THE

ONTARIO WEEKLY REPORTER

VOL. XIII. TORONTO, MARCH 25, 1909. NO. 12

CARTWRIGHT, MASTER. MARCH 12TH, 1909.

CHAMBERS.

FOSTER v. MACDONALD.

Pleading — Statement of Defence — Action for Slander— Amendment of Statement of Claim—Limiting Complaint to a Part of the Words Spoken by Defendant—Innuendo.

Motion by plaintiff in an action for slander to strike out a large part of the statement of defence as being irrelevant and embarrassing.

I. F. Hellmuth, K.C., for plaintiff.

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

THE MASTER:—The argument made it plain that defendant's counsel had supposed that the plaintiff was complaining of the whole and every part of what was said by defendant as set out in the statement of claim, and especially where at the end of the second paragraph the plaintiff was spoken of as a man "against whom there stand allegations of mismanagement of trust funds and of infidelity to the most sacred commercial and moral obligations."

Acting on that theory, a great deal was set up which would perhaps be relevant in that view. But the plaintiff's counsel is prepared to obviate this difficulty and confine the trial to the two specific acts of wrongdoing charged in the first, third, and last paragraphs of the defendant's speech as given in the statement of claim.

All that is necessary, therefore, at present is to allow plaintiff to amend his statement of claim accordingly. The

defendant will have the usual time either to amend or deliver a new statement of defence as he may prefer.

The costs of the motion and incidental thereto will be in the cause.

The innuendo was clearly applicable (if not restricted) to the two distinct allegations of wrongdoing. If these are disproved, the plaintiff will be sufficiently vindicated; and if they are proved, the defendant will have gained the day.

A man, and especially one in active political life, cannot be compelled to assume the burden of defending every act of his that may be called in question.

CARTWRIGHT, MASTER. MARCH 12TH, 1909.

CHAMBERS.

GOLDMAN v. GOLDMAN.

Alimony—Interim Allowance — Evidence — Contradictory Affidavits—Interim Disbursements—Speedy Trial.

Motion by plaintiff in an action for alimony for an order for interim alimony and disbursements.

A. R. Cochrane, for plaintiff.

H. C. Macdonald, for defendant.

THE MASTER:—There are no motions, except perhaps those to change venue, which are so difficult to deal with as these. Both of them recall the pungent remark of Lord Bowen: "Truth may be found anywhere—sometimes even in affidavits."

Here the parties make most serious charges against each other, which they both flatly deny. With that branch of the case I have fortunately nothing to do. But, even on the question of what, if any, allowance should be made to the plaintiff, there is a similar contradiction, both as to the earning power of the defendant and his capital and his resources generally. The plaintiff puts the defendant's income at $35 to $40 a week. The defendant says he is earning now only $7 to $8 a week, and has two of the children living with him. He says he never earned more than $13 a week in this city. He has not been cross-examined. Two of the children live

with the plaintiff, but whether they are a help or a burden does not clearly appear.

If the plaintiff insists on an allowance, under the authorities it must be granted. I would suggest, however, that it might be more advantageous to her to make the order that was made lately in Crawford v. Crawford, under which defendant advanced a sum of about $30 for interim disbursements, and the case was by consent to be set down and put on the peremptory list forthwith. If this is not accepted, then I will make the usual order and fix what I think reasonable in the case.

HODGINS, MASTER IN ORDINARY. MARCH 2ND, 1909.

MASTER'S OFFICE.

RE TORONTO CREAM AND BUTTER CO.

LUXTON'S CLAIM.

Principal and Agent—Judgment Obtained against Agent—Election — Claim to Rank upon Assets of Company (Principal) in Winding-up Proceedings.

Claim by one Luxton to rank as a creditor in winding-up proceedings.

George Bell, K.C., for caimant.

I. F. Hellmuth, K.C., and J. R. Meredith, for the liquidator.

THE MASTER:—The claimant Luxton, as assignee of the Bank of Hamilton, claims to prove as a creditor as against the assets of this company, under a state of facts set out in a special case or admissions. In the case it is stated that the Bank of Hamilton made certain advances to one Mrs. A. E. Clark, who carried on business in Milton as the Milton Creamery Company, and in Toronto as the Cream and Butter Company; that on 5th April, 1905, the above company was incorporated by letters patent, and on 1st June, 1905, Mrs. Clark assigned the said businesses to the incorporated company—the said company agreeing to pay therefor by allotting to Mrs. Clark 275 fully paid up shares, amounting to $27,500, of the common stock of the company,

and also undertaking "to satisfy and discharge all the debts, liabilities, contracts, and engagements of the vendors in connection with the said business, and to indemnify them and keep them indemnified and harmless against and from all liability, proceedings, claims and demands, in respect thereof.

Notwithstanding the incorporation of the company, and the said agreement, the Bank of Hamilton continued to make advances to Mrs. Clark as if she continued to be the owner of the unlimited companies above named.

The special case states that "neither the said Luxton nor the Bank of Hamilton (his assignors) had until the making of the winding-up order, any notice or knowledge" of the agreement of 1st June for the transfer of the business of the unlimited companies to the limited company—an admission which indicates that the credit given by the bank was to Mrs. Clark as carrying on business under the names of the unlimited companies.

Further, it is stated in paragraph 11 that the solicitors for Luxton and the liquidator attended in these winding-up proceedings "before the Master in Ordinary in regard to the said claim, and attempts were made by the solicitors and the said liquidator to come to an amicable adjustment of the matter; and, while the said liquidator at first questioned the connection between the said Milton Creamery Company and the Toronto Cream and Butter Company" (the two businesses carried on by Mrs. Clark under those names), "he (the liquidator) was afterwards willing to concede the same, but they failed to agree about the amount of the said claim."

Neither party brought up the question of the liability of the limited company for this claim or any adjudication as to the amount of it, and the matter stood over sine die.

Ultimately the claimant Luxton brought an action in the High Court against Mrs. Clark personally and the two unlimited companies above mentioned, for the amount of the advances made to her by the Bank of Hamilton, and the action was tried before Anglin, J., in Milton on 14th April, 1908, and resulted in a verdict in favour of Luxton against all the defendants for the sum of $17,124.10 and costs.

I think it is clear, from the statements in the special case or admissions, that the above action was instituted by Luxton against Mrs. Clark as the agent, or alleged undis-

closed agent, of the alleged principal debtor, the incorporated Cream and Butter Company; for the incorporated company was no party to that action, and there is no allegation of a joint liability of the incorporated company and Mrs. Clark in respect of the advances for which the claimant has recovered his judgment.

In Morel Brothers v. Earl of Westmorland, [1903] A. C. 11, the House of Lords held that the plaintiffs having an alternative claim against one or the other of the two defendants, and having obtained an interlocutory judgment against one of such defendants, who ex hypothesi was agent, such judgment was conclusive evidence of an election not to proceed against the other defendant.

So in McLeod v. Power, [1898] 2 Ch. 295, a judgment against one of two joint debtors was held to be a bar to proceedings against the other. See also The Bellcairn, 10 P. D. 161.

And a late case of Cross v. Matthew, 20 Times L. R. 603, bears some resemblance to the last cited case and to the present one. In that case the debt was contracted by one of the defendants as agent of the other defendant, who was the principal debtor, though credit appeared to have been given by the plaintiffs to the agent alone. Judgment by default having been obtained against the agent, the County Court Judge before whom the action was tried, adjourned the case to enable the plaintiffs to make an application to set aside that interlocutory judgment; whereupon the judgment was set aside, and the case remitted again to the County Court for trial, and resulted in a judgment being entered in favour of the agent, and against the principal. On appeal it was held that the plaintiffs, by signing judgment against the agent, had conclusively elected to proceed against him; and that there was no power in the Court to set aside that judgment, so as to revive the right of the plaintiffs to proceed against the principal.

These authorities are, I think, conclusive against the claimant Luxton in these proceedings, and, as he is conclusively bound by his election to sue Mrs. Clark for the same cause of action as he seeks to enforce here, I must dismiss his claim with costs.

MACMAHON, J. MARCH 15TH, 1909.

TRIAL.

BELL v. ROBINSON.

Bankruptcy and Insolvency — Chattel Mortgage Given by Insolvent to Creditor—Absence of Knowledge of Insolvency —Preference—Validity as against Execution Creditors.

Trial of an interpleader issue in which the plaintiffs affirmed and the defendant denied that certain goods, chattels, and effects in a certain shop in the occupation of Elizabeth Murphy, trading alone under the firm name of John Murphy & Co., in the town of North Bay, seized in execution by the sheriff of the district of Nipissing, under a writ of fieri facias issued in an action at the suit of the plaintiffs against the said Elizabeth Murphy, were, at the time of the said seizure, exigible under the said execution as against the defendant.

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

J. A. Macintosh, for defendant.

MACMAHON, J:—Elizabeth Murphy carried on business at North Bay as John Murphy & Co., and on 3rd October she was indebted to the defendant, James Robinson, who is a wholesale boot and shoe dealer in Montreal, in the sum of $4,012 for goods sold and delivered to her. On that day the defendant was in North Bay, and he took from John Murphy (the husband of Elizabeth Murphy), who was manager of Elizabeth Murphy's business, a chattel mortgage for the amount named, payable in 6 months from the date of the mortgage. John Murphy held a power of attorney from his wife, but it was exclusively confined to the banking business, making and indorsing promissory notes and bills of exchange, connected with her business, at the Bank of Ottawa in North Bay. At that time he had no authority from her to give a chattel mortgage over the stock in trade of her business.

Robinson received from the manager of the business a statutory declaration dated 17th September, 1908, shewing that the liabilities of the business were $2,932.64, and that the assets, including the stock in trade and the fixtures and repair shop, which belonged to the business, amounted to

$4,300. In that statement there appear payments to J. & T. Bell, the plaintiffs in this action, $457. ,

Robinson, the defendant, says that at that time the only creditors of Elizabeth Murphy & Co. that he heard of were Wynne & Co., to whom John Murphy said his wife owed about $140, and the Footwear Co., about $229.

The defendant made Murphy & Co.'s surplus (as shewn on exhibit 10) $1,819.12. But there was an error in crediting the book accounts twice, once at $400 and again at $350.

The account stands as follows:

Surplus as per exhibit 10	$ 167 67	
Stock on hand	3,739 80	
Book accounts from $300 to $400, say, ...	350 00	
Real estate	1,200 00	$5,457 47

Debtor:

Owing Robinson, on 3rd October	$3,912 48	
" Wynne	145 87	
" Trew	80 00	$4,138 35
		$1,219 02

On 3rd October Robinson went to North Bay and saw John Murphy, the manager of the execution debtor's business, who said that he required more goods to carry on the business and make it pay, and on the strength of the surplus, and on the statement that Murphy made that he would make him weekly payments, he agreed to furnish goods to the amount of at least $2,000, on the understanding that a chattel mortgage would be given him for the amount then owing and also for the new goods to be supplied. They both went to Mr. McGaughey's office, and it was arranged there that Mr. McGaughey, a solicitor in North Bay, should draw a mortgage covering these two amounts, and that Robinson would send the goods to McGaughey's order at North Bay, which were not to be delivered to Murphy & Co. until a chattel mortgage should be executed by Mrs. Murphy on the stock in the shop, covering the two amounts—the former indebtedness, for which John Murphy gave a mortgage on 3rd October, and the amount of the invoice of the new goods.

The goods arrived at North Bay, it is said, about 15th October, but I find that they were not delivered to Murphy & Co. until 31st October, on which date a mortgage was made for the sum of $6,207.84, being the total amount of the former mortgage and the amount of the invoice of the goods then supplied, executed by Elizabeth Murphy. Mrs. Murphy was then told of the prior mortgage having been executed by her husband, and she did not demur to its execution by him. However, the subsequent mortgage was given for the two amounts, and that constituted the then security to the defendant for the total amount of his indebtedness. This was in no way a voluntary mortgage. John Murphy, the manager, told Mr. Robinson that more goods were required to make the business a paying one, and that he was perfectly willing, if more goods were supplied, to secure the amount of the whole indebtedness; and, as all expenditures necessary had been made to the store, a paying business could be done. He found, however, that there were leakages in the business for which he could not account and the nature of which he was unable to discover.

As said in National Bank of Australia v. Morris, [1892] A. C. 290, "If a creditor who receives a payment or obtains a security has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows within the meaning of the Act that the debtor is insolvent."

In this case the only means of knowledge that the defendant had of Murphy & Co.'s position was in the statement furnished, and the statutory declaration annexed thereto of 17th September, and that, as I have already said, would shew a surplus of some $1,219.

The defendant said he saw some goods of the plaintiffs there, but, seeing that Bell & Co. had already been paid the sum of $457, he concluded that they were not then creditors of Murphy & Co., as he was not told by John Murphy of any liability to them. He was unaware that Bell & Co. were creditors.

The goods and chattels seized by the sheriff amounted to $4,854.58, which were sold, by order of the Court and with the consent of the claimant, at 100 cents on the dollar, and, after deducting costs of seizure, poundage, and other expenses, would pay about 85 cents on the dollar on the plaintiffs' claim.

I think that, being furnished with a sworn statement shewing that Murphy & Co. were solvent, and on the strength of that, and having supplied goods to the amount of over $2,000 to enable the business of John Murphy & Co. to be carried on, on the understanding that the defendant was to get security by chattel mortgage for the whole amount of his indebtedness, he was justified in taking the security, and that it was a valid security under the circumstances stated.

I find that the goods and chattels seized by the sheriff of Nipissing under the execution placed in his hands by the plaintiffs were not exigible as against the claim of the defendant in this issue. The plaintiffs, J. & T. Bell, must pay the defendant's costs of and incidental to the issue.

OSLER, J.A. MARCH 15TH, 1909.

C.A.—CHAMBERS.

CANADIAN PACIFIC R. W. CO. v. BROWN MILLING CO.

Appeal to Supreme Court of Canada—Approval of Security on Appeal—Right of Appeal—Title to Land Brought in Question—Motion to Supreme Court for Leave to Appeal.

Motion by defendants to allow the security on a proposed appeal by them to the Supreme Court of Canada from the judgment of the Court of Appeal, ante 301.

A. A. Miller, for defendants.

Angus MacMurchy, K.C., for plaintiffs.

OSLER, J.A.:—Whether, in a case like the present, the title to land is so brought into question as to give the defendants the right to appeal to the Supreme Court without leave is a point which seems not yet to have been actually decided. Whatever title they have is admitted, but it has been held that, being what it is, they have no right of compensation in respect of the lands of which they were in possession under it. Some of the cases cited by Mr. MacMurchy seem to look in favour of his contention; but, without expressing any opinion of my own, I allow the security valeat quantum, leaving the defendants to move (if they are

prudent) for leave to appeal or to confirm the security before the only tribunal which can effectually admit or reject the appeal. The Supreme Court being now in session, there can be no difficulty in the defendants making any motion of either kind, which they may be advised to make. See Rules 1-4 of the Supreme Court of Canada, 19th June, 1907; R. S. C. 1906 ch. 139, sec. 48 (2).

Costs in the cause.

CARTWRIGHT, MASTER. MARCH 16TH, 1909.

CHAMBERS.

RE SOLICITORS.

Solicitor—Bills of Costs—Right to Taxation—Time of Application — Payment — Acceptance of Promissory Notes — Conditional Payment unless otherwise Agreed — Evidence.

Application by clients for an order for taxation of bills of costs delivered on 17th July, 1908.

Gideon Grant, for clients.

C. C. Robinson, for solicitors. . . . .

THE MASTER:—The affidavit of the clients alleges that the bills contain charges not only against them, but also against two other mining companies, and are also excessive.

The affidavit in answer states that the bills were paid on 16th September by certain promissory notes which the clients requested the solicitors to accept in full payment of these bills; and that the solicitors finally agreed to do so, and waived their claims against others who would otherwise have been liable. It also states that all these notes are overdue and unpaid.

There has been no cross-examination on these affidavits.

Had the notes all been paid, then the right to taxation would be gone, but only in the absence of special circumstances: Sayer v. Wagstaff, 5 Beav. 415. Mr. Robinson argued that the decision went further in his favour, and pressed what was said by Lord Langdale, M.R., at p. 423; but the decision was only that there had not been payment in such a case, and the bill of costs was not paid until the note was paid, when it fell due a fortnight later.

Reliance was also placed on In re Romer, [1893] 2 Q. B. 286. But an examination of that case does not convince me that the right to taxation has been taken away by what has been done in this case. There bills had been rendered shewing a balance due of about $9,000. The clients had given "in settlement" 8 acceptances payable in 3, 6, 9, and 12 months respectively, and the solicitors' account had been indorsed "Paid by bills payable." The 3 months' bills were paid, but not the others. Judgment had been obtained on those due at 6 months, and the other two sets had not matured when the application was made to tax. The usual order was made by Mathew, J., but reversed by the decision of a Divisional Court, which in turn was reversed by the Court of Appeal, on the ground that taking a negotiable security is only a coditional payment, unless it is otherwise expressly agreed. On this point Lord Esher, M.R., said (p. 297): "The person who sets up such an agreement is bound to prove it, and the solicitors are bound to prove that both they and their debtors intended this result at the time. They are men of honour and position in their profession, and I do not believe that they intended to take these bills of exchange on those terms for the purpose of shutting out their clients from all power of taxing their bill of costs. I have no doubt they took them on the ordinary business terms as conditional payment of their debt." At p. 300 Lord Justice Bowen said: "If a solicitor desires to shew that there has been more than that kind of conditional payment, and that by agreement with the client the bill of costs has been actually paid, it lies on him to shew it, and we must not lose sight of the fact that this burden is on him. If the solicitor says that the bill of exchange was given in such a manner as to amount to payment, he must make this understood by the client when he gives the bill, and he must prove such circumstances as place it beyond all reasonable doubt that the client understood and assented to the arrangement." He concludes by saying that giving a negotiable security is not "a payment which puts an end to the right of the client to tax, unless assent to such an agreement was clearly brought home to the clients." To the same effect Kay, L.J., said (at p. 304): "If it was intended, when these bills were taken, to treat them as absolute payment of the bills of costs, so as to preclude the solicitors from exercising their right to sue, and the clients from exercising their right to tax, without shewing special circumstances, in such a trans-

action as that between solicitor and client it is the solicitor's duty to shew that he made clear to his client its necessary result."

Now the affidavit of the solicitor filed in answer to this motion does not touch that point. It does not contain any reference to such an explanation as the Lord Justices said was necessary if the right to tax was to be taken away, nor is it shewn if any, and if so what, receipt was given to the clients when the notes were taken. That this right is jealously preserved to the client in this province is shewn by the well-known cases Re Pinkerton and Cooke, 18 P. R. 331, and Re McBrady and O'Connor, 19 P. R. 37. The last paragraph of the judgment in this latter case seems to shew that the Court will always be astute to grant taxation if it is considered reasonable so to do.

The material is not as full as it might have been. If the clients will make an affidavit that there never was any such agreement as is said to be necessary in In re Romer, supra, then the usual order may issue for taxation, after they have been cross-examined, if the solicitors desire to do so, and the clients do not admit sufficient to justify the position taken by the solicitors.

MULOCK, C.J. MARCH 16TH, 1909.

CHAMBERS.

HEBERT v. EVANS.

Parties—Joinder of Plaintiffs—Rule 185—Right to Relief in Respect of same Series of Transactions—Claims by Miners against Directors of Mining Company for Wages—Joining 16 Claims in One Action—Judgments Recovered against Company by 14 Plaintiffs—Position of Plaintiffs who have not Recovered Judgments.

Appeal by defendants from order of Master in Chambers, ante 632.

F. J. Roche, for defendants.

A. G. Ross, for third parties.

McGregor Young, K.C., for plaintiffs.

MULOCK, C.J., allowed the appeal and required the plaintiffs to elect whether one of them, and if so which, would proceed with the action, or whether the action should be dismissed without costs.

MULOCK, C.J. MARCH 16TH, 1909.

CHAMBERS.

TITCHMARSH v. GRAHAM.

TITCHMARSH v. McCONNELL.

Pleading—Statement of Defence—Embarrassment or Irrelevancy—Action for Trespass and False Imprisonment—Defence Setting out Facts and Pleading "Not Guilty by Statute"—Conviction—No Allegation of Quashing.

Appeal by plaintiff from order of Master in Chambers, ante 618.

J. B. Mackenzie, for plaintiff.

W. E. Middleton, K.C., for defendant Graham.

W. H. McFadden, K.C., for defendant McConnell.

MULOCK, C.J., dismissed the appeal with costs

TEETZEL, J. MARCH 18TH, 1909.

TRIAL.

BADGELEY v. GRAND TRUNK R. W. CO.

Trial—Action for Negligence—Findings of Jury—Questions and Answers—Injury Caused by Defendants' Negligence—Question whether Plaintiff could have Avoided Injury by Exercising Reasonable Care—Answer, "He might have"—Construction—Contributory Negligence.

An action for damages for injury occasioned to plaintiff while crossing the defendants' railway in the city of Belleville, in which plaintiff alleged the negligence to be the failure of the engine-driver to sound the whistle and ring the bell, as required by statute.

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

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

TEETZEL, J.:—The jury, in answer to questions, found the negligence alleged against the defendants, and that the same caused the plaintiff's injury. To the question, "Could the plaintiff, by the exercise of reasonable care on his part, have avoided the collision?" the jury answered, "He might have."

Counsel for both parties moved for judgment; Mr. Porter, for plaintiff, citing Rowan v. Toronto R. W. Co., 29 S. C. R. 717, as authority that the above answer was not sufficient to disentitle plaintiff to recover. In that case, to the 5th question, "Could Rowan, by the exercise of reasonable care and diligence, have avoided the accident?" the jury answered, "We believe that it could have been possible." The Supreme Court held that "it was quite consistent with the wording of this answer that it might be most improbable that the accident could have been avoided by such reasonable care as the appellant was bound to take." The learned Chief Justice, at p. 720, said: "I regard this verdict as amounting to no more than as if the jury had said 'Perhaps it might have been possible.'" And at p. 721: "Combining the answers to the 3rd and 5th questions, I read them as if the jury had said that the defendants' negligence was the cause, though 'perhaps' the accident might have been avoided if the plaintiff had taken more care. Upon such an answer in terms there could be no doubt but that the judgment should have been entered for the appellant" (plaintiff).

I am of the opinion that the answer in this case cannot possibly be construed to have the meaning applied to the answer in the Rowan case, but, on the contrary, I think that the words "he might have," in their natural meaning, have the effect, when applied to the question, of saying that the plaintiff could have avoided the collision by the exercise of reasonable care on his part. There is nothing in the expression "he might have," in answer to the question propounded, which could be construed into meaning "possibly" or "perhaps," as the answer in the Rowan case was construed.

In my opinion, therefore, the effect of the answer is to find the plaintiff guilty of contributory negligence, in support of which there was abundant evidence, and the action must be dismissed with costs.

CARTWRIGHT, MASTER. MARCH 19TH, 1909.

CHAMBERS.

MILLS v. SPECTATOR PRINTING CO.

Libel—Pleading—Statement of Defence—Indictment of Another Person for the same Defamatory Writing—Pleading in Bar—"Embarrassing" Pleading—Rule 298—Striking out.

Motion by plaintiff to strike out paragraph 10 of the amended statement of defence in an action for libel.

John King, K.C., for plaintiff.

Featherston Aylesworth, for defendants.

THE MASTER: — Paragraph 10 sets out that plaintiff caused a bill of indictment for defamatory libel in respect of the words set out in paragraph 3 (A) of the statement of claim in this action, to be laid before the grand jury at Hamilton against one Robinson, on which he was tried and acquitted, and that by reason thereof the plaintiff is barred and cannot prosecute this action.

It might be sufficient to dispose of this motion to point out that Robinson is not a party to this action, so that the doctrine of res judicata cannot apply. But, even if Robinson were defendant in this action, such an acquittal would be no bar to a civil proceeding for the same cause: Odgers on Libel and Slander, 4th ed., p. 570; although he continues, "It is inadvisable to bring such an action except under very special circumstances." He does not apparently contemplate laying an indictment while a civil action is pending.

"The meaning of 'embarrassing,' as used in the Rule (298) is, bringing forward a defence which the defendant is not entitled to make use of:" per Armour, C.J., in Stratford Gas Co. v. Gordon, 14 P. R. at p. 414.

It follows that this paragraph 10 must be struck out with costs to plaintiff in any event. The time for reply will run only from this date.

ERMATINGER, JUN. CO. C.J. FEBRUARY 19TH, 1909.

FIRST DIVISION COURT, ELGIN.

CRAIG v. TOWNSHIP OF MALAHIDE.

LIDDLE v. TOWNSHIP OF MALAHIDE.

Municipal Corporations—Payment for Sheep Killed and Worried by Dogs—Sheep Protection Act, sec. 18—Damages —Discretion of Council—Municipal Act, 1903, sec. 537.

The plaintiffs were farmers residing in the township of Malahide, in the county of Elgin. In July, 1908, both plaintiffs had a number of sheep killed and others badly worried by dogs. They made application to the council under sec. 18 of the Act for the Protection of Sheep, R. S. O. 1897 ch. 271, for payment of two-thirds of the value, according to their own valuation, of the sheep killed and injured. The council refused to accede to their demands, but offered to pay two-thirds of the value as estimated by the inspector appointed by by-law under sec. 537 of the Consolidated Municipal Act, 1903, for the purpose of valuing and appraising the damages for sheep killed and worried by dogs. The plaintiffs refused to accept the cheques tendered them by the council, and brought these actions to enforce their claims.

W. E. Stevens, Aylmer, for plaintiffs.

E. A. Miller, Aylmer, for defendants, contended, first, that so long as the by-law under which the inspector had been appointed was in force, there was no appeal from his valuation, and that all parties were bound by it; and secondly, that the council was not bound in any event under sec. 18 of the Sheep Protection Act to pay two-thirds of the value; and that payment of two-thirds or a smaller sum was discretionary with the council.

ERMATINGER, JUN. CO. C.J., upheld the contention of the defendants on the latter point, and dismissed both actions with costs.

TEETZEL, J. MARCH 20TH, 1909.

WEEKLY COURT.

COSMOPOLITAN CLUB v. LAVINE.

Vendor and Purchaser — Deed — Restrictive Covenants — Building Scheme — Release of Covenants by Assignee of Covenantee — Rights of Owners of other Parts of Same Block of Land — Intention — Absence of Privity.

Motion by the plaintiffs for judgment upon a case stated for the opinion of the Court under Con. Rule 372.

Before 1st June, 1886, one D'Alton McCarthy was the owner in fee simple of a parcel of land on the south-west corner of Baldwin and Beverley streets, in the city of Toronto, having a frontage on the west side of Beverley street of 207 feet by a depth of 160 feet. By deed of that date McCarthy conveyed to Mrs. Jane I. Cayley the northerly 90 feet from front to rear, reserving for himself the southerly 117 feet from front to rear, upon which was built his dwelling-house. It was recited in this deed that McCarthy was the owner of the land to the south of that conveyed to Mrs. Cayley, and that, to protect himself from injury by the erection of buildings or otherwise, he had considered it advisable to exact certain covenants from Mrs. Cayley; and she, for herself, her heirs, executors, administrators, and assigns, covenanted with McCarthy, his heirs and assigns, that she, her heirs, executors, administrators, and assigns, or any person or persons claiming or deriving title to the lands conveyed, or any part thereof, through, under, or in trust for her, should not, at any time or times during the period of 33 years from the date of the deed, erect, build, etc., on the southerly portion of the lands conveyed to her, having a frontage on Beverley street of 15 feet by a depth of 120 feet, any edifice or building whatsoever, but should at all times during such period maintain and keep that part of the lands in its then open state and condition; and she further covenanted that she, her heirs and assigns, or such other persons as aforesaid, should not during such period cause or permit to be done and carried on upon the lands, or any part thereof, any act, matter, or thing, or any trade,

business, sport, or employment, or anything which should annoy or attend or operate to the annoyance of McCarthy, his heirs and assigns; and she further covenanted, for herself, her heirs, etc., not to erect or build during the term of 33 years any building other than a dwelling-house upon the northerly 75 feet of the land conveyed to her, and not to erect more than 3 dwelling houses thereon, and that any dwelling-houses erected should front or face on Beverley street; and she further covenanted, for herself and her heirs, etc., that during the period of 33 years any building or buildings to be erected should not be used for any purpose other than that of a dwelling-house or houses, and that no business should be carried on upon the premises.

Subsequently Mrs. Cayley conveyed to J. H. Kane, subject to the provisions and covenants in the deed to her, a portion of the lands having a frontage on Beverley street of 90 feet by a depth of 160 feet, and Kane covenanted to observe the said covenants, and by deed of 15th January, 1887, she conveyed the remainder to Kane.

Subsequently Kane conveyed to Catherine Walsh the westerly 40 feet fronting on Baldwin street, and Catherine Walsh conveyed to Frank J. Walsh the easterly 20 feet thereof, on which he erected a dwelling-house, in which he was residing at the time this action was brought.

By various mesne conveyances, David Lavine, the defendant, subsequently became the owner of that portion of the lands having a frontage on Beverley street of 90 feet by a depth of 120 feet.

When Frank J. Walsh purchased the easterly 20 feet of the west 40 feet, the whole of the 90 feet by 160 feet was vacant land, and when the defendant purchased the 90 feet by 120 feet, that was vacant land, but since then the defendant had erected 3 dwelling-houses fronting on Beverley street, which the plaintiffs well knew before accepting the offer hereinafter set out.

J. H. Kane, when he sold the westerly 40 feet to Catherine Walsh, entered into no covenant with her that he would observe the provisions and covenants contained in the first mentioned deed; and any person examining the title to any portion of the westerly 40 feet would have notice of that deed and the covenants contained therein.

By various mesne conveyances the plaintiffs became the owners in fee simple of the 117 feet by 160 feet upon which

stood the dwelling-house of McCarthy, and acquired the benefit of the restrictive covenants entered into by Mrs. Cayley.

On 16th September, 1908, the defendant made an offer in writing to the plaintiffs of $500 cash (and a further consideration) "for the complete removal and release of the building restrictions on my property at the south-west corner of Beverley and Baldwin streets 90 x 120 feet." The offer was accepted by plaintiffs on 25th September, 1908.

The plaintiffs submitted to the defendant a draft release purporting to be a complete release of all the said restrictive covenants, but the defendant objected that the document was insufficient, inasmuch as it did not dispose of the interest of Walsh therein, and the defendant refused to carry out his part of the contract without obtaining a release from Walsh as well as from the plaintiffs.

Upon these facts, the question stated for the opinion of the Court was, whether Walsh, by reason of the conveyances aforesaid, or otherwise howsoever, obtained such interest (if any) in the said building restrictions as to render it necessary to procure a release or consent from Walsh in order to enable the defendant to build any additional dwellings on his property.

A. Cohen, for plaintiffs.

J. Heighington, for defendant.

TEETZEL, J.:—I am of opinion that the question propounded in the stated case must be answered in the negative. I am unable to read the covenants by Cayley contained in the conveyance from McCarthy to Cayley in any other light than that they were intended for the benefit and advantage of the vendor with reference only to the property reserved by him.

It is a question of intention whether restrictive covenants contained in a conveyance are simply for the vendor's benefit in his capacity of owner of a particular property, or whether they are for the vendor's benefit in so far as he reserves unsold property, and also for the benefit of other purchasers as part of what is called a building scheme. See Brown on Covenants, p. 110; Osburn v. Bradley, [1903] 2 Ch. 446, 666; see also Nottingham v. Butler, 15 Q. B. D. 261, 16 Q. B. D. 778; Elliston v. Reacher, [1908] 2 Ch. 374; and Duke of Bedford v. Trustees of the British Museum,

2 My. & K. 552; and cases collected at pp. 771-5 of Dart on Vendors, 7th ed.

Judged from the language of the conveyance and the condition of the property and the other facts stated in the case, I am unable to find any indication of any intention at the time when the vendor, McCarthy, divided the land and sold to Cayley, that the restrictions provided for in the conveyance should extend for the benefit of any person whomsoever other than himself and those claiming under him in respect of the land reserved. A portion of the land only conveyed to Cayley was burdened with the covenants, and, while the observance of the covenants might be of advantage to the present holders of the portion of the land originally conveyed to Cayley which was not burdened with the covenants, there is no privity of contract between any such owner and the plaintiffs, who have succeeded to the ownership of the property intended to be benefited by the covenant, and, by reason of there being no circumstances to bring the property within a general building scheme, there is no equitable right by the owners of any portion of the rear 40 feet of the land sold to Cayley to compel an observance of the restrictive covenant.

There being therefore, in my opinion, no legal or equitable right vested in any such owner, with respect to the restrictive covenant in question, there is nothing to prevent the plaintiffs from completely releasing the owner of the land burdened with the covenant from its effect.

Judgment accordingly.

If costs are asked for, the matter may be spoken to again.