

certain children, the plaintiffs herein, some of whom, if they had been alone, would have lost their right to redeem by lapse of time under R. S. O. c. 108, sects. 19, 20.

*Held*, nevertheless, since some of the children had not been adult for the necessary period of five years preceding the filing of the bill herein, none of the plaintiffs were barred by the statute.

R. S. O., c. 108, sect. 11, only applies to contests between the joint owners, and it is not correct to say that R. S. O., c. 108, sect. 43, relating to disabilities, has no application to mortgage cases.

*Hull v. Caldwell*, 8 U. C. L. J. 93, declared binding in this country, on this point, notwithstanding *Forster v. Patterson*, L. R. 17 Ch. D. 132, and *Kinsman v. Rouse*, ib. 104.

One of the children surviving the mortgagor died under age and intestate in April, 1868.

*Held*, the present suit enured to those entitled to her share, including her mother as tenant for life thereof under R. S. O. c. 105, sect. 27.

*Held*, also, her mother should be directed to be made a party in the Master's office under G. O. 438, since the present case did not fall under the Judicature Act.

*Seem*, if the present case had fallen under the Judicature Act the same might have been directed under Rules 89.

*Street*, for defendant Harper, who rehears.

*H. Cassels*, contra.

Proudfoot, J.]

[June 22.

HOWES V. THE DOMINION INS. CO.

*Subrogation by insurers to rights of mortgagee*

*Unconditional clause — Evidence — Material increase of risk.*

This was a suit to redeem a mortgage. The plaintiff mortgaged certain lands to a Loan Company, covenanting to insure the same. Afterwards, at the plaintiff's request and on his behalf, the agent of the Loan Company insured the premises in the name of the Loan Company, with the defendants, and held the policy as collateral security to the mortgage; and the plaintiff paid the premium. The plaintiff's name was specified as owner both in the application for the policy made by the agent of the Loan Company, and in the policy itself. On the face of the policy it appeared that the loss, if any, was

payable to the Loan Company, and the policy also contained what is called the "unconditional" or "subrogation" clause. The policy, moreover, purported to be an insurance of the property itself. A fire having occurred, the defendants paid the Loan Company the whole amount of their claim on the mortgage, and obtained from them an assignment of the mortgage. Before this assignment the defendants had notice of the plaintiff's claim to have the amount to be paid under the policy of insurance credited on his mortgage.

*Held*, the policy was a general insurance of the policy itself, and not merely of the mortgagees' interest, and parol evidence was not admissible to prove that the Loan Company and the defendants, in effecting the insurance, had under consideration only the interest of the mortgagees.

*Seem*, such evidence might have been admissible, if any case had been made for rectifying the policy, as having been executed under a mistake.

*Held also*, the unconditional clause itself afforded some evidence that an interest in the mortgagor was recognised, and that the defendants were not insuring merely the debt due the mortgagee.

*Held further*, the plaintiff having done no act avoiding the policy, was, in redeeming his mortgage so assigned to the defendants, entitled to have credit allowed for the amount paid by the defendants to the Loan Co. under the policy, although the defendants were not aware, and did not assent to the plaintiff paying the premium.

Among the conditions endorsed on the policy was one avoiding it on any change of occupation of the premises being made material to the risk, and within the control and knowledge of the assured. On the policy there was an endorsement to the effect that "this property used to store doors and sashes;" but the application for the policy stated that the property had been used as a bending factory, and that it was intended to be used as a sash factory, and inasmuch as this application was by the policy made a part thereof, and a warranty by the assured:—

*Held*, the property might be used as a sash factory, although a sash factory is undoubtedly more hazardous than a bending factory.

*Held also*, the use of the premises for ripping