The
Ontario Weekly Notes

Vol. II. TORONTO, MAY 31, 1911. No. 36.

HIGH COURT OF JUSTICE.

RIDDELL, J. MAY 15TH, 1911.

STANDARD REALTY CO. v. NICHOLSON.

Mortgage—Mortgagor's Wife Joining in Covenant to Pay—Assignment by Mortgagor for Benefit of Creditors—Conveyance under Power of Sale—Action for Possession—Defence that Wife Entitled to Redeem—Tender on Behalf of Wife as Doweress—As Entitled to Redeem—Rights of Wife as Doweress—As Surety—Binding Contract with Purchaser before Offer to Redeem—Receipt Signed by Agent—Statute of Frauds—Rights of Mortgagor after F.O.F.—After Exercise of Power of Sale.

Action by mortgagees to recover possession of lands.

J. F. McGillivray, K.C., for the plaintiffs.

R. M. Dennistoun, K.C., for the defendants.

RIDDELL, J.:—Murdoch Nicholson, a merchant in Kenora (then Rat Portage), and his wife in 1894 mortgaged to the Hamilton Provident & Loan Society his land, Lot 4, Block No. 1, for $3,000 and interest. While both he and his wife are made mortgagors, and both covenant, a clause is to be found in the indenture: "And the said Kittie Nicholson, the wife of the mortgagor Murdoch Nicholson, hereby bars her dower in the said lands." This mortgage contained a special power of sale, the form of which need not be here considered. In 1902 this mortgage was assigned to Jacob Hose. In 1894 the same property was mortgaged to Jacob Hose for $800. On the 1st March, 1910, Murdoch Nicholson made an assignment for the benefit of his creditors to Norman L. Martin. By conveyance made the 7th June, 1911, purporting to have been made under the power of sale under the mortgage first mentioned, the administratrix of Jacob Hose, his widow, conveyed to the Standard Realty Co. Limited for $6,700, the amount owing upon the mortgages being,

it is said, about $5,100. On the 5th July, 1910, Martin, the assignee of Murdoch Nicholson, gave a quit claim to the company.

Nicholson and his wife refused to give up possession, and an action was brought by the company against them—a receiver was appointed of the property, it is said.

The defendant Murdoch Nicholson claims to be in possession by the leave of his wife, and she claims to be entitled to "an assignment . . . of the mortgage . . . in priority to the rights of the plaintiffs and . . . to be entitled to redeem as against the plaintiffs."

The facts are as follows: A sale was advertised for the 27th May, 1910. The bids went up to $6,600, being less than the reserved bid. Mrs. Hose thereupon determined to sell by private sale. Her solicitor in the sale proceedings, Mr. Machin, had in his office his present partner Mr. Ap'John, then not as yet called, but of considerable experience. Mrs. Hose saw each of these, and instructed each to sell for her for any sum in excess of the $6,600.

Nicholson had some more or less desultory conversations with Machin, looking toward his buying the property. Of course, he recognized that he could not redeem, as he had conveyed his equity of redemption to the assignee.

But during all his negotiations he did not mention the name of the person to whom the conveyance was to be made, although he says that he was in reality acting for his wife. That it was a purchase under power of sale, and not a redemption that was contemplated, is plain—among other things, the amount which Machin required to be paid was much in excess of the amount due under the mortgages.

A little after the abortive sale, Toole, the president of the plaintiff company, became interested in the property. On Thursday, the 2nd June, he went into Machin's office and asked him if the property were sold, and when he found that it was not sold, he said he would give $6,700 for it, if the title were good, etc., and it was arranged that Machin should see to that for him. Nicholson had been in Machin's office that day, but had expressed his want of hope of being able to raise the money to buy the property. Toole asked Machin if Nicholson or his wife would likely buy the property, as, if there was any chance of their being able, he (Toole) did not want to make a bid. He was told by Machin that there was no chance of their buying. Machin left town, but Ap'John, who had a power of attorney from him, remained—on Friday, 3rd June, Ap'John, for Machin, notified

Toole of the title, etc., and on the 4th, Toole came in and told Ap'John to draw up the papers—so that then there was in fact a contract for sale for $6,700.

On Monday afternoon Nicholson went to Machin's office and was talking about raising the money to buy, but I cannot find that he said to Machin that he could or would raise the money. When they were talking, Ap'John told Machin that the land had been sold. During the same afternoon Toole came in and was told by Ap'John that Nicholson had been after the land—Toole at once said: "Has that property not been sold to me?" And Ap'John replied, "Yes." On Tuesday morning, June 7th, early, Toole brought in a cheque for $50 to pay on account of the purchase, paid it to Ap'John and got a receipt, reading as follows:

"Kenora, June 7th, 1910.

"Received of Geo. A. Toole, Esq., fifty dollars deposit on lot 4, block 1, Kenora, part of purchase price, $6,700—cash bal. on closing on good title being given.

"H. A. C. Machin,

"$50.00 "F.J.A."

Mrs. Hose was communicated with by Ap'John and an appointment arranged to execute the deed. I have no doubt that Mrs. Hose knew and approved of the sale almost at once after this payment.

In the afternoon of June 7th Mr. McLennan, solicitor for Nicholson, took four cheques marked for $1,650 each, saw Machin, and offered these in payment of the property as sold to Mrs. Nicholson—this was the first time Mrs. Nicholson's name had been mentioned in connection with the transaction. Machin refused to accept, and thereupon, and not before, McLennan offered the cheques on behalf of Mrs. Nicholson to redeem the property. Machin again refused. The deed was executed on the evening of the 7th June, handed to the purchasers June 8th, and registered on the 9th—the money was paid by the purchasers.

On June 8th McLennan sent a marked cheque by letter to Mrs. Hose (reaching her probably June 9th) tendering a cheque "$5,816 in payment and redemption of the mortgage . . . on lot 4, block 1, Kenora, which includes principal, interest, and costs to date." He called for an assignment of the mortgage to Mrs. Nicholson—this cheque was refused and McLennan got it back, depositing it in the bank to his own credit June 14th.

So far as Murdoch Nicholson is concerned, it is plain that having parted with his equity of redemption by conveyance to the

assignee for the benefit of creditors, he had no right to redeem: R.S.O. (1897) ch. 147, sec. 5; ch. 77, sec. 30(2); Kinnaird v. Trollope, 39 Ch. D. 636, 642. Nor could he claim as a purchaser: all his negotiations as purchaser were indefinite, and did not "come to a head."

As regards Mrs. Nicholson, in the absence of binding authority, I should be inclined to hold that she had no right to redeem as doweress. At the trial the general right of a doweress to redeem was not disputed, but it was not, as I understood it, admitted that Mrs. Nicholson had such right under the circumstances.

In Casner v. Haight, 6 O.R. 451, the plaintiff had joined in a mortgage to bar her dower—the mortgagee issued a writ against the husband for foreclosure and obtained judgment "foreclosing all the right, title and equity of redemption of the said" mortgagor. The wife was not a party to the foreclosure proceedings, and subsequently brought an action to redeem. On demurrer, Proudfoot, J., held that the wife was not a necessary party, and that as she had no right to dower in her husband's equitable estates during his lifetime, she had no interest in the equity of redemption. The demurrer was allowed.

In Blong v. Fitzgerald, 15 P.R. 467, the wife joined to bar dower, the mortgagee brought an action for foreclosure against the mortgagor only, judgment was given for foreclosure, and report made. The wife applied upon petition to be made a party and to be allowed to redeem. Mr. Justice Rose said: "The wife has the right to redeem during the husband's lifetime, and I think also the judgment in her absence would not bind her in any way . . . she should have been a party to the action in the first instance."

For the purpose of the present inquiry it will be seen that the latter judgment does not affect the former—the order for foreclosure had not become absolute, so that the husband had not been deprived of the equity of redemption; he might still come in and redeem, and consequently the wife had an interest sufficient to found a right to redemption. Before the final order of foreclosure was made, she was allowed to exercise the right to redeem. . . . The wife in the Fitzgerald case then was in the same position, *quoad* the right to redeem, as if no judgment for foreclosure had been made; and "the veriest scintilla of interest will entitle a person to maintain such a suit," *per* Kay, J., in In re Parsons, 45 Ch. D. 51 at p. 59.

The effect of the final order of foreclosure is simply to trans-

fer the equitable estate to the mortgagee: Heath v. Pugh, 6 Q.B.D. 345, 360, *per* Lord Selborne, L.C.; affirmed 7 App. Cas. 235.

That being so, the conveyance by Nicholson to the assignee should, if Casner v. Haight, be good law, take away all right on the part of the wife to redeem *qua* wife.

On principle I think that might have been held to be the case. But for this Court the case of Pratt v. Bunnell, 21 O.R. 1, is conclusive authority that, even if the mortgagor makes an assignment for the benefit of creditors, the wife remains doweress under the provisions of the statute. See also Gemmill v. Neligan, 26 O.R. 307; and Fitzgerald v. Fitzgerald, 5 O.L.R. 279, has not modified that decision. But there is in any event no need for Mrs. Nicholson to appeal to her position as doweress, for there is another view in which she had rights. While the advertisement for sale speaks of two mortgages, no doubt meaning that of 1892 to the Hamilton Provident and Loan Society, and that of 1894, to the late Jacob Hose, the sale to the plaintiffs was made (as appears by the conveyance) under the power given by the former only. In this mortgage, as I have pointed out, while the land was admittedly that of Murdoch Nicholson, his wife is made a mortgagor and covenants to pay. The debt was admittedly his, and not hers. She then is in equity a surety for such payment. Now the rights of a surety in a mortgage are well settled.

[Reference to Beckett v. Micklethwaite, 6 Mad. 199; Aldworth v. Robinson, 2 Beav. 287; Green v. Wynn, L.R. 4 Ch. 204; Forbes v. Jackson, 19 Ch. D. 615, *per* Hall, V.-C., at p. 622.]

Mrs. Nicholson accordingly had the right to redeem the only mortgage under which the sale was made, and she had the right to pay this off and obtain an assignment of this mortgage. Having an interest in the estate in this way, she would equally have the right to redeem the other encumbrance. . . . But I am unable to give effect to this claim under the present circumstances. There is nothing, indeed, in the absence of formal tender—everybody considered the marked cheques as cash; I think, however, there is more in the case. The first suggestion of redemption was made in the afternoon of the 7th June. By that time a binding contract for sale had been entered into on behalf of the mortgagee. I am not sure that the law so far favours that spoiled child of equity, the mortgagor, as that he has the right to redeem before a contract enforceable at law against an unwilling mortgagee-vendor has been entered into,

and if the law in his favour will compel a mortgagee-vendor to break a contract binding in morals, and even at law, unless the Statute of Frauds be pleaded. The law favours honesty of dealing, and I hope it will be found that a mortgagee-vendor may act honestly with a purchaser without incurring blame. But assuming that a binding contract is necessary, I think there was such a contract here. The power of sale is, so far as needs be referred to, in the statutory form, and it is not disputed that Mrs. Hose had the right to sell. She appointed agents to sell as she well might. The receipt given by Ap'John is, in my opinion, sufficient to answer the Statute of Frauds, and it must never be forgotten that the Statute of Frauds does not deal with the validity of the transaction, but only with the evidence to prove an agreement: Maddison v. Alderson, 8 App. Cas. 467; In re Holland, [1902] 2 Ch. 360, 375. He was authorized by Mrs. Hose to sell, and an authority to sell real estate *primâ facie* entitles the agent, not only to negotiate for a sale, but also to sign a binding contract of sale: Rosenbaum v. Belson, [1900] 2 Ch. 267 at p. 271.

The Statute of Frauds does not require that the appointment of an agent should be in writing: Fry on Specific Performance, sec. 526.

[Reference to Jacob v. Kirk, 2 Moo. & R. 221; Sweet v. Lee, 3 M. & Gr. 452; Phillimore v. Barry, 1 Camp. 513.]

Moreover, Mrs. Hose ratified the transaction on the morning of the 7th June before any intimation had been given of desire to redeem—it is more than doubtful that she could revoke the agency after a *bonâ fide* sale: Day v. Wells, 30 Beav. 220.

If Machin's signature were necessary, . . . he ratified the signing of his name by Ap'John, also before any intimation of a desire to redeem.

The fact that the memorandum is in the form of a receipt for money is immaterial. In Evans v. Prothero, 1 De G. M. & G. 572, the document was in this form: "Received this 25th August, 1827, of Mr. Jenkin Richards now and before the sum of twenty-one pounds being the amount of the purchase of 3 tenements sold by me adjoining the river Taaffe. Received the contents. Witness, John Swaine. Evan Richards." This was held sufficient. It will also be noted that in this document it is not expressed that the person from whom the money was received was the purchaser, but the Court, Lord St. Leonards, L.C., held that the document contained "the names of the parties who are the buyer and seller." The result must be that a receipt given by name to one who pays money as upon a sale identifies that person as though it had

specifically said "sold to, etc."—in other words the person paying the money is taken to be the person buying.

By a parity of reasoning the person giving the receipt is presumed to be the person selling, and the name is not a mere description such as was the case in Vanderburgh v. Spooner, L.R. 1 Ex. 316.

[Reference to Newell v. Radford, L.R. 3 C.P. 52; Barickman v. Kuykendall, 6 Blackf. (Ind.) 22, a receipt, "Received the 15th December, 1837, of Isaac Homers $500 in full for a hundred acres of land in part payment (signed) Nathaniel Kuykendall," was held bad as not containing the terms of the contract, but it was not suggested that the names of the parties did not sufficiently appear: see also Williams v. Morris, 95 U.S. 444.]

That the circumstance that Ap'John was agent for Mrs. Hose, and Toole for the plaintiff company, does not affect the rights of the plaintiff company, also seems covered by authority.

Sir George Jessel's laconic statement of the law in Commins v. Scott, L.R. 20 Eq. 11, at pp. 15, 16, has frequently been cited and never overruled. He says: "There can be no doubt that if a written contract is made in this form, 'A. B. agrees to sell Blackacre to C. D. for £1,000,' then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract."

So Romer, J., in Filby v. Hounsell, [1896] 2 Ch. 737 at p. 740, thus lays down the law: "For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as the parties are concerned, that the written contract should shew who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parol." A binding contract for sale being entered into by the mortgagee before any notice of any intention to redeem, I think that Mrs. Nicholson lost any right she previously had so to redeem.

In Kenney v. Barnard, 17 O.W.R. 889, the second mortgagee on the day of a sale under the first mortgage called on the purchaser and offered him the amount of his deposit and $25 for his trouble—he also made a legal tender to the first mortgagee of the amount due, etc. Mr. Justice Sutherland says, p. 900: "The tender made after the sale was so made at a time when both vendor and purchaser were bound by the agreement which had been made . . . the vendor would have been willing to cancel the sale and permit the plaintiff to redeem. The purchaser . . was unwilling to forego his bargain. . . He declined and could

not, I think, be compelled to do so." An action brought by the second mortgagee was dismissed with costs. I follow this decision and wholly agree in my learned brother's conclusion.

The present case is wholly unlike those in which after final order of foreclosure, a foreclosure decree has been opened up and the mortgagor allowed to redeem even (in some instances) against a purchaser: For example, Campbell v. Holyland, 7 Ch. D. 166; Trinity College v. Hill, 2 O.R. 348, 10 A.R. 99; Independent Order of Foresters v. Pegg, 19 P.R. 254. The doctrine is that a purchaser buying from a mortgagee after final order of foreclosure is charged in law with knowledge of the right of the Court to exercise its discretion: see *per* Street, J., in 19 P.R. at p. 262. And "the Court looks at the estate from first to last as only a pledge for the debt. The mere fact of an order absolute for foreclosure being obtained does not necessarily prevent the Court from rescuing the estate from the mortgagee. Indeed, the order absolute amounts to very little more than authority from the Court to the mortgagee to deal with the property as his own:" 10 A.R. at p. 107; "therefore everybody who took an order for foreclosure absolute knew there was still a discretion in the Court to allow the mortgagor to redeem:" 7 Ch. D. at p. 172.

The practice was to apply to open up the foreclosure, and the Court then exercised its discretion whether to open up the final order of foreclosure and allow the mortgagor to redeem, and this would depend upon the circumstances of each particular case: 7 Ch. D. 166; cf. Re Power & Carton, 25 L.R. Ir. 459.

I do not think the same power exists where the sale is not after final order of foreclosure, but by a mortgagee under a power of sale; and Kelly v. Imperial Loan Co., 11 S.C.R. 516, 11 A.R. 526, seems to proceed upon that view: see also Crotty v. Taylor, 8 Man. 188. That the position of the mortgagee, at least after sale under power, is not in all respects the same as after sale following final order of foreclosure appears from Fisher, 6th ed., sec. 1969; Rudge v. Richens, L.R. 8 C.P. 358. And we need not enquire whether the sale in Kelly v. Imperial being after judgment for foreclosure, but after a void final order of foreclosure, was not against the rule in Stevens v. Theatres Limited, [1903] 1 Ch. 857. The difference is manifest—on a sale after final order of foreclosure the mortgagee runs the chance of making a gain—he has not to account to the mortgagor, and if he does not make enough to pay the amount of the debt he cannot sue for the balance. Where the property is sold under power of sale, the mortgagee cannot make a gain, he must account

for the surplus over his debt, but he can sue if there be a deficiency: Burnham v. Galt, 16 Gr. 417 at p. 419; Pegg v. Hobson, 14 O.R. 272; Rudge v. Richens, L.R. 8 C.P. 358.

Again, there is a marked difference in the power of the Court to interfere where it is a question of rights arising under its own decree, and where it is a question of rights arising from a contract. Where a person to support his claim to land must rely upon a judgment of the Court, the Court may well have the power to vary such judgment and the rights arising under it—but whence comes the power of the Court to interfere with rights arising under contract, and independently of any Court proceeding?

I have in finding certain facts at the trial given my view of the credit to be attached to witnesses. I would add that there was nothing in the way of oppression, collusion or bad faith on the part of vendor, solicitor, agent or purchaser—the whole trouble was the not unusual one of failure on the part of a bankrupt man to raise money in time to make a good deal. There can be no doubt that Machin would have preferred the Nicholsons to make all the money which could be made out of the property.

I think the plaintiffs are entitled to judgment for possession with costs—also to an account for use and occupation, etc., which will be determined by the Master at Kenora if the parties cannot agree. The counterclaim of the defendants will be dismissed with costs—the costs ordered to be paid to the plaintiffs will include all over which I have any control.

If any special order be required by reason of the receiver, etc., I may be applied to.

DIVISIONAL COURT. MAY 18TH, 1911.

HARRIS v. BICKERTON.

Action for Wrongful Attachment of Goods—Question of Malice not Submitted to Jury—Question of Reasonable and Probable Cause Submitted to Jury—Duty of Judge—Mistrial—When Necessary to Set Aside Former Proceeding.

Appeal by the defendant from the judgment of the County Court of Perth of the 15th December, 1910, in an action for alleged illegal and wrongful attachment of the plaintiff's goods.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and MIDDLETON, JJ.

W. T. McMullen, for the defendant.

R. S. Robertson, for the plaintiff.

MIDDLETON, J.:—In this case we think there was a mistrial before the learned County Court Judge, and direct a new trial. Costs to be in the cause.

While we indicate the error in the proceedings at the former hearing for the guidance of the parties at the new trial, we abstain from making any comment upon the facts, as we do not intend in any way to prejudice the rights of the parties upon the trial now directed.

In an action for malicious prosecution the plaintiff must establish not only malice, but the absence of reasonable and probable cause.

The fundamental error in the trial had is that the question of malice was not really submitted to the jury at all, and that the question of reasonable and probable cause, which is entirely a question for the Judge, was submitted to the jury.

The meaning of malice—the intention to set the law in motion for an indirect and improper purpose—should be explained to the jury, and they should also be told that they are at liberty to infer malice from the absence of any reasonable or probable cause justifying the defendant's acts.

The Judge, as we have said, must determine whether there was reasonable and probable cause for the defendant's action in issuing the process in question, and he must determine that in the light of the facts known to the defendant at the time the process was issued. Did the defendant, with the knowledge he then had, and in the light of the facts as they then appeared, act as a reasonable and prudent man? Facts unknown to him then, and things that occurred subsequently, should be excluded from consideration. Facts upon which this question has to be determined may be in dispute. If there is no dispute the Judge must determine the question without any reference to the jury. If there is a dispute the jury must find the facts, and upon the facts so found the Judge must determine the question of the absence of reasonable and probable cause.

The statute prevents the leaving of questions to the jury in actions of this kind, unless the parties consent, and requires, in the absence of such consent, a general verdict. If consent is refused the Judge can ask the jury, before he leaves the case to them, to determine for him the disputed issues of fact, so that

he can determine this question of reasonable and probable cause, and then dismiss the action, reserve his judgment, or leave the case, so far as it is for the jury—to them. Or the Judge may in his charge say: If you find the facts to be thus and so, then I direct you to bring in a verdict for the defendant, because there was in my opinion reasonable and probable cause, but if on the other hand you find the facts to be thus and so, then I tell you that there was not reasonable and probable cause, and you will give your verdict accordingly. This, of course, being supplemental to a proper charge on the question of malice. In an ordinary action of malicious prosecution it is necessary to shew the successful termination of the proceedings complained of. Manifestly, if the proceedings terminated adversely to the plaintiff, and judgment passed against him in them, there was reasonable and probable cause for their institution. They were well instituted, because they succeeded, and the result is conclusive, and cannot be reviewed in the second action. But when the complaint in the second action is, not the malicious assertion of an unfounded complaint, but the resorting to a mode of enforcing a claim which had a foundation, in a manner which was harsh, oppressive, and unjustified by the circumstances, e.g., a claim for a debt by arrest or attachment when there was no intention to abscond, then the determination of the existence of the debt throws no light upon the question which is raised by the second action, and this case constitutes an exception to the general rule (or rather does not fall within it at all when rightly understood), and the action can be maintained even though the plaintiff failed in the earlier action, and without the process complained of being set aside: Fahey v. Kennedy, 28 U.C.R. 301; Erickson v. Brand, 14 A.R. 614.

Bush v. Park, 12 O.L.R. 180, and Metropolitan Bank v. Pooley, 10 App. Cas. 210, clearly fall under the general rule, as what was attempted in these cases was to attack the very finding of the tribunal in the former trial, the finding of lunacy in the one case, and the finding of bankruptcy in the other.

There is no case going to shew that an unsuccessful interlocutory attempt to set aside the process complained of is a bar to the action.

Upon the whole case the parties are referred to Ford v. Canadian Express Co., 16 O.W.R. 797; Longdon v. Bilsky, 22 O.L.R. 4; and Fitchet v. Walton, 22 O.L.R. 40.

MULOCK, C.J.:—I agree.

TEETZEL, J.:—I agree.

DIVISIONAL COURT. MAY 18TH, 1911.

NORTHERN CROWN BANK v. INTERNATIONAL ELECTRIC CO. LIMITED.

Promissory Note—Action on—Note Payable on Demand—Endorsed to Plaintiffs on Date—Defence that Note Always Overdue—Endorsee Holder in Due Course—Equities between Original Parties—Bills of Exchange Act, sec. 182.

Appeal from the judgment of MEREDITH, C.J.C.P., in favour of the plaintiffs in an action upon a demand note in favour of the Electric Advertising Co., for $3,500, dated 28th June, 1906, endorsed by that company to the plaintiffs upon its date for value.

The appeal was heard by MULOCK, C.J.Ex.D., TEETZEL and MIDDLETON, JJ.

I. F. Hellmuth, K.C., and J. R. Meredith, for the defendants.

F. Arnoldi, K.C., for the plaintiffs.

MULOCK, C.J.:—This is an action upon a promissory note bearing date the 28th of June, 1906, made by the defendant company payable to the order of the Electric Advertising Co., for the sum of $3,500 with interest at 5% per annum, "before and after due and until paid," and endorsed to the plaintiffs on the day of its date.

The defence is that the note was without consideration, that being payable on demand it was always overdue, and therefore came into the plaintiffs' hands as overdue, and as such subject to the equities existing between the original parties.

The neat point to be determined is whether the note was overdue when the plaintiffs became holders for value.

The case was tried before Meredith, C.J.C.P., who held that the note was not overdue when on the day of its date it passed into the plaintiffs' hands. I fully agree with the views expressed by the learned Chief Justice in his judgment, and have little to add. It seems to me that the language of section 182 of the Bills of Exchange Act negatives the appellants' contention that a promissory note payable on demand becomes overdue at the instant of its coming into existence. In substance the section declares that mere delay in presentment for payment shall not cause a note payable on demand to be deemed overdue, thus

implying that delay may give a demand note the character of an overdue note which it had not previously possessed. If it were always overdue such delay could not have the operation contemplated by the section. I think it is fair to interpret the section as declaring to the effect that a note payable on demand shall not, because of that circumstance, be deemed to be overdue, but that delay in its presentment may give it the character of an overdue note. I think the appeal should be dismissed with costs.

TEETZEL and MIDDLETON, JJ., each gave reasons in writing for arriving at the same conclusion.

DIVISIONAL COURT. MAY 19TH, 1911.

RUSSELL v. GREENSHIELDS.

Writ of Summons—Service out of the Jurisdiction—Con. Rule 162(e)—Both Parties Resident in Another Province—Breach of Trust in Ontario—Proper Forum for Litigation—Conditional Appearance.

Appeal by the defendant from the order of BOYD, C., ante 718.

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

W. Nesbitt, K.C., and B. Osler, for the defendant.

I. F. Hellmuth, K.C., and E. C. Cattanach, for the plaintiff.

RIDDELL, J.:—This is an appeal from the decision of the Chancellor, 18 O.W.R. 264.

On the facts of this case the plaintiff and defendant were jointly interested in the purchase of certain lands, the quantity being more or less uncertain. At some stage it was thought wise that a consent should be given that claim to part of these lands should be abandoned. This abandonment must needs be in form by the Qu'Appelle Company, although in fact for the plaintiff and defendant. The plaintiff and defendant agreed to this and the defendant procured authority to give the consent for, and in the name of the Qu'Appelle Company—the consent must be given in Ottawa within this province.

Can there be any doubt under these circumstances that the defendant was acting under a contract with the plaintiff quite apart and distinct from the original agreement between them, which contract was to be performed at Ottawa?

It is alleged that he violated the duty thereby imposed upon him to consent to the abandonment of the part agreed upon, by abandoning more. I am unable to see that it makes any difference that what he did was done in the name of the Qu'Appelle Company—he was acting for the plaintiff in fact.

I agree with the Chancellor that the case comes within Con. Rule 162(e). The fact that the plaintiff has conveyed all his interest in the land, etc., is immaterial—his right of action is not an interest in the land; and if the release of January, 1907, was obtained by fraud, as is charged, it cannot stand in the way.

I think the appeal should be dismissed with costs.

The defendant may enter a conditional appearance, although I do not think it at all necessary, for reasons given in National Trusts Co. v. Trusts & Guarantee Co., 17 O.W.R. 520. The cases given in Holmested & Langton, p. 303, are not on the form of appearance, but on the form of order made when allowing issue of a writ for service out of the jurisdiction. I do not think in the present case any special direction is necessary, but if the defendant desires it, the order now made will be that the plaintiff is not to be entitled to any relief on any claim not coming within Con. Rule 162(e).

FALCONBRIDGE, C.J., and BRITTON, J., agreed with the judgment of BOYD, C., and concurred in dismissing the appeal with costs, the defendant to be permitted to enter a conditional appearance.

SUTHERLAND, J. MAY 19TH, 1911.

BULLEN v. WILKINSON.

Vendor and Purchaser—Contract for Sale of Land—City Lot—Misstatement as to Frontage—"About" and "More or Less"—Innocent Mistake—Purchaser Familiar with Premises—Purchase Money a Lump Sum—Specific Performance—Claim of Compensation for Deficiency—Whether a Question of Title.

Action for specific performance of a contract for sale of certain lands, and if defendant cannot convey all the lands described

in the contract, that she may be required to convey such portion thereof as she can convey, and that the plaintiff shall be compensated by the defendant by way of abatement from the purchase money for the difference.

W. J. Elliott, for the plaintiff.

W. E. Raney, K.C., for the defendant.

SUTHERLAND, J., referred to the description of the lands which had a frontage of 20 feet on the north side of Maitland Street in the City of Toronto by a depth of 168 feet more or less, together with a right of way over a lane 8 feet in width adjoining the land on the east, and extending from Maitland Street to the rear. After referring also to the defendant's title to the lands as devisee under her husband's will, the judgment proceeds:—

The plaintiff prior to the 12th December, 1910, had been negotiating with the defendant for the purchase of the property in question herein, and had at one time made her an offer therefor of $3,000. Some time later in that year the defendant placed the property for sale in the hands of a real estate agent named Frank A. Wood, and on or about the 9th day of December, 1910, the plaintiff made an offer in writing to purchase the said land which had been prepared by the said Wood, and subsequently, on the 12th day of December, 1910, said offer with some slight alterations which had been made therein meantime, and which only affected the question of the terms of payment, was accepted by the defendant. The description in said document is as follows:—

"All and singular the premises situated on the north side of Maitland Street in the City of Toronto, known as No. 44, having a frontage of about 24-6 feet more or less by a depth of about 169 feet more or less at the price or sum of $4,000." A difficulty soon after arose between the plaintiff and the defendant as to the said description, the plaintiff contending that according to the same he was entitled to a conveyance of a frontage on Maitland Street of 24 feet 6 inches, or if the defendant was unable to convey more than 20 feet, as she contended, was entitled to a rebate in price for the four feet six inches on the basis of a sale of 24 feet 6 inches for $4,000. This would entitle him, according to his contention, to a rebate of about $800.

It appears that some time before the final negotiations between the plaintiff and defendant which ended in the offer and acceptance already referred to, the plaintiff had seen and made enquiries of one Butler, a real estate dealer who at one time had had considerable to do with the property in question. Butler

on the occasion in question, not knowing from memory the exact description of the property, had produced and shewn to the plaintiff an assessment notice indicating that the husband of the defendant in his lifetime had been assessed as though the owner of 24 feet 6 inches. Butler, however, called the attention of the plaintiff at this interview to the fact that there was a lane, and that he did not know whether the defendant owned it or half of it or any of it, or only had a right of way over it. It appears that the house on the land in question is about 20 feet in width, and that the lane in question lies between it and the next adjoining house. There is a fence or lattice work at the front on Maitland Street between these two houses, in the middle of which is a gate or door furnishing a common entrance to the lane, and a casual inspection of the premises would apparently indicate and shew that the lane is used in common for the adjoining premises.

It appears that the plaintiff had built an apartment house on land lying east of the house on the property in question, and wished to secure the latter for the purpose of making an extension of said apartment house.

It also appears that in a general way he knew the property and had been examining it, had entered the lane and looked over the property, in fact was fairly familiar with it. It also appears that the defendant had at one time lived in the property and was familiar with it also in that way.

The plaintiff had first spoken to the tenant who was then in the house, and he says that he was then informed that the defendant owned the house and half of the lane, and he, the plaintiff, had estimated that the frontage of the house would be about 19 feet, and half the lane would bring the property up to about 25 feet. He says that he figured in the price of $4,000, which he finally offered to the defendant, on a frontage basis. It does not, however, appear that in his conversation with the defendant or her agent, any mention of the land at so much per foot frontage, or anything of that sort, was discussed. The plaintiff had offered at first $3,000 for the property, and the defendant's price at first was $5,000. In the end the sum of $4,000 appears to have been agreed upon.

When the plaintiff finally made up his mind to pay $4,000 for the property and interviewed Wood, the defendant's agent, what took place appears to have been as follows: On the plaintiff intimating that he would pay the $4,000 and the contract being discussed, it developed that Wood did not know the quantity of land in question. He says there was a suggestion that the pro-

perty be described as street No. 44, and all lands pertaining to it, but that the plaintiff wanted to know the frontage. He says that before drawing up the contract he called up the defendant and intimated to her that the plaintiff wanted to know the dimensions. He was referred by the defendant to Butler, but did not call him up. Later on he again called up the defendant, who, after telephoning to Butler, told him that the frontage was 24 feet 6 inches, which he says he then put upon a memorandum which he had originally made in connection with the property, and which memorandum he produces with the figures 24-6 x 169 marked on it. Thereupon he prepared the offer to purchase in question.

Butler is called and says that on the defendant telephoning to him on the occasion in question he gave her from the assessment notice the figures of 24 feet 6 inches, and spoke to her and warned her about the lane, telling her that he was not sure whether she owned half of it or what her interest in it was. Butler was, of course, not acting for either party at the time. The defendant says that Butler did not mention the matter of the lane so far as she remembers. It appears more than likely that if Butler did mention the lane, as he says, that the defendant did not hear it over the telephone or become aware of the significance of it. She says she simply repeated to Wood the frontage given to her by Butler.

The plaintiff in his evidence at the trial admitted that the defendant had not wilfully deceived him. I think this is perfectly clear, however, from the evidence of the defendant herself. I think it likely she had not as definite or practical a knowledge of the dimensions of the property as the plaintiff himself.

Whether Butler told her in a conversation over the telephone about the lane or not, it is clear that before that time the plaintiff had been told by him that he did not know whether the defendant was the owner of the lane in question or not. This should have put him upon his guard, as should also, I think, the appearance of the lane upon the ground. It is quite obvious from the evidence that the defendant only intended to sell what had been devised under the terms of her husband's will. I think she acted in perfect good faith in directing Wood to describe the property as he did. I cannot very well see how the plaintiff could have been deceived. With the notice he had, I think it was incumbent upon him to have had a more definite description put in his offer to purchase than is there, if he intended to hold the defendant strictly to a sale and purchase of 24 feet 6 inches. The

description in the offer casts as it were a double doubt upon the exactness of the frontage. It speaks of it as "about 24-6 feet," and qualifies that again by saying "more or less."

The purchase price mentioned in the agreement is a lump sum and there is nothing to indicate in the agreement, nor was there anything in the negotiations on the part of the plaintiff with either the defendant or her agent to indicate that he was purchasing the property at so much per foot frontage. The defendant was at first willing to convey the property according to her understanding of the agreement, and prepared, executed and tendered a conveyance to the plaintiff from herself, and in which the children of herself and her husband, all of whom are of age, joined for the purpose of authorizing and consenting to such sale and conveyance. The description inserted in said conveyance was the one by metes and bounds first hereinbefore mentioned, and comprising a frontage of 20 feet on Maitland Street, together with a right of way over the lane 8 feet wide. The consideration mentioned therein was $4,000. The plaintiff declined to accept the said conveyance and the defendant declined to concede any rebate in price.

The defendant also contended that as the plaintiff had served requisitions on title which contained, among others, the following: "We notice by your draft deed submitted that the vendor apparently proposes to convey 20 feet frontage on Maitland Street together with a right of way over a lane 8 feet wide adjoining on the east. The agreement for sale calls for a frontage of 24 feet 6 inches. This is entirely too great a discrepancy, and forms a proper matter for compensation, and the purchaser asks that a proper proportionate allowance be made him by way of compensation. Roughly speaking it makes to the purchaser this difference: At 24 feet 6 inches, he is paying about $160 a foot. At 20 feet he is paying $200 a foot, or say a difference of $800;" and as he insisted upon effect being given to this requisition she thereupon was at liberty to declare the agreement null and void, and had done so before action.

The clause in the agreement referred to is as follows: "The purchaser is to be allowed 10 days to investigate the title at his own expense, and if within that time he shall furnish the vendor in writing with any valid objection to the title which the vendor shall be unable or unwilling to remove, and which purchaser will not waive, this agreement shall be null and void and the deposit money returned to the purchaser without interest." It appears that $100 was paid to Wood on account at the time the plaintiff

signed the offer to purchase, and that upon the defendant notifying the plaintiff in writing of her intention to put an end to the contract, she intimated that she would write to Wood, the holder of said deposit, to return it to the plaintiff. Up to the time of the trial it had not, apparently, been tendered or paid to him.

The plaintiff in the letter of his solicitors dated 27th of December, 1910, to the defendant's solicitors, puts the plaintiff's position with respect to the 4½ feet in the following way: "Our demand for compensation, as we informed you on Saturday, is not an objection to title, and does not give rise on your part to any right to rescind the contract." The position of the defendant as to the 4½ feet was that she had as associated with the 20 feet an easement over an eight-foot lane adjoining, which included the 4½ feet in question. She offered to convey the 20 feet with this right of way, but was unwilling to allow an abatement in price with respect to the 4½ feet. I am not at all sure that under these circumstances the question between the parties is not a question of title, and one which the vendor being unable or unwilling to remove and the purchaser unwilling to waive, the vendor would not have the right in consequence to put an end to the contract. Reference to Fry on Specific Performance, 5th ed., p. 511, and cases there cited.

The defendant also contends that under the terms of the contract time was expressly stipulated to be of the essence thereof, and that the plaintiff not having completed the same on his part by the time mentioned therein, the purchaser had a right to and did put an end to the contract in consequence.

The contract contains these terms: "This offer to be accepted by otherwise void, and same to be completed on or before the 31st day of December, 1910, on which date possession of said premises is to be given," and also "time shall be of the essence of this offer." On the 31st December, 1910, the defendant's solicitor wrote to the plaintiff's solicitor and delivered at his office a letter as follows: "I have, however, had the conveyance as submitted to you engrossed and executed and ready for delivery. I am ready to close upon receipt of a properly executed mortgage and a cash payment as provided by the agreement. The taxes are all paid for the year. The insurance, first mortgage and interest are matters for adjustment. I am now ready to close as indicated. Will you close to-day?" To this letter the plaintiff's solicitor replied on the 3rd January, whereupon the defendant's solicitor again wrote

in these terms: "The time, however, has gone for negotiation. Time was the essence of the agreement, and the time for closing has gone by; therefore, the matter is at an end, and rescinded. Further, you persisted in your requisition in regard to compensation and refused to withdraw or waive it. The vendor, therefore, takes advantage of the provision in the agreement in that behalf and hereby declares the agreement to be null and void. I have written the agent, Mr. F. A. Wood, the holder of the deposit, to return it to your client, although it is doubtful whether he is entitled to the whole amount."

But I think this case can very well, and should, be determined on similar grounds to those discussed and laid down in Wilson Lumber Co. v. Simpson, 2 O.W.N. 410 (confirmed on appeal by a decision of a Divisional Court, not yet reported), which was much discussed before me during the argument of this case. Counsel for the plaintiff seeks to distinguish that case from the present one by shewing that the defendant was aware, before accepting the offer to purchase in question, of the object for which the plaintiff wanted the premises, viz., an extension of his apartment house building. The defendant was asked in her examination for discovery, read at the trial, certain questions as follows:—

"186. Q. Then did you have more than the one interview at any time with Mr. Bullen as regards it? A. No, just that once.

"187. Q. Did he tell you for what purpose he wanted the property? A. Yes.

"188. Q. What was the purpose? A. He was going to take the house down and build an 'L' on the far end, and use where our house is for a lawn.

"189. Q. Did he shew you any plan of it? A. No."

From this it would appear that in a general way she was told the object for which the plaintiff wanted the property. It does not appear at all that she knew he would require 24½ feet, or any particular amount of the property in question, for the extension of his building.

Having regard to the knowledge which the plaintiff himself had with reference to the property and which he had obtained on the ground and on application to Butler as already mentioned, having regard also to the fact that the defendant acted in perfect good faith throughout, and intended to sell only what was covered by the terms of her husband's will, and having regard also to the indefiniteness as to frontage in the offer to purchase, I do not think this at all a case in which a judicial discretion as to specific

performance should be exercised in favour of the plaintiff, even if that is now open to me.

The language used by Meredith, C.J., at p. 411, in the case above mentioned is, as it seems to me, very appropriate to this: "The purchase-price agreed on was $12,000, and was a bulk sum, and not a sum per foot for the frontage on either street, and the plaintiffs did not arrive at a bulk sum by an estimate of the value of the property at a price per foot. The defendant acted in good faith in describing the lot as having a depth of 110 feet more or less, and he was led into that error from the lot having been assessed and described in the assessment notices which he received as of that depth." In the same way here: the defendant was not aware of the exact dimensions of the property in question, and she was misled into any representation which she made over the telephone to Wood as to the exact frontage of the property. While the plaintiff says that he bought on the basis of a value of so much per foot frontage he never intimated this to the defendant, or to Wood.

I think the action must be dismissed with costs.

MIDDLETON, J. MAY 19TH, 1911.

MACDONALD v. PETERS.

Will — Construction — Intestacy — Power of Sale—Executors—Settled Estates Act—Representation of Issue.

Motion by the plaintiffs for construction of the will of Daniel Macdonald, administration of the estate by the Court, and the sale or partition of the lands in question.

R. U. McPherson, for the plaintiffs.

C. P. Smith, for the trustee, J. K. Macdonald.

A. A. Miller, for Elizabeth Peters and Robert Macdonald.

E. C. Cattanach, for the infants.

MIDDLETON, J.:—Re Edwards, [1906] 1 Ch. 570, gives the guiding principle when the choice is between straining the language of the will and an intestacy.

Here the testator uses the expressions, "Upon the death of *any* of my said sons," and, "upon the death of *all* of my said sons," in a manner that clearly shews they are not interchangeable.

The first part of clause "secondly" relates entirely to the income. Upon the death of any son without issue the daughter is to be permitted to share with the surviving sons on the same terms, i.e., is to receive such part of the income as the trustees may deem proper. Upon the death of all the sons without issue the daughter is the sole beneficiary, and this benefit is aptly said to be for the daughter, her heirs and assigns. If any of the sons die leaving issue, the issue are to receive a share of the income during minority, and on such issue attaining majority one-third of the then remaining estate is to be set apart and divided between such issue.

Here the testator stops. He has made no provision for the events which have happened. One son has died leaving issue—so that it cannot be said *all* have died without issue, in which event only is anything, beyond a share in the income, given the daughter, and there is an intestacy as to one-third of the estate, and if the surviving son dies without issue (he is 84 and unmarried) there will be an intestacy as to two-thirds.

I agree with counsel that the executors have not now a power of sale, and as all agree that an advantageous sale of the lands in question can now be made, an order can be issued under the Settled Estates Act for sale. The other tenant in common of the lands is ready, it is said, to join in a sale and the details can be worked out on the settlement of the order.

To clear the title the surviving son should be appointed to represent any possible issue.

It must not be forgotten that the interest as to which there is an intestacy vested in the testator's heirs upon his death.

Costs out of estate.

MIDDLETON, J. MAY 19TH, 1911.

TOFFEY v. STANTON.

Mortgage—Assignment—Covenant—"Good and Valid Security"—Verbal Warranty—Whole Agreement in Written Document.

Appeal by the defendant from the report of the local Master at Brockville.

G. F. Henderson, K.C., for the defendant.

J. A. Hutcheson, K.C., for the plaintiff.

MIDDLETON, J.:—Only one matter (outside of costs) was discussed on this appeal. The Master has charged the defendant

with $325, the amount of the deficiency arising upon the realization of the Kerr mortgage.

The plaintiff sold the defendant a mill and accepted a mortgage made by one Kerr upon which there was $1,200 due, in part payment.

The mortgage was assigned by instrument of 26th October, 1909, containing a covenant by the assignor (the defendant) "that the said mortgage is a good and valid security and that the sum of $1,200 and interest as aforesaid is now owing and unpaid."

In the statement of claim this demand is based upon a covenant "that the said mortgage was a good security for the $1,200 then due thereon."

The plaintiff also claims that the defendant represented "that the property covered by the mortgage was ample security for the amount due thereon, and the defendant relying upon the defendant's representation accepted the said mortgage at its face value of $1,200."

The claim is then based on breach of representation and covenant.

The defendant denies any misrepresentation and any such covenant as that alleged.

The Master finds in the plaintiff's favour on the covenant, with an alternative finding that in any event there was "a verbal warranty given by the defendant on the treaty as to the mortgage."

The finding upon the covenant is based upon the statement that Clarke v. Joselin, 16 O.R. 68, determines that a covenant in the form quoted has the effect contended for by the plaintiff, and is to be preferred to the later case of Agricultural Savings and Loan Co. v. Webb, 15 O.L.R. 213, when it was not cited.

I cannot agree with the Master in his reading of Clarke v. Joselin, and think that Agricultural v. Webb determines the question. That case decides that this covenant does not mean that the mortgage is sufficient security for the debt, but only that the mortgage is valid in law. Apart from authority altogether this seems to me too plain for serious discussion.

The earlier case is, I think, in no way in conflict with this. There the claim was upon a similar covenant, the breach alleged being that the mortgage was not a good and valid security, because the mortgagor had no title, the lands having been sold under a power of sale in an earlier mortgage two months before the making of the mortgage in question.

A further breach was suggested in that, while the assigned mortgage purported to be a first mortgage, it was in truth a fourth mortgage. It was said "a good and valid security" meant a good and valid first mortgage. This makes it quite plain that the issue there was not, as the Master has thought, similar to the issue here. There there was a breach of the covenant as the security was not "valid," and as it appeared on the evidence a case for reformation had been made out, this relief was granted to the defendant and the action failed.

Then it seems equally clear that the judgment cannot be supported on the alternative finding.

It was the intention of the parties that the whole bargain with reference to this mortgage should be contained in the assignment as executed. The plaintiff's solicitor says that he thought the covenant meant, as his counsel now contends, that the assignor guaranteed the value of the security.

The law is clearly stated in Gordon v. McGregor, 8 C.L.R. 316: "When a contract had been entered into by parol and afterwards reduced into writing, the parties are bound by the writing unless it is shewn by evidence that the written document was not intended to embody the whole of the terms of the contract." Unless the contract is required to be in writing, there is nothing which prevents the parties, if they choose, reducing part of their engagements to writing and allowing the remainder to rest in the oral bargain, but unless this is clearly shewn to have been the intention of both parties, they may expect to hear, as was said by Pollock, C.B., in Knight v. Barber, 16 M. & W. 69, that it is a conclusion of law that when parties are making an agreement by parol and subsequently reduce it to writing, the written document is the contract.

The Supreme Court in Provident Savings Life Assurance Society v. Mowat, 32 S.C.R. 147, at p. 155, refers to "the most salutary rule that parol negotiations leading up to a written contract are merged in the subsequent written instrument, which is conclusively presumed, in the absence of fraud, to contain the entire engagements of the parties, and by which alone their intentions are to be ascertained."

With this in mind the "collateral condition" cases and the "escrow" cases can be applied and reconciled.

See Long v. Smith, 18 O.W.R. 88, for a discussion of some of these.

Apart from this the plaintiff has another difficulty; the assignment contains a covenant which defines the defendant's

liability with reference to this mortgage. What is set up is not some collateral bargain, but an oral undertaking wider than the written covenant.

Upon the evidence the plaintiff has in my view no ground of complaint. His counsel admitted that no case of misrepresentation had been made out. The defendant had sold the land and taken back a mortgage for $1,500, as part payment. This had been reduced to $1,200, and the defendant did no more than state that he regarded this as good security for the $1,200 remaining due.

The amount found due by the Master should be reduced by deducting from the $1,651.89 the $325 allowed and interest on this from the writ to the report, $4.85, leaving a balance due the plaintiff of $1,322.04. The plaintiff should have the general costs of the action, and should pay the costs of the issue as to the Kerr mortgage and of this appeal, and these sums being set off pro tanto, the money in Court should be paid to the plaintiff on account of the balance due to him. The plaintiff should also have interest on $1,301.50 from the date of the report.

Had the defendant paid or tendered the amount paid into Court before action he would have fared better as to costs.

DIVISIONAL COURT. MAY 19TH, 1911.

CANADIAN DRUGGISTS v. THOMPSON.

Joint Stock Company—R.S.O. ch. 191, *sec.* 9—*Agreement Subsequent to Incorporation, and not Made with Company—Liability Under.*

Appeal by the plaintiffs from the judgment of the County Court of Middlesex of the 29th March, 1911, in an action to recover $100, the price of ten shares in the plaintiff company, alleged to have been subscribed for by the defendant, and allotted to him.

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

F. Aylesworth, for the plaintiffs.

E. C. Cattanach, for the defendant.

BRITTON, J.:—The plaintiffs were incorporated by letters patent of the Province of Ontario, on the 5th December, 1906,

under R.S.O. ch. 191. The agreement under which the defendant is asked to pay for ten shares of stock was not made until the 7th December, 1906, after such incorporation. The agreement relied upon was not made with the plaintiff company. It was made with the other subscribers to it, and it purports to be—so far as is indicated by the heading— "A memorandum of agreement and stock sheet of Canadian Druggists Limited." There can be no liability to the plaintiffs by the defendant upon the agreement itself. If the defendant had in any way become a shareholder he might be compelled to pay for his stock. Had this agreement been signed before the presentation of the petition for incorporation, then under section 9 of chapter 191, he might, whether named in the letters patent or not, have become one of the body corporate.

The letters patent incorporate five persons by name, and "any others who have become subscribers to the memorandum of agreement of the company."

That memorandum of agreement mentioned was executed in duplicate—one part is filed in the office of the Provincial Secretary and remains there, with the petition, the other is in the plaintiffs' book, filed upon the trial. The defendant did not sign that, but signed the one dated 7th December, 1906.

If the defendant did not become a shareholder by virtue of the agreement, as it is not pretended that in any other way he became one, he cannot be liable in this action. If not a shareholder in fact, and if not in law liable as a shareholder, whatever the company may have done or have attempted to do in the way of allotment, or making out share certificates, or in giving notice of meetings, could not create a liability. The defendant not only never acknowledged any liability, but within a week of his signing the paper he gave notice of repudiation of it. The plaintiffs should have realized that the agreement was not one by the defendant with the company, and should not have brought this action.

Appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., gave reasons in writing for arriving at the same conclusion.

MIDDLETON, J., IN CHAMBERS. MAY 22ND, 1911.

RE HOOVER AND NUNN.

Practice—Administrator ad Litem—Proposed Action to Set Aside Deed—Plaintiff in, Seeking Aid of Court to Find a Defendant — Con. Rule 195 *— Limited Application of — Suggested Application under Trustee Act and Con. Rule* 200.

Motion to appoint an administrator ad litem for the purposes of an action not yet begun.

Glyn Osler, for the applicant.

MIDDLETON, J.:—On 17th November, 1851, by Crown Patent Mary A. Hoover became the owner in fee of the lands in question. On the 6th April, 1870, she conveyed these lands to Jane Walker, her mother. On the 25th March, 1887, Jane Walker died and by her will devised the lands in question to her executors in trust for M. A. Hoover for life, and on her death for sale, and the proceeds are then to be divided.

The executors renounced and letters of administration with will annexed were on the 15th August, 1887, granted to the inspector of prisons during the lunacy of M. A. Hoover, who was then in the asylum.

M. A. Hoover died on the 1st November, 1908, without having recovered her sanity.

The applicant, the "eldest lawful uncle" of M. A. Hoover, has now obtained letters of administration to her estate, and desires to attack the deed from her to her mother made in 1870, upon the ground that she was then insane.

No one appears to be willing to apply for administration with the will annexed, to Mrs. Walker's estate, and to enable the contemplated action to be brought the plaintiff seeks the aid of this Court to find him a defendant.

I think this motion is misconceived. This Court has no probate jurisdiction unless expressly conferred by statute: Mutrie v. Alexander, 2 O.W.N. 884.

Con. Rule 195 does not apply to a case of this kind and is of very limited application. There must be an action or proceeding, and in that action or proceeding representation of the estate must be required. This does not cover the case of a person deceased who has no executor or administrator, and against whose estate no action or proceeding can be brought, nor

do I think it covers a case in which what is required is a general personal representative who has active duties to perform. In these cases a general administrator must be appointed in the Surrogate Court.

Without attempting to define all the cases in which Con. Rule 195 may be applied, it is intended to enable the Court to facilitate litigation in which the parties mainly concerned are before the Court, by appointing some one to represent an estate which has a nominal interest only, or as the form of order says: "For the purpose of attending, supplying, substantiating, and confirming these proceedings only." Such an administrator has no power to deal with the assets of the estate, and a valid foreclosure cannot be granted against him: Aylward v. Lewis, [1891] 2 Ch. 81.

In the case of an intestacy the estate will not vest in an administrator ad litem, and proceedings against the administrator ad litem cannot be resorted to when the desire is to reach the assets of the deceased. The estate may be bound by the findings of fact when it is represented under the rule in question, but neither under the Devolution of Estates Act nor under general law are the assets of the deceased vested in him.

In this case the duties of the executor, as such, have been discharged by the administrator with the will annexed for over twenty years between the deaths of Mrs. Walker and Mrs. Hoover, and all that remains to be done is in the nature of a trust rather than administration, and a new trustee may be appointed under the Trustee Act. See Re Bush, 19 O.R. 1.

On the material being put in proper shape for such an order I do not see why an order of this kind should not be granted, and why it will not meet the situation.

It will probably be thought proper that the beneficiaries, or some of them, should be before the Court, and it would be proper to have an order under Con. Rule 200, authorising a defence for the class.

CROWTHER v. TOWN OF COBOURG—MASTER IN CHAMBERS—MAY 18.

Parties—Several Defendants—Motion to Compel Plaintiff to Elect Against Which Defendant to Proceed—Unity in Matters Complained of.]—Motion by the town requiring the plaintiff to elect against which of the defendants the action shall proceed. The action was against the town and two other defendants, of whom one did not appear, and the other delivered statement of

defence denying commission of the alleged wrongful acts by him. The town had passed a by-law allowing sewers to be constructed "to be exclusively used for carrying off water from cellars, baths and sinks, and that no connections shall be made with the said drains for other than the purposes aforesaid, and only under the supervision of the Inspector of Streets of said town, who shall have power to prevent any water closets being used in connection with the said drains, and it shall be his duty to do so." The statement of claim alleged that the plaintiff owned lands through which flowed a stream which was connected with one of the said sewers, and that the individual defendants, with the knowledge and consent of the town corporation, and with their written permission, used the sewer for the discharge of their water closets, and so were polluting the stream and creating a nuisance, depreciating the plaintiff's property, and were thereby joint trespassers. The relief asked was (1) an injunction, restraining any further improper user of the sewer by the present defendants; (2) restraining the corporation from granting any similar permits; (3) declaration that plaintiff is entitled to the uninterrupted use of the stream in its former purity; and (4) damages. The Master thought that the language of BOYD, C., in Evans v. Jaffray, 1 O.L.R. at p. 621, was very applicable to the case, and that "there is such unity in the matters complained of as between all parties as justifies the retention of the defendants" in one action, even if they are not technically joint trespassers. Motion dismissed. Costs to be in the cause, and the moving defendant to have six days' further time to plead. E. N. Armour, for the town corporation. John Macgregor, for the plaintiff.

FOISY V. LORD—SUTHERLAND, J.—MAY 18.

Statute of Limitations—Deed to Several Grantees as Tenants in Common—Exclusive Possession by One Grantee—Pleading—Amendment at Trial.]—Action for the rectification of a deed. At the conclusion of the trial judgment was given dismissing the plaintiffs' claim, and also the claim of the defendants for an order rectifying the deed by striking out the names of all the grantees therein except that of the defendant Angele Lord. The learned Judge reserved the question of the claim of the defendants for a declaration establishing a title by possession in the said Angele Lord, as to which branch of the case he has now

found that they are entitled to succeed, as the evidence shews that about 18 years prior to the commencement of this action the said defendant Angele Lord went into possession of the land in question and continued in quiet, peaceable, continuous and undisturbed possession thereof down to the issuance of the writ. Her position in the action was that she always believed until recently that the deed in question was a conveyance to herself in fee simple, and it was not until the fall of the year 1910 that she became aware of the fact that the names of other parties as grantees were included therein. SUTHERLAND, J., states the conclusion arrived at by him as follows: "Under the said deed the grantees therein take the land in question as tenants in common. The defendant Angele Lord went into sole possession thereof 18 years ago. The possession of one tenant in common is not to be considered as the possession of any other: Dart on Vendors & Purchasers, 7th ed., p. 451; Harris v. Mudie, 7 A.R. 414. The benefit of the Real Property Limitation Act, R.S.O. 1897 ch. 133, sec. 4, is not expressly pleaded by the defendants. But in the statement of defence, after setting out the possession of the defendant Angele Lord as above, a declaration is in the alternative asked "establishing a title by possession" in her. Counsel for said defendant Angele Lord asked at the trial for permission to amend if necessary and plead said statute. I think under the circumstances disclosed in the evidence such permission should be granted. The statement of defence may be amended accordingly. I think upon the evidence that the defendant Angele Lord is entitled to a declaration that she has been in such open, visible, continuous and exclusive possession of the land in question for more than the statutory period as to extinguish any title of the plaintiffs and the defendants other than herself therein under the said deed or otherwise, and I make such declaration accordingly. . . Under all the circumstances I do not think this is a case for costs in favour of either party." M. J. Gorman, K.C., and A. E. Lussier, for the plaintiffs. J. U. Vincent, K.C., for the defendants.

NIXON v. WALSH—DIVISIONAL COURT—MAY 22.

Statute of Limitations—Possession of Land—Acts of Possession—Sufficiency of—Entry—Resumption of Possession.]—Appeal by the defendant from the judgment of the senior Judge of the County of Wentworth in favour of the plaintiff in an action

brought for a declaration that the plaintiff had acquired title by possession to a strip of land three feet eleven inches in width, lying north of the defendant's property. The acts of possession relied upon by the plaintiff were the planting of a lilac bush and vines against the defendant's brick wall, sodding and caring for the strip, and occasionally using it, together with her own land on the north, as a place of resort for herself and friends during the summer, and cleaning the snow off the sidewalk in front of it during the winter. MULOCK, C.J.Ex.D., in a written judgment, after reviewing the evidence, said that it appeared from the evidence of one Clark, a predecessor in title of the defendant, that he, without the plaintiff's permission, in the summer of 1904 pulled up the weeds growing near his wall, and in the following spring dug portions of the land and planted vines along the wall, and cut the grass, and in the winter of 1904-5 entered upon the strip and shovelled away the snow from near his wall in order to prevent water from soaking into his cellar. Each of these acts constituted an entry upon the land as owner, an assertion of ownership, and a resumption of possession for the time being: [Reference to Donovan v. Herbert, 4 O.R. 635; Griffith v. Brown, 5 A.R. 303; Coffin v. North American Land Co., 21 O.R. 86. Cutting down a tree, digging the soil, etc., "these do amount to an entry:" Co. Litt. 245b; Barnett v. Earl of Guilsford, 11 Ex. 19.] The learned Chief Justice found that Clark's entry on each of these occasions, not as trespasser, but as owner, re-possessed him of the property and defeated the plaintiff's claim to continuous possession for the statutory period of ten years. He was, therefore, of opinion that the appeal should be allowed with costs and the action dismissed with costs. TEETZEL, J., concurred, and MIDDLETON, J., gave reasons in writing for arriving at the same conclusion, being of opinion that upon the evidence, the acts done on the land by the plaintiff, while quite consistent with ownership, were not enough to give statutory title. W. S. MacBrayne, for the defendant. J. A. Ogilvie, for the plaintiff.

RE BASSETT—TEETZEL, J.—MAY 22.

Will—Codicils—Construction—Legacy to Executor—Revocation of Appointment—Effect of—Appropriation for Maintenance of Burial Plot.]—Motion by the executors of Mary Bassett for the construction of her will, by which she appointed Matthew

Orme one of her executors, and bequeathed him a legacy of $200. By the first codicil to her will she revoked the bequest of $200 to Orme and also revoked his appointment as executor, and by the same codicil she appointed James Tracey one of her executors and bequeathed him a legacy of $100. By a third codicil to her will she revoked the appointment of James Tracey as one of her executors, but did not expressly revoke his legacy, and one question under the will was whether the revocation of his appointment as executor also revoked the legacy. TEETZEL, J., expressed his view as follows: "The general rule is that a legacy to a person appointed executor is given to him in that character, and it is on him to shew something in the nature of the legacy, or other circumstances arising on the will to repel that presumption. The presumption will be rebutted if it should appear either from the language of the bequest, or from the fair construction of the whole will, that the bequest to a person who is named as an executor is given to him independently of that character: Williams on Executors, 10th ed., pp. 1027-30, and cases there cited; also Jarman on Wills, 6th ed., pp. 1623-4. In Wildes v. Davies, 22 L.J. Ch. 495, at p. 498, Vice-Chancellor Stuart observes that the Courts had allowed very minute circumstances to take cases out of the rule. Now reading this will and the codicils as one document expressing the testamentary intentions of the deceased, and bearing in mind that when she made the third codicil she had before her the first codicil in which she revoked not only the appointment of Matthew Orme as one of her executors, but also expressly revoked the legacy of $200 to him, I think the fair inference is that when, in the third codicil, she revoked the appointment of James Tracey as one of her executors and omitted to revoke the legacy to him she intended to leave the legacy to him undisturbed. In other words, it is fair to infer that if she had intended to revoke the legacy to Tracey as well as his appointment as executor, she would have followed the same course as she had taken in the case of Orme's legacy. I, therefore, think that the legacy should be paid." As to the other question submitted, the learned Judge thought that on the authority of Re Cronin, 15 O.W.R. 819, the executor was warranted by the terms of the will in setting apart $100, the amount suggested upon the argument, for the care and maintenance of the burial plot in which the deceased was interred. Costs of all parties out of the estate. C. J. Holman, K.C., for the executors. H. M. Mowat, K.C., for the Brethren and for James Tracey. J. A. Macintosh, for the residuary legatee.

REX EX REL. SLATER v. HOMAN—MASTER IN CHAMBERS—MAY 22.

Municipal Elections—Proceeding to Set Aside Election of Alderman—Supply of Material to Contractor—Municipal Act, sec. 80—Evidence—Respondent not Called, Though Present.]—Motion by the relator for an order setting aside the election of the respondent as alderman of the City of Niagara Falls. On 19th October, 1910, a contract was awarded to Mr. Ferris for the erection of a fire hall in the City of Niagara Falls, to cost $5,000. The work was begun shortly thereafter, but is not yet finished. The relator charged that the respondent had as well before as since the election in January last furnished supplies and material to the contractor, and that he had thereby vacated his seat as alderman, pursuant to 3 Edw. VII. ch. 19, sec. 80, and evidence was taken before the Master at Niagara Falls on the 29th April and the motion was argued on the 10th May. On the argument certain technical objections taken on behalf of the respondent were disallowed. It was also argued that no case against the respondent was shewn by the evidence. Judgment: Eight witnesses were called by the relator, of whom the most important were Ferris, the contractor, and Secord, who had charge of the work for Ferris, the latter being engaged on work in the Cobalt district. Both of these witnesses were reluctant to give any evidence that might damage the respondent; especially was this the case with Secord. However, from these witnesses and the evidence of Garner, Trelford, Nichols and Lawson, who all supplied material or worked on the fire hall, it appears that Secord was authorised by Ferris to arrange for the necessary materials; and that Secord had previously worked for Homan and did so during the progress of the work in question. He got Homan to order some supplies, chiefly brick and lumber, some of which was delivered on the job by Homan's teamsters. In some way and under some arrangement which was not explained, all payments were made at Homan's office, some being as late as 15th April last. The only money paid on the contract so far by the city being $2,100 on 7th February, and $1,200 on 4th April. According to Secord (Q. 199 et seq.) the sand supplied by Homan is not all paid for yet. If his answers to those questions are to be taken literally and strictly it would seem that the motion must succeed unless this was afterwards explained. This is also true of the evidence of Trelford, who in his cross-examination by Mr. Griffiths (at Q. 267) says that Homan's name was on the door frames supplied to the building. [Reference was made to the evidence of other witnesses and the judgment proceeds:]

In face of all this evidence it is difficult to see why Homan, who was present, was not called to give evidence in explanation, especially of such a suggestive fact as that of Homan's name being on the door frames, taken in conjunction with the numerous bills of materials, all made out to him and receipted as paid by him. [Reference to Town of Sudbury v. Bidgood, 13 O.W.R. 1094, at p. 1097; Wigmore on Evidence, secs. 285, 287, 289 and cases cited; Taylor on Evidence, secs. 376(A) and 377.] Had the facts stated in the evidence called by the relator been set out in affidavits as is usually done, and these had been allowed to pass without any cross-examination and without any affidavits in answer, I cannot see how the respondent could have expected to have the motion dismissed—the effect of the evidence as given before me viva voce, and subject to and after cross-examination, is at least as strong, when not broken down or explained away satisfactorily. I, therefore, feel bound to hold that the relator has given sufficient proof of his allegations and that the motion to have the respondent unseated must be allowed with costs. A. C. Kingstone, for the relator. F. W. Griffiths, for the respondent.

CORRECTIONS.

In McCutcheon v. Traders' Fire Insurance Co., ante 1138, line 16 from the bottom, after the words, "the typewritten particulars," the following words should have been inserted, "referring to the natural gas drilling plant known as No. 1"; and at p. 1141, line 15 from the bottom, for "recites," read "cites."