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BRITTON, J. DECEMBER 9TH, 1907.

WEEKLY COURT.

CARROLL v. ERIE COUNTY NATURAL GAS AND FUEL CO.

Contract — Breach — Supply of Gas — Value—Damages—Liability of Several Defendants—"Reservation"—Plant "Exception"—Judgment—Construction of Contract——Evidence as to Damages — Measurement of Gas — Computation—Reference—Report—Appeal—Costs.

Appeal by defendants and cross-appeal by plaintiffs from report of local Master at Welland.

W. M. Douglas, K.C., and T. D. Cowper, Welland, for defendants.

G. F. Shepley, K.C., and W. M. German, K.C., for plaintiffs.

BRITTON, J.:—These appeals are in continuation of the long litigation between the parties, which began in 1894, growing out of an agreement for sale by the plaintiffs to the defendants the Erie County Natural Gas and Fuel Co. of certain wells and leases.

The agreement is dated 6th April, 1891. The plaintiffs were the owners of leases over gas territory, upon which were 16 wells, in addition to 2 in course of being drilled. The plaintiffs carried on the business of making quick lime, quarrying stone, &c. So far as I can make out from the evidence of the plaintiff S. S. Carroll, the plant which plaintiffs had at the time of the transfer consisted of 2 kilns,

a centrifugal pump, lake hopper, land hopper, a small boiler to supply stone to the kilns, another small boiler to supply the centrifugal pump, a jet pump, and at least two other small boilers. They had also a cable hoist in course of construction. The only additions to the this plant from the time of the sale of the leases to the Erie company down to the time of the sale of plaintiffs' business in 1902, to the Empire company, was the addition of a second cable hoist and two additional lime kilns and another small boiler. The plaintiffs contended that under the agreement of 6th April, 1891, and the further document of 20th April, 1891, completing the sale of the leases, they were entitled to a reservation of sufficient gas to supply their plant then operated, on the property, so that they could continue their business. On 6th April, 1891, the plaintiffs were getting gas for this purpose from the "main" through which the gas flowed to supply consumers, and was delivered by the Erie company in the enlarged business of supplying gas which they, after their purchase, carried on.

After 6th April the plaintiffs continued to get their gas as before until 18th July, 1894. On that day the Erie company sold out to the defendants the Provincial Natural Gas and Fuel Co., and the latter company immediately cut the plaintiffs off.

The plaintiffs then brought an action to restrain the Provincial company from interfering with plaintiffs' supply. This action was carried to the Supreme Court, 26 S. C. R. 181, and the plaintiffs failed. The present action was commenced on 20th July, 1896. The plaintiffs asked to have the instrument of transfer of 20th April, 1891, from them to the Erie County Natural Gas and Fuel Company, rectified and reformed by inserting therein, in apt terms, a provision securing to the plaintiffs gas from the wells mentioned, sufficient to supply the plant then operated or to be operated by the plaintiffs on their property, or otherwise, so that the said instrument might express the true agreement between the said parties. The action was tried before the late Chief Justice Armour, and judgment was given by him on 28th April, 1897, and was, so far as at present material, as follows: that the conveyance dated 20th April, 1891, be reformed as of that date by inserting therein before the attestation clause the following words: "It is understood that the parties of

the first part reserve gas enough to supply the plant now operated or to be operated by them on said property."

A reference was directed to the Master at Welland to ascertain and report what damages (if any) the plaintiffs had suffered by reason of the action of the defendants in not permitting them to take gas for the supply of their works operated by them on the property referred to.

The judgment of the trial Judge was reversed by the Court of Appeal, but was restored by the Supreme Court: see 29 S. C. R. 591.

The reference then proceeded in the Master's office, and he has reported in substance as follows:—

1. That from 15th November, 1894, to 1st August, 1902, the plaintiffs were entitled to have their works, operated by them on the property mentioned in the agreement, supplied with gas from the gas mains of the defendants the Provincial Natural Gas and Fuel Company, and that they were prevented by the last mentioned company from getting such gas.

2. That by reason of the action of the last mentioned defendants the plaintiffs were obliged to consume their own natural gas.

3. That the plaintiffs did consume 911,722,303 cubic feet of gas.

4. That this gas was worth 12½c. per thousand cubic feet, and on that basis he found $113,965.29 as the amount which the defendants the Provincial Natural Gas and Fuel Company should pay.

The finding of the learned Master was only against the Provincial Natural Gas and Fuel Co., as, in his opinion, the other defendants (the Erie company) were not liable, and he so found "notwithstanding the fact that no question of separate liability was raised" before him.

The Provincial Natural Gas and Fuel Co. appeal from this report on many grounds, and the plaintiffs appeal so far as the report is in favour of the Erie County Natural Gas and Fuel Co.

The plaintiffs should succeed in their appeal. The judgment is against both defendants, and the reference was to assess damages, if any, against both. The defendants made common cause, and as it appears to me, it was not open to the Master, having found damages, to limit the plaintiffs' recovery to the defendants the Provincial company, and to

completely exonerate the other defendants. There is nothing before me to shew that there was argument or contention on behalf of the Erie company that they were not liable if the plaintiffs were, upon the law and facts, entitled to recover damages for the causes of action mentioned.

The objections by the defendants on this appeal are, first, as to the meaning of the word "reservation" implied in the words "reserve gas enough" in the agreement, and as to the effect of these words in creating a liability against the defendants. I am of opinion that the Master is right in the conclusion arrived at by him, and for the reasons given by him, as to the question of liability. Whatever variety of meaning may be given to the word "reservation," and however it may be distinguished from the word "exception" —where such words are used in a conveyance—it was clearly the intention of the parties to this agreement that the plaintiffs should get from the gas wells being sold to the Erie company "gas enough to supply the plant" then operated or to be operated by the plaintiffs on their property. The parties contracted in reference to an existing state of things. The plaintiffs were, at the time of the agreement, operating a plant in carrying on their business, and in orer to carry on this business they required gas from the wells owned by them and being sold, and it was gas from a known source of supply, and obtained and used by plaintiffs in a way well known to the Erie company, that by this agreement the plaintiffs intended to reserve the right to get, and that the Erie company were willing the plaintiffs should get. What was reserved by plaintiffs was gas of value for plaintiffs' purposes—the plaintiffs had a right to it—the defendants interfered with that right, and so are liable. If the words inserted were not intended to create, or do not in fact create, a liability for any interference with plaintiffs' right, the Court above would have varied, or set aside, or qualified the finding of the trial Judge, and there would have been no reference as to damages. With the document of sale, as it is since its reformation, I am of opinion that it was not open to the Master, and it is not open to me on appeal, to say that it does not operate as a covenant or agreement in plaintiffs' favour, or that it is void because there can not be a reservation of gas, or because the reservation is void for vagueness.

Apart from feeling myself bound by the judgment of reference, I feel no difficulty in holding that what was in-

tended by the parties and what is expressed in the document is the right of plaintiffs, for their use as mentioned, to get gas created or formed, or found, in the wells sold by plaintiffs, from which and in the manner defendants were getting gas; and so the reservation is not restricted to gas "in esse" at the time the agreement was made. See Vancy v. Scott, 2 M. & R. at p. 337.

To whatever length refinement may go in attempting to elicit the precise meaning of particular words, the words now under consideration clearly shew that the intention of the parties was that plaintiffs should get, of the gas available to the defendants from the property conveyed by the plaintiffs, sufficient to supply the plant then operated or to be operated by the plaintiffs, on said property. Some of the cases to which I was referred shew that, if necessary for the purpose of carrying out the real intention of the parties, a "reservation" may be construed as an "exception," and vice versa.

The best evidence of what the parties intended is in what the parties did. From 20th April, 1891, down to 18th July, 1894, the plaintiffs continued to get gas for their plant, just as they had done prior to 20th April. Upon the sale by the Erie County Natural Gas and Fuel Co. to the Provincial Natural Gas and Fuel Co., which was carried out on 18th July, 1894, the latter company cut plaintiffs off. Until that time there was not any doubt or difficulty about the true construction of the agreement.

The Master's finding that the plant for the supply of which plaintiffs were entitled to gas, was upon the property of plaintiffs, within the meaning of the agreement, is, in my opinion, right. There was a good deal of argument before me about the plaintiffs getting their supply, or a part of their supply, from the Schussler No. 1 well. That was a matter of contention at the trial. The defendants contended strongly that the plaintiffs were not entitled to the reservation claimed, as, instead of and in lieu of that, the real agreement was that plaintiffs should hold as their own Schussler No. 1: see p. 49 of the appeal book. The trial Judge dealt with that contention: see p. 76 of the appeal book. The Master could not go behind the judgment. The defendants argue that the agreement, as it stands, must be interpreted, and the damage, if any, measured, having in view the fact that plaintiffs, when the agreement was made,

were obtaining, or could obtain, from Schussler, No. 1 enough gas for their plant, and so, upon failure of that well, the defendants ought not to be liable to make good from other wells the shortage arising from such failure. I do not agree with this argument. It appears in evidence that Schussler No. 1 was not producing in 1894. The Master was right in leaving out of consideration, as I think he has done, anything about what plaintiffs obtained from, or represented could be obtained from, that well.

The Master is right, and for the reasons stated by him, in not allowing any damages for the period between 18th July and 15th November, 1894.

I also agree that if the plaintiffs are entitled to recover, they are entitled once for all; that this is a case within Rule 552, and damages may be assessed down to date of sale by plaintiffs to the Empire company in July, 1902.

I think plaintiffs are entitled to damages. On what principle are such damages to be assessed? It is not disputed that sufficient gas flowed from the wells purchased from plaintiffs, and through the main to which plaintiffs' pipe was attached, to operate plaintiffs' plant. There is evidence that the supply of gas is diminishing in some of the wells. That fact should be borne in mind in determining quantity flowing in earlier years, by tests applied in later years.

So much of the gas as would be sufficient to operate plaintiffs' plant may be regarded as belonging to plaintiffs, and defendants have converted this to their own use. That being so, the measure of damages is the value of the gas at the point where plaintiffs are entitled to get it.

It is argued that, as the plaintiffs obtained new territory, drilled new wells, and operated their plant by gas so obtained, the necessary expense of all this is what, if anything, plaintiffs must recover. This expenditure did result in plaintiffs procuring gas; this gas had a commercial value; and plaintiffs could have sold it, had they not required it in lieu of gas defendants retained, and so the plaintiffs are entitled to the value of the gas. There is evidence of a request by plaintiffs to Mr. Coste, the manager of the Provincial company, for gas, not a formal or specific demand under the agreement, but the writ was a demand as of that date, and, in view of the litigation between the parties, I think a formal demand was not necessary, or was dispensed with. The issue was

made by the defendants the Provincial Natural Gas and Fuel Co. They denied from the start the plaintiffs' rights.

As to price, there is a wide divergence in the evidence—5 cents per 1,000 cubic feet to 25 cents. I am not able to say that the Master is wrong in fixing the value at 12½ cents per 1,000 cubic feet.

In determining the quantity there is very great difficulty. It can not be done with anything like mathematical accuracy. There was no measurement of the gas plaintiffs were using while it was being used. The plaintiffs rely upon evidence of the quantity of gas that flowed through their supply pipe in a given time, and upon evidence of the gas consumed in operating plaintiffs' plant at times when tests were applied.

Mr. E. A. Hitchcock was called as a witness, and he was highly regarded and greatly relied upon by the Master. Mr. Hitchcock is a consulting and testing mechanical engineer in the Ohio University—no doubt a man of ability and of some experience; and he is able, with the aid of instruments, as he explained, to test the volume of gas passing through a pipe in a given time and under different conditions of the atmosphere. At plaintiffs' instance, Mr. Hitchcock visited their plant on 19th January, 1900, and was there 2 days, a second time in March, 1901, 2 days, and a third time, after plaintiffs had sold out their plant, on 29th, 30th, and 31st July, 1903. On this occasion, with the aid of a metre called the "Petot," which Mr. Hitchcock vouches for as the most perfect of the kind known, he obtains data—from which calculations are made shewing the quantity of gas required and used by paintiffs from November, 1894, to July, 1902.

It is only on this last occasion that the tests are presented as accurate. Mr. Hitchcock says that in view of what he found on the last occasion the first and second are not to be relied on.

In accordance with this evidence and the computations made the Master has found the gas used, and for which defendants are liable, to be:—

(1) For operating lime kilns	520,056,670	c.f.
(2) For operating the other plant of plaintiffs	391,665,631	c.f.
	911,722,301	c.f.

I am not able to find upon the evidence the material to give these exact figures as the result of computation from Mr. Hitchcock's test. I do not agree that Mr. Hitchcock's test should govern—qualified as it is by other evidence—and by conditions—but assuming that it should determine for plaintiffs the quantity for all the years from 1894 to 1902, and assuming that the computation made by Mr. Martin is correct, I am not able to find as proved a greater quantity of gas used for the lime kilns than 318,008,372 c.f. as against the 520,056,670 found by the Master. . . .

I have endeavoured to consider with care the evidence of Mr. Hitchcock, Mr. Coste, Mr. Martin, and Mr. Reeb, as well as any other evidence bearing upon the question of quantity, and without citing parts—or quoting from it—I can only say that it does not satisfy me, and it is not sufficient to establish that there ought to be charged against the defendants any such quantity of gas required as the Master has found. If, as a matter of fact, there was so great a quantity used by plaintiffs, it should be considered as exceptional and not in the ordinary course. Such a quantity was not required for the work done. The defendants should not be held liable for any waste of gas, or for any use, out of the ordinary and reasonable use, for the operating of plaintiffs' plant in the way defendants knew about, when agreement made.

It was established—so far as I recollect it was not questioned on the argument—that in the ordinary kilns, like the plaintiffs', a ton (2,000 lbs.) of lime woud require for its manufacture, and could be made with, on an average, 7,000 cubic feet of gas. . . .

For reasons given, I have concluded that the quantity of gas for manufacturing lime as allowed by the Master should be reduced as above stated, such reduction amounting in round figures to about $\frac{2}{5}$ of the quantity found. . . .

In the manufacture of lime it is necessary to keep heat on, and not allow lime or the kilns to cool too suddenly. It was described as "keeping heat on to prevent lime from spoiling." It is reasonable that gas for the purpose should be allowed. The plaintiffs gave no evidence on this point, by way of challenging the correctness of defendants' exhibit 5.

It was estimated that during the whole period gas for that purpose, if used, would be 23,743,451 c.f.; at 12½c.

per 1,000 c.f., the amount would be $2,967.92. This amount should be allowed.

The total damages will be $54,031.82 as follows:—

Gas for making lime	$26,584 80
Gas for keeping lime and kilns hot.	2,967 92
Gas for operating other plant	24,479 10
	$54,031 82 . . .

As to plaintiffs' appeal against the Erie County Natural Gas and Fuel Co., no notice had been given prior to the hearing, and indulgence was granted; so this appeal should be allowed without costs.

The defendants have succeeded in part—only as to amount allowed—a large amount—but, as they failed upon many objections put forward, there should be no costs of their appeal.

Appeal of defendants allowed as to amount, and the damages in favour of plaintiffs assessed at $54,031.82.

FALCONBRIDGE, C.J. DECEMBER 9TH, 1907.

TRIAL.

FREEMAN v. COOPER.

Sale of Goods—Action for Price—Warranty—Failure to Establish—Onus—Evidence—Course of Dealing.

Action to recover a balance of $2,454.08, alleged to be due and payable by the defendant to the plaintiffs as the price of goods sold and delivered by plaintiffs to defendant. Defendant paid into Court $226.26, and alleged that the plaintiffs warranted certain cement to be first-class No. 1 in quality, and represented to the defendant that the cement was equal to the best brands of cement on the market; and on that representation induced the defendant to purchase the cement, but that the cement was not of the description or quality warranted but was of an inferior description and quality, whereby defendant sustained great damage.

G. H. Watson, K.C., and J. W. Nesbitt, K.C., for plaintiffs.

Lyman Lee, Hamilton, and J. G. Farmer, Hamilton, for defendant.

FALCONBRIDGE, C.J.:—The defendant failed to satisfy the onus cast upon him of establishing any express warranty.

The defendant and the manager of the plaintiffs' firm appeared both to be persons of respectability and probity. They did not agree as to what passed between them at the time of the purchase. It is defendant's misfortune if he has not any writing, nor indeed any circumstance of corroboration, to turn the scale in his favour. Plaintiffs' firm are not manufacturers; they deal not only in cement but in other commodities, e.g., wood and coal. The particular brand of cement which was attacked is spoken of by persons of many years' experience, like Michael A. Piggott, as being a brand which had a good reputation before others now in the market were discovered or developed; that it is to be relied upon, and that fact is known amongst contractors; and that it can be offered confidently to architects and engineers. So that upon this branch of the case I must hold that there was no warranty, express or implied.

But if I were to hold otherwise on the first branch of the case, it would be impossible for me, upon the evidence before me, to hold that the defendant had satisfied the onus of establishing that the trouble which arose in the construction of the building was due to defects in the quality of the cement. There were other causes which might satisfactorily account for the imperfections besides the theory—for after all it was only a theory—of the experts called by the defendant. There was palpable neglect and want of ordinary business care in the conduct of the defendant and those placed by him in charge of the construction. There was no inspection of the gravel at the pit by any person of skill. Teamsters appear to have brought it as they chose. Material was thrown together in a haphazard fashion without any proper proportions being regarded, and it was handled and used in construction by mere workmen without any knowledge of or skill in so delicate a process. I should say that this course of dealing supplies a more obvious and probable cause for the difficulties that ensued than does any alleged defect in the cement.

The result is that the plaintiffs are entitled to judgment for the full amount, less the sum paid into Court, with costs. The counterclaim is dismissed with costs.

DECEMBER 9TH, 1907.

DIVISIONAL COURT.

BRYANS v. MOFFATT.

Jury Notice—Motion to Strike out—Discretion of Judge—Exercise before Trial—Place of Trial outside of Toronto—Equitable Defence—Pleadings.

Appeal by defendants from order of BOYD C., in Chambers, striking out defendants' jury notice.

The action was brought by the executors of the will of Robert Stewart, deceased, against Andrew Moffatt and Elizabeth Moffatt, his wife, to recover $1,000 principal and $50 interest upon a covenant by the defendants for payment to the testator of the moneys secured by an indenture of mortgage dated 5th October, 1905.

The defendant Andrew Moffatt, by his statement of defence, admitted that the mortgage moneys, amounting to $1,000 and interest, had not been paid; and said (2) that on and prior to the 25th September, 1905, the deceased Robert Stewart was the owner of 200 acres, and prior to that date, being anxious to dispose of the same, proposed to the defendant Andrew Moffatt that he should agree to purchase the lands at the nominal price of $4,500, and that he (Stewart) would convey the same to him (Moffatt) at that figure, and that he (Moffatt) should raise by way of mortgage on the security of the lands $3,500 and pay the same to Stewart, and that he (Moffatt) should give to Stewart security that he would pay to Stewart an annuity of $50 per annum, that amount being fixed as interest at the rate of 5 per cent. per annum on $1,000, but that on the death of Stewart there should be no obligation resting on Moffatt to pay the $1,000, or any part thereof, and Moffatt accepted the proposal; (3) that Moffatt was ignorant in matters of conveyancing, and had had little or no experience in matters of business, and trusted entirely to Stewart to carry out the proposal and acceptance according to the terms and conditions thereof, and had no independent or other advice; that Moffatt was instructed to present himself and his wife to an unlicensed conveyancer, who was not a solicitor, selected by Stewart to carry out the contract, and

Moffatt, without consideration and without understanding them, signed such papers as were put before him; that the raising of the $3,500 and the borrowing of the moneys on a mortgage were arranged by the conveyancer or by Stewart, and Moffatt took no part therein other than signing such papers as were put before him, but he knew that the $3,500 was borrowed from one Richard Souch; (4) that Moffatt did not understand at the time that he was signing a mortgage for $1,000 payable to Stewart and covenanting therein that he would pay him $1,000 and interest, as it turned out that he had, but supposed he was simply signing a writing securing to Stewart the payment of an annuity of $50 for his life; (5) that Moffatt made the contract with Stewart that the lands should be conveyed to him alone, and not to him and his wife, as had been done, and Moffatt instructed his wife, when he requested her to go to the conveyancer to sign the necessary papers, that she was required to sign for the purpose of barring her prospective right to dower in the lands only, and for no other purpose, and his wife did not know that the conveyance was being made to him and her jointly, and that she was signing the mortgage to Souch and giving security for the annuity to Stewart as a joint owner and mortgagor; (6) that Moffatt, after the commencement of this action, and after he had consulted his solicitors, who searched the papers in the registry office, and had been advised by them, learned for the first time that the conveyance had been made to him and his wife jointly, and that his wife jointly with him had covenanted to pay the amount of the mortgage moneys to Souch and to Stewart; (7) that the lands, at the time of the agreement to purchase referred to, were not worth $4,500, and were not saleable for more than $3,500; (8) that Moffatt and his wife, on 16th October, 1907, offered to the plaintiffs, and were now willing and offered, to pay all interest in arrear on the Souch mortgage to a reasonable time after the date of the defence (16th November, 1907), and all arrears of annuity of $50 to the date of the death of Stewart, and also pay to the plaintiffs a proportionate share of the $50 per annum from the date of the death to a reasonable time after the date of the defence, and to pay all taxes for 1907, and to reconvey the lands to the plaintiffs, subject to the Souch mortgage, and give up possession to the plaintiffs, and that there be no costs of the action payable by the plaintiffs or defendants to the other of them; Moffatt making this offer for the rea-

son that there may have been an honest misunderstanding on the part of the conveyancer. And Moffatt prayed that if the offer set out in paragraph 8 was not accepted by the 15th December, 1907, and before any further costs were incurred, that it be regarded as not binding on him, and that the mortgage be discharged by the plaintiffs or delivered up to be cancelled.

The statement of defence of the defendant Elizabeth Moffatt set forth: (1) that she took advantage of the facts stated in the defence of her co-defendant; (2) that she never accepted the conveyance referred to, and now formally repudiated it; (3) that she was absolutely inexperienced in matters of business and conveyancing or purchasing lands, and in carrying out the contract which her co-defendant made with Stewart she was acting without independent or other advice, and was unaware that she was making herself liable, or any little estate she had responsible, for the amounts claimed by the plaintiffs; that she simply signed any papers put before her, on the understanding that she was only barring her prospective right to dower to enable her husband to carry out any contract that he made with Stewart, and that she should not be held personally liable; (4) that she was a married woman, married in 1871, and pleaded as a defence the statutes relating to married women, their rights and liabilities; that she joined in the offer of settlement made in the 8th paragraph of the statement of defence of her co-defendant. And she prayed that if the offer made were not accepted by the 15th December, 1907, and before any further costs were incurred, the mortgage should be reformed by eliminating therefrom any liability of hers thereunder.

The plaintiffs delivered a reply in which they joined issue, denied the contract alleged by the defendants, and set up the Statute of Frauds.

The venue was laid at Cobourg.

H. E. Rose, for defendants.

A. C. Macdonell, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., TEETZEL J.), was delivered by

MEREDITH, C.J.:—Speaking for myself, I think the rule of practice laid down in Ryan v. Montgomery, 9 O. W. R. 855, 13 O. L. R. 297, might well be extended to all cases,

whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury.

I think the Court is bound to take notice of the fact that keeping juries waiting while sometimes very long cases to be tried without a jury are going on, is a grave injustice to the county, and the Court ought to endeavour, if it can be done without a denial of any substantial right to the litigants, to avoid that expense being incurred.

It is not necessary for the purposes of this case to lay that down as the practice to be followed, because it seems to us that we ought not to interfere with the discretion which the learned Chancellor exercised. It is very doubtful whether the defence which is sought to be set up would be admissible under what was formerly the plea of non est factum, and I am inclined to think that the only remedy the defendants would have, if they are able to make out what they set up, would be obtainable only by rectification of the instrument sued on, in which case a jury notice would not be proper.

It would be highly unsatisfactory in a case of this character, where there is a writing, and one of the parties to the transaction is dead, and the sole defence is that that writing does not express the true agreement, that the defendants never intended to sign such an instrument as was executed by them, that that question should be tried by a jury.

We think that the Chancellor exercised a proper discretion in striking out the jury notice, and the appeal will be dismissed with costs to the plaintiffs in any event of the action.

BOYD, C. DECEMBER 10TH, 1907.

WEEKLY COURT.

T—— v. B——.

Marriage—Action for Declaration of Nullity for Impotency of Wife—No Jurisdiction in Court to Entertain.

Pursuant to an order, the question of the jurisdiction of the Court to entertain an action to have a marriage declared null and void, was argued as a preliminary question of law in the nature of a demurrer.

C. W. Thompson, for plaintiff.

H. W. Mickle, for defendant.

BOYD, C.:—The question of jurisdiction was raised in regard to the power of the Court to entertain an action by the husband to have his marriage declared null and void by reason of the alleged incapacity and impotence of the wife, who is the defendant. The ceremony of marriage was in September, 1906, and the action is brought in November, 1907, and, according to the plaintiff's statement of claim, the parties have "lived together as man and wife," though without consummation. The defendant denies this last allegation, and affirms the fact of sexual intercourse having existed for a time, though discontinued from physical causes in the husband. The parties were of the ages of 35 and 22 when they were married. This case is now brought before me on the sole point in law as to the jurisdiction of the Court. It is a novel attempt to enlarge the jurisdiction in a case where the parties are of age, competent to contract, and have contracted to enter into the relationship of husband and wife, and have lived in marital companionship for over a year.

In 1868 Sir J. P. Wilde said: "It may be safely asserted that the question of impotency as a ground of nullity, has never yet been raised in the temporal courts of this country. . . . A suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universaly binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the ecclesiastical courts or in the Divorce Court alone:" A. v. B., L. R. 1 P. & D. 559, 561. In cases of nullity the marriage status exists down to the time that the decree dissolving or annulling the marriage is made absolute: Foden v. Foden, [1894] P. 307.

Lawless v. Chamberlain, 18 O. R. 297, was a very different case from this. There both parties were under age, the ground of complaint was that the consent had been procured by duress and intimidation, and that there had been no coming together of the parties afterwards either in domestic or marital relations. The circumstances, if proved, were such as to shew that the alleged marriage was void ab initio, and that the ceremony performed was a mere unmeaning form.

Here the marriage has been validly solemnized and matrimonial relations established for many months, and the fact of alleged "impotence" would only render the relation

voidable and not void. In this case the marriage relation existed de jure from the outset, on the ground that "consensus non concubitus facit nuptias." The marriage is valid in the eye of the law, though there has been no consummation. The injured party may, upon proof before a proper tribunal, obtain a judgment declaring it to be a nullity, but till then it is merely voidable, even if the alleged impotence really exists; it is not void ab initio: Turner v. Thompson, 13 P. D. at p. 41.

The ratio decidendi in Lawless v. Chamberlain has been, I think, legislatively recognized in the late statute passed in Ontario of this year, 7 Edw. VII. ch. 23, sec. 8, providing for cases of infancy where the marriage has been merely a form, and there has been no cohabitation. See also a late American case in equity where the Court adjudicated in case where the alleged marriage was no marriage: Rosney v. Rosney, 54 N. J. Eq. 231.

Jurisdiction in cases of nullity and other matrimonial difficulties is given by the old statute law in Quebec: Gemmill on Divorce, p. 43; but no such legislation enables the Courts of this province to hold suit in cases where the marriage status is involved, and the litigation is really in rem, dissolving the existing marital union. The only forum open to aggrieved spouses is the High Court of the Dominion Parliament, to which body the right appertains: White's Case, referred to in detail in Gemmill, at pp. 111 and 191.

The plaintiff has no right of action in this Court, and his action should be dismissed with costs as between solicitor and client.

MABEE, J. DECEMBER 10TH, 1907.

TRIAL.

STUART v. BANK OF MONTREAL.

Husband and Wife—Guaranty by Wife of Advances to Husband from Bank — Absence of Independent Advice — Settlement with Bank—Property of Wife Handed over to Bank—Action for Rescission and Return of Property —No Fraud or Misrepresentation — Consideration—Estoppel—Release.

Action to rescind many transactions entered into by the plaintiff, a married woman, with the defendants, upon the

ground that they were so entered into by her without independent advice.

I. F. Hellmuth, K.C., and W. J. Elliott, for plaintiff.

G. F. Shepley, K.C., for defendants.

MABEE, J.:— . . . Mr. John Stuart, the plaintiff's husband, had for many years prior to 1896 occupied a very prominent position in financial and mercantile matters in Hamilton—he was the head of a large wholesale house, the president of the Bank of Hamilton, and connected with other corporations.

Prior to 1896 he had made large investments in the Maritime Sulphite Fibre Company, owning a pulp and paper mill at Chatham, N.B.; he was the president of the company, his only living son was the general manager, almost the whole of his available resources were invested in that company—the defendants were carrying the account, and more money was urgently required if there was to be any likelihood of the company being made a success. On 6th February, 1896, Mr. Stuart in a letter to the defendants says: "He (Mr. Lee, a fellow director), however, knows that the $50,000 mentioned in the guarantee will not be sufficient to carry us through. . . . I shall find a surety to take his place. I explained to him, as to you, the pressing necessity for relief in money matters in Chatham during the next few days. . . Mr. Lee will either sign the guarantee in a day or two, or agree with me for a substitute; in the latter case my wife will join me in the guarantee, and I now submit her name to you for that purpose. As I told you, her means are ample enough to secure payment for a much larger sum than we contemplate requiring now or in future. Pending the carrying out of these arrangements, I trust you will authorize your Chatham branch to pay the company's cheques for funds required as follows (then follows a statement amounting to $7,500). I would prefer, as you will readily believe, not to ask this favour lest it should meet the fate of similar previous ones, but it is based upon the proposals above recited, and I trust you will have no doubt that my promise to complete one or other during the coming week will be kept."

On 7th February the general manager of the bank wrote saying the bank would advance $4,250 of the $7,500 asked,

and stating the balance could stand until the guarantee was completed, and the following is a postscript: "I think it only reasonable to ask that, if you offer Mrs. Stuart's guarantee, you should furnish us with a statement of her means and ability to make it good."

The information was furnished, shewing Mrs. Stuart to be possessed in her own right of real estate, stocks, and mortgages to the value of about $250,000.

On 24th February, 1896, Mr. Stuart completed the proposed transaction, or rather the guarantee bearing that date was completed shortly afterward, and the plaintiff signed a document guaranteeing advances to the Sulphite Company up to $100,000.

On 14th February, 1896, she assigned in trust for the bank mortgages amounting to about $27,000, and on 11th April, 1898, she gave out the guarantee to the bank for Sulphite Company advances up to $125,000; this latter was inclusive of the $100,000 guarantee, so her total liability was not to exceed $125,000.

Advances were made by the bank upon these guarantees, and in 1903 the company went into liquidation, and on 2nd October, 1903, the plaintiff and her husband gave the bank a mortgage upon all the real estate owned by them. On 25th July, 1904, a lengthy agreement was entered into between the bank and the plaintiff and her husband—the result of which was that the plaintiff gave up to the bank all her estate, both real and personal, in settlement of her guarantee. The plaintiff's husband, at this time, was liable to the bank upon a note for $196,052 and a guarantee of $50,000, and he was discharged from this debt by the bank. Many stocks that the plaintiff owned, but which stood in the name of her husband, were pledged by him for advances from other banks, and the equity of redemption only in these was turned over by the settlement of July. There was nothing in the transaction to shew the defendants that these stocks belonged to the plaintiff, and I have every reason to believe the officers of the bank traded upon the basis of these stocks belonging to the husband.

On 6th January, 1903, Mr. John Stuart resigned his position of director and president of the Bank of Hamilton, and received from them an agreement to pay him the sum of $5,000 per year so long as he lives, the payments to be made monthly in advance. Of course, by releasing him

from the indebtedness to the bank, in consideration of both the husband and wife agreeing to make the transfers provided for in the settlement of July, the defendants put it out of their power to proceed for the recovery of the $5,000 per year payable by the Bank of Hamilton. Mr. Stuart said he had understood that was not available for creditors, but it is quite apparent that the defendants could have obtained judgment against Mr. Stuart and obtained a receiving order and swept away from him the monthly payments from the Bank of Hamilton.

Many deeds were executed as provided for by the settlement of July, 1904, the properties turned over to the bank, stocks sold, some of the real estate, if not all, it was said in argument, had been sold, and the position of the defendants entirely changed.

In 1903, during the liquidation of the Sulphite Company, the defendants were in litigation with the liquidators, and on 6th October, 1903, Mrs. Stuart joined in an agreement authorizing the settlement of that litigation, upon the strength of which the defendants made compromises and otherwise changed their position, and made a cash payment to the liquidators of $15,000.

On 24th February, 1896, 5 shareholders and their representatives transferred to the plaintiff 134 preference and 100 ordinary shares (in all $23,400) "in consideration of Mrs. Jane J. Stuart giving a guarantee to the Bank of Montreal for advances made and to be made to the company to the extent of $100,000." Mrs. Stuart signed acceptances of the transfer of these shares upon the books of the company, and from time to time gave proxies for them to be voted upon. In a letter written by Mr. Stuart to Mr. Bruce (who was a shareholder and guarantor to the bank) of 12th February, 1896, he says: "The question at once presents itself, what inducement can we offer to any one to assume the responsibility of guaranteeing the necessary advances ($100,000 referred to in the letter) and how can the matter be arranged? . . . I believe I can procure the guarantor required by the bank for the new advances, or the security of a lien on material to the bank, and the postponement by Mr. Lee and myself of our claims for cash advances, together with a reasonable bonus in the way of stock, which may under existing circumstances be considered of only nominal value. It is of course most vital to me to save this property

in which my all is invested, and it is of no small consequence to all concerned, for all have not merely an interest in the value that is expected to be given to the stock, but also perhaps a more serious responsibility contingent on the unpaid debt due to the Bank of Montreal."

Of course Mrs. Stuart was the guarantor referred to in the letter, and, in addition to the stock bonus which was given to her, the postponement of the debt for cash advances was also executed by Messrs. Stuart and Lee. On 26th February, or thereabouts, when the $100,000 guarantee was given by the plaintiff, the advances already made, and for which the plaintiff was becoming liable, were about $20,000, but whether this sum includes the $7,500 which Mr. Stuart was asking in his letter of 6th February, 1896, the bank to advance upon the strength of the guarantee being given, does not clearly appear, but it is altogether likely it does include that sum, as on 20th February the debt upon this head was only some $11,000. In any event the guarantee was not given for an entire past due liability to the bank; at least the sum of $80,000 was advanced upon the strength of the first guarantee, and an additional sum of $25,000 upon the second guarantee, being given.

Mrs. Stuart is a lady of intelligence and refinement. She was the sole executrix and devisee under her father's will, and obtained in land and securities about $250,000 from that source upon his death in 1886. Her husband had had the entire management of her estate, and in 1896 it stood at something like $240,000.

Prior to becoming liable to the defendants in February, 1896, she had indorsed for her husband a note discounted and then held by the Bank of Hamilton for $125,000; that note was afterwards paid out of the proceeds of her securities, which, with the transfers made by her to the defendants in 1904, entirely wiped out her fortune.

She says she had no experience in business matters, that she signed at her husband's wish, that she knew something of his business matters, and thought he had independent means, that she knew of his connection with the Sulphite Company long before 1896, and that she also knew Messrs. Lee, Bruce, Brown, and Leys were connected with it, that her son had been connected with it for many years, and was the manager, and that she and her husband were both hoping the company would afford him an opportunity for a success-

ful business career. She also says she knew there was nothing that her husband was more engrossed in than the success of the company, and that she knew he had a large amount invested in it; that upon that account and her son being manager she was also interested in its success. She says she consulted no one about the wisdom of her entering upon the guarantee; that she would have scorned to consult any one about the transaction, and regarded it solely as a matter between herself and her husband; that she knew the bank would advance a large amount of money to the company that her husband and son were interested in, upon the strength of the guarantee; and that she intended the bank to act upon the guarantee and advance the money; that she was in no way under the control or influence of her husband, but exercised her own free will; and that she was sanguine about the success of the company, if the bank would advance the money. She says that if her husband had said to her not to enter into the guarantee without asking some one else, she would have refused to consult any person else, that she knew there was no sham about the guarantee, and that she was becoming legally bound; that her husband did not make the slightest misrepresentation to her, and she repudiates the suggestion that she was in any way deceived or misled. Then when giving the second guarantee she said she knew the company wanted more money, and that that was the reason she was asked to give the additional guarantee. She did not remember getting stock in the company, but at once frankly recognized her signatures in the company's books, and to the proxies, although she had also forgotten about the latter. Then, speaking of the settlement made in 1904, when she gave up everything, she says she knew all the facts connected with the matter, and had learned nothing additional to what she knew at that time; she knew of the arrangement the Bank of Hamilton had made to pay her husband an annuity of $5,000 per year; that the bank were releasing him from all liability; she knew she was conveying everything to the bank; that they could not keep up Inglewood (the Hamilton residence, which also belonged to her), on $5,000 a year, and that she intended the bank to get it.

Mr. Stuart says that no misrepresentations of any kind were made to induce her to sign any of the documents; and

that he told her "she was to get shares in the Fibre Company as a sort of acknowledgment of her goodness in doing this."

There is no element of fraud of any kind in the case. There was the utmost good faith by Mr. Stuart both towards the bank and the plaintiff throughout a long course of dealings in connection with this Sulphite Company, and, so far as the evidence and correspondence discloses, the same upright dealings and good faith entered into all the business transactions had between the guarantors to the bank.

Mr. Hellmuth contends, in the face of all this, that all these documents signed by the plaintiff must be rescinded, and that the law is that the wife cannot make herself liable for the debt of another without first having had independent advice. I have read all the cases cited by him and many more, and the opinion I entertained at the trial that this action could not possibly succeed has only been strengthened.

Powell v. Powell, [1900] 1 Ch. 243, followed in Wright v. Carter, [1903] 1 Ch. 27, are entirely different cases and were not between husband and wife. In Morley v. Loughnan, [1893] 1 Ch. 736, the statement made at p. 752 as follows, "or the donor may shew that confidential relationship existed between the donor and the recipient, and then the law upon grounds of public policy presumes that the gift in fact freely made was the effect of the influence induced by those relations, and the burden lies upon the recipient to shew that the donor had independent advice, or adopted the transaction after the influence was removed or some equivalent circumstances," is, I think, too wide, and must be intended to apply to the facts of that case, and it by no means follows that the wife, having separate estate of her own, can never make any contract for the benefit of the husband without independent advice.

Of course Adams v. Cox, 35 S. C. R. 393, was relied upon, and I presume it was upon the supposed authority of that case that the action was brought. No one would suggest that the facts are in any respect similar—the signatures of the ladies in the Cox case were obtained by gross fraud and misrepresentation, and no fresh advances were made upon the strength of those signatures; but it was argued that the case stands as a binding authority that the wife cannot obligate herself upon a contract for the husband's benefit without independent advice, fraud or no fraud, deceit or no deceit. It may be that that is the result of the judg-

ments of two members of the Court, but, as I read the case, it is not the judgment of the majority, and I do not think goes so far as to place the wife in the same position as a son, daughter, or ward, and prohibits her contracting as the statute has enabled her to do.

Mr. Hellmuth contended that the concluding words of the judgment of Mr. Justice Sedgewick made it appear that he was joining in the judgments of Mr. Justice Girouard and Mr. Justice Davies, but I do not think this at all clear, nor was it necessary in the view he took of the case.

By 22 Vict. ch. 85, secs. 1 and 2, provision is made for the conveyance of real estate of a married woman to such use as to her husband may seem meet. Section 2 provides for the execution in Upper Canada of a deed by a married woman before a Judge of the Court of Queen's Bench, Common Pleas, or County Court, or two justices of the peace, an examination of the married woman apart from her husband respecting her free and voluntary consent to convey was required, and if this was given it had to be indorsed upon the deed. Section 7 provided that a deed not so executed should not be valid or have any effect. 34 Vict. ch. 24 repealed some of the provisions of 22 Vict. ch. 85, and enlarged the class of persons before whom such a deed might be executed. Then 36 Vict. ch. 18, sec. 14, repealed the above provisions, and, by sec. 3, enacted that every married woman . . . might by deed convey her real estate . . as fully and effectually as if she were a feme sole. Now, applying these provisions of the law to the transactions of July, 1904, whereby Mrs. Stuart conveyed her real estate to the bank in discharge of her own and her husband's indebtedness, how can it be said the bank were bound to see that she had independent advice? The statute had for many years required in effect independent advice, by means of the examination apart from her husband respecting her free and voluntary consent, and, if the abolition of this provision and empowering her to convey as effectually as if she were a feme sole meant anything, it made independent advice unnecessary. This in no way jeopardizes the married woman, because the Court in each case would scrutinize the transaction closely, and where unfair dealing, misrepresentation, fraud, or overreaching was shewn, would see that she was adequately protected.

Then, even were the doctrine of independent advice applicable, what is to be done where the attacking party says she would have scorned to take any independent advice. Mr. Hellmuth invited me to apply the law laid down in Powell v. Powell, [1900] 1 Ch. at p. 246, where Farwell, J., says: "Further, it is not sufficient that the donor should have an independent adviser, unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule, but the stronger the influence the greater the need of protection." The learned Judge in that case was dealing with a settlement by a young girl, just from a convent and barely 21 years of age, made upon her step-mother, through the instrumentality of the solicitor of the step-mother. If any such rule is applicable to transactions between husband and wife, the sooner the legislature repeals the Married Woman's Property Act, and reverts to the old case of requiring an examination apart from the husband, the better for the security of the public. In the meantime, I shall hold that the married woman is free to convey, of course apart from fraud or misrepresentation; and the result then as to all the conveyances and transfers made by the plaintiff to the defendants in July, 1904, having made them with a full understanding of the facts, and there being no fraud or misrepresentation of any kind, but, on the contrary, the most absolute fair dealing upon the part of the bank and all concerned in the settlement, is that they are not open to attack.

There are, I think, other grounds upon which all the transactions can be upheld. The original guarantee of February, 1896, I think, was executed for valuable consideration moving to the wife. She was vitally interested in the protection of her husband's fortune, which was invested in this mill, and it is apparent from the correspondence at the time that the business must go under if no more money could be obtained from the bank. She was interested in the success of her son, the general manager. She obtained a considerable block of the stock of the company, and must have known that the control and expenditure of the bank's advances would be almost entirely in the hands of the husband and son—surely all this formed consideration of the most valuable kind. Then, I think also, the plaintiff long since

estopped herself from questioning the original guarantees by the authorization given by her to the bank to settle the litigation with the liquidators, the release of others who were liable to the bank, and the changes in the bank's position by the agreements made with the plaintiff, so the parties could never be placed in their original positions. Then, I think it is obvious, even if the matter were otherwise open to attack, that the deeds of July, 1904, could not be vacated without also rescinding the release given by the bank to the husband, and leaving the bank to their rights against the $5,000 annuity; this was all one transaction, and it would be absurd to take from the bank the consideration given by the wife for the husband's release without reinstating his liability—this could not be done in this action, as the husband is not a party.

I was strongly pressed to find that Mrs. Stuart had the advice of her family and her son-in-law, a practising solicitor in Hamilton, before giving the first guarantee. There certainly are facts that point most strongly to the conclusion that the matter was discussed, but, taking the view of the case that I do, I do not regard it as necessary to find either way upon this point.

The case fails entirely, and must be dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 11TH, 1907.

CHAMBERS.

CANADA SAND LIME AND BRICK CO. v. POOLE.

Mechanics' Liens—Statement of Claim—Motion to Set aside —Affidavit Sworn before Plaintiffs' Solicitor—Rule 522 —Expiry of Time for Filing Statement of Claim— Practice.

Motion by defendant Morrison to set aside the statement of claim in a statutory action to enforce a mechanics' lien, upon the ground that the affidavit required by the Mechanics' Lien Act, R. S. O. 1897 ch. 153, sec. 31, sub-sec. 2, was sworn before the plaintiffs' solicitor.

G. W. P. Hood, Toronto Junction, for defendant Morrison.

R. G. Agnew, for plaintiffs.

THE MASTER:—The applicant's contention is supported by Rule 522, which says that such an affidavit "shall not be used," with only one exception. The affidavit in this case is intituled in the High Court of Justice and in the full style of the cause.

The question would not be of any moment were it not that it will now be too late to file a new statement of claim, and the success of this motion will deprive the plaintiffs of any remedy against the land. But this, while a weighty reason for upholding the proceeding if it can properly be done, is no ground for seeking to evade the Rule. The statement of claim was not delivered to defendant until the 90 days had elapsed, though it was dated 3 weeks earlier. Had the plaintiffs been prompt, the present difficulty could have easily been cured. If in that case the defendant had not moved until the expiration of the 90 days, he might have been held to have waived the defect.

As it is, there does not seem to be any power to relieve the plaintiffs, and an order must go setting aside the statement of claim, but, in the circumstances, without costs.

By sec. 31, "the ordinary procedure" of the High Court is made applicable to these proceedings, and the Rules are styled "The Rules of Practice and Procedure." It seems to follow that Rule 522 can be successfully invoked, and must be applied if its plain direction is disregarded.

CARTWRIGHT, MASTER. DECEMBER 11TH, 1907.

CHAMBERS.

McLEOD v. CRAWFORD.

Evidence — Motion for Better Affidavit on Production of Documents—Examination of Witnesses in Support of Motion—Appointment for, Set aside—Discovery.

Motion by plaintiffs to set aside an appointment and a subpœna issued by defendants for the examination of witnesses under Rule 491 for use on a pending motion for a further affidavit on production by plaintiffs, on the ground

that the sufficiency of an affidavit on production cannot be impeached in this way.

J. B. Holden, for plaintiffs.

S. R. Clarke, for defendants.

THE MASTER:—This question was to some extent before me in Doyle v. Williams, 9 O. W. R. 286, and I see no reason to arrive at a different conclusion on this motion, which seems to be decided by the judgment of a Divisional Court in Standard Trading Co. v. Seybold, 1 O. W. R. 650. In Doyle v. Williams it was not denied that there were, prima facie, documents which might have to be produced on discovery. Here, no less than in Dryden v. Smith, 17 P. R. 500, there is an attempt to do indirectly what cannot be done directly. If it was a possible method of obtaining a further affidavit, it might be supposed that it would have been attempted sooner. And there would not then have been any necessity for the amended English Rule referred to in Doyle v. Williams, supra, and case cited. On examination for discovery the plaintiffs can be asked as to the existence of other documents. If any such are shewn to exist and to be relevant, no doubt they must be produced.

As at present advised, I hold that the motion must be allowed with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. DECEMBER 12TH, 1907.

CHAMBERS.

CLARKSON v. CRAWFORD.

Writ of Summons—Service out of Jurisdiction—Contract to be Performed in Ontario—Rule 162 — Conditional Appearance.

Motion by defendants to set aside order obtained by plaintiff under Rule 162 permitting the issue of a writ of summons for service upon the defendants out of the jurisdiction, and the writ issued pursuant thereto, and the ser-

vice on the defendants. The action was for specific performance of an agreement to take stock in a projected company.

A. O'Heir, Hamilton, for defendants.

W. M. McClemont, Hamilton, for plaintiff.

THE MASTER:—The affidavit on which the order was made refers to the agreement, which was therefore before the Court. In it there is no mention of the plaintiff company, and the affidavit is styled only in a cause with Clarkson as sole plaintiff. This was probably an oversight in some way, and might be amended, if necessary.

The more serious difficulty is that the agreement makes no mention whatever of the plaintiff company. It is true that in the statement of claim it is said that Clarkson made the agreement sued on "as agent of his co-plaintiffs"—but the statement of claim is not mentioned in the order as part of the material on which it was issued. The agreement itself refers to a conveyance of realty in this province for the formation of a company with head office in Hamilton, and in which defendants were to have stock to the value of $50,000, on payment of that amount in cash. It may not unfairly be assumed that this payment was prima facie to be made at Hamilton, as it would be there that the stock would be allotted and certificates issued to the defendants. But this should have been made quite clear. The right of the plaintiff company is not anywhere apparent. It is not even mentioned in the agreement.

The better course seems, therefore, to be to allow defendants to enter a conditional appearance. Burson v. German Union Insurance Co., 3 O. W. R. 230, 372, and at the trial, 6 O. W. R. 21, where the action was dismissed on the ground of failure to shew a cause of action in this province, shews that it is not at any earlier stage that the question of jurisdiction can satisfactorily be determined in many cases. To the same effect are the expressions of the Chancellor in Canadian Radiator Co. v. Cuthbertson, 9 O. L. R. 126, 5 O. W. R. 66. . . .

[Reference also to William Blackley Limited v. Elite Costume Co., 9 O. L. R. 382, 5 O. W. R. 57, and Dominion Canister Co. v. Lamoureux, 7 O. W. R. 272, 378.]

Following these cases, I think the motion should be dismissed and the defendants allowed to enter a conditional appearance. . . .

Costs in the cause unless the trial Judge otherwise orders.

RIDDELL, J. DECEMBER 12TH, 1907.

TRIAL.

HARDY v. SHERIFF.

Will—Construction—Allowance to Guardian of Infants—Additional to Infants' Allowances for Maintenance—Income of Estate—Direction for Accumulation of Part—Annuities out of Surplus Income—Costs—Action Brought where Summary Application Sufficient.

Action for construction of will of G. T. Fulford, deceased.

W. Nesbitt, K.C., and Britton Osler, for plaintiff.

H. S. Osler, K.C., for unborn infants.

E. T. Malone, K.C., for executors.

I. F. Hellmuth, K.C., and D. W. Saunders, for infant G. T. Fulford.

H. B. McGiverin, Ottawa, and A. Haydon, Ottawa, for defendant Sheriff.

F. W. Harcourt, for other infants.

RIDDELL, J.:—The late G. T. Fulford, 13th February, 1902, made his will, which is the subject of this action. It is not long, but one of the provisions has given rise to a controversy involving, as I am informed, $1,000,000 or more. At the time the will was made the testator had two daughters, one, the plaintiff, nearly if not quite 21 years of age, and the other, the defendant Mrs. Sheriff, about 19. A son, the defendant G. T. Fulford, was born 6th May, 1902, 3 months after the date of the will.

I shall refer to the parts of the will which seem to me to be of consequence in this inquiry.

The testator, after appointing executors and giving them power of management, etc., authorizes them to invest the moneys of the estate, as they come in, in government bonds and other securities. Provision is then made for continuing the business, which is said to have been very profitable; this business to be kept up by employing the profits and proceeds therefrom, but not the capital or income of the existing investments. By clause 10 an annuity of $12,000 per annum was directed to be paid to each of the daughters, D. (the plaintiff) and M. (now Mrs. Sheriff), "till she attains the age of 25 years." After certain annuities to specified persons, the testator appoints his wife guardian of his children during their minority, and in the event of her death one W. was appointed, and the executors were directed to pay the said W., while she is such guardian, "the sum of $1,000 per annum, to be charged against the shares of the child or children she is guardian of." Clause 16 provides for the event of another child or children being born—no doubt the birth of one was known to be imminent—and says: "Should I have another child or children, I direct the following provisions to be made for the support, maintenance, or education thereof; the sum of $3,000 each per annum to be paid to the mother or other guardian until the age of 14 years is reached, from the age of 14 years to 21 years $5,000 per annum, from the age of 21 years to 25 years, in the case of a son $25,000 per annum, in the case of a daughter $12,000 per annum. After the age of 18 years is reached payments can be made personally to any child, even though under age, and such child's personal receipt shall be a sufficient discharge therefor."

Pausing here for a moment, I am of the opinion that the sum directed to be paid to the guardian is in addition to the sums provided for the "support, maintenance, or education" of the child; the fact that after 18 the child's receipt is sufficient does not militate against this view, but I think, if anything, it supports it.

Then comes clause 18, which has given rise to the difficulty here. It is as follows: "18. I direct that as each child attains the age of 25 years, his or her income from my estate is to be during the 10-year period of accumulation hereinafter provided for, his or her proportionate part of 90 per cent. of the income of my estate after all charges are paid (excluding always as hereinafter directed the income of

my business), it being my intention that my children are to share equally in such income, but until each child attains the age of 25 years what would have been his or her share is to accumulate and form part of my general estate."

In the original will clause 18 had read: "I direct that as each child attains the age of 25 years his or her share of the income from my estate is to be during," etc., but the words underlined were struck out, and this properly initialled. I do not think this of any weight, even if I were at liberty to use the original will and not confine myself to the probate thereof.

The will then continues: "19. I direct that for the 10 years after my death the surplus income of my estate, after paying the annuities and other charges and amounts to be paid, shall be allowed to accumulate, and at the expiration of such 10 years 10 per cent. of the total amount of my estate exceeding $2,500,000, but not exceeding $400,000 in all, shall be set apart and be paid out of my personal estate to the Brockville General Hospital for the purpose of establishing a home for indigent Protestant old women who are bona fide residents of Canada and without adequate means of support, one-sixth to be appropriated for building and site and equipment, and the remainder for an endowment fund.

"It is my wish that full provision be made for the support and maintenance of the said old women, including, besides anything else which the directors, governors, or trustees of said hospital may deem necessary or proper for their comfort, clothing, spending money, medical and other attendance, and funeral expenses, to be paid for out of the income of such endowment fund.

"20. I direct that the revenue and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business, after making all proper allowances and provisions, shall be accumulated from year to year and invested and form part of the capital of my estate from which the income to be paid over under this will is to be derived.

"21. I give, devise, and bequeath all the rest, residue, and remainder of my property of every kind (including the amounts reserved to pay annuities as they cease to be required) to be disposed of as follows. Subject to the preceding provisions, including those as to accumulation and the

times of being entitled to payment, the income each year is to be divided between my children equally share and share alike; on the death of each child his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly (the issue of any who may be dead leaving issue to take their parent's share), but should he or she die without issue the same share or proportion shall belong to my estate.

"I further direct that all of such payments of income to my children are to be without power of anticipation or charging or disposing of, and are intended for the support and maintenance of themselves and their families, and in case of females for separate use."

The will had previously provided that the executors should "set apart an ample amount from the principal of my estate to provide for full payment of the annuities given in this (paragraph 11) and other paragraphs."

The estate at the time of the death of the testator consisted of a very large amount invested, of certain real and personal property not necessary to be here considered, and of the profitable business referred to in the will.

It is contended by the plaintiff that upon the true interpretation of the said will, and in particular of paragraphs 18, 19, and 21 thereof, the differences between the annuities directed to be paid to each of the children of the testator while under the age of 25 years, and the full one-third shares of the surplus income of the estate after carrying into effect all the directions of the said will, including the direction to accumulate 10 per cent. thereof for the period of 10 years, for the purposes in the said will set forth, which would have been payable to each of the said children respectively had they been all of the full age of 25 years at the date of the death of the testator, do not accumulate for the benefit of such children respectively, and are not payable to them upon attaining the full age of 25 years respectively, but fall into the general estate to be accumulated and invested, and that the full proportionate share of the income derived therefrom from time to time is payable to those children who have attained the age of 25 years, that is to say, that each child having attained the age of 25 years is entitled to be paid the full one-third of the surplus income of the

estate, including one-third of the income derived from the investment of the said differences, subject to the 10 per cent. accumulation hereinbefore referred to.

It is contended on the other hand that upon the true interpretation of the said will, and in particular of paragraphs 18, 19, and 21 thereof, the difference between the annuities directed to be paid to or set aside for each of the children while under the age of 25 years, and the full one-third shares of the surplus income of the estate of the testator, do accumulate for the benefit of such children respectively, and are payable to them upon attaining the age of 25 years respectively, so as to carry out the true intention of the testator, namely, that his children should each have an equal share in the total income of the said estate.

The case came in for hearing at the non-jury sittings at Toronto on Monday 9th December, 1907. I had the assistance of very able arguments by counsel concerned, and have since the argument read and re-read the will several times. My opinion has fluctuated from time to time, and I cannot say that I am at all sure that I am right in the view I have finally arrived at, but I do not think that there would be any change in that view if I were to reserve judgment longer.

The intention of the will seems to be that there shall be a sharp distinction made and retained between the business and the remainder of the estate. The business (clause 5) is to be continued by employing the profits and proceeds thereof, but not by using any of the capital or income of investments—clause 20 providing that so much of the revenue from that source as may not be needed for carrying on the business shall not be paid over as part of the income of the estate, but be invested and become part of the capital of the estate. The capital of the estate then will be composed of (a) the existing investments and the increase therefrom as mentioned in clause 4, and (b) investments made from the surplus income from the business.

From the principal of this is to be formed, set apart, a fund to provide for the payment of all annuities: clause 12 ad fin. It is not necessary to refer specially to the other annuities, but those given to the children must be considered. It is apparent that the testator intended to give to each of his children a certain fixed sum until such child should be

25 years of age, clause 10 providing for the children then in esse, and clause 16 for those in posse. The sums so provided are annuities, and, with other annuities, are to be paid from the income of this annuity fund.

At the time the will was made the plaintiff was, as has been said, about 21, and her sister about 19; it was apparent that each would come to the age of 25 years before the expiration of a 10-year period for which the testator intended to provide. When any child became of the age of 25 years, his or her claim upon the annuity fund ceased ipso facto, and a new provision needed to be made. If the testator had the thought that under the age of 25 no child of his should have the right to any more than $12,000 or $25,000, as the case may be, and ought not to have more than that sum to spend or otherwise dispose of, and if he also had the thought that the estate was to be divided, as far as possible, year by year, he certainly had the right to make a will which would have the effect of bringing about this result.

The accumulation spoken of is brought about in the first place by taking the balance of income of the annuity fund after paying the annuities, taking also the net income from the remainder of the estate (always excepting the capital, etc., employed in the business), and therewith forming an accumulating fund. So long as all the children are under 25 no draft need be made upon this fund to pay them an income, but at 25 the child must look elsewhere for it, and clause 18 is introduced accordingly.

It is declared to be the intention of the testator—generally—that the children are to share equally in the income of the estate (see clauses 15 and 21); so that there need be no difficulty in the words "her proportionate part." The provision then is for the child arriving at 25 and losing the right to look to the annuity fund, by computing 90 per cent. of the income from the estate, dividing this by the number indicating the number of children, and the quotient is the amount the child is entitled to receive. This happening the first year after the attaining of the stated age, what is to be done with the other fraction of the income of the estate? The express provision is that "it being my intention that my children are to share equally in such income, but until each child shall attain the age of 21 years what would have been his or her share is to accumulate and form part of my general estate." It is to be noted that the words here

are not "what would have been his or her income from my estate," but "his or her share." These shares or proportions of the 90 per cent. of the income are directed to accumulate and to form part of the general estate. Had the directions stopped at the word "accumulate," it may well be that this should be held to mean, accumulate for the benefit of the child under the age of 25 years and until attaining that age. There is no explicit direction of that kind, and there is an express provision for accumulation. Whether, independently of the closing words of clause 18, "and form part of my general estate," the provision as to accumulation in clause 19 would have had any effect upon these sums, I need not consider. An express provision, such as, that what would under other circumstances have been the share of a person shall form part of the general estate, is, to my mind, too clear to be disregarded or to have any but the one interpretation. No assistance can be derived from the use of the words "general estate" in clause 18—it is found nowhere else in will or codicil—the word "estate" is found in clauses 3, 4, 11, 12, 14, 18, 19, 20, 21, and 22, and twice in the codicil.

Nothing in the subsequent part of the will relieves me from the necessity of finding that the intention of the testator was that for the period of 10 years during which the accumulation was going on, a child 25 years of age or more should receive an aliquot part of 90 per cent. of the net income, but the aliquot parts to which the younger child or children would otherwise have been entitled should "lapse," and such child or children be compelled to look to the annuity fund for all moneys he or she had any right to. This provision may, at the time the will was made, have been a beneficial one for such younger child or children—there is no evidence as to the condition of the estate at that time—or it may, as I have suggested, have been for some other good reason the deliberate policy of the testator. With all that I have nothing to do; all I am concerned with is to find out from the language employed what the testator really meant. A may may do what he likes with his own.

The provisions of clause 21 are expressly "subject to the preceding provisions, including those as to accumulation and the times of being entitled to payment, the income each year is to be divided between my children equally share and share alike." No doubt an argument may be based upon

the expression "the times of being entitled to payment," as indicating that the provision in the latter part of clause 18, now under discussion, was intended to provide simply for a time of payment, and not for the interest or right in the income from the estate of the child under 25. But that argument cannot avail against the express provision that what would have been a share shall form part of the general estate.

The succeeding provision had at the trial a strong influence upon my mind, "at the death of each child his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly." It seemed to me that the result might be that a child might die under 25 leaving issue, and that if the argument I am giving effect to were sound, such issue would receive a very small part of the estate. The daughter, being entitled to $12,000 out of an income say of 10 times as much, dying under 25 leaving issue, that issue would be held to be entitled to receive only 10 per cent. of the estate. But it may be that there did in fact exist at the time of the making of the will some good reason for this, or that the exact effect of such a provision was not considered at all. The provision has nothing of the absurd about it, and further consideration has convinced me that this provision cannot be allowed to modify the express words of clause 18.

Another provision, namely, that for the payment to W. of the sum of $1,000 while she is guardian of an infant child or children, may also be referred to as affording an argument that a child under 21, and therefore under 25, might have a "share" beyond the annuity given. But this difficulty, if it be one, is got over by considering that the sum of $1,000 is to be paid out of the sum payable yearly for the support, maintenance, and education of such child or children.

I think the plaintiff is right in her contention. If I had given effect to the contention of the defendant Sheriff, the question would arise as to the right of this defendant to receive the annuity of $12,000 to which the plaintiff is no longer entitled, and also one-third of the 90 per cent. This consideration, I think, supports the conclusion at which I have arrived.

As to costs, this matter was proper to be brought before the Court, but the bringing of an action by writ instead of applying to the Court under the Rules is not to be encouraged.

I pointed out in Willison v. Gourlay, 10 O. W. R. 853, the practice which should be followed. For reasons there given, costs will be given to all parties out of the estate, but limited to costs as of an application under the Rules. No doubt in this particular instance the extra costs (if any) are a mere trifle as compared with the amount involved, but there is another consideration which solicitors should bear in mind. The people at large have to pay for the support of our courts of justice, and, while it is right and just that every litigant should have all the time necessary fully to develope and try his case, no one has a right to take up the time of a Court sitting for the trial of actions with questions such as these, when there is already a tribunal sitting charged with the duty of disposing of just such questions.

The time of the Court is taken up at the expense of the people. Moreover, other litigants who have come into the proper forum are delayed and put to inconvenience and expense improperly.

OSLER, J.A. DECEMBER 12TH, 1907.

C.A.—CHAMBERS.

McCANN MILLING CO. v. MARTIN.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Amount Involved—Review of Judgments below—Chattel Mortgage — Renewal—Validity—Time—Computation of Year.

Motion by plaintiffs for leave to appeal to the Court of Appeal from order of a Divisional Court, ante 681, affirming judgment of MACMAHON, J., at the trial, ante 264.

W. R. Smyth, for plaintiffs.

A. Abbott, Trenton, for defendants.

OSLER, J.A:—The only question intended to be raised by the appeal is whether the renewal statement and affidavit of the amount due on the chattel mortgage, the subject of the action, was filed in time, within the meaning of sec. 18 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 ch. 146, which enacts that "every mortgage . . . filed in pursuance of this Act shall cease to be valid . . . after the expiration of one year from the day of the filing thereof, unless, within 30 days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee . . is filed in the office of the clerk of the County Court." The chattel mortgage was filed on 26th April, 1904. When did "the term of one year from the day of the filing thereof" expire? "From," according to all modern authorities, when a particular time is given from a certain date within which an act is to be done, would exclude the day of filing, and therefore the year from the day of filing began at the earliest moment of the 27th April, 1904, and expired at midnight of the 26th April, 1905. And the renewal statement, to be valid, must have been filed within 30 days next preceding the expiration, not the day of the expiration of that year, and therefore a filing of the statement at any time on the 26th, as it here was filed, would be sufficient. The late Mr. Justice Patterson would evidently have taken this view of the construction of an Act, as in Thompson v. Quirk, noted in 18 S. C. R. 696 (appendix), and reported in Cameron's Supreme Court Cases, p. 436, he expressed the opinion, obiter no doubt, that under a North-West Territories Ordinance similar in terms to our former Chattel Mortgage Act, providing that the mortgage should cease to be valid after the expiration of one year from the filing thereof, the whole day of the original filing was excluded from the computation of the year, which, perhaps, had not been so held by our Courts: see Armstrong v. Ausman, 11 U. C. R. 498. Nothing now seems to turn upon the hour of the original filing, as by 57 Vict. ch. 37, sec. 14, the language of the section was changed as it now appears.

Cases upon the renewal of writs of execution, e.g., Bank of Montreal v. Taylor, 15 C. P. 107, have no application, for they turn partly upon the application of the rule that a judicial act such as the issuing of execution is, in contemplation of law, deemed to have taken place at the earliest

moment of the day on which it is done, and partly upon the general rule that the word "from" may be either inclusive or exclusive, according to circumstances, and that these, for the reasons assigned by the learned Judge (Wilson, J.), who delivered the judgment in the case referred to, required it to be construed as inclusive in computing the year from the teste of the execution for the purpose of its renewal.

The amount in question here is not large, and I am unable to suggest any reason for thinking that the judgment of the trial Judge, affirmed without dissent by the Divisional Court, is wrong. I therefore refuse leave to appeal. Costs must follow, to the respondents.

CARTWRIGHT, MASTER. DECEMBER 13TH, 1907.

CHAMBERS.

McKENZIE v. SHOEBOTHAM.

Jury Notice—Irregularity—Cause Removed from Surrogate Court into High Court—Terms of Order Removing—Time for Filing Jury Notice.

Motion by plaintiff to set aside a jury notice filed and served by defendant.

Grayson Smith, for plaintiff.

H. L. Drayton, for defendant.

THE MASTER:—On 6th December instant an order was made, on plaintiff's application, transferring this action from a Surrogate Court to the High Court, to be tried at Woodstock. The motion to transfer was opposed by the defendant, and her solicitor filed an affidavit that the case could not be ready for the non-jury sittings at Woodstock commencing next week, and that defendant required a trial by jury. The order directed that the pleadings and proceedings "do stand in the same plight and condition in which the same are now in said Surrogate Court."

The plaintiff on 7th instant gave notice of trial for the non-jury sittings to be held next week, and on 9th instant defendant served a jury notice, which prevents the case being set down. Plaintiff now moves to set the jury notice aside as irregular.

The cause was at issue in the Surrogate Court on 20th November, and, if the words of the order are to be construed in their natural sense, the jury notice was too late. Seeing what was stated in the affidavit of defendant's solicitor, it is unfortunate that the point was not made clear in the order. But, looking at the Surrogate Courts Act, R. S. O. 1897 ch. 59, sec. 35, it would seem to be open at any time for either party in such a case as the present to move for a jury. But until that has been done the language of the order seems to make the jury notice irregular, and it must be set aside and the plaintiff be at liberty to set the case down for the sittings on 19th instant. This will be, of course, without prejudice to any application by the defendant to the trial Judge or otherwise as she may be advised. Costs in the cause.

MULOCK, C.J. DECEMBER 13TH, 1907.

TRIAL.

DOCKER v. LONDON-ELGIN OIL CO.

Landlord and Tenant—Lease—Right to Drill for Oil—Construction of Lease—Covenants—Breach—Commencement of Operations — Alternative Payment of Rent — Forfeiture—Relief—Ceasing to Operate—Payment into Court—Costs.

Action for a declaration that a certain lease of land made by the plaintiff to one Steele, and by the latter assigned to the defendants, was void.

C. St. Clair Leitch, Dutton, and J. C. Payne, Dutton, for plaintiff.

J. B. McKillop, London, for defendants.

MULOCK, C.J.:—The lease is dated 18th June, 1902, and by it the plaintiff demised the land therein mentioned for 10 years from the date of the lease, the lessor to receive by way of rental a one-eighth part of all oil and minerals obtained by the lessee and his assigns from the demised premises during the continuance of the demise, and also $50 a year for each gas well from which the lessee should obtain and sell gas to the public.

The lease contains, amongst others, the following clauses and covenants:—

"This lease is made for the purpose of enabling the lessee and his assigns, and he is and they are hereby authorized and empowered, to sink or drill oil wells," etc.; "and to dispose of all oil," etc.; "and the lessor hereby grants, assigns, transfers, and sets over to the lessee and his assigns all such oil," etc.; "subject only to the payment of the rental hereinbefore reserved;" the lessee "covenants with the lessor and his assigns in manner following, that is to say, that the lessee or his assigns, so long as he or they shall be of opinion that any wells sunk by him or them upon the said premises are yielding and will continue to yield, or will, if worked, yield, oil in sufficient quantities in his or their opinion to induce the lessee or his assigns to work and continue working the same, will: (a) pump and work the same faithfully and uninterruptedly unless hindered," etc.; (b) "he will keep books of account," etc.; (c) "will deliver to the lessor or his assigns in bulk one-eighth of all oil or mineral removed by the lessee or his assigns," etc.; and (d) "will commence operations upon the said premises on or before the first day of November, 1902, or will pay to the lessor or his assigns the sum of $6 per month from the date hereof until operations are commenced on the said premises: provided that the said term hereby granted shall cease and determine if the lessee or his assigns shall wholly cease for the space of 6 months continuously to operate under this lease: proviso for re-entry by the said lessor for non-payment of rent or non-performance of covenants."

The plaintiff: . . . charges that neither the lessee, nor his assigns, the defendants, ever commenced to operate on the demised lands, or paid to the plaintiff . . . $6 a month from the date of the lease, and that, by reason of the breach or non-performance of the covenants above quoted

and of the non-payment of "rent," the plaintiff is entitled to have the lease forfeited.

The defendants contend that they were not obliged unconditionally to commence operations on or before 1st November, 1902, but that it was optional with them either to do so or to pay . . . $6 a month until the commencement of operations.

The facts are not in dispute. The defendants did not commence operations on or before 1st November, 1902, but, in lieu thereof, paid to the plaintiff, who accepted the same, the monthly sums agreed upon, computed from the date of the lease down to 1st November, 1902; they also paid further sums accruing due after 1st November, 1902, the last of such payments, so far as appeared at the trial, being an item of $36 paid on 27th January, 1905. Evidently some arrears had accumulated, for defendants bring into Court $216, which they say satisfies all moneys owing up to the commencement of this action, but the plaintiff refuses to accept the same, contending that he is entitled to have the lease declared at an end. This contention he rests on the following grounds: (a) breach of covenant to commence operations on or before 1st November, 1902; (b) non-payment of rent; (c) the defendants ceasing for 6 months to operate.

As to the first ground . . . I do not construe the covenant as an unconditional one to make such commencement, but an alternative covenant to do one of two things, namely, either to make such commencement or to pay $6 a month from the date of the lease until 1st November, 1902.

When a person, as here, is bound to perform one of two things, he may elect which he will perform: Layton v. Douglas, 1 Doug. 16. The defendants have elected not to commence operations, but to pay the monthly sums. To give effect to the plaintiff's contention would involve disregarding the words "or will pay to the lessor or his assigns the sum of $6 a month from the date hereof until operations are commenced on the said premises." These words are part of the covenant, they represent part of the contract between the parties, and proper effect must be given to them. The plaintiff has not the right to elect which thing the defendants should perform. Such is not the contract. The lessee covenanted to do one of two things—not the one which the

lessor should choose, but the one which he himself should choose. If he does either, he performs his covenant. He has done one, namely, paid the rent. I therefore think the defendants were guilty of no breach of contract because of not having commenced operations on or before 1st November, 1902. The plaintiffs evidently at one time took this view of the contract, for he accepted payment for the period up to 1st November, 1902. The covenant does not entitle the plaintiff to such payment and at the same time to re-enter because of default in commencement of operations. The acceptance by the plaintiff of the "rent" in payment for what he contends is the defendants' default (but in which contention I am unable to agree with him) in itself estops him from advancing a claim for forfeiture.

I am, therefore, of opinion that the plaintiff has no cause of action because of operations not having been commenced on or before 1st November, 1902. Thereafter the contract is silent as to any obligation to make commencement, but merely provides that the lessee shall pay the monthly sum of $6 until there be a commencement. From time to time payments of this kind were made. Both parties have treated these moneys as "rent," the plaintiff's receipts so describe them, and by his statement of claim he charges that the "rent" is in arrear, and that in consequence he is entitled to re-enter. But whether or not these sums are "rent" is immaterial. The plaintiff claims the right to re-enter because of the non-payment of money. This right to re-enter is a penalty for non-payment, and nothing has been done which would make it inequitable to relieve the defendants from forfeiture of the lease because of non-payment, provided all arrears with interest are now properly paid. The plaintiff gave no evidence as to the amount in arrears, nor challenged the sufficiency of the amount paid into Court, and such payment, I think, should be held to relieve the defendants from forfeiture of the lease.

Plaintiff's counsel contended that the real object of the lease was to secure to the plaintiff the operation of the lands for mining purposes, and that, therefore, no equitable relief could be given to the defendants, because of their default in payment of the rent, and he relied upon the words quoted above from the lease: "This lease is made for the purpose of enabling the lessee, his heirs and assigns, and he

is and they are hereby authorized and empowered, to sink, drill," etc. The fair meaning of these words is not to create a duty on the lessee to operate, but merely to confer upon him the right to do so, and therefore they in no way modify the nature of the alternative covenant above quoted, which is the only provision in the lease obliging the defendants, and then only in the alternative, to operate.

As to the last ground of complaint, namely, that the defendants have ceased for 6 months to operate under the lease: to cease implies a beginning: they never began, and therefore could not have ceased; and this ground fails.

The action is, therefore, dismissed with costs since payment into Court: up to that time the plaintiff to have his costs; the money in Court to be available to answer defendants' costs, and any balance to be paid to plaintiff.

DECEMBER 13TH, 1907.

C. A.

REX v. LEE GUEY.

Criminal Law—Keeping Disorderly House—Common Gaming House—Summary Trial—Jurisdiction of Police Magistrate—Right of Accused to Elect to be Tried by Higher Court—Provisions of Criminal Code.

Case stated by the police magistrate for the city of Hamilton. On 10th June, 1907, the defendants (three Chinamen) were brought before the magistrate upon a charge that they did at Hamilton unlawfully keep, maintain, and use a disorderly house, to wit, a common gaming house, by keeping for gain a certain house, or room known as 35 John street north, for playing therein at games of chance and mixed games of chance and skill, and in which a bank was kept by one or more of the players exclusive of the others, and were tried by the magistrate summarily, without their consent, and in opposition to their request to be tried by a Superior Court, and were convicted of the offence charged, and sentenced to pay a fine of $100 each, which

fines were paid under protest. The question reserved was whether the magistrate had absolute jurisdiction under sec. 774 of the Criminal Code to try defendants without their consent, or whether they had a right to elect to be tried by a higher Court.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

A. M. Lewis, Hamilton, for defendants.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.:—That a common gaming house was a disorderly house and an indictable nuisance at common law there can be no doubt. It was treated as being in that respect on the same plane as a common bawdy house, and is so referred to in the British statute of 25 Geo. II. ch. 26, which speaks of "persons having the care, management, or government of any bawdy house, gaming house, or other disorderly house," language which finds an echo in sec. 228 (2) of the Code: and see Jenks v. Turpin, 13 Q. B. D. 505, 514.

Under the Code such a house is expressly declared to be a disorderly house, and the keeping of it is an indictable offence which may be prosecuted before a jury upon an indictment or before the County Court Judge under the speedy trials sections, part XVIII. of the Code.

The question raised by the case reserved is, whether a police magistrate has not also absolute and summary jurisdiction to try the offence under the summary trials clauses, secs. 773 and 774, part XVI., a jurisdiction which he undoubtedly possesses in respect of the offence of keeping a disorderly house of another character, viz., the common bawdy house or house of ill fame. The answer to the question depends upon the proper construction and meaning of the expression "disorderly house," having regard to its collocation with the other words of the section. The same expression is found in other sections, a reference to which and comparison with the language of secs. 773 and 774 will aid us in ascertaining its meaning.

Section 225 defines a common bawdy house as being a house, room, set of rooms, or place of any kind kept for the purposes of prostitution; sec. 226 defines a common

gaming house, and sec. 227 a common betting house. These sections are found in part V. of the Code, under the subhead "Nuisances." Section 228 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps "any disorderly house," that is to say, any common bawdy house, common gaming house, or common betting house, as hereinbefore defined. Section 228 (2) enacts that any one who appears, acts, or behaves as the master or mistress or as the person having the care, government, or management of "any disorderly house" shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such. Section 229 penalizes every one who plays or looks on while any one is playing in "a common gaming house." Clauses (a) and (d) deal with the offences of wilfully preventing or using any contrivance to prevent a constable duly authorized to enter "any disorderly house" from entering the same; and clause (e) of the same section, with the securing by any bolt, chain, or other contrivance any external or internal door of or means of access to "any common gaming house" authorized to be entered by a constable.

Under the heading "Vagrancy" we find sec. 238, which enacts that "every one is a loose, idle, or disorderly person or vagrant who is (j) a keeper or inmate of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes, or (k) is in the habit of frequenting such houses, and does not give a satisfactory account of himself or herself." Section 239 makes such a person liable, on summary conviction, to a fine not exceeding $50 or to imprisonment for any time not exceeding 6 months, or to both.

In part XVI. of the Code, which deals with the summary trial of indictable offences, sec. 773 (f) enacts that when any person is charged before a magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill fame, or bawdy house, the magistrate may determine the charge in a summary way, and sec. 774 makes his jurisdiction in that case absolute, and not dependent upon the consent of the person charged; and subsec. (2) of that section declares that the provisions of part XVI. shall not affect the absolute summary jurisdiction given to any justice or justices in any case by any other part of the Act.

The case appears to me to be a very plain one for the application to secs. 773-4 of the rule of ejusdem generis, or its congener—the rule as to the construction of associated words, noscitur a sociis—and to call for the limitation of the term "disorderly house" to one of the class or character of those specifically mentioned in the words which immediately follow it, viz., house of ill fame or bawdy houses. Where the legislature meant that the compendious expression "disorderly house" should have the general and distributive meaning attributed to it in sec. 228, it has shewn that it knew how to say so by using the term without qualification or limitation, which adds force to the argument that where the general phrase is followed by or associated with the enumeration of specific words, as in secs. 238 and 773, 774, the ordinary rule of construction was intended to apply, and that the former was to take its colour and meaning from the latter and to be read in a qualified or limited sense as confined to the classes specified, in the present instance houses of ill fame or bawdy houses. It shews, as Lindley, M.R., said in In re Stockport Schools, [1898] 2 Ch. 687, the type the legislature was referring to.

Section 238 (k) is the only clause, so far as I am aware, which penalizes the habitual frequenter of a disorderly house, house of ill fame, or bawdy house, and sec. 774 (2) saves the absolute summary jurisdiction given to any justice or justices by any other part of the Act, which is probably that given by sec. 238, though under that section the prosecution would in form be for the offence of vagrancy, and the offender liable to a milder punishment. In either case it appears to me that the disorderly house meant is that specifically mentioned, and that the absolute summary jurisdiction of the magistrate is limited to that case.

The precise point now before us came before the Court of Queen's Bench (Quebec), appeal side, in The Queen v. France, 1 Can. Crim. Cas. 32, where it was decided, Bossé, J., dissenting, that the expression was thus limited, and that the magistrate had no jurisdiction to try summarily the offence of keeping a common gaming house. The reasoning of Wurtele, J., who delivered the judgment of the Court, based upon the authorities and the history of the legislation on the subject, seems to me entirely satisfactory. I cannot follow the Chambers decisions in British Columbia and the Yukon.

The conviction must, therefore, be quashed, and the questions (in the terms put by the magistrate) answered: (1) that the magistrate had not absolute jurisdiction to try the defendants without their consent; and (2) that they had the right to elect to be tried by a higher Court.

The result is, as in The Queen v. France, that, as there was no legal trial, the accused must be tried before the proper tribunal.

MEREDITH, J.A., gave reasons in writing for the same conclusions.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.