

JUNE 13TH, 1903.

DIVISIONAL COURT.

LIVINGSTON v. COUNSELL.

Trusts and Trustees—Account—Contract—Parties.

Appeal by plaintiff from judgment of MEREDITH, C.J., at the trial at Brantford, dismissing the action with costs, without prejudice to a further action being brought by the proper parties. The plaintiff is the wife of one W. C. Livingston, and the action was brought by her against Charlotte E. Counsell, executrix of the will of C. M. Counsell, deceased, claiming an account and payment of money. Thomas C. Livingston, the father of plaintiff's husband, was the owner of certain property in Winnipeg, subject to certain mortgages. On 27th October, 1897, an agreement under seal was entered into between him and the late C. M. Counsell, which provided that Counsell should advance \$15,000 to him upon the security of a mortgage of his equity of redemption, and should discount for him the note of Thomas C. Livingston, indorsed by W. C. Livingston and plaintiff for \$3,500, at three months, which note should be renewed from time to time for four years; that Counsell should forthwith be put in possession of the property and should collect the rents of it, and should apply them in payment of interest on the prior mortgages and his own mortgage, and of taxes, etc., and in payment to himself of a remuneration of \$10 a month, and should pay any surplus to plaintiff. The advance was made and the note discounted, and plaintiff had to pay the note. Counsell went into possession of the property and collected the rents. The plaintiff alleged that Counsell or the defendant had not paid over the surplus over and above the sums authorized to be deducted from the rents, and asked for an account. The trial Judge ruled that Thomas C. Livingston was a necessary party to the action, but plaintiff declined to amend by adding him, and the action was thereupon dismissed as above.

A. B. Aylesworth, K.C., for plaintiff.

J. L. Counsell, Hamilton, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—Counsell became a trustee of the surplus rents for plaintiff under the agreement, but upon the facts of the case the trust would come to an end when the object of it,