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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 29TH, 1915.

*BROWN v. COLEMAN DEVELOPMENT CO.

Statute of Frauds—Moneys Advanced by Director of Company for Benefit of Company—Oral Promise of President of Company to Repay—Evidence—Nature of Contract.

Appeal by the plaintiff from an order of MIDDLETON, J., of the 25th June, 1915, allowing an appeal by the defendant Gillies from the report of an Official Referee: 34 O.L.R. 210.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

W. M. Douglas, K.C., and S. W. McKeown, for the appellant.

H. S. White, for the defendant Gillies, the respondent.

RIDDELL, J., in written reasons for judgment, said that he found himself unable to agree with the conclusion that the promise undoubtedly made was one made by Gillies to answer the debt of the company so as to let in the Statute of Frauds.

The promise was, "You advance this money, and I will return it to you;" and that was an express contract of the respondent's own, and only his own. It was of no importance that some third person, corporation or otherwise, had the advantage of the advance: Thomas v. Cook (1828), 8 B. & C. 728; Wildes v. Dudlow (1874), L.R. 19 Eq. 198; Guild & Co. v. Conrad, [1894] 2 Q.B. 885 (C.A.); Lakeman v. Mountstephen (1874), L.R. 7 H.L. 17; Mountstephen v. Lakeman (1870), L.R. 5 Q.B. 613.

*This case and all others so marked to be reported in the Ontario Law Reports.

It is argued that the plaintiff rendered his account to the company; but the same thing took place in the Lakeman case (L.R. 5 Q.B. at p. 615); and the subsequent transactions between the parties were at least as favourable to the plaintiff's as to the defendant's contention.

The appeal should be allowed and the Referee's finding reinstated with costs here and below.

FALCONBRIDGE, C.J.K.B., LATCHFORD and KELLY, JJ., concurred, each giving reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 30TH, 1915.

CORBY v. PERKUS.

Mechanics' Liens — Claim of Contractor — Abandonment of Work—Time for Registration of Lien and Commencement of Action—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 22, 23—*Amount Due to Contractor after Allowance for Defects and Non-completion.*

Appeal by the defendant from the judgment of the Local Judge at Haileybury in a proceeding to enforce two mechanics' liens, for work done and material supplied by the plaintiff under a contract for doing the excavation and foundation work of a building upon the defendant's land, the plaintiff contracting directly with the defendant.

By the judgment appealed from, the plaintiff was declared entitled to a lien for $475.42 debt and $179.62 costs, and the defendant was adjudged liable to pay these sums.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

Gideon Grant, for the appellant.

H. D. Gamble, K.C., for the plaintiff, respondent.

KELLY, J., delivering the judgment of the Court, said that on the plaintiff's own evidence the lien could not be upheld. The plain meaning of the evidence was, that he abandoned the work on the 19th December, 1914, not again returning to it except on the 3rd February, 1915, in order, as he said, to pro-

tect the lien. But there was no statement, either in the claim for lien or on the record or in the evidence, as to what, if anything, he did on that date in fulfilment of his contract. The claim for lien was not registered within the time prescribed by sec. 22 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, nor was the action to realise commenced within the time mentioned in sec. 23.

The appeal must be allowed with costs here and below.

During the argument, the appellant's counsel expressed himself as desiring that the plaintiff should be paid whatever sum was due him after all due allowances were made; and it was suggested that the Court should say for what, if anything, the defendant was liable to the plaintiff in respect of the contract.

Taking the evidence as it stood—in some respects it was meagre—and considering the statements of the plaintiff and his witnesses of defects and of non-completion, the defendant was entitled to an allowance which would reduce the amount claimed to $75.

SECOND DIVISIONAL COURT. DECEMBER 31ST, 1915.

DAVISON v. FORBES.

Trust—Share of Proceeds of Sale of Farm—Account—Contract —Counterclaim—Fraud and Misrepresentation—Appeal — New Evidence—Admissibility—Costs.

Appeal by the defendant Forbes and cross-appeal by the plaintiff from the judgment of KELLY, J., ante 22.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., MACLAREN, J.A., RIDDELL and LATCHFORD, JJ.

Wallace Nesbitt, K.C., J. W. Bain, K.C., and Christopher C. Robinson, for the defendant Forbes.

W. N. Tilley, K.C., and J. T. White, for the plaintiff.

R. McKay, K.C., and D. Inglis Grant, for the defendant Haines.

FALCONBRIDGE, C.J.K.B., delivering judgment, said that, to his mind, the evidence of Alfred Ernest Davison, brother of the plaintiff, given before this Court on the 22nd November, 1915, by leave of the Court (see ante 145), after the argument had been partly heard, was conclusive. This witness said that

on the 15th day of July, 1910, the plaintiff told him that he was selling to his partners Forbes and Haines.

The appeal of the defendant Forbes should be allowed with costs and the action dismissed with costs. The cross-appeal should be dismissed with costs. The motion of the defendant Forbes to be allowed to counterclaim in this action should be refused without costs—he might bring an action if so advised.

RIDDELL, J., agreed that the appeal of the defendant Forbes should be allowed and the action dismissed, but without costs either of the trial or appeal.

The cross-appeal should be dismissed with costs, and the motion of Forbes refused without costs.

MACLAREN, J.A., said that the facts which the witness Alfred Ernest Davison swore to upon cross-examination were not disclosed in the affidavit upon which the leave to examine this witness was given; and, if they had been, the learned Judge would not have concurred in the decision to hear it. It was the defendant Haines who induced the plaintiff to sell the farm in question and to sign the document of the 15th July, 1910, consenting to the sale, which was prepared by that defendant's solicitor on his instructions, and he was the partner and agent of his co-defendant Forbes in the transaction, and they had made common cause throughout the whole defence. The knowledge of Haines was the knowledge of Forbes; and to accept or act upon testimony received in these circumstances would be to disregard the safeguards which the law provides against the admission of tainted evidence. Reference to a number of well-known cases, the latest being Rathbone v. Michael (1910), 20 O.L.R. 503, where the authorities are reviewed. And, even if the evidence were properly admissible, the learned Judge would hesitate to give it credence, as the new witness did not impress him favourably, and his story was inherently improbable.

The appeal of the defendant Forbes should be dismissed with costs.

LATCHFORD, J., agreed with MACLAREN, J.A., for reasons stated in writing.

The Court being equally divided as to the appeal of the defendant Forbes, it was dismissed without costs. The cross-appeal was dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 31ST, 1915.

*RE GRAMM MOTOR TRUCK CO. OF CANADA AND BENNETT.

Company—Shareholder—Summary Application for Removal of Name from Register—Companies Act, R.S.O. 1914 *ch.* 178, *secs.* 118, 119.

Appeal by one Galusha from an order of LATCHFORD, J., dismissing the appellant's motion for an order removing from the register of shareholders of the Gramm Motor Truck Company of Canada the name of William A. Bennett as the holder of 199 shares.

The appeal was heard by FALCONBRIDGE, C.J.K.B., HODGINS, J.A., RIDDELL and KELLY, JJ.

A. C. Heighington, for the appellant.

H. E. Rose, K.C., for Bennett, respondent.

RIDDELL, J., read a judgment, in which FALCONBRIDGE, C.J.K.B., concurred, in which it was said that the appellant's application was made under secs. 118 and 119 of the Companies Act, R.S.O. 1914 ch. 178. The result of the evidence was, as the Judge below correctly shewed, that Bennett was obligated to pay at least par for the shares, and there could be no objection to him on that account. That he had not paid for the shares was no reason for saying that he was not a shareholder. It may be that the company can sue or can be compelled to sue for the purchase-price—but that is not the present proceeding.

The appeal should be dismissed with costs, but without prejudice to any action the appellant may bring for a declaration that Bennett is not a shareholder—all the facts may not be before the Court, and many of the allegations are contentious. The sections of the statute referred to are not to be invoked except in a reasonably clear case.

HODGINS, J.A., read a judgment in which he stated the facts at some length, and referred to Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor (1915), 34 O.L.R. 161; In re Railway Timetables Publishing Co. (1889), 42 Ch.D. 98; Re Wiarton Beet Sugar Co., Jarvis's Case (1905), 5 O.W.R. 542; Re Modern House Manufacturing Co. (1913), 29 O.L.R. 266; Cam-

eron v. Cuddy, [1914] A.C. 651. He was of opinion that Bennett had become a shareholder, and that the appeal should be dismissed, but without costs.

KELLY, J., was of opinion, for reasons briefly stated in writing, that the appeal should be dismissed with costs.

Appeal dismissed with costs; HODGINS, J.A., *dissenting as to costs.*

SECOND DIVISIONAL COURT. DECEMBER 31ST, 1915.

*CAMPAIGNE v. CARVER.

Mechanics' Liens—Claim of Material-man—Erection of Pair of Houses for Different Owners on Adjoining Lots—Separate Contracts—Material Furnished for one House only within 30 Days before Registration—Failure of Lien as to other Lot—Reduction of Amount as to first—Request and Benefit of Owner—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 2 (*c*)—*Appeal—Costs.*

Appeal by the defendants Carver, Spence, and Castell, from the judgment of the Local Master at Hamilton in favour of the plaintiff, a material-man, in his action to enforce his lien against the defendant Carver, the contractor, and the defendants Spence and Castell, the owners of two adjoining lots, upon which the defendant Carver built for them a pair of semi-detached houses.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

Gideon Grant, for the appellants.

P. R. Morris, for the plaintiff, respondent.

LATCHFORD, J., delivering judgment, said that, if there was a joint contract by the two owners, the lien was properly registered, and attached to the interests of both: Deegan v. Kilpatrick (1900), 54 N.Y. App. Div. 371; Rockel on Mechanics' Liens (1909), p. 225. But the facts here were different. In considering the evidence, it was to be observed that Carver did not require a joint acceptance of his tender. That he might have done so was nothing to the point. While the defendant Carver's

tender was frequently referred to as "the contract," it was in reality but a proposal, the acceptance of which, whether joint or several, was necessary before a contract or more than one contract could be constituted.

In one aspect the tender itself was not severable. The houses were to be semi-detached. It was highly improbable that Carver would, at the tendered price, have built one if he was not at the same time to have the building of the other. But this term, plainly enough implied, would be completely satisfied if, with the concurrence of Carver, each of the owners accepted for himself.

It was manifest, from the testimony given and from the conduct of all the parties concerned, that the defendant Spence accepted the tender as to the one house, and Castell as to the other, so as to constitute, when ratified, as it was, by Carver, one contract between Spence and Carver for the Spence house, and another contract between Castell and Carver for the Castell house.

Upon the erroneous conclusion that there was but one contract, and that a joint contract between Spence and Castell on the one part and Castell on the other for the erection of the two houses on the two parcels treated as one, was based the Master's decision that the plaintiff was entitled to a lien on the interest of the owners of both parcels for $168.23, being the price of plumbing materials used in both the houses by the defendant Snodny, who had a sub-contract (and only one sub-contract) for the installation of the plumbing in both houses. The last of such materials—a bath and sink-basin—were furnished on the 6th August, and were placed in the Castell house by Snodny on the 10th August. On that day Snodny's man did, as he said, 15 minutes' work in the Spence house; but there was no evidence that any materials furnished for the Spence house were supplied within 30 days of the registration of the lien—which was effected on the 3rd September.

There being two contracts, the lien, so far as it affected the interest of the defendant Spence in his land, utterly failed.

The claim to a lien for $168.23 also failed as to the Castell property. The Castell interest could not be held liable for goods not supplied upon the request of Castell and not for his direct benefit: Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 2 (c); and the claim covered materials supplied for both houses. It was a reasonable inference that half the materials were used in each house, and the plaintiff's lien

should be reduced to $84.11 and restricted to the Castell property.

If the plaintiff is not satisfied with the amount, he may have a reference at his own risk.

No costs of the appeal. The plaintiff should have his costs of the proceedings below against the defendant Castell, limited, however, apart from disbursements, to an amount not exceeding 25 per cent. of the amount recovered.

FALCONBRIDGE, C.J.K.B., concurred.

KELLY, J., also concurred, for reasons stated in writing.

RIDDELL, J., was of opinion, for reasons stated in writing, that the appeal should be dismissed with costs.

Appeal allowed in part; RIDDELL, J., *dissenting.*

HODGINS, J.A., IN CHAMBERS. DECEMBER 28TH, 1915.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Appeal—Stay of Execution—Rule 496*—Application for Removal of Stay—Judgment Dismissing Action with Costs—Stay Operative as to Costs only.*

Motion by the defendants the Ottawa Separate Schools Commission to remove the stay created under Rule 496 by the setting down by the plaintiffs of their appeal to a Divisional Court of the Appellate Division from the judgment of MEREDITH, C.J.C.P., 34 O.L.R. 624, 9 O.W.N. 193.

W. N. Tilley, K.C., for the applicants.

F. B. Proctor, for the defendants the Corporation of the City of Ottawa.

J. H. Fraser, for the plaintiffs.

HODGINS, J.A., said that the affidavits filed on behalf of the applicants indicated that, while the result of the judgment was to establish the position of the applicants, they had not received the school moneys raised by taxation, because the Cor-

poration of the City of Ottawa retained them. The secretary-treasurer of the Commission deposed that these moneys were urgently needed for the opening of the Ottawa separate schools in the month of January, 1916, and for upkeep and maintenance, and for the payment of outstanding obligations.

Counsel for the city corporation stated that the corporation desired some definite direction of the Court before paying the moneys over; and had launched an application for such a direction, which was to come before a Divisional Court of the Appellate Division at the same time as the main appeal.

The form of the judgment here was a simple dismissal of the action. Under Rule 496, the entry of the judgment was not stayed, but merely its execution, except the taxation of costs under it. The judgment, therefore, when duly entered, as it may be, is a valid and effectual one until reversed, and can be used as the foundation of any other proceedings which may be necessary to compel payment to the Commission of moneys properly payable to it. The "execution of the judgment" is in this case limited to the enforcement of the payment of the costs awarded, when taxed.

Any desire for the execution of the judgment in this respect, pending the disposition of the appeal, being disclaimed by the applicants, the removal of the stay created by the Rule —the judgment being simply one dismissing the action—will not help the applicants. There is really nothing left upon which the stay operates; and, therefore, to make a formal order for its removal would be like subtracting something from nothing.

No order, and no costs.

MASTEN, J. DECEMBER 28TH, 1915.

McLAUGHLIN v. MALLORY.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser for Specific Performance — Discretion — Advantage Taken of Vendor — Agreement to Rescind—Failure to Establish—Laches in Prosecution of Action—Inability of Vendor to Convey—Declaratory Judgment—Leave to Apply for Consequential Relief.

Action by the purchaser for the specific performance of an agreement for the sale of a forty-acre farm in the township of Darlington for $1,400.

The agreement was dated the 20th February, 1913; and the action was begun on the 2nd April, 1913.

The action was tried without a jury at Cobourg and Toronto.

D. L. McCarthy, K.C., for the plaintiff.

C. J. Holman, K.C., for the defendant.

MASTEN, J., dealt with the facts in a written opinion of considerable length. The contest, he said, arose on three defences raised by the defendant: (1) that the contract was so harsh and generally unfair that the Court ought to exercise its discretion by declining to give specific performance; (2) that the contract was rescinded by subsequent mutual agreement; (3) laches in the prosecution of this action.

Upon the first defence, reference was made to Fry on Specific Performance, 5th ed., paras. 399, 401. The learned Judge said that, while the price was low, the defendant less able than the plaintiff, and the plaintiff had pressed the defendant with an unsound argument relative to his wife's dower, there was no sufficient reason for refusing specific performance. The defendant had a well-founded knowledge of the true value of the farm; he was amply able to take ordinary care of his interests in such a transaction; the plaintiff stood in no fiduciary relationship towards the plaintiff, and had no special hold over him; and, with respect to the dower question, the defendant had abundant opportunities of independent legal advice, and was quite competent to ask for it if he had thought that he needed it. The Court has a discretion, no doubt; but the discretion must be exercised according to established principles, the chief of which is, that a contract genuinely made shall not lightly be disregarded. This defence should not prevail.

As to the second defence, the learned Judge said that the agreement could be rescinded without a writing. But, unless the evidence of rescission was entirely plain, the written agreement must stand; and the finding must be that no definite and positive agreement to rescind was ever arrived at.

With respect to the last defence, the learned Judge was of opinion that the delay had been explained in such a way that the plaintiff ought not to be precluded by it.

Owing to the fact that a final order of foreclosure had been made in an action brought by one Foster, mortgagee of the farm, and that Foster had conveyed to one Mountjoy, no effective

order could be made in this action for a conveyance by the defendant to the plaintiff: Fry on Specific Performance, 5th ed., paras. 990, 993.

Judgment declaring: (1) that the contract is and was legal and binding on the parties and is a contract which ought to have been specifically performed on its date or so soon thereafter as practicable; (2) that the contract has not been rescinded; (3) that the plaintiff is not by laches disentitled to maintain this action; and (4) allowing the plaintiff to apply in this or any other action, whether now pending or hereafter brought, for such relief as he may deem himself entitled to have consequent on the above declarations.

Costs of the action to be paid by the defendant.

MIDDLETON, J. DECEMBER 30TH, 1915.

RUDOLPH v. CONTINENTAL LIFE INSURANCE CO.

Life Insurance — Insurance Moneys, where Payable — Policy Issued in Alberta, where Assured Domiciled — Claim of Beneficiary Named in Policy—Adverse Claim under Will of Assured—Effect of Alberta Statute—Forum—Payment into Court.

Motion by the plaintiff, a beneficiary under a certain policy issued by the defendants, for an injunction restraining the defendants from paying the money claimed by the plaintiff into Court in Alberta, and obtaining a discharge under the provisions of the Alberta Insurance Act.

The motion was heard in the Weekly Court at Toronto.

T. N. Phelan, for the plaintiff.

J. B. Holden, for the defendants.

MIDDLETON, J., said that the defendants have their head office at Toronto; they have obtained a license to carry on business in the Province of Alberta; and on the 11th May, 1914, they issued a policy for $5,000 upon the life of T. W. Gravelle, payable to his brother, J. W. Gravelle, as beneficiary. The insured died on the 13th April, 1915, leaving a will which purported to deal with this insurance money by giving $2,000 to the plaintiff. The defendants, having paid $3,000 to the brother, now pro-

posed to pay $2,000 into Court in Alberta, because of a claim made to it by the brother, who had notified the defendants that he elected to take against the will; and, therefore, disputed the plaintiff's title.

The plaintiff's contention was, that, because the policy provided for payment in Ontario, the defendants had no right to exonerate themselves by paying the money into Court in Alberta. With this the learned Judge does not agree. The Alberta statute (Acts of 1915, ch. 8, sec. 43) provides that in all cases where a company licensed to do business in Alberta issues a policy, the insurance money shall be payable in the Province of Alberta, when the assured is or dies domiciled therein, notwithstanding anything contained in any policy or the fact that the head office of the company is not within that Province.

This policy, it was admitted, was issued in Alberta, and the assured was domiciled therein; and the effect of this statute was to supersede and override the policy provision, and to make the money payable there. The statute has in effect become part of the contract; and the plaintiff, claiming under the policy, was bound by the contract, and could have no higher rights.

There is grave doubt whether any such action as this would lie, even if the finding on the main question were otherwise; for, if the plaintiff's contention was well-founded, and she was not bound by the provisions of the statute, and the Alberta Court had no jurisdiction in the premises, her remedy would be to sue the defendants upon the policy, if indeed she had any right of action against them.

As an injunction was the only thing sought in this action, the motion should be turned into a motion for judgment, and the action should be dismissed with costs.

MIDDLETON, J., in CHAMBERS. DECEMBER 30TH, 1915.

*RE SOVEREIGN BANK OF CANADA.

*CLARK'S CASE.

Bank—Winding-up—Contributory—Double Liability — Shares Purchased for Infant—Ratification after Majority—Leave to Appeal.

Motion by Muriel I. Clark for leave to appeal to a Divisional Court of the Appellate Division from the order of RIDDELL, J.,

ante 279, dismissing the applicant's appeal from the order of an Official Referee, in the matter of the winding-up of the bank, confirming the placing of her name upon the list of contributories in respect of the double liability of bank shareholders.

George Kerr, for the applicant.
J. W. Bain, K.C., for the liquidator.

MIDDLETON, J., said that the question appeared to be one which justified further consideration. In ordinary cases, an infant is called upon to repudiate within a reasonable time after attaining majority (Edwards v. Carter, [1893] A.C. 360); but where the liability is statutory and does not arise from an express contract on the part of the infant, the reasoning is scarcely applicable, and it may be that the liquidator cannot succeed unless he can shew an act of ratification.

In the view of MIDDLETON, J., the taking by the applicant of the money in the bank was not to be looked upon as an undoubted act of ratification—it was in no way ear-marked as the issue or product of the stock.

There is a marked distinction between the position of an infant shareholder in a company which at the time of his attaining majority is a going concern and his position where the company is being would up. See the cases referred to in Simpson on Infants, 3rd ed., pp. 41, 42. The bank was in truth being wound up at the time the infant attained her majority, although the winding-up order was not made till subsequently.

Upon an application of this nature, an appeal should be allowed where there is reasonable ground to suppose that the would-be appellant may obtain relief by further appeal, and a prolongation of the litigation cannot be regarded as vexatious. This case is apparently one of great hardship, and the appeal appears to be one clearly arguable.

Leave granted.

FALCONBRIDGE, C.J.K.B. DECEMBER 31ST, 1915

TEASDALL v. DWYER.

Landlord and Tenant — Lease — Proviso for Determination — Notice—Enforcement—Sale of Land—Bona Fides—Parties —Action for Possession Brought by Lessor and Vendee against Administratrix of Lessee — Infant Beneficiary — Costs.

Action to recover possession of land demised.

The action was tried without a jury at London.

W. R. Meredith, for the plaintiffs.

T. G. Meredith, K.C., for the defendant Catherine Dwyer.

F. P. Betts, K.C., for the Official Guardian, representing the defendant Kathleen Dwyer, an infant.

FALCONBRIDGE, C.J.K.B., said that the first question was, whether the agreement and sale of the property by the plaintiff Maria Dwyer to the plaintiff Dr. Teasdall were bona fide. Although the agreement between the plaintiffs (exhibit 2) was not very intelligible as written, and although some of the surrounding circumstances had a suspicious aspect, yet the evidence did not justify a finding that the sale was a bogus one.

Then the chief question to be decided was, whether Pepper v. Butler (1875), 37 U.C.R. 253, applied to the case in hand. In the opinion of the learned Chief Justice, it did not. That case was decided entirely on the wording of the particular proviso, which was not at all similar to this one; and there the lessor did not sell, but assigned.

The lease in question in this action provided that "in the event of a sale by the lessor of the whole of the said lot or the part thereof upon which the said building is situated, the lessees will, immediately after the expiration of one month's notice so to do quit and deliver up possession of the premises hereby demised to them respectively to the lessor." Under this, the notice could not be given until a sale had taken place; and, if it could not be given by the lessor, it apparently could not be given at all.

The notice here was given by the solicitors acting for both plaintiffs; and effect could not be given to any defence of this nature.

A somewhat similar proviso was discussed in Lumbers v. Gold Medal Furniture Co. (1899), 30 S.C.R. 55.

The defendants also took the objection that neither of the plaintiffs could bring this action. There was nothing in this contention. The terms of the lease are that, if there is a sale and the notice is given, possession will be handed over to the lessor. This clearly enabled the plaintiff Maria Dwyer to bring this action for possession; and, as Dr. Teasdall is now the owner of the land and the holder of the legal title, and wants possession of his property, it cannot be said to have been wrong to join him as a party plaintiff.

It was not necessary to join the infant as a party defendant. Under the Devolution of Estates Act and Rule 74, the administrator is competent to defend an action of this nature on behalf of the estate: Holmested's Judicature Act, pp. 431-433. The costs of the Official Guardian should be paid by the plaintiffs.

Judgment declaring that the defendant Catherine Dwyer has no further interest, as administratrix or otherwise, in the premises described in the lease, and ordering her, on payment to her of the sum of $350, forthwith to deliver up possession thereof.

The defendant Catherine Dwyer is to pay the plaintiffs' costs, fixed at $100, to be deducted from the $450 to which she would otherwise have been entitled.

SUTHERLAND, J. DECEMBER 31ST, 1915.

PENNEFATHER v. LIFE ASSOCIATION OF SCOTLAND.

Life Insurance—Portions of Premiums Remaining Unpaid — Accumulations of Interest—Charge against Amount Payable at Death—Usury—Equitable Relief—Knowledge and Acquiescence of Assured.

Action to recover the sum of $1,542.40 alleged to be due upon a policy of insurance on the life of John G. Pennefather, deceased. The defendants admitted that a sum of $1,148.30 was due, and that amount was paid. The plaintiff alleged that a further sum was due.

The policy was issued on the 5th January, 1865, for £300 sterling. The annual premium was £9 15s. 6d. sterling. The assured was to participate in profits. Under a clause in the policy, the assured was allowed during the first 10 years to pay

only two-thirds of the annual premium, but the one-third remaining unpaid was to be deducted from the sum assured at death, if not previously paid, with interest at 6 per cent. per annum. This clause was taken advantage of by the assured, and the sum due at death was greatly reduced in consequence.

The action was tried without a jury.

W. H. Hunter, for the plaintiff.

Leighton McCarthy, K.C., for the defendants.

SUTHERLAND, J., after setting out the facts and correspondence, said that he was not at all sure that the contract could properly be called a usurious one, or that it was made illegal and void by the terms of the statute invoked for that purpose. The defendants contended that the effect of the statute (1890) 53 Vict. ch. 34, repealing secs. 10 and 11 of R.S.C. 1886 ch. 127, which two sections in the consolidation took the place of the sections in the Acts of 1858 and 1860, was to remove the contract from any disability such as was contended for by the plaintiff. But, whether the statute of 1890 had the effect contended for by the defendants or not, the plaintiff admitted that he could not successfully claim the balance alleged to be due, except by an appeal to the principle that a borrower who seeks equitable relief against a security which is voidable in equity, or which is void by statute, can obtain it only on terms of paying the money which is properly due, that is to say, as the plaintiff admits in this case, the amounts of the unpaid portions of the premiums for the first ten years of the life of the policy, with interest at 6 per cent. from their respective dates.

Reference to Halsbury's Laws of England, vol. 13, p. 71; Neesom v. Clarkson (1845), 4 Hare 97, 101; Davey v. Durrant (1857), 1 DeG. & J. 535; Plimmer v. Wellington Corporation (1884), 9 App. Cas. 699 (P.C.); Ramsden v. Dyson (1866), L.R. 1 H.L. 129, 141; Jackson v. Cator (1800), 5 Ves. 687, 690; Waller v. Dalt (1676), 1 Ca. Ch. 276; Bill v. Price (1687), 1 Vern. 467; Mason v. Gardiner (1793), 4 Bro. C.C. 436; 63 & 64 Vict. ch. 51; Chapman v. Michælson, [1909] 1 Ch. 238 (C.A.); Lodge v. National Union Investment Co. Limited, [1907] 1 Ch. 300; Hanson v. Keating (1844), 4 Hare 1, 5; Drake v. Bank of Toronto (1862), 9 Gr. 116.

But could it be said, in the face of the facts in this case, that it would be fair and reasonable to grant such relief? The evidence of the defendants went to shew that this policy was not

an isolated one, but one of many of a similar kind existing and maturing during the life of the policy in question in this action, and existing to-day and to mature in the future. No complaint was made by the assured. He continued to pay his premiums in full and to lead the company to believe that he was acquiescing in the validity of the policy in all respects. He knew that bonus additions were being fixed from time to time by the directors and applied to his policy, among others, and that these would go to swell the amount to be ultimately paid thereunder. Part of the revenue out of which these bonus additions were fixed and allotted was the result of interest on loans on unpaid portions of premiums made up in the same way as in connection with this policy, and part of that interest, no doubt, was represented in the bonus additions applied to this policy.

In these circumstances, and with the knowledge and acquiescence on the part of the assured, it would not be just or equitable to allow the claim of the plaintiff: Clarkson v. Henderson (1880), 14 Ch.D. 348; Quinlan v. Gordon (1861), 20 Gr. Appendix i.

Action dismissed, with costs, if asked.

LATCHFORD, J., IN CHAMBERS. DECEMBER 31ST, 1915.

RE MERCHANTS BANK OF CANADA v. NEELY.

Division Courts — Jurisdiction — Claim against Garnishees — Amount Involved—Issue as to Validity of Assignment of Moneys Attached—Division Courts Act, R.S.O. 1914 *ch.* 63, *sec.* 146—"*Debt Owing or Accruing.*"

Motion by Thomas Alfred Neely, a claimant of moneys attached in the hands of the executors of the father of John Edgar Neely, the defendant, for an order prohibiting the Judge presiding in the Third Division Court in the County of Grey from proceeding to try an issue as to the validity of the assignment made to the applicant by the defendant, on the ground that the matters involved in the issue were beyond the jurisdiction of a Division Court.

H. E. Rose, K.C., for the applicant.
J. R. Barlow, for the plaintiffs.
E. F. Raney, for the garnishees.

LATCHFORD, J., said that it was contended that prohibition should be granted because the amount of the legacies was in excess of the amount in respect of which a Division Court has jurisdiction; and because the validity of the assignment of the legacies, if the legacies were, in the words of sec. 146 of the Division Courts Act, R.S.O. 1914 ch. 63, "a debt owing or accruing" to the defendant, will necessarily have to be determined by the Judge in the Division Court.

The amount of the claim is plainly within the jurisdiction of the Court (sec. 62, sub-sec. (1) (*d*) (i)); and the liability of the primary debtor to the primary creditors is ascertained by the judgment.

In every case in which the existence of a debt to the primary debtor is not admitted by the garnishee, it becomes necessary for the Judge, before he can give effect to the attachment sought under sec. 146, to determine whether any and what debt is owing or accruing to the primary debtor from the garnishee. That is the question for determination here. The resolution of it may involve the consideration of the validity of the assignment; and, as the primary debtor has many other creditors, may affect in its consequences sums much in excess of the amount now claimed. But all that the primary creditors are concerned about is, whether there is a debt sufficient to satisfy their judgment for $93.19, in whole or in part. That is the real and only issue to be tried. It may be found that no debt exists—or a large debt. But the amount of that debt, no matter how great, cannot oust the jurisdiction of the Court to inquire whether there is owing or accruing from the executors sufficient to satisfy the judgment held by the plaintiffs.

Motion dismissed with costs.

BYRICK v. CATHOLIC ORDER OF FORESTERS—SUTHERLAND, J.—DEC. 28.

Life Insurance—Untrue Statements by Applicant—Materiality—Avoidance of Policy.]—Action by Mary Byrick to recover $1,000 upon a certificate or policy of insurance issued by the defendants upon the life of her husband, John Byrick, who died on the 14th June, 1914. The certificate was dated the 6th January, 1913; the plaintiff was the sole beneficiary. The deceased had been ill for 4 or 5 months before his death; the cause of his death was tuberculosis of the lungs. The defence

was that the deceased had, when applying for the insurance, returned untrue answers both as to his family history and his own mental condition—his mother having been in fact insane, and he himself having, before the insurance was effected, been confined in an asylum for the insane. The action was tried without a jury. SUTHERLAND, J., reviewed the evidence in a written opinion of some length. The contract of life insurance, he said, is a contract uberrimæ fidei; and a policy is avoided by fraud or by concealment or misrepresentation of material facts. The misrepresentations of the applicant with reference to the cause of his mother's death, the duration of her illness, and as to her previous state of health, were misrepresentations of material facts, as also the misrepresentation as to his not having been an inmate of an asylum and having had no disease of the brain. His statements were material to the contract and untrue; and the contract was, therefore, not enforceable at the instance of the plaintiff. Reference to the Insurance Act, R.S.O. 1914 ch. 183, sec. 156, sub-sec. 5; Jordan v. Provincial Provident Institution (1898), 28 S.C.R. 554; Lindenau v Desborough (1828), 3 Man. & Ry. 45; Strano v. Mutual Life Assurance Co. (1912), 3 O.W.N. 1372; Halsbury's Laws of England, vol. 17, paras, 1100, 1101. Action dismissed, and with costs if demanded. W. S. Brewster, K.C., for the plaintiff. L. V. McBrady, K.C., for the defendants.

BROOKS v. FLETCHER—SUTHERLAND, J.—DEC. 29.

Vendor and Purchaser—Agreement for Sale of Land—Lack of Definite Description in Written Agreement—Evidence to Supplement — Admissibility — Purchaser's Breach of Contract —Damages—Costs.]—Action to compel specific performance of an agreement dated the 29th April, 1915, for the purchase by the defendant from the plaintiff of the south half of lot 17 in the 4th concession of the township of Collingwood. The action was tried without a jury at Owen Sound. The defendant did not appear and did not defend. At the trial, the plaintiff elected to ask for damages against the defendant for breach of his contract. The learned Judge, in a considered opinion, said that in the written agreement the identity of the property contracted for with that owned by the plaintiff was not clear, but it was made so by extrinsic evidence properly admitted to shew what land was meant: Fry on Specific Performance, 5th ed.

(1911), p. 168; Ogilvie v. Foljambe (1817), 3 Mer. 53. It was shewn in evidence that, before the defendant signed the contract, he was put in communication with the plaintiff's solicitor, and learned the nature of the title and incumbrances upon the property. Substantial justice would be done by assessing the damages at $500, from which should be deducted $100 paid as a deposit, and fixing the plaintiff's costs at $100. Judgment for the plaintiff for $400 damages and $100 costs. H. G. Tucker, for the plaintiff.

SCHMIDT v. SCHMIDT—MIDDLETON, J., IN CHAMBERS—DEC. 30.

Security for Costs—Actions by Wife against Husband—Alimony—Custody of Children—Waiver.]—Appeal by the defendant from an order of the Master in Chambers refusing to require the plaintiff to give security for costs, although she is resident out of the Province. The plaintiff has brought two actions against her husband—one for alimony and one to obtain the custody of the children. It was conceded that security for costs could not be ordered in the alimony action. The Master refused to order it in the other action, upon the ground that the right to security, if it ever existed, had been waived by allowing the action to proceed so far that it had been entered for trial. The learned Judge said that he agreed with the Master in this; and he would go further and say that the instances in which a wife's proceeding to obtain the custody of her children should be stayed by an order for security for costs at the instance of the husband must be very few indeed. The principle is the same as that underlying the decision refusing security in alimony actions. Appeal dismissed with costs to the plaintiff in any event. J. M. Duff, for the defendant. Alfred Bicknell, for the plaintiff.