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RIDDELL, J. JULY 8TH, 1907.

CHAMBERS.

RE BUCHANAN v. BROWN.

Costs—Motion for Prohibition—Division Court—Territorial Jurisdiction—Cause of Action, where Arising—Action for Price of Goods Sold—Plaintiff Consenting to Transfer of Action after Motion for Prohibition Launched.

Motion by defendant Brown for the costs of a motion made by him for prohibition to the 5th Division Court in the county of Oxford, in the circumstances stated in the judgment.

W. C. MacKay, for defendant Brown.

C. A. Moss, for plaintiff.

RIDDELL, J.:—Defendant Brown lives in Seaforth, in the county of Huron. Plaintiff resides and carries on business as a firm and under a firm name at Ingersoll, in the county of Oxford. On 20th February, 1907, a summons was issued at the instance of plaintiff against defendant from the 5th Division Court in the county of Oxford for $18.30, the balance of an account for goods supplied and interest on such balance. It was served upon defendant in Seaforth, and he filed a dispute note, disputing not only the claim but also the jurisdiction of the Court. He alleges that a member of plaintiff's firm shortly afterwards saw him in Seaforth, and, endeavouring to arrange a settlement, said that the action would have to be tried in Seaforth, but that

plaintiff's firm wished to save the necessity of coming to Seaforth, and so would like to arrange a settlement. Mitchell Thomas Buchanan makes an affidavit and says that "there is no member of plaintiff's firm other than myself, and neither I nor any agent of mine had any authority to do what is stated in said paragraph to have taken place or to decide what Court had jurisdiction to try this case." I confess my inability to understand this.

However that may be, a letter is written to the clerk of the Oxford Court by defendant's solicitor, from Seaforth, a few days after the alleged interview, in which he says that plaintiff's agent had been in Seaforth during the week, and admitted to defendant that the Oxford Court had no jurisdiction, and that the case must be transferred to Seaforth. He adds: "The defendant resides here, the transaction took place here, and under no circumstances could your Court have jurisdiction. Bring this letter to the attention of the Judge, and see that the case is transferred here. In view of plaintiff's agent's admission, I did not think it wise to send a witness down to attend Court. I will depend on you to have this attended to."

At the first sitting of the Oxford Court the Judge of the County Court was not present, and the solicitor for plaintiff was acting Judge, and, as the clerk writes defendant's solicitor, he "only tried cases he was not interested in himself. I shewed the acting Judge your letter."

At the next sitting of the Oxford Court defendant did not attend, but the matter was gone on with in his absence, and judgment given for plaintiff for $15.70 and $3.46 costs, although the clerk says, "I shewed your letter . . . to the Judge."

Defendant's solicitor, upon being notified by the clerk of what had been done, at once wrote to plaintiff, reciting the first letter he had written to the clerk of the Oxford Court, and notifying plaintiff "unless you at once notify me that you are willing to have said judgment vacated and the action properly transferred to the 2nd Division Court, county of Huron," a motion would be made for prohibition. Thereupon plaintiff writes . . . and asserts his right and his intention to enforce the judgment. The letter was written on 6th April. On 15th April notice of motion for prohibition was served upon the Judge of the County Court of Oxford, returnable 19th April. On 16th April . . . plaintiff made an affidavit saying that he is informed and

believes that defendant intends to move for prohibition; that "I do not care to incur any risk or question of costs, and, as defendant desires that the case should be transferred to the 2nd Division Court of the county of Huron, I am willing that the judgment entered herein should be set aside, and an order made transferring the suit to the 2nd Division Court of the county of Huron." An order was made, upon the application of plaintiff, setting aside the judgment and transferring accordingly. So much appears upon the material filed. . . .

Correspondence took place between the solicitors for the parties as to the costs, and, at the suggestion of plaintiff's solicitor, defendant's solicitor also wrote plaintiff. This came to nothing . . . and so at last a notice of motion was served 21st June, 1907, that plaintiff should pay the costs of the proceedings taken for prohibition. . . .

Defendant is entitled to these costs if prohibition would have been ordered, and certainly there is nothing in the conduct of plaintiff—act or word—which entitles him to the slightest consideration.

Defendant admittedly resides at Seaforth, and he swears that "the transactions in question in said action were arranged at the said town of Seaforth or by correspondence, and during none of the dealings was I at any time within the territory of the said 5th Division Court of the county of Oxford."

Plaintiff. . . swears: "It is entirely untrue . . . that any of the transactions in question in this suit were arranged at the said town of Seaforth. The whole of the goods sued for . . . were sold to defendant on orders received by me therefor at the said town of Ingersoll, where my place of business is, and in no other way; and payments therefor were all to be made at Ingersoll, where the goods were shipped from to defendant, and were so made."

An enlargement was had at the instance of defendant that he might, if so advised, cross-examine Buchanan upon his affidavit. He has not done so. I presume, then, that plaintiff and defendant agree as to the facts, and that defendant was rather swearing to what he considered the legal result of these facts. At all events for the purpose of this motion, I must accept plaintiff's statements. But he cannot complain if the affidavit which he makes to meet the case of defendant is taken strictly. . . .

[Reference to In re Doolittle v. Electrical Maintenance and Construction Co., 3 O. L. R. 460, 1 O. W. R. 202; Taylor v. Reid, 8 O. W. R. 623, 763.]

Taking plaintiff's affidavit, he does not pretend that the goods became the goods of defendant at Ingersoll, or that the goods need not be received by defendant before liability attaches to defendant for the price. Prima facie, delivery of the goods must be made at the time or before the money the price thereof is payable, and I see nothing to indicate that defendant here could not traverse the delivery to him. Such delivery would, of course, in the absence of some special agreement such as is not indicated here, be outside of the jurisdiction of the Oxford Court.

The case is not like Re Noble v. Cline, 18 O. R. 33. . . .

The action should, therefore, not have been brought in that Court, and plaintiff will pay the costs.

JULY 11TH, 1907.

DIVISIONAL COURT.

HOUSE v. BROWN.

Contract—Sale of Goods—Provisions as to Payment of Price—Deferred Payments to be Agreed upon Subsequently—Incomplete Contract—Vendor not Entitled to Enforce—Purchaser Taking Possession of Goods to Test and Returning Same—Dismissal of Action—Costs.

Appeal by defendant from judgment of MORGAN, Jun. J. of County Court of York, in favour of plaintiff for the recovery of $145, the price of a "House cold tire setter," awarded as damages for breach of contract to purchase the same.

F. M. Field, Cobourg, for defendant.

F. E. Hodgins, K. C., for plaintiff.

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

ANGLIN, J.:—The contract between the parties bearing date 7th April, 1906, is in the following terms:

"ORDER.

"(Cobourg, Ont.), April 7th, 1906.

"Julius F. House, Toronto, Ont.

"Sir:—I hereby purchase from you one No. one House cold tire setter, which please ship to me at Cobourg, county of . . . . on or about . . . . 190.. for which . . . agree to pay you $145 . . . f. o. b. Toronto, Ont., as follows: Cash, $45 . . . and I agree to execute notes as follows:

One Note for $..... due .....190..
" " $..... " .....190..
" " $..... " .....190..
" " $..... " .....190..
" " $..... " .....190..
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" " $..... " .....190..

"Said settlement to be made as soon as I have had sufficient time after the arrival of the machine at destination herein mentioned, to see that it is in proper working order, or your representative calls to instruct me how to operate it; should the machine be found to be defective in either case, I agree to notify you immediately and to take said settlement as soon thereafter as it is repaired or replaced with a good one.

"The title to this machine to remain in Julius F. House until above notes are paid. Said notes to bear no interest from . . . . and each of said notes shall be a lien upon said machine until paid.

"I give this order with the understanding that you are to ship me this machine subject to your printed warranty, providing I operate it according to your printed instructions, which I hereby agree to do, and if on receipt of this machine I am not able to do the work claimed for it, I will not return it, but immediately apply to you for instructions necessary to operate it, and in the event we cannot agree as to the machine being capable of doing what you claim for it, I hereby agree to abide by the decision of disinterested arbitrators selected in the usual way.

"I hereby acknowledge a copy of this order at this date.

"Witness E. O. Geo. M. Brown.

"All orders taken subject to the approval of Julius F. House."

The agent of the vendor communicated to the defendant a circular which contained the following clause: "The price of House cold tire setter No. 1 is $145, c. o. b. cars Toronto, Canada; $40 cash; balance in payments as may be agreed on; and a discount of $10 will be allowed for full cash settlement within 10 days after receipt of machine."

By the evidence taken at the trial it was shewn that the dates of the deferred payments were to be agreed upon subsequently by the parties, and a letter of 10th April, 1906, from plaintiff to defendant contained this sentence: "I note that you have left the date of your deferred payments to be decided upon when my agent calls on you again." In a letter of 8th May, 1906, to defendant, plaintiff again refers to the fact that "the times and amounts" of the deferred payments are still to be settled.

The machine was shipped to defendant about the middle of April, and was taken by him from the Grand Trunk station at Cobourg. He tested the machine, and on 10th May decided to return it, writing on that date a letter intended for plaintiff, but which, however, did not reach him until 22nd May. In this he states that he has shipped the tire setter back to the vendor, and intends to cancel his order, upon the ground that the machine would not perform the work required of it. The present action was begun on 19th July, plaintiff claiming to recover the price of the machine sold to defendant, or, in the alternative, damages for breach of contract to accept and pay for the same.

For the appellant it was urged that the evidence shewed a parol collateral agreement that there should be no contract between the parties unless the machine was approved of after test by defendant; that the machine delivered was not that which was ordered; and that there was no evidence to warrant a finding that the machine had been accepted by defendant.

We expressed our opinion in the course of the argument that upon none of these grounds could the appellant succeed. Counsel for the respondent was heard only upon the question whether, in view of the fact that the dates and amounts of the deferred payments were to be the subject of further agreement between the parties, there was a binding contract of sale for breach of which the plaintiff would be entitled to damages.

It is well settled law that to render a contract of sale complete there must be a price ascertained or ascertainable:

Logan v. Le Mesurier, 6 Moo. P. C. 116, 132. Where the agreement makes no reference to price, the law will infer a contract for a reasonable price, which can be ascertained by a jury. Where the parties agree to sell for a reasonable price without more, such reasonable price may be ascertained in like manner. But it is otherwise where the agreement specifies a particular mode of ascertaining the price. The Court cannot, in that case, compel the parties to submit to any other mode of ascertainment; and where the mode of ascertainment provided for is the future agreement of the parties, an essential element of the contract of sale is left open, and there is no completed contract which can be enforced: Milnes v. Gery, 14 Ves. 400. . . .

[Reference to Wittkowsky v. Wasson, 71 N. C. 451, 456; Benjamin on Sales, p. 69; Clarke v. Westroppe, 18 C. B. 765; Devane v. Fennell, 2 Ired. 36.]

I am unable to see any real distinction between an agreement which leaves the price to be fixed by future negotiations between the parties and an agreement which names the price, but, providing for deferred payments, relegates to future negotiations the determination of the times and amounts of such deferred payments. It will be noticed that in the memorandum of 7th April above quoted, it is provided that the deferred payments shall not bear interest. Were they to bear interest, the length of the periods within which they should be made might be of great importance to both vendor and purchaser; but with a provision excluding interest the importance of this undetermined element is much increased.

That the want of a definite provision in a contract fixing the amounts and dates of payment of deferred instalments of purchase money renders a contract incomplete and unenforceable, where it is contemplated that these matters shall be the subject of further negotiations and future settlement between the parties themselves, is well established: Hussey v. Horne-Payne, 4 App. Cas. 311; Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. 616; Queen's College v. Jayne, 10 O. L. R. 319, 5 O. W. R. 666.

In all these cases the Court had to deal with contracts made by correspondence, and proceeded upon the rule that the whole of that which has passed between the parties must be taken into consideration in determining whether or not

there is a completed contract and what the contract is. But it was because the consideration of the entire correspondence made it manifest that, although the price was fixed, the amounts of the deferred payments and the dates at which the same should become payable were left to be subsequently agreed upon by the parties, that it was held that there was, in fact, no completed agreement between them.

I can see no distinction in principle between such cases and the present, where the memorandum of the contract itself shews upon its face that the amounts and due dates of the deferred payments were left to be settled by future negotiations, and the subsequent letters of the vendor (plaintiff) shew that this was his understanding of the situation.

McGibbon v. Charlton, decided in the Court of Appeal for Ontario on 24th December, 1902, and not reported (noted 1 O. W. R. 828), is a decision to the like effect. In that case the price was ascertained, but the agreement, as found, provided that payment should be made within 90 days from shipment, or, if the purchasers desired more than 90 days for part, interest was to be paid on such part after the 90 days. Maclennan, J.A., in delivering the judgment of the Court, pointed out that it was left uncertain whether credit was to be given for 90 per cent. or 10 per cent. of the purchase money, and equally uncertain whether the period of credit should be short or long, and for these reasons the contract was held to be incomplete and unenforceable.

In Wardell v. Williams, 62 Mich. 50, a contract for the sale of a farm at a fixed price provided that a portion of the purchase money should be paid by the giving of a mortgage. The agreement further stated that the farm had been subdivided into lots; that the parties were to agree to the valuation of each lot; and that the purchaser should be entitled, upon payment of the amount so fixed as the value of each lot, to the discharge of any lot the value of which he paid. The Court held that this contract was incomplete and unenforceable, in the absence of an agreement as to the value of the several lots. Again in Gates v. Nelles, 52 Mich. 444, a contract for the sale of an interest in a business at a fixed price contained a provision that the purchaser should give "sufficient security for the payment of an indebtedness of the business and of the purchase price." This was held to

be an incomplete and unenforceable agreement, because it contemplated further negotiations and agreement as to the sufficiency of the security to be given.

Nor do I see that the fact that the purchaser took possession of the tire setter, and retained it for a time for the purpose of making tests, affects the rights of the parties. Possession was taken and the machine was tested pursuant to the terms of the agreement made between the parties: it cannot, therefore, in my opinion, be ascribed to an implied contract for sale at the price named in the contract or at a reasonable price. As stated in Wittkowsky v. Wasson, though actual possession has been delivered to the vendee under a contract which is incomplete, it is still constructively in the vendor, the parties having provided that there should be a period of credit to be fixed by themselves by subsequent agreement. It is impossible for the Court to substitute itself for the parties, and, making for them an agreement which they have not made for themselves, to determine either what that period of credit shall be or that there shall be no period of credit.

In my opinion, there was no completed contract between the parties, and the plaintiff's action therefore fails.

The defendant, however, did not reject the machine upon the ground that there was no contract, but insisted on other rights, which he failed to establish. It is impossible to say what position the plaintiff would have taken had the defendant at the outset asserted that there was no completed contract. This point was merely mentioned in the course of the trial before the County Court Judge. The defendant entirely failed upon what were his main grounds of defence. He retained the machine for an undue length of time, and, if the contract had been complete and binding upon him, returned it in violation of his agreement not to do so, but to allow the plaintiff an opportunity to demonstrate its capacity to do the work required of it. Having regard to all the circumstances, it would appear to be equitable that neither party should have any costs of the action. But plaintiff, having unsuccessfully opposed defendant's appeal, should pay the costs thereof to defendant.

RIDDELL, J. JULY 12TH, 1907.

CHAMBERS.

RE TORONTO AND NIAGARA POWER CO. AND WEBB.

Costs—Payment out of Court—Money Paid in by Company for their own Convenience—Railway Act—Lands Acquired by Company—Vesting Order.

Motion for payment out of a sum in Court and for costs against the company.

W. E. Middleton, for the applicants.

McQuesten, Hamilton, for the company.

RIDDELL, J.:—The late John Webb, in September, 1890, bought, and from thence to the time of his death was in continued, absolute, and uninterrupted possession of certain land in the township of Saltfleet. He died in 1892, having made his will, whereby, after appointing his sons John Edward and George Frederick Webb and one Robert Reuben Morgan, executors and trustees, he directed that his said trustees should "at such time or times and in such manner as they may think fit, sell . . such part of. . . real . . estate as shall be necessary . ." and pay debts, etc. The remainder of his real estate was devised to his trustees in trust for his wife for life, and thereafter to his children, with a direction that the trustees might, upon request of the wife, at their discretion, sell any part, and that after her death they might sell and divide the proceeds.

The Toronto and Niagara Power Company were incorporated by the Dominion Act 2 Edw. VII. ch. 107; their Act made applicable to their undertaking, secs. 136-169 of the Railway Act, 1888, i.e., 51 Vict. ch. 29 (D.) The company made an agreement with the trustees to buy a portion of the land for $1,500, but, not being satisfied with the title, they paid this sum into Court under sec. 167 of the Railway Act of 1888.

Application is now made for the payment out of this sum to the persons entitled and for the costs to be paid by the company. The company do not oppose the payment out, but ask that the costs be paid by the applicants; and

the company also ask for a vesting order. I do not think a vesting order is necessary, as sec. 167 (R. S. C. 1906 ch. 37. sec. 210 (2)) provides that the "agreement shall be deemed to be the title of the company to the land therein mentioned."

As to costs: I, in Re Canadian Pacific R. W. Co. and Byrne, ante 278, considered that the rule laid down by the Chancellor in Re Dolsen, 13 P. R. 84, is still applicable in cases to which that rule formerly applied. And here the company, desiring land for their own purposes ,which land they might expropriate if the owners would not or could not make a valid conveyance, for their own purposes, and not for the advantage of those entitled to the purchase price of the land, pay the money into Court. I think that the company must pay the costs of this motion. In my view the payment of the costs of an occasional motion such as this, is a very trifling price to pay for the extraordinary powers given to this company.

RIDDELL, J. JULY 12TH, 1907.

CHAMBERS.

RE DIEHL AND CARRETT.

Company—Receivers — Bondholders — Priorities—Scheme for Re-arrangement—Bondholder Attacking—Leave to Bring Action against Receivers.

Motion by one Clement for an order authorizing him to bring an action against the receivers of the Imperial Paper Mills of Canada, Limited, in the circumstances mentioned in the judgment.

A. M. Stewart, for the applicant.

C. A. Masten, for the receivers.

W. H. Blake, K.C., and Frank McCarthy, for two sets of trustees.

RIDDELL, J.:—The Imperial Paper Mills of Canada, Limited, is a company incorporated under the provisions of the Ontario Companies Act.

On 5th October, 1903, the directors of the company passed a by-law, No. 52, for an issue of bonds to the amount of £200,000, to be secured by a mortgage. This by-law was sanctioned by the shareholders on 16th November, 1903, and the bond issue was accordingly made. The applicant, Clement, is the holder of bonds of that issue, of the face value of £2,000.

A meeting of the holders of the bonds of this issue was called for Monday 8th April, 1907, at the offices of the company, No. 62 London Wall, London, England, to consider, and if approved to pass, a resolution consenting, on behalf of all the holders of the bonds of the said issue, to the creation and issue by the company of mortgage debentures for the aggregate sum of £400,000, to be secured by a charge upon all the property comprised in the indenture of mortgage securing the £200,000 issue, in priority to that indenture and the bonds thereby secured.

This meeting passed the resolution by a unanimous vote of those present at the meeting: these held £120,800 of the bonds. From the minutes it is clear that Clement, who is said to be an American, was not present.

One Adolf Diehl, who also was not present at the meeting, thereupon brought an action in the High Court of Justice in England, on behalf of himself and all other holders of the said bond issue, against the company and others, and in that action asked for an injunction. The motion for an injunction seeking to restrain the issue of the proposed bonds in priority to the bonds for £200,000 coming on 23rd March, 1907, before Mr. Justice Swinfen Eady, it was turned into a motion for judgment, and judgment was given that the company, with the consent of a bare majority in value of the bond holders, given at a meeting duly called, might issue bonds forming or creating a lien upon the property contained in the mortgage of 18th November, 1903, in priority to or pari passu with the bonds secured by that mortgage.

Clement is not alleged to have been a party to, or cognizant of, this action.

In October, 1906, Diehl and another, suing on behalf of themselves and all other bond holders of the company, began an action in this Court against certain persons named, and the company, asking to have it declared that the mortgage constitutes a charge upon all the property of the com-

pany comprised therein, and for payment, foreclosure, or sale. A receiver or manager was also claimed. In this action orders were made by this Court 27th October, 26th November, 1906, 9th January and 30th May, 1907, whereby, in the result, John Craig and George Edwards are constituted receivers and managers of the company until 1st September, 1907.

These gentlemen, with the trustees under the deed of November, 1903, are said to be actively engaged in carrying out the scheme whereby the mortgage of November, 1903, shall be postponed to a new debt to be created.

Clement now asks to be allowed to bring an action for a declaration of his rights, and to restrain the receivers and others from giving consents, etc., to assist in the carrying out of the scheme already referred to. It is scarcely denied that if this scheme go through, the result will be that the applicant will lose, if not the whole, at least a substantial part of his claim.

The rule adopted by the Court upon applications of this character is laid down by Lord Justice Turner in Randfield v. Randfield, 3 De G. F. & J. 766, at p. 722, as follows: "It is not, as I apprehend, according to the course of the Court to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim." This, so far as I know, has never been questioned; on the contrary, it is expressly adopted and followed by Mr. (afterwards Lord) Justice Chitty in Lane v. Capsey, [1891] 3 Ch. 411, at p. 414. And the same rule is adopted in the Courts in some, at least, of the United States: see Hills v. Parker, 111 Mass. 508, at p. 511, where it is said: "Leave to bring such an action, when applied for, is granted by the Court of Chancery as of course, unless it is clear that there is no foundation for the claim."

Can it be said here that "it is perfectly clear that there is no foundation for the claim?"

The right claimed that a bare majority of creditors have it in their power to destroy the securities of the minority is an extraordinary one, and can only be obtained by the clearest of agreements. I do not intend to be, and I think I am not, guilty of any want of respect for Mr. Justice Swaifen Eady when I say that I cannot find that it is perfectly clear that there is no foundation for the claim that Clement de-

sires to advance. Anything that that very able Judge may say must be received with the utmost respect; but I think he would himself be the last to say that his judgment is certainly right. That being so, I am of opinion that the application should be granted.

The costs will be disposed of by the trial Judge in the action to be begun, or upon application to me in my Chambers.

RIDDELL, J. JULY 13TH, 1907.

CHAMBERS.

SWITZER v. SWITZER.

Husband and Wife—Alimony—Interim Alimony and Disbursements—Marriage Admitted—Separation Agreement—Adultery—Foreign Divorce.

Appeal by defendant from order of local Judge at Walkerton directing payment by defendant to plaintiff of interim alimony and disbursements.

W. E. Middleton, for defendant.

G. H. Kilmer, for plaintiff.

RIDDELL, J.:—This is an action for alimony and other relief. The marriage is admitted, but it is contended for defendant: (a) that a separation agreement entered into between the parties concludes plaintiff; (b) that plaintiff was guilty of adultery with a person named; (c) that a decree of divorce has been obtained from a Court in North Dakota.

Plaintiff answers these contentions by saying that the alleged separation agreement is not binding upon her, as it was obtained by pressure and executed under fear of further ill-treatment, and that in any case the fact that defendant has gone through a form of marriage with and is now cohabiting with another woman named relieves her from the covenants in the deed: Morall v. Morall, 6 P. D. 98. She denies the adultery, and says that the decree for divorce is invalid.

The rule as to interim alimony and disbursements I think, correctly stated by Meredith, J., in Atwood v. Atwood, 16 P. R. 50, at p. 51: "The marriage being admitted, and need and refusal of support being proved, the plaintiff" is "prima facie entitled to interim alimony and costs." It is true that the learned Judge disagreed in the result of that particular action with his brother Judge, but I do not think that any fault can be found with the rule laid down by him. "It was, no doubt, rightly said that the granting or refusing of such application rests largely in the sound discretion of the Court—that is, the sound judicial discretion:" S. C., p. 50.

The separation deed whereby the wife gives up all her rights for $200, executed in the circumstances shewn in the material, cannot be a bar to the application any more than it was in Lafrance v. Lafrance, 18 P. R. 62, a decision by the Chancellor, who, it must be remembered, was the Judge in Chambers with whom Ferguson, J. (disagreeing with Meredith, J.), agreed in the Atwood case. In the Atwood case the existence of such a document is admitted, but its legal effect is questioned—no affidavits shewing fraud or duress being before the Chancellor on the appeal. That case, therefore, is distinguishable from the case under consideration.

The adultery is denied, and that cannot be tried upon motion.

As to the North Dakota divorce, it would appear that, the parties residing in Manitoba, the defendant remained there until after his sale in March, 1905, and came to Bruce county, Ontario, in the summer of 1905. He then went to Dickinson, North Dakota, and remained there for about a month, at which time he gave instructions to his attorney for divorce proceedings. He had, when living in Manitoba, been in Dickinson in 1904 for some months, and, as he says, he had gone into the horse business. He seems to have made in April, 1905, a declaration of intention to become a citizen of the United States. The separation took place in November, 1904.

In January, 1906, he seems to have obtained a decree for a divorce from the District Court of that State, without personal service upon his wife and in her absence. He was

in Bruce county, Ontario, at the time the divorce was granted, and had been for some time before—indeed he was visiting from time to time the woman with whom he afterwards went through the form of marriage. . . .

I decline to consider a decree for divorce obtained in this way, and by a person so situated, a valid answer prima facie to an application such as this.

The appeal from the order of the local Judge awarding interim alimony and disbursements will be dismissed, except that the amount of interim disbursements shall be fixed at $95. Costs to plaintiff in any event.