THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING MAY 6TH, 1905.)

VOL. V. TORONTO, MAY 11, 1905. NO. 18

MEREDITH, C.J. APRIL 28TH, 1905.

CHAMBERS.

SMITH v. SMITH.

Trial—Order Directing Preliminary Trial of Questions of Law—Separate Issues Disposing of Whole Action—Reasonable Probability of Establishing Propositions of Law—Rule 259.

Appeal by defendants Robert Jaffray and W. J. Smith from order of Master in Chambers, ante 518, dismissing an application for an order under Rule 259 directing a preliminary trial of certain issues arising in the action, and motion for a substantive order for a preliminary trial in the event of it being held that the Master had no jurisdiction to make the order.

W. E. Middleton, for appellants.

E. E. A. DuVernet, for the other defendants.

T. P. Galt, for plaintiffs.

MEREDITH, C.J., dismissed the appeal and motion with costs to plaintiffs in any event.

MEREDITH, C.J. APRIL 29TH, 1905.

TRIAL.

DELISLE v. DELISLE.

Parent and Child—Conveyance of Land by Father to Son—Undue Influence—Absence of Independent Advice—Improvidence—Annuity—Covenant for Maintenance—Consideration—Delivery of Conveyance—Charge on Land—Power of Distress—Re-entry for Breach of Covenant.

Action to set aside a transaction entered into between plaintiff and defendants (his son and daughter-in-law) on

8th February, 1896, and evidenced by a conveyance from him to them of a small farm in the township of Sandwich South, and a life lease from defendants to plaintiff and his wife, containing special provisions for the control by plaintiff of the cultivation of the farm as long as he should be competent to exercise proper control, and another transaction entered into between plaintiff and defendants on 25th May, 1897, evidenced by a quit claim deed from plaintiff to defendants of the farm and a bond from defendants to plaintiff by which defendants became bound to him for, amongst other things, the payment to him during his life of an annuity of $30, and to give him "a decent and peaceable board during his life."

F. E. Hodgins, K.C., and F. D. Davis, Windsor, for plaintiff.

E. S. Wigle, Windsor, for defendants.

MEREDITH, C.J.:—The transactions are attacked as having been brought about by undue influence exercised by defendants upon plaintiff, and the second transaction is also attacked upon the ground that it was entered into by plaintiff without consideration and when he was incapable of understanding and did not understand the nature and effect of it, and under the belief that he remained the absolute owner of the property during his life, and plaintiff alleges that he was, in making these conveyances, without professional or other independent advice, and that defendants prevented him from obtaining such advice.

Plaintiff claims in the alternative payment of a sum sufficient properly to maintain him as provided by the bond, or payment of $1,500, the penalty mentioned in it.

At the trial plaintiff's counsel applied to amend by setting up that the second transaction was an improvident one and by claiming relief on that ground also.

Upon the argument it was conceded by counsel for plaintiff that the transaction of 8th February, 1896, could not be successfully attacked, but it was strongly urged that the later transaction should be set aside on one or other of the two grounds. . . .

In addition to the farm, the personal property of plaintiff, including his farm stock and implements and some hay and grain he then had on hand, were transferred to defendants

on the same terms as were applicable to the transfer of the land.

Plaintiff contended and testified at the trial that the conveyance of 8th February, 1896, was never delivered, and was not intended to be operative until after his death, and that it was surreptitiously taken by or for defendants from a hiding place where he had put it, and registered without his knowledge or consent.

There is, in my opinion, no ground whatever for the assertion that undue influence was exercised by defendants or either of them upon plaintiff to induce him to enter into either of the transactions. . . . Plaintiff is an intelligent and shrewd man and of strong will, much more so than his son or his daughter-in-law, and the earlier transaction was of his own seeking and not proposed by defendants, who had settled upon another small farm upon which plaintiff had placed them, intending that it should be theirs at his death, and on which defendants had made substantial, though not very valuable, improvements, relying on plaintiff's promise to carry out that intention.

I am unable to find that the conveyance of 8th February, 1896, was not delivered. It was, I think, intended that the farm should pass by it to defendants; indeed, plaintiff frankly admitted that it was to be irrevocable; and my view of the retention by him of the conveyance in his own hands is, that it was to give effect to the stipulation of the life lease that he should have the control of the farm so long as he should be competent to exercise proper control of it.

The fact that the life lease was made by defendants to plaintiff, apart from the technical effect of it as an estoppel, is inconsistent with plaintiff's present contention, as is also the provision of the bond as to the son's mortgaging the farm to raise $275, which he could not do unless the land had passed to him by the conveyance.

The later transaction is not, I think, open to successful attack, either on account of undue influence or because plaintiff did not understand the nature and effect of the two documents that were then executed by the parties—the quit claim and the bond. I have no doubt that he did understand that he was giving the quit claim, and that his rights were thereafter to be measured by the provisions which were contained in the bond.

That transaction was, moreover, entered into after plaintiff and his son had together visited their parish priest and

had obtained his opinion as to the propriety of what was proposed to be done, which was in favour of the proposition being carried out. Notwithstanding that opinion, plaintiff did not at once agree to the arrangement, but only after he had reflected upon it when he had returned home after the visit.

The transactions were not, I think, as plaintiff alleges, entered into without any consideration moving from the son to the father. Besides having altered his arrangements as I have already indicated, the son assumed and agreed to pay plaintiff's debts, and did pay them, and the $275 for the raising of which provision was made by the bond, was raised and was used to pay plaintiff's debts, and the mortgage has since been paid off by defendants.

Defendants have also made valuable improvements on the farm in question, permanent in their character, which have very much increased its selling value.

The only question upon which I have entertained any doubt is as to the effect of the absence of any express provision in the bond charging the obligations of defendants other than the one for the payment of the annuity of $30 on the lands, and a power of distress in default of payment of the annuity, and the absence of a provision for plaintiff re-entering if defendants should make default in providing board for plaintiff, to render the transaction of which the making of such provisions for the protection of plaintiff might well have formed part, an improvident one.

I have, however, after consideration, reached the conclusion that, in view of the circumstances I have mentioned and the delay that has taken place since the impeached transaction was entered into, I ought not to set it aside.

It is not to be treated as a voluntary transaction on the part of plaintiff, for it was, as I have said, entered into for a substantial and valuable consideration, and if defendants are willing to make all that by the bond they have agreed to do for plaintiff a charge upon the land, and to give to plaintiff power to distrain for the annuity if default is made in payment of it, and also to confer upon plaintiff power to re-enter if default is made in providing board for him as agreed, and they execute a proper instrument embodying such provisions, the action should, in my opinion, be dismissed without costs.

The alternative case made by plaintiff is not made out. There is, in my opinion, no foundation for the allegation of

plaintiff that defendants have failed to provide him with decent and peaceable board as they bound themselves to do. Their treatment of plaintiff was not open to the charge which he makes against them, and I have no doubt that but for the interference of plaintiff's son Michael, there would have been no trouble between the parties. I prefer, on this branch of the case, the testimony of almost all the other children of plaintiff, who agree in saying that their father was well treated by defendants, to the testimony of Michael.

Defendants must within one month elect whether or not they will execute such an instrument as I have indicated should be executed by them, and, if they elect to execute it, it must be settled by the deputy clerk of the Crown at Sandwich, in case the parties differ as to the terms of it. If they elect not to execute it, the case may be spoken to by counsel.

SCOTT, LOCAL MASTER AT OTTAWA. MAY 17TH, 1904.

FEBRUARY 17TH, 1905.

MASTER'S OFFICE.

PAIN v. COLE.

Principal and Agent — Account — Contract — Construction —Parol Variation—Competing Business Done by Agent on his own Behalf—Goods Supplied by Agent — Profits — Remuneration of Agent — Damages for Loss of Agent's Profits—Special Services of Agent—Payment for—Method of Taking Account—Burden of Proof—Disbursements of Agent.

Action for an account, and counterclaim for goods supplied, damages for loss of profits, and for the value of services rendered. Reference to Master for trial of action and counterclaim.

J. Lorn McDougall, Ottawa, for plaintiffs.

Glyn Osler, for defendant.

THE MASTER:—Plaintiffs, whose chief place of business is in London, England, are large contractors for fireworks, decorations, and illuminations. In the summer of 1901, in anticipation of the visit to Canada of their Royal Highnesses the Duke and Duchess of York, plaintiffs sent out here Mr.

J. H. Dyson to represent them in the obtaining and carrying out of contracts for house and street decorations. Dyson's operations extended to Quebec, Montreal, Ottawa, Toronto, and London, and, as he quite obviously could not see personally to all arrangements at so many different points, and as he was, moreover, a stranger in the country, his first step was to appoint a local agent in each place. Defendant was appointed agent at Ottawa; and it is over the terms of this agency that the present disputes have arisen. Defendant obtained and carried out contracts for decorations on his own behalf, without regard to plaintiffs, and for these plaintiffs now seek to make him account. Defendant, in addition to denying plaintiffs' right to this relief, counterclaims, first, for the value of certain goods supplied to plaintiffs; second, for damages for alleged loss of profits by reason of the default of plaintiffs; and third, for services alleged to have been rendered in obtaining certain rebates of customs duties.

What was the bargain between the parties? The agreement is in writing and reads as follows:—

"We, The Cole's National Manufacturing Co. of Ottawa, agree to act as sole agents for the city of Ottawa, Eastern Ontario, and the Province of Quebec, west of Montreal, for Mr. J. H. Dyson, on behalf of Messrs. James Pain & Sons, pyrotechnists, of 121 Walworth Road, London, S.E.

"We to advertise and find room for storage of decorations and illuminations as may be required.

"Messrs. Pain & Sons to pay all expenses for the carrying out of any work that may be contracted for, directly or through us, and to pay as remuneration 10 per cent. of all amounts received for public work, such as decorations, illuminations, or fireworks which may be carried out by government, municipalities, or by public subscription, and 20 per cent. on all amounts received for private work. Duty, if any paid, to be deducted before commissions are computed.

"This agreement is made this 8th day of July, 1901.

"Cole's National M'f'g Co.,
"per Crawford Ross.
"J. H. Dyson,
"for James Pain & Sons, London."

The first point that strikes one on reading this document is, that it is general in terms, and makes no reference to any

specific time or occasion. It is, however, obvious from the surrounding circumstances, and is, moreover, admitted on both sides, that it was intended to apply to the public and private decorations which it was anticipated would be undertaken in connection with the then impending royal visit.

Defendant contends, first, that nothing in the terms of the agreement or the nature of the relations thereby established precluded him from undertaking and carrying out decorations on his own account, and, second, that it was a term of the contract, though not included in the written memorandum of it, that he should have this privilege.

Let us first examine the written document. What were Cole's duties under it to be? He was to advertise and to find room for storage, but his duties could hardly end there, nor is it contended that they did. He admits that he was to introduce Dyson to persons in Ottawa, to lend him his credit, and to canvass with him. I think it also clear that he was himself to canvass for and obtain orders when Dyson was not here. This follows from the language of the document—"work that may be contracted for directly or through us" (i.e., through Cole's National Manufacturing Company). It also follows from the necessities of the case. Dyson's main object, it seems to me, in appointing a local agent would be to have some one on the spot to represent him in obtaining orders. The dates of the royal visits to the various places in which he was operating followed so quickly on each other that the work had obviously to be carried on almost simultaneously in them all, and could not therefore have possibly been attended to by one man, excepting in a very general and supervisory manner. This seems so obvious that it must, I think, be taken to have been in the contemplation of the parties.

But, if it was defendant's duty to canvass for and obtain business on behalf of plaintiffs, it was entirely incompatible with that duty for him to endeavour at the same time to secure similar orders for his own private profit. By doing so he would be entering into competition with his principal; and placing himself in such a position as to render it practically impossible for him to carry out fairly his obligations towards that principal. The proposition seems so obvious that I deem it unnecessary to enlarge on it further.

But it is said that there was a parol agreement between the parties that defendant should have the right to make contracts on his own behalf. If such an understanding formed a condition precedent to the contract, it might, of course, be proved by parol, and, as defendant sought to establish this, I allowed evidence of what took place at the time of and prior to the signing of the agreement, to go in, subject to objection. Such a condition, however, so materially modifying what I conceive to be the plain effect of the written contract, would obviously require to be established by the clearest evidence. This has certainly not been done. The most that has been shewn is that Dyson explained that the contract need not interfere with defendant's business. Defendant's business was that of manufacturing and selling tents, awnings, flags, etc. Contracting for decorations formed no regular part of it. It is true that both defendant and his manager, Ross, say that for two or three months prior to the date of the agreement they had been preparing material for the anticipated decorations, but the evidence, taking it all together, does not establish that Dyson knew of this.

I therefore find that in respect to all the contracts entered into by defendant during the royal visit, whether taken in his own name or in that of plaintiffs, he acted as plaintiffs' agent; and that he is bound to account to them for all money received thereunder.

Turning to the first part of the counterclaim, it is not disputed that certain goods were supplied by defendant at Dyson's request; but plaintiffs object to the prices charged for them. These prices admittedly include a profit to defendant, whereas plaintiffs contend that they are only liable for the actual cost. The articles in question were all used or intended to be used in connection with the work plaintiffs had undertaken to do in Ottawa. The contract provides that plaintiffs are "to pay all expenses for the carrying out of any work that may be contracted for" . . . "and to pay as remuneration 10 per cent. of all amounts received for public work . . . and 20 per cent. on all amounts received for private work." As a matter of fact, with comparatively few exceptions, plaintiffs supplied from their own stock all the materials required; but there was nothing in the contract obliging them to this. There was nothing to prevent their asking defendant, as their agent, to procure

for them any articles which they might require and which he was in a position to obtain. Such assistance rendered to the principal seems to fall naturally within the scope of an agency such as this. For articles so supplied to them by their agent, plaintiffs are bound to pay "all expenses"—but only, I think, expenses. The remuneration — and the whole remuneration—receivable by the agent is set out in the contract. He is to get in certain cases 10 per cent. and in other cases 20 per cent. of the contract price. If he, in addition, makes a profit on the articles required for the carrying out of the contract, he is getting out of the work more than the contract entitles him to. Defendant must, therefore, file a new account of the amounts due for these articles, eliminating therefrom all profits to himself.

The second branch of the counterclaim is a claim for $500 damages for alleged loss of profits owing to the default of plaintiffs. No charge of this nature is made against Dyson in defendant's books, nor is such a charge included in the items of any of the bills rendered from time to time by defendant. Even in a bill, put in as exhibit 25, which was used as the basis of an attempted settlement after both parties had placed the matter in the hands of their solicitors, there is no mention of such a charge. It first appeared in the counterclaim, six months after the occurrences complained of. It evidently belongs, therefore, to that numerous class of causes of action which are resurrected after the parties get into litigation over other matters, and which would never have been heard of were it not for that litigation. If such a claim is supported by proper evidence, it must, of course, be given effect to, nothwithstanding the circumstances in which it is brought forward; but that evidence will naturally be more carefully scrutinized than would perhaps otherwise have been the case. What is the evidence here? Cole says that, as he understood the contract, he was to canvass for plaintiffs only when Dyson was here to go with him, and that, owing to the infrequency and shortness of the latter's visits, coupled with his failure to supply designs and price lists, contracts were lost which might otherwise have been secured. I have already stated that, in my view of the meaning of the contract, Cole's duty was to canvass for and secure orders irrespective of Dyson's presence or absence. I have no doubt that Cole was in a position to do this, notwithstanding

the alleged failure to supply designs. He was quite competent to do decoration work, and, as he himself says, told Dyson so. As a matter of fact many of the designs actually adopted were sketched by him, and he, of course, both designed and carried out the contracts which he purported to take on his own account. He had in his possession plaintiffs' price list for the lending of flags, shields, etc., and Dyson had explained to him the principle on which prices were to be calculated. The latter was, in fact, simplicity itself. It consisted in fixing on an amount sufficiently large to ensure a wide margin for profit, and then increasing it to a figure proportionate to the ability and willingness of the party to pay. The correspondence, it is true, shews that Cole from time to time urged Dyson to spend more time in Ottawa, and that the latter made promises in that respect which he sometimes found himself unable to carry out. It was natural that Cole should desire Dyson to be present here for as much of the time as possible, and Dyson no doubt desired to spend as much time here as his work elsewhere would permit. But there was nothing in the contract requiring Dyson to give to Ottawa a specific amount of his time, and he has, I think, been guilty of no default, either in that respect or otherwise, entitling defendant to damages such as he now claims. Even were this otherwise, I would, on the evidence, experience the greatest difficulty in assessing any damages. The evidence offered for that purpose is by no means satisfactory, depending, as it does, on so many contingencies. Defendant speaks to some one about decorations, in the street or in his shop. He gets, perhaps, some encouragement, but does not eventually secure the order, and he thinks that, had Dyson been there to second his efforts, he might have been more successful; but does that follow? Others were in the field, and plaintiffs could not be expected to secure all the business.

The last branch of the counterclaim is a claim for $100 for services alleged to have been rendered in connection with securing a rebate of customs. A customs broker was also employed, and it is not clear what rebate was secured. The services of defendant, as he himself tells us, consisted of interviews with customs officials on four different occasions. As the rebates seem to have been on goods used elsewhere than in Ottawa, it would seem that defendant is entitled to

some remuneration for his services, though the amount he claims cannot possibly be supported. Ten dollars should well repay him for the time he expended, and I fix his remuneration at that amount.

Defendant having filed an account, judgment was given as follows.

THE MASTER:—On the 17th May, 1904, I found that defendant was the agent of plaintiffs, and that, under the terms of the contract between them (exhibit 2), he was precluded from entering into contracts for decorations on his own behalf and for his own profit, and that he was bound to account to plaintiffs for all amounts received under any contracts purporting to have been so entered into.

Pursuant to my direction, defendant, on 27th June, 1904, filed an account of receipts and disbursements in connection with such contracts. Schedule A. of this account shews receipts to the extent of $1,469.30, and as to this no question arises. Schedule B. shews commission and general disbursements in respect of all contracts, and schedule C. shews disbursements attributable to specific contracts.

Before dealing in detail with these last two schedules, it will be well to lay down some general principles which must, I apprehend, govern the inquiry. Defendant, as I have found, was plaintiffs' agent. Contrary to his duty as such agent, and in violation of the terms of his contract, he purported to enter into certain contracts on his own account. The first principle which must apply is that plaintiffs must, as far as possible, be put into the position which they would have been in had the contract been carried out; in other words, they must not be allowed to suffer by reason of defendant's default. The second is that defendant must not be allowed to make a profit out of his wrong-doing. The third is that, the whole trouble having been brought about by defendant's default, the onus is entirely on him, and every doubtful circumstance must be construed unfavourably to his rights and interests. See Story on Agency, 9th ed., sec. 333.

Coming now to the account, the first item of schedule B. is not strictly speaking a disbursement. It is $293.86, being 20 per cent. commission on the $1,469.30 received from the

contracts in question. It was argued on behalf of plaintiffs that defendant had by his conduct forfeited all right to commission. I cannot take that view. If plaintiffs can be placed in practically the same position they would have occupied had no breach of contract taken place, and I think they can, then it would be manifestly unfair to further penalize defendant by depriving him of the remuneration to which, by the terms of the contract, he is entitled. I therefore allow the item.

The disbursements proper naturally divide themselves into two classes; first, those like labour employed in putting up and taking down decorations, evergreens, etc., which were exhausted in the using; and, second, those like flags, shields, etc., which were capable of being put to further use. The items falling within the former class are properly chargeable in full to plaintiffs, provided that no more is charged for them than it would have cost plaintiffs to supply them. For instance, the evergreen festooning, though it actually cost defendant six cents a yard, can be allowed at only five cents a yard, the figure at which plaintiffs had contracted for it.

The items of the latter class stand in a somewhat different position. With comparatively few exceptions plaintiffs supplied from their own stock, brought here for the purpose, all similar articles used in connection with the contracts carried out by them. According to the evidence of their agent Dyson, they had in the city at the time surplus material amply sufficient for what was required on the contracts carried out by defendant. There was some question as to whether or not this surplus material was in the city in time, but that does not, I think, affect the matter. Had the contracts taken in his own name by defendant been reported to Dyson at the proper time, doubtless the latter would have made proper provision for carrying them out. Had he failed to do so, it would have been no concern of defendant's. The latter would have done his whole duty by taking and reporting the orders and carrying out whatever instructions were given him, and the responsibility for any default would have rested solely on plaintiffs. The defendant, excepting in certain specific instances, had no authority to purchase or supply goods for the carrying out of plaintiffs' contracts,

and he cannot, as to the contracts now in question, be placed in any better position. I must, therefore, assume that, if defendant had done his duty, plaintiffs would have used their own goods on these contracts, as they did on the others, and I must endeavour to place them in the same position financially as though they had actually done so. Plaintiffs are continually carrying out decorative works in various parts of the world, and they are thus able to use their material many times over. Still its life must obviously have a limit, and not a very long one, when it is remembered that faded or worn goods cannot well be used for decorative purposes. The goods used by defendant on the disputed contracts have all been produced before me, and practically without exception they bear little or no trace of even having left the shop. From these and other considerations, I have come to the conclusion that, had plaintiffs' goods been used, a fair amount to have deducted from their value by reason of that use would have been 10 per cent. In the absence of other evidence, I am forced to assume that the cost of the goods actually used on the contracts in question by defendant represents the value of the goods plaintiffs would have used had they been given an opportunity, and on that assumption 10 per cent. of the cost of defendant's goods would represent the deterioration which plaintiffs' goods would have suffered had they been used.

In taking the account, therefore, defendant will be entitled to deduct from the $1,469.30 which he admits having received, (1) his commission amounting to $293.86, (2) the whole amount properly chargeable on account of what I have called disbursements of the first class, and (3) 10 per cent. of the value of the articles the charges for which I have called disbursements of the second class.

In arriving at the cost of the various articles, it will be necessary to bear in mind the general principles already laid down as governing the whole inquiry.

SCOTT, LOCAL MASTER AT OTTAWA. MARCH 15TH, 1905.

MASTER'S OFFICE.

BOUCHER v. CAPITAL BREWING CO.

Account—Sale of Hotel Business—Counterclaim for Balance Due on Sale—Deductions—Resale of Assets of Business —License — Renewal—Trust — Goodwill—Chattel Mortgage—Seizure—Sale—Onus.

Reference to the Master under the judgment of a Divisional Court (ante 270) to take an account of the amount due on defendants' counterclaim.

J. Lorn McDougall, Ottawa, for defendants.

A. E. Lussier, Ottawa, for plaintiff.

THE MASTER:—Plaintiff has been awarded judgment for $1,986.80, the amount paid by him to defendants for liquor illegally sold by them to him, and it has been referred to me to take an account of the amount due to defendants on their counterclaim. The bulk of the account is not in dispute. Defendants' books shew a balance due by plaintiff of $3,070. Of this amount $236.25 is admittedly due for liquor and must be deducted. To the extent of $2,226.85 defendants allege that the indebtedness is secured by 7 notes, particulars of which are set out in paragraph 9 of their counterclaim. The original notes were given for the price of the business, with the object of enabling defendants to raise money on them in the bank. The subsequent ones were, as I find, given in part renewal of the others, which defendants were gradually retiring. This circumstance does not, however, affect the matter. Defendants in their counterclaim set up the dealings between plaintiff and themselves, and it is, therefore, open to me to find the amount actually due them by him, regardless of whether or not they are entitled to claim on the notes.

Defendants seized under a chattel mortgage and went into possession of the property on 2nd February, 1904. The account includes charges for water rates and license fee up to 1st May, but, as defendants are not accounting for their dealings with the premises after 2nd February, they clearly cannot charge water rates or license fee after that date. The respective amounts to be deducted on those accounts are

$10.50 and $106.25. It also includes a sum of $34 paid to the bailiff who executed the seizure. Details of this are not given, but it appears to include expenses of keeping a man in possession. Defendants are entitled to the reasonable costs of seizing and of keeping possession until plaintiff went out. If, as would seem, something more has been included, the additional amount must be deducted.

A short time after the seizure defendants re-opened the hotel and conducted it for their own benefit until 12th November, 1904, when they sold by private sale to one Abraham Gould for $2,850. This sale covered the license, the goodwill of the business, the chattels on the premises, and the license fee and rent up to 1st May, 1905. Gould considered that he had got a great bargain, valuing the license alone at $2,500 and the furniture, etc., at $300, though the latter was a rough guess only and not based on any itemized valuation.

It was urged by counsel for plaintiff that the price obtained for the license and goodwill, as well as for the chattels seized, should be deducted from the amount due defendants.

Plaintiff purchased the license and goodwill, together with some chattels which are stated to have been worth from $40 to $140, for $1,200. It was stated in evidence that the goodwill of a hotel such as that in question, without the license, was worth practically nothing. A license, on the contrary, is a valuable asset. It subsists, it is true, for only one year, but it gives the holder a standing which insures a probability of its renewal, and it is a matter of common knowledge that persons are willing to pay substantial sums for a transfer, assuming the risk of obtaining the consent of the license commissioners to the transfer under sec. 37 of the Act, and of securing renewals of the license in succeeding years. For the year commencing May, 1904, the total number of licenses issued in Ottawa was reduced, and this circumstance further enhanced the market value of those that remained.

Neither the license nor the goodwill was included in the chattel mortgage under which defendants seized. The license was all along in the name of Henry Kuntz, defendants' manager, but from 12th November, 1901, until at all events 2nd February, 1904, he held it as a trustee for plaintiff in order to secure the payment of the latter's indebtedness to defendants. It has been held by the Divisional Court that the license

did not, in these circumstances, confer any right on plaintiff to sell liquor. It was even pointed out by the Chief Justice of the Common Pleas that the license might never have been of any validity. Neither of these considerations appears, however, to affect the question I am now dealing with. As between the parties, defendants were, through their manager, trustees or rather mortgagees of the license, and plaintiff was, as between them, the true owner of it. When defendants went into possession and began selling under the license, they put themselves in the position as regards the license of mortgagees in possession. Had the license been sold at any time prior to 1st May, plaintiff would, I think, have been clearly entitled to be credited with the proceeds of the sale; but on 1st May, while defendants were themselves carrying on the business, a new license issued, and I think I am bound by Taylor v. Macfarlane, 4 O. L. R. 239, 1 O. W.R. 283, to hold that this new license was their own, free of any trust in favour of plaintiff. This conclusion may seem at first sight somewhat inequitable. Defendants are allowed to charge plaintiff with the purchase price of the license and goodwill without crediting him with the proceeds of a subsequent sale at a much higher figure. If, however, I have rightly understood the decision in Taylor v. Macfarlane, the result is inevitable. There is, moreover, some evidence of an abandonment on the part of plaintiff at the time he went out; and during the trial of the action, in May, 1904, defendants offered to hand him over the business on payment of the balance due them, but the offer was declined.

As regards the chattels seized under the mortgage the position is different. The defendants have sold plaintiff's goods, and it is not disputed that they must give him credit for the proceeds. The only question is as to the amount. The sale to Gould was for $2,850, which was not specifically apportioned, though both parties appear to have looked on $300 as the amount paid for the chattels. . . .

We have $360 as the total cost of plaintiff's goods that were subsequently sold to Gould. Defendants never advertised the goods, but sold them, mixed with their own, by private sale. The onus is therefore on them to shew not only what they got for the goods, but that they sold them at a fair price. Considering all the circumstances and remember-

ing that second-hand goods cannot be expected to bring their full value, I fix the amount with which plaintiff is entitled to be credited on account of these goods, at the sum of $250.

Subject to a deduction from the bailiff's fees, this leaves the amount due to defendants on their counterclaim at the sum of $2,324.15 made up as follows:—

Amount claimed		$3,070 00
Less amount due for liquor	$236 25	
Water rates after 2nd February, 1904	10 50	
Proportion of license fee, 2nd February, 1904	106 25	
Charged for interest	142 85	
Value of plaintiff's goods sold	250 00	745 85
		$2,324 15

There will be interest on this amount from 2nd February, 1904.

SCOTT, LOCAL MASTER AT OTTAWA. APRIL 29TH, 1905

CHAMBERS.

HILL v. EDEY.

Summary Judgment—Rule 603—Action on Agreement to Pay Money in Settlement of Claim—Repudiation of Settlement—Authority of Solicitor—Case for Jury—Unconditional Leave to Defend.

Motion by plaintiff for summary judgment under Rule 603.

J. F. Orde, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendant.

THE MASTER:—The circumstances are somewhat peculiar.

On 25th January, 1904, a building which was being erected by a firm of Taylor & Lackey for the corporation of the city of Ottawa, under the supervision of defendant as architect, collapsed, causing injury to plaintiff In an action for damages brought against the contractors and the corporation the jury found that the accident was due solely

to the negligence of the architect, and the action was dismissed. (See Hill v. Taylor, 4 O. W. R. 284, ante 85.) On 24th January, 1905, plaintiff's solicitors wrote to Mr. Edey threatening to sue him for damages for the injury unless he was prepared to make a satisfactory offer of settlement. Negotiations were thereupon entered into, resulting, as plaintiff alleges, in a settlement for $1,500. Defendant, however, repudiated the alleged settlement, and plaintiff now sues for the $1,500, or, in the alternative, on the original cause of action for unstated damages.

The material filed in support of the motion consists of the affidavit of Mr. Osler, plaintiff's solicitor, three letters exhibited therein, and the evidence of Mr. A. W. Fraser, defendant's solicitor, called as a witness on behalf of plaintiff. In answer defendant files his own affidavit, on which he has been cross-examined. This covers probably all the evidence relating to the alleged settlement which would be available were the case to go to trial. The facts being all before me, there can be no question of putting defendant on terms. Either he is entitled to defend unconditionally or plaintiff is entitled to judgment. If there is evidence to go to a jury that no settlement binding on defendant took place, whatever my own view may be as to the weight of that evidence, I must refuse the application.

The inquiry is naturally two-fold. (1) Did defendant's solicitor purport to enter into an agreement to settle for $1,500; and (2), if so, is that agreement binding on defendant? The first question must clearly, I think, be answered in the affirmative. Negotiations looking towards a settlement were begun shortly after 24th January by an offer by Mr. Fraser to pay $250. This Mr. Osler characterized as too ridiculous to discuss, and he intimated that the lowest amount plaintiff would accept was $2,000. From this beginning negotiations went on for about a month, various sums being from time to time discussed. Mr. Fraser at one time mentioned $1,200, and Mr. Osler $1,700, and later $1,600. Mr. Osler's recollection of what took place and that of Mr. Fraser do not always correspond. Mr. Fraser, however, produced his office blotter containing entries dictated to his stenographer at the time, and therefore presumably correct. On 20th February the entry reads: "Attending Mr. Osler and discussing matter in afternoon on

basis of $1,500 cash. He will see his client about same." On 21st February, "Attending Mr. Osler and discussing matter, when he offers to take $1,600." On 27th February, "Attending Mr. Osler and told him we could do no better, when he will give us an answer to-morrow." And on 28th February, "Received letter from Mr. Osler accepting offer of $1,500 cash settlement. Telephoned Mr. Edey." The letter referred to in this last entry reads as follows:—

"I have seen Mr. Hill and have instructions to accept your offer to pay $1,500 in cash in settlement of his claim for personal injuries received in the falling of the fat stock show building in January, 1904. You may treat this letter as an acceptance of your offer."

If, as is contended, no definite offer of settlement had been made by Mr. Fraser, the latter would naturally on the receipt of this letter have hastened to correct the wrong impression Mr. Osler was evidently labouring under, yet nothing of the kind is stated to have taken place until after the receipt of another letter from Mr. Osler dated 30th March, threatening unless the $1,500 was paid at once, to proceed with the action. All this evidence, coupled with the positive statement of Mr. Osler, makes a case that cannot well be displaced. It is suggested that all that Mr. Fraser did was to ascertain the lowest amount plaintiff was willing to accept, or that if there was a settlement it was conditional on Mr. Edey's obtaining the sanction and assistance of certain friends. Mr. Fraser's evidence, taken as a whole, does not appear to me to support either of these contentions, and they can obviously rest on nothing else. Mr. Fraser, it is true, says that he never offered to pay an amount, but he appears to have in mind a distinction between agreeing on an amount and actually paying it. The references to Mr. Edey's consulting his friends are, I think, capable of a similar explanation. However that may be, his evidence when his memory is refreshed by reference to his diary so strongly supports Mr. Osler's story as, coupled with the other circumstances I have mentioned, to be quite conclusive in favour of plaintiff.

The second question is not so easily answered. The defendant admits that he instructed Mr. Fraser to make an offer of $250. When that was refused he says he "requested him to ascertain what amount was the lowest sum

that plaintiff would accept and I would consult my friends in regard thereto." And again, "Finally my said solicitor intimated to me that he thought plaintiff would be willing to accept $1,500, whereupon I suggested to him that he should ascertain whether plaintiff would be willing to accept this amount." In his cross-examination he says of Mr. Fraser, "He was acting as my solicitor, and I simply said to him the whole thing was in his hands." He admits that he was in constant touch with Mr. Fraser during the negotiations, and that the sum of $1,500 was discussed between them as far back as 20th February, although Mr. Fraser's final offer of settlement was not made until 27th February. On the other hand, he swears positively that Mr. Fraser's instructions went no further than to ascertain the lowest amount plaintiff would accept and that he did not authorize a settlement.

The contents of Mr. Osler's letter of 28th February were at once communicated to defendant, yet the settlement was not repudiated until after the receipt by his solicitor of the letter of 30th March. Defendant swears that on seeing the letter of 28th February he objected to the amount, $1,500, and that he understood Mr. Fraser saw Mr. Osler and told him so, but there is no hint of this in Mr. Fraser's evidence. If Mr. Fraser's instructions were limited in the way defendant alleges, I think, on the cases, the settlement cannot stand, unless indeed, as plaintiff contends, ratification of it must be implied from the long delay in repudiating it. See as to the first point, Neil v. Lady Gordon Lennox, [1902] A. C. 465; Lewis's v. Lewis, 45 Ch. D. 281; Dewar v. Orr, 3 Ch. Ch. 224; Watt v. Clark, 12 P. R. 359; and Benner v. Edmonds, 19 P. R. 9; and as to the second, Evans on Principal and Agent, Blackstone ed., *p. 79, and Bowstead on Agency, 2nd ed. p. 54.

After careful consideration, I have come, with some hesitation, to the conclusion that defendant is entitled to have both the question of Mr. Fraser's authority and that of the ratification of what he did, submitted to a jury. Were I to decide otherwise, I should, I think, be trying the case, which I have, of course, no right to do.

The motion will therefore be dismissed. The costs will be reserved to be disposed of by the trial Judge; or if not disposed of by him they will be in the cause.

TEETZEL, J. MAY 3RD, 1905.

WEEKLY COURT.

WALSH v. FLEMING.

Will—Construction—Lapsed Devise—Failure of Objects—Residuary Clause—Wills Act, sec. 27—Rules of Construction—Avoidance of Intestacy.

Motion by plaintiff for judgment on the pleadings in an action for construction of the will of James Orford, and for an account.

J. E. Jones, for plaintiff.

C. Robinson, K.C., and J. F. Richardson, for defendant Lydia Jane Fleming.

A. Hoskin, K.C., for defendant Britton.

E. Coatsworth, for defendant Samuel Platt, the surviving executor.

F. W. Harcourt, for the infant defendants.

B. Morton Jones, for defendants James, Ellen, John, and Frank Walsh.

TEETZEL, J.:—The testator died on 22nd September, 1880, and the will is dated 3rd August, 1880. The testator was twice married, and at the date of the will there were living two daughters and one son (William Orford) by the first wife, and one daughter, Lydia Jane Orford (afterwards Fleming), by the second wife.

The son, William Orford, left home a few months after his father's second marriage in 1860, and had not returned at the time of his father's death.

The portions of the will particularly in question are . . . as follows:—

"I give, devise, and bequeath unto my wife Mary Ferguson Orford all my real estate, consisting of lots 1, 2, 3," (and a number of others) . . . "and also all other real estate and the personal estate of which I may die seised or possessed of or in any way entitled to, as follows:—

"1. To hold the same for the benefit of my said wife . . . during the term of her natural life or so long as she may remain my widow, allowing her the full and free

use of all personal estate and all rents and profits of my said real estate, such provision to be accepted in lieu of dower.

"2. After the death or marriage of my said wife as aforesaid to hold the same for my daughter Lydia Jane Orford during her life for her sole benefit, free from the control of any husband she may have, allowing her full and free use of my said personal estate and all rents and profits of said real estate.

"3. From and after the death of my said daughter . . . to divide the said real and personal estate between her children. . . .

"4. Notwithstanding the directions hereinbefore contained, I desire that if my son William Orford returns to Toronto within 5 years from the date of my death, my executors shall hold in trust for him from the time of his return to Toronto said lots 15, 16, 17, 18, 19, and 20, and also said lot 1" (being some of those already dealt with), "subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct and appoint, and in default of such direction or appointment to divide said property equally between them . . . ."

The son William Orford returned to Toronto within 5 years from his father's death, and entered into receipt of the rents and profits of the lands devised to him. He died in 1904, without issue, never having married. The widow died in 1902.

Plaintiff and defendant Britton and defendants Walsh are children of testator's two daughters by his first wife, both since deceased. The other defendants are the daughter Lydia Jane, her seven infant children, and the surviving executor.

Plaintiff contends that upon the true construction of the will the gift to William Orford for life and the remainder to his children is an alternative contingent gift which, when it became operative by the return of William Orford, entirely replaced, defeated, and extinguished the prior gift to defendant Lydia Jane Fleming and her children, and that upon the death of William Orford without issue the property

devised to him for life did not revert to Lydia Jane Fleming and her children, but devolved upon plaintiff and the other heirs of law of the testator, as upon an intestacy.

On behalf of defendants Fleming it is contended that the devise to William Orford was merely taken or carved out of the estate devised to . . . Mary Ferguson Orford and the defendant Lydia Jane Fleming and her children, and that upon the death of William Orford unmarried and intestate the estate which was taken or carved out became exhausted, and the lands and premises therein referred to then remained vested in Mrs. Fleming and her children for the estates given them under the will.

To adopt plaintiff's contention involves a conflict with the natural and reasonable presumption, that when the will is executed the testator does not intend to die intestate as to any part of his property. . . .

The expression "also all other real estate and the personal estate of which I may die seised or possessed," in the 1st paragraph of the will, manifests clearly the testator's intention that there should not be a partial intestacy, and there is nothing in the language of the subsequent part of the will shewing a contrary intention.

For plaintiff it was argued that the authorities establish a rule of law to the effect that a vested interest which is given over in certain events is divested if those events happen, though the gift over may be void, or though the devisee to take under the gift over dies before the testator, or may never come into existence; citing Doe Blomfield v. Eyre, 5 C. B. 713; Robinson v. Wood, 27 L. J. Ch. 726; O'Mahoney v. Burdette, L. R. 7 H. L. 388; Hurst v. Hurst, 21 Ch. D. 278; and other cases referred to on p. 570 of Theobald, 5th ed. . . .

Plaintiff contends that the return of William within 5 years was the event upon which is to depend the divesting of the estate in the lands previously given to Lydia Jane and her children, and, that event having happened, the previous devise of the same property is effectually cancelled for all purposes, and, there being no provision in the will for revesting in Lydia and her children, in case William leaves no children, there is consequently . . . an intestacy in the absence of a residuary devise.

Theobald, at p. 571, citing Gatenby v. Morgan, 1 Q. B. D. 685 . . . points out that a distinction must be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of a portion of the prior interest in certain events. In the latter case the prior interest is divested only so far as is necessary to give effect to the gift over. This proposition of law was relied upon by counsel for the Flemings as being applicable to this case, and it was argued that at most the prior interest had only been divested to the extent of the executory devise to William for life, and that upon the death without children the purpose of the devise was satisfied, and the estate thereupon revested in the first devisees.

With not a little hesitation, I am unable to support this view, for the gift over was not of a portion but of the entire interest in the lots named, and the contingency upon which the gift over was to take effect was William's return, and I think the failure of the objects of the executory devise to his children resulted only in a lapse of that devise.

No express provision having been made for the contingency of William leaving no children, the question is, whether the devise to them (having failed) falls into the residue under sec. 27 of the Wills Act, to be held by the executors after the death of the widow for the benefit of Mrs. Fleming and her children. . . .

The questions therefore are: (1) Whether in this will there is a residuary devise; and (2), if there is, whether there appears in the will any intention contrary to the lapsed devise being included in such residuary devise. . . .

[Reference to Springett v. Jenings, L. R. 6 Ch. 333; In re Mason, Ogden v. Mason, [1900] 2 Ch. 196, [1901] 1 Ch. 619, [1903] A. C. 1; Carter v. Haswell, 26 L. J. Ch. 577.]

The provision of the Wills Act in question being of a remedial nature, I take it that in ascertaining whether a devise amounts to a residuary devise within the meaning of the Act, two well established rules of construction must be applied: first, that remedial statutes should be construed liberally and not strictly; and, second, not to impute to a testator the intention of dying intestate. . . . [Refer-

ence to In re Harrison, 30 Ch. D. 393.] These two rules, as all other rules of construction, must of course bend to the fundamental rule, namely, that the intention of the testator as gathered from the whole will is to govern.

Now, in the light of these rules of construction, I am of opinion that the will in question does contain a residuary devise in language sufficiently comprehensive to "sweep up" the lapsed devise in question. . . .

[Reference to Blight v. Hartnell, 23 Ch. D. 220, 222.]

I think the effect of the language contained in this will is, in the first instance, to give all the lots specifically mentioned and all the residue of testator's estate as stated in the first 3 clauses of the will, except lots 15, 16, 17, 18, 19, and 20, which in the event of William returning are to be held as in paragraph 4. In other words, I cannot construe the words "notwithstanding the directions hereinbefore contained." etc., as having any greater effect upon the limitations of the residuary clause in paragraph 1 then if the devise contained in paragraph 4 had been engrafted on paragraph 1 as an exception from the general and residuary devise therein contained.

The fact that the residuary clause is in the first paragraph of the will, instead of the last, is not of controlling consequence, and can have no effect except as it bears upon the question of the intent of the testator. . . . [Reference to Morton v. Woodbury, 153 N. Y. at p. 252, and cases cited.]

I can find nothing in this will affording the slightest evidence of an intention on the part of the testator to exclude this lapsed devise from the residuary devise which I find the will contains.

This construction enables the Court to give effect to what seems to have been two prominent ideas of the testator, namely: (1) not in any event to die even partly intestate; (2) to provide for his son William and his children, if any, in the event of his returning within 5 years.

Judgment accordingly. Costs of all parties out of the estate.

OSLER, J.A. MAY 3RD, 1905.

TRIAL.

PARDEE v. FERGUSON.

Principal and Agent—Agent's Commission on Sale of Timber Limits—Introduction of Purchaser—Failure of Negotiations—Subsequent Sale at Reduced Price.

Action to recover from defendants Ferguson and McFadden money alleged to be due for commission on sale of certain timber berths.

E. E. A. DuVernet, for plaintiffs.

W. R. White, K.C., for defendants.

OSLER, J.A.:—The defendants Ferguson and McFadden were the owners of three timber berths in the district of Algoma. Some time in the year 1902 plaintiffs learned from a friend in the Crown Lands Department that they might be willing to sell, and in October, 1902, they wrote to defendants asking for information and for an option, which, however, defendants were not then disposed to give. Nothing further passed on the subject of any importance for some time, though plaintiffs evidently kept the matter in mind and were making inquiries as to a possible purchase, with a view to opening negotiations later on.

Plaintiff Pardee swore that on 20th June, 1903, he went to see defendant McFadden at his hotel, and told him that, if he could get an option on the limits, he could find, or had, a purchaser; that he could sell through one Upton, who, he said, was his agent in the matter, and, as he expressed it, could "swing the deal;" that McFadden told him he would give him a chance to sell and would pay a commission on the sale price—on whatever sum he could succeed in getting the limits sold for—but that he wished the commission to go through defendants Henderson and Brophy, in other words, that they were to share the commission, they or one of them having already had the limits in their hands for sale. No one was present at this conversation, though Upton had accompanied Pardee to the hotel, and was soon afterwards, I think on the same day, introduced by Pardee to McFadden as a person who could buy or sell if he had an option.

In his examination for discovery Pardee states that the price at which McFadden would sell, $325,000, was stated at their interview. There was nothing in writing about the commission.

McFadden's account of the conversation of 20th June was very different from Pardee's. He said that he did not then or at any time put the limits in plaintiffs' hands for sale, or agree to pay them a commission; that plaintiff Pardee had introduced Upton to him as a person capable of buying on his own account. He admitted that the subject of commission was spoken of, but that it was in reference to what he might pay or have to pay to defendant Brophy, who then held something in the nature of an option or authority, dated 10th November, 1902, to sell the limits for $325,000. The defendant Henderson he had nothing to do with, and recognized no one but Brophy as having authority to act for him. After Pardee and he had separated, Upton pressed for an option, which McFadden refused to give until he could communicate with Brophy on the subject. This he afterwards did, and on 13th July, 1903, wrote Upton a letter stating that he would give him the option of purchasing the limits at $325,000, until 1st August then next, with additional time, if required, if negotiations for a sale or examination of the limits were then still pending or being continued. Upton told Pardee that he had procured the option, and sent out a man to examine the limits. He offered them to a firm of Carney Brothers for $350,000. They refused to buy, and he never offered them to any one else. . . . Finally Upton threw the matter up, said he was unable to do anything with the option, and that defendants were free to deal with the limits without reference to him, and he told Pardee that he had done so. On the same day, or in the course of a few days, defendants began to negotiate with Carney Brothers themselves, and finally concluded a sale to them at $305,000. Pardee's sole connection with the matter was to introduce Upton to defendants. He paid no expense and did no work, and, while asserting that Upton was his agent, denied that he was ever under any obligation to reimburse him or pay him anything for what he did. Upton said he was dealing for himself alone, and was not in any way acting as Pardee's agent. Defendant Brophy swore that he did not consider that he had any claim for commission; he had been paid none and was to be paid none; and that his connection with the

limits was at an end when Upton got an option and sent his man out to examine them. He denied also that he and Henderson were jointly interested in the commission. The latter had allowed judgment to go by default and was not a witness at the trial. Several letters which had passed between plaintiffs and Henderson were put in, against defendants' objection. Their contents cannot affect defendants, but they shew that plaintiffs had been corresponding with Henderson on the subject of the commission, which, as plaintiff Pardee stated, defendant McFadden had told him must be shared between them.

I find upon the evidence that Pardee introduced Upton as a purchaser, or a person who, if he had an option on the limits, could probably find a purchaser at the price demanded by plaintiffs, $325,000; that, if Upton had bought, or had found, or if plaintiff Pardee himself had found a purchaser at that price, plaintiffs would have become entitled to a commission to be shared probably with Brophy. Upton's profit was to be in any sum he might be able to sell for, over defendants' price, at least that was his own idea of his interest. When Upton's option expired he gave defendants the name of the persons—Carney Brothers—to whom he had offered the limits, and defendants afterwards sold to them for $305,000.

But, in my opinion, this gives plaintiffs no claim to commission on that or any other sum, as the only contract they had was for commission on a sale for $325,000, which they never effected. It was not a bargain for commission on a sale for any sum which might result from plaintiffs' or Upton's introduction. When Upton's option expired or was abandoned, defendants were free to make the best bargain they could with the Carney Bros. or any one else, and the fact that the latter were introduced by Upton, or that defendants heard of them from him, gives plaintiffs no right to commission on the sale they afterwards made, a sale on different terms from the only one which plaintiffs ever had authority to make. In short, plaintiffs proved unable to comply with or carry out the only terms on which they could have earned their commission.

The recent cases of Miller v. Radford, 19 A. R. 575 (C. A.), Calloway v. Stobart, 35 S. C. R. 301, and Morson v. Burnside, 31 O. R. 438, may be referred to.

The action must, therefore, be dismissed as against all the defendants, and as to Ferguson, McFadden, and Brophy with costs.

SCOTT, LOCAL MASTER AT OTTAWA. MAY 4TH, 1905.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Parties—Defendant by Counterclaim—Action of Ejectment—Counterclaim for Declaration of Title—Heir-at-Law of Deceased Owner — Administrator—Pleading—Defences—Irrelevancy—Striking out.

Application by plaintiff to strike out the name of John O'Connor as a defendant by counterclaim, and to strike out certain paragraphs of statement of defence and counterclaim.

G. F. Henderson, Ottawa, for plaintiff.

W. N. Munro, Ottawa, for defendant.

THE MASTER:—The action is for ejectment and mesne profits. Plaintiff and defendant and John O'Connor are the only children of one James O'Connor, the former owner of the property in question, who died intestate on 10th February, 1902. Plaintiff claims under a deed from her father dated 3rd December, 1895. Defendant denies the execution of the deed, and sets up that, if executed, it was voluntary and improvident and obtained by fraud and undue influence. He also sets up an agreement alleged to have been entered into between James O'Connor and defendant in 1887, whereby the former was to hand over the property to the latter in consideration of his making certain improvements and supporting his father and mother during their lives, and that plaintiff had notice of the agreement prior to the date of the deed. The counterclaim asks for a declaration that defendant is entitled to the property under the agreement, and, in the alternative, for a lien on the lands for the improvements, for the amounts expended on the maintenance of his father and mother, and for wages for the period during which he worked for them. There is also a counterclaim for money alleged to have been expended for the support and clothing of plaintiff. John O'Connor, the only other heir-at-law of James O'Connor, is made a defendant by counterclaim under Rules 248 and 249, in order that defendant's claim for a declaration of ownership may be finally disposed of.

To my mind defendant's claim under the alleged agreement is one which it is eminently proper should be disposed

of in the present action. The rules deduced by Messrs. Holmested & Langton (pp. 429 & 430) from the cases regarding counterclaims against plaintiffs and others, are as follows:—(1) The relief sought to be obtained must relate specifically to, or be connected with, the subject matter of the action. (2) The counterclaim must claim relief against plaintiff along with the person sought to be added. Both of these requisites are present here. The ownership of the land is the subject matter of both the claim and the counterclaim; and the relief claimed by the latter is against both plaintiff and John O'Connor, who with defendant are the heirs-at-law of James O'Connor. Of course, even where these conditions exist, there is power under Rule 254 to strike out the counterclaim. The present does not, however, appear to me to be a case for the exercise of this discretion. Were the counterclaim for a declaration of ownership struck out, the rights of defendant under the alleged agreement might still have to be adjudicated upon by way of defence; and yet the decision come to would not be binding on John O'Connor, and, in the event of defendant's success, the whole matter might have to be gone into anew in an action against him. Suppose plaintiff proves her deed, and defendant proves his agreement, and that plaintiff took with notice of it. In such an event, if John O'Connor is a party, and the counterclaim for a declaration of ownership is allowed to stand, the whole matter would be disposed of for all time. If, on the contrary, the order now asked is made, defendant would be at all the expense of proving his counterclaim, and yet would be obliged to incur all that expense over again in an independent action. I have carefully examined the cases on which the plaintiff relies. In Romann v. Brodrecht, 9 P. R. 2, Canadian Securities Co. v. Prentice, ib. 324, Torrance v. Livingstone, 10 P. R. 29, and General Electric Co. v. Victoria Electric Light Co., 16 P. R. 476, 529, the counterclaims sought to set up matters with which the respective plaintiffs had no concern. In Dunlop Pneumatic Tire Co. v. Ryckman, 5 O. L. R. 249, 1 O. W. R. 699, 820, there was held to be no such intimate connection between the subject of the action and the subject of the counterclaim as to oblige the Court to require both to be disposed of in the same action, and there were circumstances making it very undesirable that this should be done. None of these cases applies here, where the subject matter of the claim and of the counter-

claim is identical, and the latter is against both plaintiff and the added party. Counsel for plaintiff appeared also for John O'Connor and stated that the latter made no claim to the land. This does not affect defendant's right to have a judgment binding on him, and the trial Judge will doubtless consider the circumstance in disposing of the costs. The application, in so far as it is for the striking out of the name of John O'Connor as a party, therefore fails.

Certain paragraphs of the statement of defence are attacked on other grounds. The first of these is No. 2, which reads as follows:—

"The defendant is applying for letters of administration to the estate of James O'Connor, deceased, and prosecutes his defence and counterclaim in this action both personally and as administrator. The plaintiff, the defendant, and one John O'Connor are the only heirs of the said James O'Connor, deceased."

It is objected that, as letters of administration have not yet been granted, defendant cannot defend or counterclaim as administrator. The contrary was decided in Trice v. Robinson, 16 O. R. 433. So long as defendant perfects his title as administrator before the trial actually takes place, it is sufficient.

Paragraphs 6, 7, and 8 are also objected to, on the ground that they raise no issue and are irrelevant. They read as follows:—

"6. This defendant alleges and the facts are that the said James O'Connor at one time carried on business as a wheelwright on the lands in question, and that he (this defendant) assisted him in his shop in the carrying on of such business until about the year 1875, when he (this defendant) began to carry on the said business by himself upon the lands in question, and continued to do so until the decease of the said James O'Connor in February, 1903. From 1875 to 1890 the said James O'Connor occasionally assisted this defendant in carrying on the said business. The profits realized from the said business were insufficient for the support of the said James O'Connor and his wife, this defendant's mother, who died in the month of December, 1898.

"7. This defendant in order to support his said father and mother was obliged to work for farmers in the neighbourhood, and contributed his wages so earned to their support,

and to that of his sister, the said Anastasia O'Connor. About the year 1897 the said James O'Connor became unable to work at his trade of wheelwright, and from that time on he and his wife became absolutely dependent upon this defendant, who supported them both until the time of their decease.

"8. Previously to the year 1878 there was upon the lands a small dwelling-house in which this defendant, his father and mother, and the plaintiff, lived. It was not worth more than $30 or $40. In the year mentioned the defendant erected at his own expense a barn which is still upon the lands and in good condition, and the expense of erecting same was about $300."

The objection to these paragraphs is well taken. The allegation in paragraph 7 as to the support of James O'Connor and his wife from the date of the agreement until their deaths is proper, but it is repeated more specifically in paragraph 10. Otherwise they raise no issues and the facts set out are either irrelevant altogether or are merely evidence. The improvements referred to were made prior to the date of the alleged agreement and not pursuant to it. The subsequent improvements are set out in paragraph 10.

There will, therefore, be an order striking out paragraphs 6, 7, and 8, but otherwise dismissing plaintiff's application. As success is divided, the costs will be in the cause.

HODGINS, MASTER IN ORDINARY. APRIL 13TH, 1905.

MASTER'S OFFICE.

JORDAN v. FROGLEY.

Will—Construction—Direction to Sell Land—Conversion into Personalty—Death of Devisees—Personal Representatives —"Equal Moieties"—Meaning of.

Upon the usual reference in a proceeding for partition or sale of the lands of William Sharp, deceased, after the death of his widow (tenant for life) and the death of his children (the devisees under his will), the question of the proper construction of the will came before the Master upon an application to add the necessary parties in his office.

W. J. Tremeear, for plaintiff.

J. P. Eastwood and H. T. Canniff, for adult defendants.

J. R. Meredith, for the official guardian, representing the infant defendants.

THE MASTER:—The testator's will, dated 17th December, 1879, leaves his real property, being a lot and houses thereon, to his wife "for her sole and separate use, by her keeping up repairs, taxes, and insurance, during her natural life." It then provides that "at her death I desire that the said lot with the 4 houses thereon shall be sold, and the money realized from the sale I give and bequeath in equal moieties to my son William Sharp and three daughters, viz., Ellen, Sarah, and Fanny." His wife survived him, and died 5th July, 1904, but all his children have died since his death and before the death of the tenant for life.

The will operates on this real estate to convert it out and out into personal estate on the death of the wife, the tenant for life. And as to the children named in the will, it must be dealt with in the character of personal estate, which the will had impressed upon it. All the children to whom it was devised having died after the death of the testator and before the death of the tenant for life, it must therefore follow that the reversionary interest in the lot and houses, as converted, personally vested in each child's personal representative, with all the incidental rights and liabilities affecting personal estate. See Ashby v. Palmer, 1 Mer. 296; Biggs v. Andrews, 5 Sim. 424; Elliott v. Fisher, 12 Sim. 505.

Then as to the share to which each is entitled. The testator has used the expression "equal moieties" twice in his will. As to the moneys realized from the sale of his real estate he says: "I give and bequeath in equal moieties to my son William Sharp and my three daughters, Ellen, Sarah, and Fanny." And as to the moneys realized from the sale of his goods and chattels he says: "I give and bequeath in equal moieties to the children of my wife Charlotte under a former marriage," of whom 5 were living at the time of his death.

The use of this expression "equal moieties" twice in this will must be held to indicate that he intended it to receive a uniform interpretation, and not its ordinary interpretation of one-half.

In Morrow v. McConville, L. R. 11 Ir. Ch. 236, the testator left a moiety of his property in trust for each of three purposes, and Chatterton, V.-C., in construing its meaning in the will, said: "Although the proper meaning of the word 'moiety' is a half-part, it is here, in my opinion, used by the testator in the sense of an equal part or share. I am not aware of any judicial opinion having been expressed on the meaning of this or a similar word. In the Imperial Dictionary, a book of some authority to which I have referred, I find one of its meanings given as a part or share, as distinguished from a half-part."

Following this interpretation of the expression, I must hold that the personal representatives of the son and 3 daughters take equal parts or shares in moneys realized from the sale of the testator's real estate.

STREET, J. MAY 6TH, 1905.

TRIAL.

HIME v. LOVEGROVE.

Covenant—Building Restriction—Deed of Land — Covenant Running with Land—Breach—Construction—"House."

Action for damages for breach of a covenant and for an injunction.

On 1st December, 1886, George Evans, being the owner of two adjoining parcels of land in Wellington place, in the city of Toronto, conveyed one of them to Norman B. Dick. The parcel retained by the grantor was occupied by him, and upon it he had erected a house at a cost of $10,000 or $12,000, in which he lived. The parcel conveyed to Dick was vacant, and had formed part of the garden attached to the other parcel. The conveyance to Dick was executed by him, and contained a covenant by him, for himself, his heirs, executors, administrators, and assigns, "that he or they will not, nor will they or any of them permit any person whomsoever, to erect or build more than one house upon the property hereby conveyed, and that any house so erected shall be of brick or stone or partly of brick and partly of stone, and shall

cost not less than $5,000; the southerly wall of such house not to be nearer the northerly limit of Wellington place than the southerly wall of the house at present occupied by the party hereto of the first part immediately east of the property hereby conveyed, and no part of the wall or walls of any house built upon the said lands to be nearer than 10 feet from the westerly wall of the house at present occupied by the party hereto of the first part as aforesaid."

In 1888 George Evans conveyed to H. L. Hime the parcel retained by him, and it was now vested under the will of Mr. Hime in plaintiffs, subject to mortgages made by Mr. Hime.

Defendants by various mesne conveyances had become the owners in fee of the parcel conveyed to Dick.

In July, 1904, defendants began the erection of a stable and carriage house, towards the end of their lot, made of brick, and had the walls about two-thirds completed when they were notified by plaintiffs that its erection was a breach of the covenant of Mr. Dick, their predecessor in title, and, upon their continuing the building, the present action was brought for an injunction to restrain them from proceeding with its erection and for damages, and by an amendment for an order requiring them to take it down.

No motion for an interim injunction was made, and defendants completed the stable and drive house, and used the stable for two or three horses and a couple of waggons, and stored cement in the drive house, for use in their business. Both defendants swore that the lot was purchased with the intention of erecting upon it a dwelling-house for defendant Lovegrove, which should comply with the terms of the covenant, with the stable and drive house in the rear. There was plenty of room between the stable and Wellington place for the erection of such a house, as well as for the space between it and Wellington place required by the terms of the covenant. The easterly wall of the stable was more than 10 feet distant from the line of the westerly wall of the house on plaintiffs' lot. After the conveyance from Evans to Dick a stable was built by Evans or Hime upon the rear end of the lot retained by him.

The character of the neighbourhood had changed materially since the date of the conveyance from Evans to Dick, and a number of factories of various kinds had grown up in

the neighbourhood, some of the larger dwellings having been converted into factories. The house on the lot retained by Evans had ceased within two years before action to be a private dwelling-house, and had been converted into two flats.

A. Cassels, for plaintiffs.

J. Bicknell, K.C., for defendants.

STREET, J.:—. . . I think it must be held, in the circumstances of this case, that the burthen of the covenant passed with the land to defendants, and the benefit of it to plaintiffs. See the cases of Renals v. Cowlinshaw, 9 Ch. D. 130, and Rogers v. Hosegood, [1900] 2 Ch. 388, where the question is very fully discussed.

The covenant, however, should not be extended beyond what its terms may be held reasonably to import. The purchaser is not to build more than one *house* upon the property; this is the sole restriction upon what he may do as to building, except that any house built upon the lot is to be of brick or stone and to cost not less than $5,000. If defendants had built a dwelling-house upon the lot complying with the terms of the covenant, they could not, in my opinion, have been restrained from afterwards adding a stable and carriage-house, for the covenant seems to be aimed at preventing the erection of more than one dwelling-house upon it. The covenantee himself built a stable upon his lot after the making of the covenant, and, without express words applying clearly to a stable, he could not have complained of his grantees for doing that which he himself had done. If defendants could build a house first and then add a stable without breach of the covenant, I see no reason why they should not begin by building the stable and afterwards build the house, as they swear it is their intention to do. See Russell v. Baber, 18 W. R. 1021; Bowes v. Law, ib. 640.

I think there is no breach . . . and the action must be dismissed with costs.

CARTWRIGHT, MASTER. MAY 5TH, 1905.

CHAMBERS.

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION No. 30 AMALGAMATED SHEET METAL WORKERS INTERNATIONAL ASSOCIATION.

Attachment of Debts—Moneys of Unincorporated Association —Judgment Against Members in Representative Action— Trust.

The taxing officer having certified a balance of $146.66 for costs due by defendants to plaintiffs under the judgment of the Court of Appeal in this action, the reasons for which are reported in 9 O. L. R. 171, and ante 95, and an execution for that amount having been issued against the defendants and placed in the sheriff's hands and remaining unsatisfied, the plaintiffs obtained an order attaching all moneys deposited in the Dominion Bank to the credit of the defendant union or of the individual defendants.

The plaintiffs moved for an order for payment over by the garnishees of the moneys attached.

W. N. Tilley, for plaintiffs.

J. G. O'Donoghue, for defendants.

W. B. Milliken, for the garnishees.

THE MASTER:—The Dominion Bank admit $20 in their hands to the credit of defendant William Jose, and $409.85 to the credit of an account headed "Amalgamated Sheet Metal Workers Union No. 30," which moneys are payable out on cheques signed by Alexander Kay, president, W. C. Brake, recording secretary, and R. Russell, treasurer.

It was admitted that the $20 to the credit of Jose must be paid to plaintiffs.

As to the other sum it was argued that the order of 5th October, 1903, was representative only, and that there was no order for these costs against the Local Union.

On the other side reliance was placed on the terms of the above order and of the certificate of the Court of Appeal.

The point was admitted by both counsel to be new, and neither of them cited any authorities.

The result of the judgment of the Court of Appeal would seem to be that Local Union No. 30 is not "an entity known to the law." Counsel agreed before me that its name should not appear as a party to the litigation.

Not being a legal entity, it cannot hold property, and the money standing in the Dominion Bank is not the property of the Union. It rather belongs to those who from time to time are entitled to share in what is really a trust fund for securing the payment of certain sums for relief in cases of sickness or of the death of those who are members of the voluntary association known as Local Union No. 30.

The money paid into this fund ceases at once to be the property of the contributors. They have no longer any individual power to deal with it in any way. It has passed out of their control, and is therefore not assignable by them, nor can it be attached to satisfy their debts.

The Court of Appeal has decided that the two voluntary associations cannot be made parties to an action. They can only be reached in the way of the order made by Mr. Justice MacMahon. Whether such an order will bind the other members of the association so as to render them liable for costs is a matter which may have to be considered later on. How it will be decided is by no means clear.

At present it is sufficient to say that the funds in question are not shewn to be exigible to satisfy plaintiffs' execution for costs.

Before an order of this kind can be made absolute, it must be beyond any reasonable doubt that the money is properly exigible to satisfy plaintiffs' judgment.

But this is far from being established in the present case, and therefore as to the larger sum the motion must be dismissed and the order discharged.

As the plaintiffs have had some measure of success, and as the point on the other branch is new, there will be no order as to costs, except that those of the garnishees (fixed at $7) will be paid by plaintiffs.

Reference to the following may be useful:

Kingston v. Salvation Army, 6 O. L. R. 406, 7 O. L. R. 681, 2 O. W. R. 859, 3 O. W. R. 556, and Aikins v. Dominion Live Stock Association, 17 P. R. 303, which contains a very full discussion of the nature of such unincorporated bodies, and a review of the English cases as to the way in which such bodies can be reached.

TEETZEL, J. MAY 6TH, 1905.

TRIAL.

HARVEY v. McKAY.

Collateral Security—Life Insurance Policy — Promissory Notes—Account—Entries in Books — Appropriation of Payments—Mortgage—Merger—Surety— Discharge.

Appeal by plaintiffs from report of WINCHESTER, Co. C.J., as a special referee, upon a reference to determine whether plaintiffs, or either of them, or defendant, was entitled to $1,476.50 paid into Court as the amount secured by a policy of insurance on the life of the late John McKay, who was defendant's husband.

W. R. Riddell, K.C., and D. B. Simpson, K.C., for plaintiffs.

G. F. Shepley, K.C., and J. R. Code, for defendant.

TEETZEL, J.:—On 2nd February, 1881, the deceased, John McKay, who was a manufacturer in Dundas, was largely indebted to plaintiff John Harvey for advances in connection with his cotton manufacturing business, which had been charged to him in plaintiff's ledger as "John McKay, cotton account." Further advances having been applied for, defendant executed the following memorandum:—

"Hamilton, Canada, February 2nd, 1881.

"Memo. of Agreement:

"In consideration of John Harvey, merchant, Hamilton, advancing either in cash or his acceptances to John McKay, Dundas, manufacturer, for the purpose of supplying funds to supply the mill at Dundas with cotton and money to pay wages, I hereby agree to give my acceptance to John Harvey for the sum of $1,000 at 6 months from date, and further by way of collateral security to transfer my interest in a certain policy of insurance in the Sun Mutual Insurance Co., of Montreal, paid up in full for some $1,476 or thereabouts, and assign my interest in 208 acres land in township of Robinson, Manitoulin Island, as a further collateral security.

"This security to cover any notes given to Mr. John McKay for supplying the mill, or renewals of such notes from time to time, until the said amount is paid off, with any interest that may be due on the same."

The following receipt was added at the foot of said memorandum: "Received from Mrs. E. McKay note dated February 2nd, 1881, at 6 months, payable at my office, Hamilton, for $1,000 for the purposes stated as above. John Harvey."

In pursuance of said agreement plaintiff John Harvey gave John McKay his note for $1,000, payable in 4 months from 2nd February, 1881, which was discounted by McKay in the bank, and the proceeds received by him; and this $1,000 note was charged to him in the cotton account, and when it fell due on 6th June, 1881, the account was credited with a renewal, and when the renewal fell due the account was debited with cash $1,000, and credited with a renewal as bills receivable for $1,000, and the $1,000 note continued to be renewed in full, and the appropriate entries to be made in the account until 27th December, 1883, when plaintiff John Harvey paid on account thereof $300, and the account is then credited with a renewal of the note of $700, and it was afterwards renewed in part 6 times, the cash reductions from time to time having been made by John Harvey, and on 19th October, 1885, the last renewal for $250 was paid by Harvey.

The learned referee has reported in favour of defendant, holding that plaintiffs are not entitled as against defendant to the moneys in Court. This is the result of the findings of fact and law set forth in paragraphs 2, 3, 4, and 5 of the referee's report. The findings are not the result of conclusions upon conflicting evidence, but are based upon the construction of documents and inferences drawn from the uncontradicted evidence of Harvey and his bookkeeper.

With very great respect, I am driven to differ from the learned referee upon his findings of law and fact.

Paragraph 2 of the report reads as follows:

"As the result of taking the accounts, I find that plaintiff received sufficient moneys from John McKay after 2nd February, 1881, to have taken up the said note and to have paid off the said $1,000."

I am unable to find anywhere in the evidence a single word to indicate that any of the sums which appear to the

credit of John McKay cotton account, or any other moneys, were appropriated to this $1,000 transaction, either by authority of defendant or her husband, or by act of plaintiff John Harvey. The account is a running one, and was continued as such after the transaction of 2nd February, 1881, at which date, as stated before, a large debit was standing against John McKay, and while there are numerous credit items, there is no evidence whatever to take away the application of the rule that the earlier debit items in the account, in the absence of express appropriation, must be first paid by subsequent credits; and, in my opinion, neither by express act of either of the parties, nor by application of any of the rules regarding the appropriation of payments, could it be said that the $1,000 which plaintiff John Harvey paid to take up his accommodation note to John McKay was ever repaid either by defendant or John McKay.

Besides the entire absence of any payment or appropriation of any of the moneys placed to the credit of the said account, I think the way in which John McKay and John Harvey dealt with this $1,000 item, until long after the last credit of cash appears in the account, shews conclusively that none of the moneys credited to the account were ever considered to be appropriated towards satisfaction of the accommodation note, for, as pointed out before, this note was renewed in full down to 24th August, 1883, and subsequent to that date it does not appear that any cash whatever was placed to the credit of the John McKay cotton account, while the last cash credited in the cotton account is on 8th December, 1881.

The security given by defendant, that is, her promissory note for $1,000, and the policy in question, were for the repayment to Harvey of any moneys he might have to pay in consequence of his giving the $1,000 accommodation note to John McKay.

The dealings between John McKay and John Harvey in reference to this note, and generally in regard to the appropriation of moneys received by Harvey, would be binding upon defendant as a surety for John McKay, in the absence of fraud. See Munger on Application of Payments, pp. 76-77; also Rowlatt on Principal and Surety, pp. 120-1, where it is stated that the question whether the payments made by the principal debtor are to be appropriated to a discharge or reduction of the guaranteed or some other indebtedness is one which, in the absence of special agreement between

the creditor and the surety, must be determined as if it arose merely between the creditor and the principal debtor, the surety having no right of his own to dictate either to the creditor or the debtor how payments made by the latter are to be appropriated. See also Wright v. Hickling, L. R. 2 C. P. 199; City Discount Co. v. McLean, L. R. 9 C. P. 692.

Paragraph 3 of the report finds that "John Harvey released John McKay from payment of the said $1,000, by transferring it from his account and charging defendant with it, and also by releasing John McKay from balance of the cotton account, of which it formed a part, and wiping it off his books."

It would appear that during the year 1881 John McKay failed, and plaintiff John Harvey, who was the owner of the mill premises occupied by McKay, conveyed the same to defendant for $12,000, and took her mortgage back for the full amount to secure the purchase money; and in August, 1881, an account is opened in the name of Mrs. Elizabeth McKay.

On 23rd January of that year Harvey's bookkeeper, as I find, without any authority from Harvey, but of his own motion, debited Mrs. Elizabeth McKay with two items of $677.92 and $1,308.19, described as "J. McKay cotton account," and at the same time credited the said two amounts to "John McKay cotton account." And afterwards, also, as I find, without any authority of his employer, said bookkeeper of his own motion on 31st December, 1885, balanced off the John McKay cotton account by transferring the debit balance of $609.06 to profit and loss, and placing that amount to the credit of the cotton account, so that, so far as the bookkeeping shews, John McKay would not be indebted to John Harvey in respect of said cotton account.

In my opinion, the evidence conclusively shews that on 19th October, 1885 (the date when the last renewal of accommodation note was taken up), John McKay was actually indebted to plaintiff John Harvey in respect of the cotton account, including the $1,000 note and interest, in the sum of $2,406.02, as per exhibit 10, which, in my opinion, was fully verified by the evidence. And I am of the opinion that the transfer entries made by the bookkeeper are in no way conclusive, nor can they operate as a release of the liability of John McKay to John Harvey.

Notwithstanding these acts of the bookkeeper, it is clear to my mind that John Harvey would have been entitled to recover from John McKay the said sum of $2,406.02, and therefore the making of these entries in no way prejudiced defendant as surety.

Paragraph 4 of the report finds "that the $1,000 was included and merged in a mortgage in the account "A" attached thereto, given by defendant to John Harvey for $12,000; that John Harvey agreed to release and discharge the mortgage for $9,000; and that, instead of the $9,000 being paid in cash, John Harvey accepted in lieu thereof a release of the equity of redemption from defendant, and discharged and released defendant therefrom."

This conclusion the referee has drawn from his interpretation of the correspondence between the parties. I confess I am unable to put this interpretation upon it. The only proposal binding upon John Harvey is contained in his letters of 2nd and 3rd April, 1884, the effect of which, as I read them, is that he agrees to accept $9,000 in cash in satisfaction of the $12,000 mortgage and two accounts appended thereto and an account against John McKay as of 30th April, 1881, of $2,076.51.

The only reference which I find he makes to the policy in question is at the close of his letter of 3rd April, in which he says: "I hold a policy of insurance paid up on John McKay's life for ——— against which I advanced you $1,000 cash, which if paid will retransfer to you the policy of insurance."

Even if the $9,000 had been paid, which it was not in fact, nor was the subsequent release and sale to Dixon accepted in lieu of the $9,000, I think it would not have entitled defendant to a retransfer of this policy. I think the only interpretation which can be put upon the letter is that he would retransfer the policy upon payment of the $1,000 in cash, independently of the $9,000 proposition.

The referee in his judgment concludes that the account "A," $1,677.92, included this $1,000 note. I think he is mistaken in this, as I think that, as originally made up at $1,677.92, it included a $1,000 note of one Duncan, and had no reference to the note in question.

The 5th finding of the report is in effect that defendant, being a surety for the payment of the $1,000 given to her

husband under said agreement, was released from her suretyship by reason of the dealings of plaintiff John Harvey with John McKay, and with the said mortgage, and therefore that the policy given by her as security is also released and she is entitled to the proceeds paid into Court.

I have already dealt in part with this finding in dealing with findings 3 and 4. I will only add that I can find no evidence whatever of any dealings between Harvey and John McKay which would release defendant as surety. There was no variance in the terms of the contract, either between the principal debtor and the creditor or between the creditor and the surety, nor has there been any contract or dealing between the creditor and principal debtor by which the principal debtor is released, nor was there any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. Nor do I find that the creditor has done any act which is inconsistent with the right of his surety, or has omitted to do any act which his duty to the surety required him to do, or by which the rights of the surety against the principal debtor were in any way impaired.

The agreement under which the security was put up, provided for renewals of notes from time to time until the said amount (meaning the $1,000) is paid off, and other than the repeated renewals of the accommodation paper given by Harvey to McKay there were no binding extensions of time.

The dealings with the mill property, the discharge of the mortgage, and the acceptance of the release of the equity of redemption, had no bearing whatever upon the rights or liabilities of either of the parties in respect of the security in question here, and I find that there was no evidence whatever to lead to the conclusion that the $1,000 obligation of John McKay or of defendant ever became merged in the $12,000 mortgage.

The appeal will be allowed and judgment entered declaring that plaintiff Wilhelmina Harvey, who is the purchaser from the assignee of John Harvey of the security in question, is entitled to the moneys in Court, together with costs of the appeal to be paid by defendant.