FRANK R. KUNGL (*Plaintiff*) .....APPELLANT;

AND

TONY SCHIEFER (*Defendant*) .....RESPONDENT.

1962

*Mar. 5, 6
Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Adultery—Action brought for criminal conversation and alienation of affections—No separate cause of action for "alienation of affections" in Ontario—Such alienation a matter to be considered in assessment of damages for criminal conversation.

In an action for damages for criminal conversation and alienation of affections judgment was given in favour of the plaintiff for a total of $10,000, $2,000 for adultery and $8,000 for alienation of affections. The Court of Appeal set aside this judgment and directed a new trial limited to the ascertainment of the plaintiff's damages. It was held that the findings of the jury as to the commission of adultery ought not to be disturbed but that there had been non-direction as to certain matters which the jury should have been told to consider in mitigation of damages and that there had been misdirection which may well have resulted in a duplication in the two sums awarded

*PRESENT: Cartwright, Abbott, Martland. Judson and Ritchie JJ

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by the jury. The plaintiff appealed to this Court asking that the judgment at trial be restored. The defendant's cross-appeal raised two propositions, (i) that in Ontario there is no separate cause of action for alienation of affections although alienation of a wife's affection if established may be an element in the assessment of the husband's damages in an action for criminal conversation or for enticement, and (ii) that in any event there was, in the case at bar, no evidence to support any assessment of damages for alienation separate from those for criminal conversation. Counsel for both parties requested this Court to assess the damages instead of directing a new trial.

Held: The order of the Court of Appeal should be varied; in lieu of the direction of a new assessment of damages it should be directed that judgment be entered in favour of the plaintiff against the defendant for $5,000 and the costs of the action.

Under s. 1 of *The Property and Civil Rights Act,* now R.S.O. 1960, c. 310, it is provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th day of October 1792 except so far as they have been altered by legislation having the force of law in Ontario. It was not suggested that there was any legislation in force in Ontario bearing upon the matter raised in the defendant's submission that in Ontario there is no separate cause of action for alienation of affections.

The action for damages for criminal conversation and the action for damages for enticement were introduced into Ontario as part of the common law of England. There was in 1792 no case in the books and no case has since that date been decided in England holding that a husband is entitled to damages on proof of the fact that he has lost the affection of his wife by reason of the conduct of the defendant unless that conduct was such as would support an action for criminal conversation or an action for enticement or was itself tortious.

Hence, there is no separate cause of action for "alienation of affections" known to the law of Ontario. *Winsmore v. Greenbank* (1745), Willes 577, distinguished; *Bannister v. Thompson* (1913), 29 O.L.R. 562, (1914), 32 O.L.R. 34, not followed; *Lellis v. Lambert* (1897), 24 O.A.R. 653, approved.

In the case at bar on the findings of the jury the plaintiff had established his cause of action for damages for criminal conversation; he did not have a separate cause of action for alienation of his wife's affections but such alienation in so far as it had been established was the result of the criminal conversation and was one of the matters to be taken into consideration in assessing the damages.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Treleaven J. and ordering a new trial as to damages in an action for criminal conversation and alienation of affections. Order of the Court of Appeal varied.

E. A. Goodman, Q.C., G. J. Karry, Q.C., and *L. H. Schipper,* for the plaintiff, appellant.

[1] [1961] O.R. 1, 25 D.L.R. (2d) 344.

M. Lerner, Q.C., and *E. Cherniak*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Treleaven J. in favour of the plaintiff for $10,000 and directing a new trial limited to the ascertainment of the plaintiff's damages.

The action was brought for damages for criminal conversation and alienation of affections.

The appellant asks that the judgment at the trial be restored with costs throughout.

While the respondent did not serve a notice of cross-appeal or a notice, pursuant to Rule 100, asking that the decision of the Court of Appeal should be varied, he is described in his factum as "Respondent and Cross-Appellant" and the factum contains an elaborate argument in support of two propositions, (i) that in Ontario there is no separate cause of action for alienation of affections although alienation of a wife's affection if established may be an element in the assessment of the husband's damages in an action for criminal conversation or for enticement, and (ii) that in any event there was, in the case at bar, no evidence to support any assessment of damages for alienation separate from those for criminal conversation. The factum concludes with the submission that:

> the cross-appeal be allowed, and one of the following dispositions be made:
>
> (*a*) The claims for alienation of affections be dismissed and the matter be remitted for a new trial limited to damages for criminal conversation;
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> (*b*) The claim for alienation of affections be dismissed and the damages for criminal conversation be assessed by this Court;
>
> (*c*) That there be one assessment of damages for criminal conversation and alienation of affections, either in a new trial or by this Court.

At the opening of the argument counsel for the appellant submitted that the respondent ought not to be allowed to raise the matters set out in his factum as recited above because (i) they had not been raised in the courts below and (ii) no notice of intention had been given. The Court was of opinion that we should hear counsel for the respondent on these matters and asked counsel for the appellant whether in view of this he wished an adjournment of the

[1] [1961] O.R. 1, 25 D.L.R. (2d) 344.

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hearing as contemplated by Rule 100. Counsel replied that he was ready to proceed and filed a supplementary factum dealing with the points raised in the cross-appeal.

The action was commenced on September 12, 1957.

In the statement of claim it is alleged that during a period of approximately four months before August 1954 the defendant resolved to alienate the affection of the plaintiff's wife, that he succeeded in doing so, that he committed adultery with her "thereby destroying the plaintiff's home and marriage and causing the plaintiff to lose the enjoyment of the society, affection, comfort and services of his said wife", that as a result of the adultery the plaintiff's wife gave birth to a female child of which the defendant was the father. The statement of claim continues:

7. As a result of the Defendant's conduct aforesaid, the Plaintiff suffered a severe blow to and an invasion of his honour and great laceration to his feelings owing to the successful attack by the Defendant upon the Plaintiff's exclusive right to intercourse with the Plaintiff's wife.

8. As a result of the Defendant's conduct aforesaid, the Plaintiff's family life has been very greatly damaged and has caused an estrangement between the Plaintiff and his wife, as well as a confusion in his household over the birth and future welfare of the said child.

9. The Plaintiff states that he has suffered serious loss and will continue to suffer further loss.

The Plaintiff, therefore, claims:

(*a*) Damages for criminal conversation in the sum of $25,000;

(*b*) Damages for alienation of affections in the sum of $25,000;

(*c*) Loss of earnings of the Plaintiff's wife in the sum of $557;

(*d*) Medical expenses in the sum of $157;

(*e*) Past and future maintenance of the said child born to the Plaintiff's wife and the Defendant in the sum of $25,000;

(*f*) His costs of this action;

(*g*) Such further and other relief as to this Honourable Court may seem just.

By the statement of defence all the material allegations in the statement of claim were denied and the defendant pleaded that if any estrangement had been caused between the plaintiff and his wife it had been caused not by any conduct of the defendant but by the plaintiff's own conduct.

The trial took place on October 14 and 15, 1959. The questions put to the jury and their answers were as follows:

Q. 1. Was there any adultery committed between the Defendant and the Plaintiff's wife?

Answer. Yes.

Q. 2. If your answer is "yes", when and where was the adultery committed?

Answer. July 1954 to November 1956 at his house and her house.

Q. 3. If your answer is "yes", at what amount do you assess the damages for adultery?

Answer. $2,000.

Q. 4. Did the Defendant alienate the affections of the Plaintiff's wife?

Answer. Yes.

Q. 5. If your answer to question No. 4 is "yes", at what amount do you assess the damages for such alienation?

Answer. $8,000.

On these answers judgment was entered for $10,000 and costs.

The defendant appealed to the Court of Appeal on the grounds, *inter alia*, that the damages were excessive and that there was non-direction and misdirection on the part of the learned trial judge.

In the unanimous judgment of the Court of Appeal delivered by Schroeder J.A. it was held that there was evidence to support the findings made by the jury in answering questions one, two and four and that these findings should not be disturbed, but that there had been non-direction as to certain matters which the jury should have been told to consider in mitigation of damages and that there had been misdirection which may well have resulted in a duplication in the two sums awarded by the jury. A new trial limited to the assessment of damages was accordingly directed. The decision of the Court of Appeal that the findings of the jury as to the commission of adultery ought not to be disturbed was not questioned before us.

At the conclusion of the argument of counsel for the appellant the Court stated that we were all of opinion that the Court of Appeal was right in directing a new trial and that we would hear counsel for the respondent on the matters raised in his factum by way of cross-appeal.

Mr. Cherniak presented a carefully prepared argument in support of the submission that in Ontario there is no separate cause of action for alienation of affections; Mr. Goodman in reply contended the contrary but also submitted that in the case at bar the question has little, if any, importance as the finding of adultery is not now questioned

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and the plaintiff is entitled to urge the loss of his wife's affection as one of the matters to be considered in assessing his damages for criminal conversation.

At the conclusion of the reply counsel for both parties joined in requesting that this Court assess the plaintiff's damages instead of sending the matter back for another trial and in our opinion it is in the best interest of the parties that we should take this course.

While it may be that in the case at bar we could fix the plaintiff's damages without dealing with the point argued by Mr. Cherniak I think it better that we should decide that question, for, strictly speaking, if there are two separate causes of action we ought, I suppose, to make a separate assessment on each; and the matter is one of general importance.

I have reached the conclusion that Mr. Cherniak's argument is sound and that there is no separate cause of action for "alienation of affections" known to the law of Ontario.

Under s. 1 of *The Property and Civil Rights Act,* now R.S.O. 1960, c. 310, it is provided that in all matters of controversy relative to property and civil rights resort shall be had to the laws of England as they stood on the 15th day of October 1792 except so far as they have been altered by legislation having the force of law in Ontario. It is not suggested that there is any legislation in force in Ontario bearing upon the matter.

In 1792, the action for damages for criminal conversation and the action for damages for enticement were well known and both were introduced into Ontario as part of the common law of England. In my opinion, there was in 1792 no case in the books and no case has since that date been decided in England holding that a husband is entitled to damages on proof of the fact that he has lost the affection of his wife by reason of the conduct of the defendant unless that conduct was such as would support an action for criminal conversation or an action for enticement or was itself tortious as, for example, if the defendant's conduct which resulted in the plaintiff's loss of his wife's affection was the publication of a libel concerning the plaintiff.

The present position of the law in England on this point is, I think, accurately stated in Lush on Husband and Wife, 4th ed., 1933, at p. 35 as follows:

> This action of enticement lay against anyone, male or female, friend or relative, who unlawfully induced the wife to leave her husband, or unlawfully harbours her after she has left him.
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> Adultery was irrelevant to the action, the husband's appropriate remedy therefor was the action technically laid in trespass, but in substance one upon the case for criminal conversation, now abolished, but replaced by a petition against the alleged adulterer for damages brought in the Divorce Division.
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> Moreover, the action is not one for alienation of affections; an action on such ground is unknown to the law of England, would be new in principle and not merely in instance, and would therefore not lie, unless such a right of action were expressly created by statute.

There are, however, a number of cases in Ontario, some of them judgments of the Court of Appeal, in which, while the above quotation is recognized as a correct statement of the law in England, the assertion is made that the right of action for alienation of affections does exist in Ontario. On examination, it appears that in all of these cases the assertion mentioned is derived directly or mediately from *Bannister v. Thompson*[1]. *Bannister v. Thompson* was tried before Middleton J. and a jury. It is stated in the reasons of Middleton J. that the defendant had acquired a malign influence over the wife of the plaintiff, that his conduct was such that to the learned judge the inference that he was guilty of adultery appeared almost irresistible (although he dealt with the case on the basis that no adultery had been proved, as the jury had failed to find it), that the misconduct of the defendant had resulted in the total alienation of the affection of the wife and the wrecking of the plaintiff's home, that the wife while continuing to live under her husband's roof had entirely ceased to discharge any wifely function, slept in her own room locking the door, refused to speak to her husband, and the husband was as fully deprived of her *consortium* as if she lived in a separate building.

Middleton J. submitted two questions to the jury and instructed the jury to assess damages "separately upon each count" if they found for the plaintiff. The questions were put in the precise words of the plaintiff's claim and the jury

[1] (1913), 29 O.L.R. 562, affirmed in part (1914), 32 O.L.R. 34.

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found that the defendant, (i) "enticed away from the plaintiff his wife, Annie Bannister, and procured her to absent herself unlawfully without his consent for long intervals from the house and society of the plaintiff", and (ii) "by his wrongful acts has alienated from the plaintiff the affections of his wife, Annie Bannister, and deprived the plaintiff of the love, services, and society of his wife, thus destroying the peace and happiness of his household".

The jury assessed the damages at $500 on the first head and $1,000 on the second.

For the defendant it was argued that on these findings the plaintiff was not entitled to judgment. The learned judge stated that the considerations applicable to each of the counts differed and that they must be treated separately.

Dealing first with enticement Middleton J. said, at p. 564:

> The wife, while living under her husband's roof, had entirely ceased to discharge any wifely function. She slept in her own room, locking the door. She refused to speak to her husband; and he was as fully deprived of her *consortium* as if she lived in a separate building.
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> It is said that this constitutes no cause of action, because the defendant himself has not actually received her to his own house. I do not think that this is so. It is not the fact that the woman is staying with her paramour that constitutes the wrong; it is depriving the plaintiff of the wife's *consortium*, which, under the circumstances, is just as full and complete as if the woman had been forcibly abducted.

In my opinion this is a correct statement of the law. The ingredients of the cause of action for enticement are stated in the reasons of the Lords Justices in *Place v. Searle*[1], particularly by Greer L.J. at p. 517, and are accurately summarized in the head-note to the report as follows:

> A wife owes the duty to her husband to reside and consort with him, and any one who, without justification, procures, entices or persuades her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages.

The judgment in *Bannister* simply makes it clear that a wife may violate her duty to reside and consort with her husband although continuing to live under the same roof.

Turning to the second branch of the case Middleton J. rejects the dictum of Osler J.A. in *Lellis v. Lambert*[2] (to be examined shortly), taking the view that it is *obiter* and continues, at pp. 565 and 566:

[1] [1932] 2 K. B. 497.

[2] (1897), 24 O.A.R. 653 at p. 664.

I find myself quite unable to accept this statement of the law. I think the case of *Winsmore v. Greenbank* (1745), Willes 577, establishes otherwise, and that the law recognises the right of the husband to recover damages against a defendant for any misconduct which deprives the plaintiff of the love, services, and society of his wife—to use the words of this pleading—commonly called *consortium*. It may be that the two counts in this statement are really an alternative description of the same wrong, and that the view already expressed sufficiently shews the plaintiff's right to recover.

I think this case illustrates the distinction between the action of enticement and the action of crim. con. To maintain the latter, proof of adultery is essential, and the action may be maintained even though there has been no consequent loss of the wife's affections, society, and services.

* * *

and at pp. 566 and 567:

Winsmore v. Greenbank is not, so far as I can ascertain, doubted or qualified. It is everywhere cited as authority. It is there said, (p. 581): "There must be *damnum cum injuriâ;* which I admit. I admit likewise the consequence, that the fact laid down before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a tortious act: it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie. This rule therefore being admitted, the only question is whether any such injury be laid here."

An unlawful procuring, it is said, is shewn where the defendant persuades the wife with effect to do an unlawful act, this rendering it unlawful in the defendant; for "every moment that a wife continues absent from her husband it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so." The consequence of the unlawful act was said to be sufficiently laid when it was alleged that by means thereof the plaintiff "lost the comfort and society of his wife and her aid and assistance in his domestic affairs and the profit and advantage he would and ought to have had of and from her estates."

As Middleton J. says, *Winsmore v. Greenbank* is "everywhere cited as authority"; but the cause of action, the *injuria,* recognized in that case was enticement; alienation of the wife's affections was only one of the items going to make up the total of the damages caused to the plaintiff.

It will be observed that, in the quotation from his reasons above, Middleton J. suggests that "the two counts . . . are really an alternative description of the same wrong, and that the view already expressed (*i.e.,* the view that the plaintiff had a cause of action for enticement) sufficiently shews the plaintiff's right to recover". With respect, I am of opinion that the correct statement would have been that the *injuria* which gave the plaintiff a cause of action was the

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enticement and that the alienation of the wife's affections which was one of the consequences of the enticement was part of the *damnum* resulting from that *injuria*.

This appears to me to be in accord with the view of the Court of Appeal whereby the appeal from the judgment at the trial was allowed in part and the damages were reduced to $1,000. Maclaren J.A. who gave the judgment of the Court said (at 32 O.L.R., pp. 36 and 37):

> The appellant also urges that the two paragraphs above referred to overlap. The first alleges that the defendant enticed away from the plaintiff his wife and procured her to absent herself unlawfully for long intervals from his house and society; the second, that the defendant by his wrongful acts alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society.
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> * * *
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> The first paragraph refers rather to the means used, the second to the damages resulting therefrom. This is dealt with in the case of *Winsmore v. Greenbank, supra,* at p. 582, where, in answer to the objection that procuring, enticing, and persuading were not sufficient, if no ill consequences followed from them, it was held to be sufficient in that case because it was specifically alleged that the plaintiff had thereby lost the comfort and society of his wife, and the advantage of her fortune, etc.

The dictum of Osler J.A. in *Lellis v. Lambert*[1], referred to above, which was rejected by Middleton J. reads as follows:

> The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium,* never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no "procuring and enticing", or "harbouring and secreting" of the wife, no action lay at the suit of the husband against the man.

There may be some difficulty in suggesting a case in which the conduct of a defendant which results directly in a wife's refusal to live with her husband would not amount to procuring and enticing her to leave her husband and result in a total loss of *consortium*; but in so far as Osler J.A. says that, where there is no adultery, no "procuring and enticing" or "harbouring and secreting" of a wife and no loss of her *consortium,* the mere fact that conduct of the defendant has

[1] (1897), 24 O.A.R. 653 at p. 664.

caused the loss of a wife's affections does not give her husband a cause of action, it appears to me that he has stated the law correctly.

I do not propose to refer in detail to the decisions in Ontario cited by counsel in which it has been asserted that the fact of alienation of a wife's affections caused by the defendant gives a separate cause of action to the wife's husband. I have examined all of them. I am satisfied that in each the ground of the assertion can be traced to the judgments in *Bannister v. Thompson* and *Winsmore v. Greenbank,* and for the reasons I have given above it is my opinion that in so far as they do make the assertion they ought not to be followed.

I have reached the conclusion that in the case at bar on the findings of the jury the plaintiff has established his cause of action for damages for criminal conversation, that he has not a separate cause of action for alienation of his wife's affections but that such alienation in so far as it has been established is the result of the criminal conversation and is one of the matters to be taken into consideration in assessing the damages.

It remains to assess the damages. The facts are unusual; they are stated in the reasons of Schroeder J.A. and it is not necessary to set them out in great detail.

The appellant and his wife, Anna Kungl, were married in Hungary on April 27, 1937. Three children, Mary Kungl, born on July 15, 1938, Theresa Kungl, born on May 28, 1940, and Joseph Kungl, born on April 29, 1942, were born in Hungary.

The respondent was married to the appellant's sister and in 1952 he brought the appellant and his family to Canada. The cost of moving was borne by the respondent. The appellant and his family moved into the respondent's home. There was a friendly relationship between the appellant and the respondent and their families. In 1953 the appellant and his family moved out of the respondent's house into their own living quarters in the nearby town of Leamington, Ontario.

The respondent's wife became ill and for six weeks prior to her death on April 15, 1954, the appellant's wife stayed with her day and night and nursed her. About three weeks after his wife's death the respondent requested Mrs. Kungl

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to come to work for him by the day as a housekeeper and she did so until 1955. During this time the respondent transported her to and from his home each day. Mrs. Kungl stated that on the first day on which she attended at the respondent's home to do the housecleaning the respondent made improper advances to her and offered her $100 to submit to him but she refused, that for several weeks thereafter the advances continued, that she finally yielded and from about August 1954 to October 1956 the respondent regularly had sexual intercourse with her and professed his love for her.

On January 9, 1957, Mrs. Kungl gave birth to a daughter, Rosann, of whom she stated that the respondent is the father. The learned trial judge instructed the jury as a matter of law that this daughter must be presumed to be the child of the appellant and this direction was not attacked in argument.

In the month of June 1957, the appellant's wife stated to her husband that the respondent was the father of the child Rosann.

Up to this time the appellant and his wife were living together as man and wife and having normal sexual relations with each other and in spite of the wife's statement as to the paternity of Rosann they continued to do so thereafter.

There is no suggestion in the evidence that at any time after the birth of Rosann the respondent had any improper relations with the appellant's wife or made any attempt to entice her or indeed to have anything to do with her.

After his wife's statement as to the paternity of Rosann the appellant and his wife sold the house which they jointly owned and bought another the title to which was taken in their joint names. Commencing with the summer of 1958 there were intermittent separations between the appellant and his wife but they were still living together in September 1959. They separated again a few weeks before the trial of the action. In reply to a question put by the learned trial judge as to whether she was willing to stay with her husband, Mrs. Kungl said "Yes, I would have stayed but my husband couldn't stand me."

There was evidence that the family life of the appellant and his wife had been a reasonably happy one but that it became less happy following her disclosure of her relationship with the respondent.

Three witnesses called by the defence gave evidence which, if accepted, established, in the words of Schroeder J.A., "that the plaintiff's wife had on several occasions engaged in the most vulgar sort of familiarity with friends or acquaintances of her husband". Mrs. Kungl was not called as a witness in reply to deny the evidence of these witnesses.

It is not necessary to restate the general principles by which the Court is guided in assessing damages for adultery. They are accurately set out in the reasons of McCardie J. in *Butterworth v. Butterworth & Englefield*[1]. In a case of this sort there is no method of calculation by which a figure can be reached with any exactitude. Our task is to endeavour to approach the matter as would a properly instructed jury, bearing in mind the general principles referred to above and the circumstances which Schroeder J.A. points out ought in this case to be considered as matters of mitigation, and to estimate the figure which appears proper on the particular facts of this case. We have reached the conclusion that the damages should be fixed at $5,000.

But for the fact that counsel for both parties asked us to assess the damages, the appeal to this Court would have been dismissed and the respondent is entitled to his costs of the appeal. I would make no order as to costs of the cross-appeal. The respondent is entitled to his costs in the Court of Appeal but the appellant is entitled to the costs of the trial.

In the result the order of the Court of Appeal should be varied; in lieu of the direction for a new assessment of damages it should be directed that judgment be entered in favour of the appellant against the respondent for $5,000 and the costs of the action. The respondent should recover from the appellant his costs of the appeal to the Court of Appeal and of the appeal to this Court.

[1] [1920] P. 126.

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Order of Court of Appeal varied. Judgment to be entered in favour of appellant for $5,000 and costs of the action. Respondent entitled to his costs of the appeal to the Court of Appeal and of the appeal to this Court.

Solicitor for the plaintiff, appellant: George J. Karry, Kingsville.

Solicitors for the defendant, respondent: Lerner, Lerner, Bitz & Bradley, London.