event of cause.

SUTHERLAND, J., refused leave to appeal.

J. M. Godfrey, for the defendants, moved for leave to appeal.

John MacGregor, for the plaintiffs, contra.

HON. MR. JUSTICE SUTHERLAND. JANUARY 24TH, 1913.

MARTIN v. MIDDLESEX COUNTY.

4 O. W. N. 682.

Water and Watercourses—Improvement of Highway—Closing of Cove—Injury to Plaintiff's Land by Flooding—Defective Work—Action—Arbitration—Amount of Damages.

SUTHERLAND, J., gave judgment for plaintiff for $700 and costs, in an action against a municipal corporation for damages to plaintiff's lands, by reason of the closing up of a natural watercourse and the neglect to provide sufficient other means for the escape of the water in the spring freshets, whereby plaintiff's lands were overflowed and seriously injured.

Action for damage to plaintiff's lands caused by defendants' negligence.

P. H. Bartlett, for the plaintiff.

J. C. Elliott and W. D. Moss, for the defendants.

HON. MR. JUSTICE SUTHERLAND:—Under and in pursuance of 7 Edw. VII. ch. 16, "An Act for the Improvement of Public Highways," the municipal corporation of the county of Middlesex passed a by-law No. 601, dated the 6th December, 1907, under which they designated certain roads as those to be assumed as of April 1st, 1908, and improved in that county, and amongst others, "the highway known as the 5th concession of the township of London." No other by-law as to the work in question was passed.

The plaintiff is the owner of the north-east part of lot No. 1 in the 4th concession of the said township, containing 50 acres, lying to the south of said road.

In and prior to the year 1907 there had been a wooden bridge spanning the river Thames in the line of the said highway or road, at a point a little west of the westerly line of the plaintiff's land. The road, up to that time, was apparently not a very good one, and was simply raised a little above the level of the lands on either side thereof which were low-lying as they approached the east end of the bridge.

On the north side of the road and opposite the westerly portion of the plaintiff's land there was a considerable tract of such low-lying land, through which a couple of water courses had been formed by the waters of the river when they overflowed its banks in spring freshets, and which commenced near the easterly bank of the river, some distance north of the

road, and extended in a south-easterly direction towards it deepening just as they approached it.

Before 1907, at times of freshet, the waters running through and along these water-courses broke away the road at a point in front of the plaintiff's land and a little to the east of the westerly line thereof and formed a well-defined channel, or cove, as it is called, extending from the road southerly to the river Thames, which turns easterly and slightly southerly from the point where the bridge crosses it. To the east of the flat lands already mentioned the land is somewhat higher.

Before the road and bridge were taken over and assumed by the county, it appears that when freshets occurred, as they did from time to time, and the road was thus pierced and broken away by the water, the practice was to simply repair it again until the next high water took it away.

About the time the county took over the road the wooden bridge, which was one of the three spans of 72 feet each, or in all 216 feet, had been partly carried away by a spring flood. A breach had also been made in the road as the waters made their way into the cove and thence to the river.

In the year 1908 the council passed a resolution authorizing one Talbot, who had been the engineer of the county since the year 1901, and though not a college graduate, had had considerable experience in such work, to prepare plans for the construction of a new bridge. He investigated the conditions, came to the conclusion that in order to preserve the new bridge, when constructed, it would be desirable to close up the cove, and so reported to the council. He was directed to and did prepare plans which were submitted to the council and approved of by it.

Tenders were asked for the work and dealt with at the June session of the council in that year. A committee was appointed in connection with the improvements and the grading of the road, which was part of the recommended scheme.

Talbot, in his evidence, says that the plaintiff intimated that if the cove were to be closed the grade of the road must be raised. It seems that it then became apparent that a larger amount would be required to be expended in the contemplated work than was at first thought necessary and arranged for, and the matter was left over until the year 1909.

Talbot, after further investigation and consideration, came to the conclusion that there should be a bridge with two spans of 120 feet each (240 feet in all), thus providing 24 feet of

additional width, and that the road should be raised from the easterly end of the bridge to a point at the easterly side of the plaintiff's land where the land commences to rise to a hill. The plan provided that the road should be raised to a uniform height, except just opposite the cove, where it should be made 15 inches higher to allow for possible settlement there.

Talbot recommended this plan to the council in the year 1909, which considered and accepted it and the work was thereupon done in that year. He testified that it was well done, and when completed was as good a job as he ever saw.

I think it is apparent that the council sought Talbot's advice as an expert on a matter of technical knowledge and accepted and acted on it in good faith throughout. Indeed, their good faith is not, as I understand it, called in question.

It is said that the river Thames is a stream that was known to be turbulent in the spring and liable to freshets, some of which had been severe. As completed in the year 1909, the bridge and road stood during the seasons of 1910 and 1911, and though the waters were high the additional width provided in the new bridge apparently afforded a sufficient outlet under it for the waters which came down during these seasons without affecting the new road at the point opposite the cove where it had been previously washed away, or elsewhere.

In the spring of 1912 a very severe freshet occurred with the result that the water rose very rapidly and very high. It washed out and broke through the road at several points, two of them east of the cove. The plaintiff's land had previously at times when freshets occurred been covered for short periods with water coming through the cove, but these waters soon ran off the land and had apparently carried with them no sediment or deposit of an injurious character. At all events he did not suffer or complain of injury. The freshet of 1912, it is alleged, was of a different character or at all events produced different results. The plaintiff says that by it portions of the best part of his land were torn up and washed out and quantities of sand and gravel deposited on other parts, with the result that from five to ten acres were injured or destroyed for purposes of cultivation.

He alleges that in raising the road to the height they did the defendants filled up and closed the said cove or water course and prevented the waters of the river Thames, during

the spring flood of 1912, from passing along that course, which was their natural course, and caused them to be penned back, with the result that they were diverted from such natural course and caused to break through the road at the other points mentioned and flood and damage his lands. It is his contention that he was entitled to the benefit and protection of the waters flowing along that natural course, and that the defendants could interfere with it only at the peril of answering in damages in case he suffered any in consequence of their so doing.

He alleges that it was their duty to carry the road to such a height that it would effectually hold back the waters of the Thames from overflowing his lands and have provided another and sufficient way of escape for the said waters so as that they would not injure him, or should have provided, at the cove, a relief bridge to assist the other bridge at freshet times in carrying off the waters so as to prevent injury to him, or otherwise have left the cove as it was, so that it would carry off in the natural way the waters, as had previously been the case.

He also alleges that the work done by the defendants was faulty in two respects; first, that the road as constructed was not high enough towards the east end thereof. I think, and find, that this was a fact. It was at points between the cove and the hill to the east that two of the breaks occurred through which the waters passed upon the lands of the plaintiff and injured him. If the road had been as high and as strong at these points, one would expect it to have stood the pressure of the water as well as at any other point. In fact, better, because near the cove the weight of the waters coming down towards the roads at that point along the water courses would have been felt the most, rather than farther east.

The evidence of one Ure, an engineer called by the plaintiff, was to the effect that the easterly portion of the road was lower than at the cove and that on the contrary it should have been higher, so that if there had been an overflow it would be near the cove and thus less calculated to damage and injure the plaintiff.

Second, that in the elevation of the road the defendants had taken out earth from the north side thereof and formed a ditch leading from a point at the cove easterly to the hill.

The evidence of Ure was also to the effect that as thus constructed there would be a tendency when the water came

down towards the cove for it to be drawn along the ditch on the north side of the road. I think this is just what occurred.

I am of opinion that it was this ditch which led the water to the east and caused the two breaks made in the road between the cove and the hill through which the water came which caused the damage to the plaintiff.

Experts were called on both sides. Those who testified for the defendants stated that the scheme provided by the defendants was a reasonable and proper one. It is quite apparent, I think, from the evidence, and I find that no such severe freshet as occurred that spring had happened for fifty or sixty years before 1912, if any such ever occurred before.

I think it plain also that the engineer and the members of the defendants' council could not reasonably have anticipated, in the light of what had previously occurred. such a severe freshet.

In addition to calling Talbot the defendants called three other engineers, the last one being Alexander Baird. When he was called objection was taken, on the part of the plaintiff, to the admission of his evidence on the ground that the defendants had already called three engineers. It was argued for the defendants that Talbot had been called by them merely to give evidence as to the facts and not to give opinion evidence as to the merits of the scheme.

I was disposed to think that his examination in chief had only gone as far as contended for by the defendants, but a more careful perusal and consideration of his evidence leads me to a different conclusion. I have, therefore, in the consideration of the case, eliminated the evidence of Baird, which I admitted at the trial, subject to the objection of the plaintiff. This is perhaps of no real consequence if I am right in the view I am taking.

The surveyor Ure also testified that he would have provided a relief bridge, so that at times of freshet it might assist the main bridge. It is true that elsewhere he said it was simply a matter of opinion whether it was better to add to the width of the bridge or build a relief bridge at the cove. He also said it was difficult to know how best to control the water in a stream like the Thames. His opinion on the whole was "that taking the general locus a sufficient waterway had not been provided by the defendants." With due respect to the opinions of the other engineers who testified I have come to the same conclusion.

I think the work of construction was defective in the two ways already indicated, namely, that the road was not carried to a sufficient height east of the cove and that the ditch on the north side should not have been left as it was. No doubt it was a somewhat difficult case for the council to deal with. The plaintiff, however, had had the benefit and protection of the natural water course to carry off the waters which would otherwise have damaged him at times of freshet.

The defendants undertook to close up the cove through which these waters naturally ran. They were required under these circumstances to take the very greatest precaution. While the course they followed appeared to be a reasonable one and was no doubt undertaken in good faith, it nevertheless was, I think, and find, defective, and the injury the plaintiff sustained flowed from these defects.

It was contended also that the remedy of the plaintiff, if any, was by arbitration. I am unable to agree with this view, but think the proper course for him to take was the one he has taken, namely, by action. Reference to *McGarvey* v. *Town of Strathroy*, 10 A. R. 631; *Arthur* v. *Grand Trunk R.W. Co.*, 22 A. R. p. 89; *Derinzy* v. *Ottawa*, 15 A. R. 712.

A considerable amount of evidence was given as to the damages which the plaintiff suffered in consequence of the freshet. Upon the whole I think that the sum of $700 would fairly cover such damages, and I fix the same at that amount.

The plaintiff will also have his costs of action.

DIVISIONAL COURT.

DECEMBER 17TH, 1912.

RICKART v. BRITTON MFG. CO.

4 O. W. N. 499.

Action — Motion to Stay — Non-payment of Interlocutory Costs — Vexatious Proceedings — Principle Involved.

RIDDELL, J., 23 O. W. R. 814; 4 O. W. N. 258, on the application by defendants, stayed the action until payment of the costs of two interlocutory motions as ordered, holding that the motions had been of a vexatious character.

An action may be stayed in the discretion of the Court for non-payment of interlocutory costs, where the action is vexatious, or where plaintiff, in the course of it, acts vexatiously towards defendant.

Re Wickham, 35 Ch. D. 272;
Graham v. *Sutton*, [1897] 2 Ch. 367;
Stewart v. *Sullivan*, 11 P. R. 529, and
Wright v. *Wright*, 12 P. R. 42, referred to.

DIVISIONAL COURT affirmed above judgment.

An appeal by the plaintiff from an order of HON. MR. JUSTICE RIDDELL, 23 O. W. R. 814; 4 O. W. N. 258.

The Appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE MIDDLETON.

J. G. O'Donoghue, for the plaintiffs, appellants.

C. G. Jarvis, for the defendants, respondents.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR JOHN BOYD, C. (V.V.):—We cannot disturb the order appealed from. I would put this decision on the ground that there is jurisdiction in the Court to stay proceedings in default of payment of interlocutory costs, especially if the action is vexatious, or if the plaintiff, in the course of it, acts vexatiously towards the defendant. The learned Judge appealed from has exercised this discretion, holding that the plaintiffs, in the course of the action, acted vexatiously towards the defendant, and thus imposed the payment of the prior costs as a test of the *bona fides* of the litigation. The judgment will be affirmed, with costs.