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RIDDELL, J. NOVEMBER 4TH, 1907.

TRIAL.

THOMPSON v. EQUITY FIRE INSURANCE CO.

THOMPSON v. STANDARD MUTUAL FIRE INSURANCE CO.

Fire Insurance—Actions on Policies — Defences—Statutory Condition 10 (f) — "Gasoline Kept or Stored in the Building Insured"—Small Quantity of Gasoline in Store for Use—Defects in Proofs of Loss — Assignment by Assured of Policy to Bank — Adding Bank at Trial as Party Plaintiff ab Initio and nunc pro tunc—Absence of Notice of Assignment — Subsequent Insurance not Assented to by Prior Insurers — Statutory Condition 8—Substituted Insurance — Prior Insurance Undisclosed—Insurance Effected by Mortgagees without Knowledge of Assured—Fraud—Incumbrances Undisclosed—Immateriality—Costs—Technical Defences.

Actions upon policies of fire insurance.

H. D. Gamble and F. L. Smiley, New Liskeard, for plaintiff.

W. E. Raney and R. W. Eyre, for the defendants.

I. F. Hellmuth, K.C., for the Union Bank, added as party plaintiffs in each case.

RIDDELL, J.:—These cases arose out of what, if one were to disregard the current euphemisms, would be characterized as an attempt on the part of two fire insurance companies, which I presume consider themselves respectable,

to defraud the plaintiff by refusing to pay him that part of his loss covered by their policies, and that on pretexts of the most flimsy character. The only thing about the defences that is to be commended is the admirable propriety and skill with which the defences were conducted in Court by Mr. Raney and Mr. Eyre.

The plaintiff had a furniture and drug store in New Liskeard, in Northern Ontario, and took out a policy of insurance in the Equity Fire Insurance Company, 12th June, 1906, for one year from 25th May, 1906. This policy was on the building No. 214 Sharpe street, and was based upon an application of the plaintiff.

He also had insured in the Standard Mutual Fire Insurance Company, this being evidenced by an interim receipt, No. 19793, dated 27th August, 1906. The insurance was for $1,500, and was upon the stock of drugs, $1,000, and fixtures, fittings, etc., $500, for 12 months from 27th August, 1906. The application for this insurance is not dated, but, no doubt, it was made on that day.

Not being a qualified chemist and druggist himself, the plaintiff had in his employ, in one branch of his business, a member of that profession, Post by name. This gentleman was also tenant of the plaintiff, and occupied the rooms above the store. He had a gasoline stove, which he had used a very few times, and then discarded, leaving in it a small quantity of gasoline.

On 4th September the druggist, desiring to make some "fruit essences," so called, I understand, because there is no fruit in them, for the soda fountain, and not having time for the longer process, brought down the discarded gasoline stove and lighted it, leaving it in the back room; in a short time smoke and fire were noticed. This, no doubt, was started from the stove.

Every effort was made to extinguish the fire, but, owing apparently to a break-down in the fire apparatus of the town, the attempt was unsuccessful. At the trial some questions were put to the plaintiff by counsel for the Equity Fire Insurance Company looking toward a contention that there was or might have been some want of activity on the part of the plaintiff in having the fire put out, but there is no shadow of foundation for any suspicion of or charge against the plaintiff of that or any other impropriety. The Standard Mutual Fire Insurance Company go further and plead specifically

that the fire was caused by the act of the plaintiff himself. Such a pleading, in my view, is a disgrace to the party pleading it, unless there is something justifying such a plea. This plea remained upon the record, and still remains, but no evidence was offered in support of it, and I have already said that there is nothing upon the evidence to justify it. Were I compelled to dismiss the action against the Standard Mutual Fire Insurance Company, I should order them to pay the costs. The loss of the plaintiff was largely in excess of his insurance.

Shortly after the fire, one Graydon, an adjuster for the Standard, and under special instructions from the Equity company, came to New Liskeard. The plaintiff was very anxious to get his money; the adjuster represented that the policies were voided by reason of the fire having taken place through gasoline, and it was arranged that the plaintiff would for immediate settlement take from the Equity $1,500 or so, and from the Standard $1,000 in full. The adjuster prepared proofs of loss, or had them prepared, as a matter of form, and had the plaintiff sign them. These proofs of loss were given and received "without prejudice" and simply as a matter of form. If I were to be at liberty to recall my own experience, I would say that having had while at the Bar a great deal to do with insurance companies, I know it was a very common practice, when an arrangement was made with an assured by way of settlement or compromise, still to insist upon proofs of loss being put in to be put away in the files of the company. Whether this was the object of the adjuster in this case, or whether he was desiring to make evidence for his principals, I need not determine. The fact is that it never was understood that these proofs of loss should be such as might be required in a disputed claim, and that they were given by the plaintiff without prejudice to any claim he might assert if the arrangement he thought he was making was not carried out. In this, as in all other matters, I acquit the plaintiff of all charge or imputation of wrongdoing. I believe he was a perfectly candid and credible witness, and where his evidence differs from that of any other witness whatsoever, I unhesitatingly accept his account as the true one.

The proposed arrangement was not carried out—the companies refused to pay.

The plaintiff's bankers, the Union Bank of Canada, pressing him for security, he, on the 15th November, 1906, assigned to that bank all his "right, title, and interest in or to any money which is or may become payable to him under and by virtue of the following policies of insurance, namely" (setting out these insurance policies and others), and authorized "the said bank to give a good discharge to the said insurance companies." No notice of this assignment was ever given to the insurance companies, and the insurance companies had no knowledge of it until long after the commencement of the action—indeed, counsel for the Equity Fire Insurance Company said that they knew nothing of it till the fact came out at the trial.

The J. J. McLaughlin Company (Limited) had furnished the plaintiff with a fountain, upon which it appears they thought they had a lien—I find as a fact that they had not; they also had an account against the plaintiff to a considerable amount, and desired a settlement. The plaintiff came to the office of the solicitor for the J. J. McLaughlin Company, and informed the solicitor that he had already made an assignment to the Union Bank. He, however, agreed to assign, and did assign, to the company the policy in the Standard, but expressly on the condition that the Union Bank would relinquish their claim. This the Union Bank would not do, and will not do. This assignment then, which was made about 20th November, 1906, is a mere nullity. The solicitor swore that without the knowledge of the plaintiff an arrangement has been made with the Standard Mutual Fire Insurance Company that they should pay his clients $500 in full; and then, the solicitor says, his clients are to credit the full amount of $1,000 to the plaintiff. I need not say that this arrangement was expressed by the Standard Mutual Fire Insurance Company to be without any acknowledgment of liability, and for the sake of peace—such arrangements always are. This arrangement being quite irrespective of the result of this action, it is pleasing to know that the plaintiff will benefit by his insurance in the Standard Company, no matter what may be the decision here. The question of the McLaughlin assignment belongs in reality only to the Standard case, but it is convenient to mention it here.

The plaintiff, being unable to get his insurance money, brought these actions, and they came before me at the North Bay Assizes. I struck out the jury notices, and tried

the two cases together. Some of the witnesses not being present, I adjourned the hearing to Toronto, and I heard the remainder of the evidence and the argument here. Counsel have been good enough also to put in a written argument upon certain points—I may say that I have derived great assistance from the very careful and able arguments of all the counsel concerned.

The Standard insurance being evidenced by an interim receipt, and the Equity policy not having any variations applicable to the case, it is clear that both insurances are subject to the statutory conditions, and to these alone. Both companies rely upon condition 10 (f), which provides that "the company is not liable for the losses following, that is to say:— . . .

"(f) For loss or damage occurring while . . . gasoline . . is . . kept or stored in the building insured or containing the property insured, unless permission is given in writing by the company."

No permission was in either case given by the company, so that it is manifest that the companies will escape liability, if what was done in this case makes it right to say that "gasoline" was "kept or stored in the building."

The plaintiff knew nothing of the use of gasoline before the fire. Graydon is in error in saying that the plaintiff admitted that before the fire he knew of its use. This ignorance may not, indeed cannot, assist the plaintiff, nor can his express order to Post not to have gasoline upon the premises. Insurance companies are entitled to the full protection given them by the statutes, but they are entitled to no more.

I think it would shock any ordinary person to be told that if he allowed a small quantity of gasoline to remain in a discarded stove, he thereby "kept or stored it." I have, say, a box of cigars in my smoking room—I hope I do not thereby "keep or store" tobacco on my premises.

Such collocations of words have been often interpreted by our own and other Courts. For example, in Biggs v. Mitchell, 2 B. & S. 523, the prohibition in the statute of 12 Geo. III. whereby it was directed that no person shall "have or keep" more than 200 lbs. of gunpowder, was considered, and it was held that the two words must mean the same thing. And in Foster v. Diphwys, &c., Co., 18 Q. B. D. 428, the same was said of the words "case or canister." On principle "keep or store" should not be held to mean any-

thing more than "store," and I should not be able to hold that the present was an instance to which such a word could rightly be applied. But authority is not wanting on the very phrase. In Mitchell v. London Assurance Co., 12 O. R. 706, it was held in the Queen's Bench Division by a divided Court that crude and earth oils kept for lubricating purposes could not be said to be "stored or kept," and that the above clause (f) did not apply: this was sustained in the Court of Appeal, 12 A. R. 262. Hagarty, C.J.O., says, p. 268: "It is not 'stored or kept,' in the apparent meaning of the words, which seem to point to a different matter, such as the dealing in such articles, or having a storehouse therefor." The definition implied in these words, I adopt.

Many cases were cited to me decided upon words more or less like those in our statute, and I think the weight of authority in other Courts is in favour of the construction placed upon the statute which would hold that the present instance did not shew a violation of clause 10 (f).

For example, in Williams v. Firemen's Fund Insurance Co., 54 N. Y. 569, it was held on appeal from the General Term that a provision forbidding the storing or keeping of certain hazardous articles, amongst them petroleum, should be interpreted so as not to prohibit the insured from keeping a jug of petroleum for use as a medicine. Reynolds, C., says, p. 572: "The provision against storing or keeping was obviously aimed at storing or keeping in a mercantile sense, in considerable quantities, with a view to commercial traffic." Many cases are cited in the arguments and judgments which may be referred to in support of the contention on either side.

I do not think it would answer any good purpose to go through the many cases cited, some of them decided upon words quite different from those in our statute: I think it sufficient to refer to Joyce on Insurance, vol. 3, sec. 2200, and to May on Insurance, 4th ed., sec. 242. I would refer also to the cases mentioned in Clement's Insurance Digest. The former work says: "Another of the ordinary provisions of an insurance policy is that prohibiting the storing of certain hazardous articles: this provision has been construed as covering only those cases where the storing and safekeeping of the prohibited articles is the sole object of the deposit, or to the storing in a mercantile sense: that is, a keeping for safe custody."

May says: "Storing has been defined to mean keeping for safe custody to be delivered out again in the same condition, substantially, as when received, and to apply only when the storing or safekeeping is for trading purposes, and is the sole or principal object of the deposit, and not when it is merely incidental . . . as when kerosene is kept for the purpose of illumination or saltpetre for the purpose of curing meats . . . ."

It may well be that the definition indicated in the dicta of the learned text writers will be found to be too narrow—but it seems to me clear that the remarks of Hagarty, C.J.O., must connote a definition as broad as the words reasonably bear—there must be something in the nature of dealing in such articles or having a storehouse therefor. I am of opinion that no Court could give to the words a meaning wide enough to cover the present case.

This defence then fails.

It is said that there were defects or worse in the proofs of loss. I think that if there are any such defects, they are not matters which are of any importance and did not arise from any fraud or other impropriety: and I "consider it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions." I therefore, under sec. 172 (1) of the Insurance Act, R. S. O. 1897 ch. 203, hold that the liability of the insurance companies is not discharged thereby.

At the trial it became known to the defendants, or at least to the Equity Fire Insurance Company, that the plaintiff had made an assignment to the Union Bank. I thought that the Union Bank should be made a party plaintiff, and that was done under objection by the defendants. It is clear that I had the power to add the Union Bank under the circumstances: Hughes v. Pump House H. Co., [1902] 2 K. B. 485, in the Court of Appeal; it not being a case of setting up a new claim.

It is contended, however, that, as regards the Union Bank, the statute bars any claim, clause 22 providing that "every action . . against the company for the recovery of any claim . . . shall be absolutely barred unless commenced within the term of one year next after the loss or damage occurs." It is argued that the Union Bank can be considered as suing only as from the time at which they are added as parties, and that is more than a year from the occurrence of the loss or damage. Holmested & Lang-

ton, p. 528, is cited for this last proposition. I do not find myself able to agree with the learned authors: neither of the cases cited by them at all supports the dictum. . . . [Ayscough v. Bulier, 41 Ch. D. 341, and Walcott v. Lyons, 29 Ch. D. 584, distinguished.]

The provisions of the Rules seem to me to indicate the reverse. Rule 206 makes a sharp distinction between plaintiff and defendant added. The Court is given power at any stage, and upon such terms as are just, to add any person as a party. In the case of a plaintiff, "(3) no person shall be added or substituted as a plaintiff . . . without his own consent in writing thereto to be filed." No such provision is made for an added defendant. In the cases of defendants they are to be served, &c., "and the proceedings as against them shall be deemed to have begun only at the time of service." No such provision is made for plaintiffs. It seems to me that the Court has power, at any time, to add or substitute plaintiffs (they having filed their consent), and that such addition or substitution will take effect, in the absence of provision to the contrary, as of the teste of the writ. Terms may, indeed, be imposed. as in the case in 41 Ch. D., and one of these may be that they shall be entitled only to the relief they could have claimed if the action had commenced at the time of their joinder. In many cases —perhaps most—that would be a reasonable term to impose —but not, I think, in a case like this, where the reason for the addition of the plaintiff is technical only. I therefore add the Union Bank as parties ab initio and nunc pro tunc. By reason of an arrangement made at the trial, the Equity company agree that the Union Bank shall be thus added, and it is only in reference to the defence of the Standard that the question is material.

But I do not think that, even with the Union Bank left out, the defence can succeed.

The Union Bank not having given notice of the assignment, as required by the statute, Ontario Judicature Act, sec. 58 (5), at law the action must have been brought by the present plaintiff. I do not find anything in the statutes or decisions which takes away the common law right of the plaintiff to sue. Even had the document been treated as an equitable assignment, it would have been right for the bank, if they sued, to add the plaintiff as a party plaintiff. And if the bank had brought the action, they would have been trustees for the plaintiff for part of the proceeds of

the action, as the amount of the claim to secure which the assignment was given is considerably less than the amount of the policies assigned. That the plaintiff has an interest in the subject matter of the action is most manifest—and the Union Bank not asserting any claim adverse to the plaintiff, but lying by and allowing him to bring and proceed with the action as sole plaintiff, I do not think that the defendants could take advantage of the assignment. It was, of course, right that the bank should be made a party, that the rights of all interested might be protected.

Some minor defences are to be now considered.

The defence of the Equity Fire Insurance Company as to subsequent insurance is based upon the following facts. On 3rd August the plaintiff made an application to the Equity company for a further insurance of $1,000 upon the same building, and received an interim receipt, No. 10166. No policy was actually sent, but the interim receipt was not cancelled, and, therefore, the company held the plaintiff insured for the further sum of $1,000 during the currency of this interim receipt, i.e., at least 30 days from 3rd August, viz., to 2nd September. Some correspondence is put in between the company and their agent, shewing a willingness on the part of the company to take the risk at a premium of 3 per cent. I do not think the reason is material: at all events on 3rd September the plaintiff, instead of taking the Equity company's policy, took out insurance in the Atlas Assurance Company for the same amount, in substitution for the insurance under receipt No. 10166, and through the same agent. It is admitted that the Atlas is a company of the highest standing, and no exception can be taken to it in any way. The agent at New Liskeard, being the agent for both the Atlas and Equity companies, sent into the Equity head office at once a letter (not dated, but received in Toronto 5th September), and the interim receipt, with an intimation that it was not wanted. The fire took place, as I have said, on 4th September, 1905. If the plaintiff had, immediately after receiving his interim receipt from the Atlas, sent word to the Equity, it is possible that that company might have received the letter before the fire actually took place—but no time could be lost.

The Equity company now say that this is subsequent insurance to which they did not assent, and therefore the policy is void by the 8th statutory condition, which provides that "the company is not liable for loss . . . if any

subsequent insurance is effected by any other company unless and until the company assents thereto, or unless the company does not dissent in writing within 2 weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected." On 4th September the company wrote their New Liskeard agent that they would issue a policy on their interim certificate 10166 at 3 per cent.; and it is to be remembered that they had themselves had an insurance under that receipt for 30 days. I think that this point is entirely covered by the decision of the Court of Appeal in Mutchmor v. Waterloo Mutual Fire Insurance Co., 4 O. L. R. 606, 1 O. W. R. 667. And I cannot see that it makes any difference that in the Mutchmor case the former insurance, for which the subsequent insurance was taken in substitution, was in another company than that consenting, while in the present case the former insurance is in the very company itself. I think this defence fails.

As regards the defence of prior insurance undisclosed, this seems to have been under a mistake of fact as to the company. When Graydon went out to New Liskeard and saw the plaintiff, he (Graydon) told him (the plaintiff) that the mortgagees had an insurance upon the property for $400 in the Norwich Union Fire Insurance Company sufficient to cover their claim under a mortgage. Accordingly, in the pro forma proofs of loss, the other insurance on the property was mentioned as $1,400. This was the first that the plaintiff knew of any insurance put on by any one but himself, but he accepted the statement of Graydon. In the proofs of loss put in afterwards, he placed the other insurance at the sum put on by himself, viz., $1,000.

It was thought at the trial that there had been this insurance in the Norwich Union, and I gave leave, upon terms that the Equity company should abandon all objection to the Union Bank being added as a party ab initio, that the facts as to this prior insurance should be proved on affidavits, or by joint statement of counsel. Such a statement is now put in. From it, it appears that there was no insurance in the Norwich Union, but an insurance for $400 was placed in the Union Assurance Society on the property, December, 1905, in the name of A. & A., New Liskeard, apparently the original mortgagees—that the society were notified by the mortgagees of the fire on 5th September, and paid $374.59

to the mortgagees on 27th September. I do not think that such an insurance as this put on by mortgagees for their own protection, and of which the owner was entirely ignorant, could void the policy, and indeed this is admitted by Mr. Raney. See Park v. Phœnix Insurance Co., 19 U. C. R. 110; May on Insurance, 4th ed., sec. 365, and cases cited. But he argues that it shews fraud on the part of the plaintiff, in first setting out the other insurance at $1,400 and then at $1,000. So far as actual fraud or intention to do anything wrong is concerned, I find the plaintiff quite innocent of anything of the kind; and I am unable to give any effect to the contention of the company.

It remains now only to notice the defence of incumbrances undisclosed. The fact is that the plaintiff, upon buying the property, had paid his solicitors the full purchase price, and supposed that he owned the property free from all incumbrances. The solicitors, however, found that a mortgagee to a small amount (about $300) refused to take his money and discharge his mortgage, so they, months after the insurance was effected, repaid to their client the amount. No intentional misrepresentation as to title was made. The manager of the company admits that the disclosure of the mortgage still subsisting was not material, and would have made no difference. I do not think that this brings the case within the first statutory condition. At the trial counsel for the Equity abandoned all right to relief on this ground; and I notice it now only because the point is raised upon the pleadings.

The Standard Mutual Fire Insurance Company set up the defence peculiar to their case, that the assignment to the J. J. McLaughlin Co. Ltd. divested the plaintiff of his right of action, and that the proofs of loss are insufficient. I have already dealt with the first, and my remarks as to the proofs of loss apply equally to this company as to the Equity.

The defences wholly fail, and there must be judgment for the plaintiff for the full amount of the policies, with interest from a day 60 days after the receipt of the proofs of loss. The defendants will also pay the costs—these costs are not to exceed the amount which would have been incurred had the Union Bank been made parties from the beginning, but will include the costs of the trial both at North Bay and Toronto, the argument, and as against the Equity company

a reasonable sum for procuring the facts as to the insurance in the Union Assurance Society.

I cannot part with these cases without again deprecating the course taken by these companies. While at the Bar, as I have said, I had very considerable practice in insurance cases: and I think I may say that it was the universal custom of all respectable companies not to raise technical defences such as have been raised in these cases, except in cases in which there was well grounded suspicion of fraud on the part of the insured. Judged even by the low ground of expediency, it was found for insurance companies as for others that "honesty is the best policy." And I must say it is rather against one's ideas of honesty and fair dealing that a claim such as this, having no suspicious circumstances and nothing to indicate aught but fair dealing, should be contested upon the grounds taken here. The Court cannot prevent an insurance company taking advantage of everything law or practice entitles them to, technical or otherwise: but it might be well for insurance companies to consider whether such defences as these are not to some extent responsible for the feeling that notoriously exists in the country against them.

CARTWRIGHT, MASTER. NOVEMBER 11TH, 1907.

CHAMBERS.

TODD v. LABROSSE.

Summary Judgment—Rule 603—Action on Promissory Note—Nominal Plaintiff—Defence—Renewal—Payment—Indemnity—Action in Foreign Court—Stay of Proceedings—Addition of Parties.

Motion by plaintiff for summary judgment under Rule 603 against defendant Labrosse; and motion by defendant Labrosse to add parties and stay proceedings in an action brought in Quebec.

A. B. Morine, for plaintiff.

J. M. Ferguson, for defendant Labrosse.

THE MASTER:—This action is against the two last indorsers only of a promissory note which is held by a nominal plaintiff, to whom it was admittedly assigned for the purpose of suit after maturity; and who therefore holds it subject to all its equities. . . .

The plaintiff has made the usual affidavit. On this he was cross-examined, and shews, as was to be expected, that he knows nothing about the facts except what he has been told. He states that he is lending his name to the Imperial Bank.

It was argued by Mr. Ferguson that this was not a compliance with Rule 603. He does not even know if the note has been renewed, and never asked about this, nor can he say why the other parties to the note are not being sued, or why this motion is made only against Mr. Labrosse.

On the other hand, Labrosse has filed a lengthy affidavit, on which he has not been cross-examined, and which must therefore be accepted as true. In it he sets out the facts and gives a history of the whole transaction out of which this note arose. In the 14th and 15th paragraphs of that affidavit he alleges that this note has been renewed by Fortier and Mann, and this is corroborated by an affidavit of Mr. Lamothe, who is acting for these defendants in an action brought against them in Quebec by Mann and Fortier. Labrosse also states that the note has been paid by Mann and Fortier, and that this action is really brought at their request to assist them in the Quebec action, which is for a declaration that Labrosse and his co-defendant are bound to indemnify them against this note.

The defendant has moved under these circumstances to have the Imperial Bank and Fortier and Mann added as defendants. But this does not seem necessary for the determination of the question between plaintiff and the present defendants, and, therefore, they should not be added against the will of the plaintiff. See Reid v. Goold, 13 O. L. R. 51, 8 O. W. R. 642, and cases there cited.

That motion is, therefore, dismissed with costs to the plaintiff in the cause.

Taking into consideration the facts as developed in the material filed on these motions, I think that there are therein "disclosed such facts as should be deemed sufficient to entitle" the defendant to have the action tried out in the regular way after full disclosure both of documents and parties, including the assignor of the nominal plaintiff,

if so desired. That in a case of this kind summary judgment should not be granted seems to follow from the decision in cases such as Imperial Bank v. Tuckett, 6 O. W. R. 121, 161. As I have lately pointed out in that case, the defendant, after having my order for judgment set aside, did not even appear at the trial.

The Courts of this province have no power to stay the proceedings in Quebec, and the motion to that effect cannot be granted. But, though it might not be unreasonable to make such an order, if the power to do so existed, it certainly seems only right and just that the action should proceed in the regular way.

The plaintiff, it is conceded, took the note sued on, subject to all its equities; what these are cannot be determined on an interlocutory motion with conflicting affidavits.

The motion for judgment, in my opinion, must be dismissed. The costs will be in the cause.

CARTWRIGHT, MASTER. NOVEMBER 11TH, 1907.

CHAMBERS.

ARNOLDI v. COCKBURN.

Particulars—Statement of Claim—Compliance with Previous Order—Pleading—Evidence.

After the decision reported ante 641, the plaintiff submitted to examination on the defendant's motion for further and better particulars, and that motion was argued on 7th November, 1907.

F. E. Hodgins, K.C., for defendant.

R. McKay, for plaintiff.

THE MASTER:—The point for decision appears to be this: has the order of 16th May been substantially and reasonably complied with?

That order was made because (see 9 O. W. R. 886), plaintiff's "is such a substantial claim that defendant is entitled to know how it has been arrived at before delivery of his defence."

The plaintiff has furnished particulars covering 13 typewritten pages, and giving details as to 73 different days.

It is objected that these are not sufficiently definite, and in some respects are not confined to the matters set out in the statement of claim.

In his examination as a witness on this motion, the plaintiff gave the sources of information from which the particulars were made out. He says he has a mass of material from which these particulars may be supplemented when he has to be prepared for trial, and this material is gone over for that purpose. At that stage, by the usual discovery, defendant may obtain further information if it is thought necessary to do so.

The amount claimed is, no doubt, large, but the issue to be tried between the parties is very simple: What is plaintiff entitled to be paid for services which were admittedly rendered?

As yet no statement of defence has been delivered. Defendant may now make such an offer by his pleading and payment into Court as will terminate the action.

However that may be, I think that the plaintiff has given sufficient details at this stage to enable defendant "to know how the sum of $7,500 was arrived at" (see p. 886 supra), to enable him to form a judgment of the reasonableness of the demand.

The defendant should plead within a week—and the costs of this motion should be in the cause.

Clause 70 of the particulars was expressly objected to. I think it was intended to give defendant notice that the evidence of the plaintiff at the trial would necessarily be of a general characeter, and that the names of the 25 gentlemen are given so as to indicate the nature of the services for which, rightly or wrongly, the plaintiff is making his claim in the action.

The plaintiff did not seem anxious to retain it, if defendant thinks he is in any way prejudiced by it. This appears to relate to the part other than the 25 names mentioned.

BRITTON, J. NOVEMBER 11TH, 1907.

TRIAL.

PAYNE v. TEW.

Fraudulent Conveyance—Interest in Land under Agreement for Purchase—Assignment by Purchaser to Daughter—Action to Declare Daughter Trustee for Father—Evidence—Honest Transaction.

Action upon a money demand for $1,865.89 against defendant James R. Tew, and, on behalf of all creditors of defendant James R. Tew, to have defendant Lillian M. Tew declared a trustee for her father, James R. Tew, of a house and land in the township of Raleigh.

Ward Stanworth, Chatham, and W. F. Smith, Chatham, for plaintiff.

W. E. Gundy, Chatham, for defendant Lillian M. Tew.

No one appeared for defendant James R. Tew.

BRITTON, J.:—On 22nd October, 1896, defendant James R. Tew entered into an agreement with the Dominion Building and Loan Association, Toronto, for the purchase of the property mentioned for $1,302, payable in 186 equal consecutive monthly instalments of $7 each, the first to become due and payable on 1st December, 1896. This agreement was a very onerous one for the purchaser. Besides providing for payment of insurance and taxes, the purchaser was to pay interest after default of any instalment at 9 per cent. per annum, compounded monthly upon the amount in default. If the payments fell into arrears for two months, all payments were to be treated as payment of rent at the rate of $7 a month, etc., etc., etc.

The defendant James R. Tew was called an easy-going man—a man of small means; he was first a peddler, then worked at a monthly wage, and for some two or more years prior to June, 1906, he sold meat by retail, getting his supplies from plaintiff, who was a butcher, and who sold meat by the carcase or side.

On 4th July, 1906, James R. Tew owed the plaintiff a large sum of money—the plaintiff says $1,815.89; the

other defendant says not nearly so much. Plaintiff alleges that prior to that date James R. Tew and his daughter Lillian M. Tew entered into a fraudulent scheme or conspiracy for putting this agreement for the purchase of property out of the hands of James R. Tew and into the hands of his daughter Lillian, for the purpose of defeating, defrauding, and delaying the creditors of James R. Tew, and, in pursuance of that scheme, James R. Tew assigned the agreement to Lillian, and she procured a conveyance of the land mentioned from the Dominion Permanent Loan Co. (the successors of the Dominion Building and Loan Association) to herself. The plaintiff asks that this assignment be declared fraudulent; that Lillian be declared a trustee; and that a sale of this land be ordered for the benefit of the creditors.

The evidence establishes that James R. Tew was not a good provider for his family. He seldom furnished money for household or family expenses, and was not a success in business. On the other hand, his wife and children were and apparently are workers. Mrs. Tew taught music, and the children were wage-earners as soon as able to work.

Prior to 22nd October, 1896, James R. Tew rented the property in question, paying $5 a month as rental, but upon the property being offered to him for what was called $700, payable on the monthly instalment plan of $7 a month, the family wanted the place purchased, and so the father entered into the agreement mentioned. The first monthly instalment became due on 1st December, 1896. By a pass book produced (exhibit 14) there is shewn a credit on 8th January, 1897, of $31 applied in full for December, 1896, January, February, and March, 1897, instalments, and $3 applied on the April instalment. This sum was really allowed for painting, which by the agreement the vendors agreed to pay for, and which James R. Tew did or waived. The instalments were paid, not always promptly, but paid down to December, 1897, the December instalment having been paid on 20th January, 1898. Then the instalments due January, February, and March, 1898, were not paid and went into default. The story of the defendant Lillian is that in April, 1898, her father talked of abandoning the agreement for purchase and of falling back upon the renting plan, presumably treating the agreement as cancelled, and

paying only $5 a month as rent, and not on account of purchase. The family urged against this, and then the father told Lillian that if she liked to take hold of the matter and keep up the monthly instalments, she could have the property. She agreed to this, and at first, perhaps for 2 years, she was assisted by her mother, as she, Lillian, was ill and not able to work steadily, but after that, and until April, 1906, she furnished the money, generally paying it in to her mother, who in turn paid it to the agent of the Dominion company. She says she saved $1.75 each week out of her wages, and at the end of the month gave $7 to her mother for the payment of these instalments. The instalments were paid, as appears by the pass-book, but not by the mother with any such promptness or regularity as Lillian says they were paid to the mother. As to this offer to Lillian and the acceptance by her, her evidence is corroborated by the evidence of her mother, and to some extent by the evidence of her brother. It is almost incredible that these 3, mother, son, and daughter, have committed perjury in swearing to this offer to and acceptance by Lillian, and, if they have not, if the verbal arrangement was really made, and if from that time payments were made by Lillian in pursuance thereof, then it completely negatives any fraud or conspiracy to defeat or delay creditors.

No doubt, it is a very singular thing that a girl of only 16, as was Lillian in 1898, would make an agreement of the kind, but there is less difficulty in accepting the account as given than in coming to a contrary conclusion upon the evidence.

The 3 witnesses, mother, daughter, and son, appeared to be truthful; they were not shaken on cross-examination, and there was not in their appearance in the witness box anything to indicate a want of veracity.

In 1906, and in June or before it, Lillian says she thought of marrying and going to British Columbia. She wanted this house agreement closed, and for the purpose wanted to borrow money and pay the Dominion company off. Mr. White, of Chatham, acted for her. He had also acted as solicitor for her father, and was a money lender too, and a creditor of her father to a small amount. He applied to the Dominion company for a statement, and found that a present payment of $413 would be required to pay off. He asked for a deed for Lillian, upon payment, but the

company replied that there had been no agreement with her, they had no record of her interest, if any, and they required an assignment from her father to her. This assignment was prepared and executed, dated 5th June, 1906. It does not correctly state the amount due, as it was not $450; but the sum of $450 was raised by Lillian upon mortgage to a Mrs. Scott; the difference between $413 and $450 being used up by the conveyancer, Mr. White, in payment of insurance and costs, and of some claim of his against the father, James R. Tew. The mortgage is dated 28th May, 1906. The conveyance impeached is dated 4th June, 1906, and the consideration stated is the original price of the property, viz., $1,302. The assignment of 5th June, 1906, from James R. Tew to the defendant Lillian, does not recite any such agreement as Lillian and her brother and mother set up, but it does recite that Lillian had been making payments under the agreement of 22nd October, 1896, and in consideration of that and of the further payment to the assignor of $450, the assignment is made. As a matter of fact, the payment of the $450 was not made to the assignor, but $413 was paid to the Dominion company, the balance being expenses, insurance, and possibly a small debt to James R. Tew, provided for at the instance of the conveyancer, Mr. White. Very likely he was looking out for himself as well as for the defendant.

White was called by plaintiff, and being ill, his evidence was not taken as fully as it otherwise would have been. He was acting for defendant Lillian, and did not know of the insolvency of James R. Tew, if he was insolvent, and he did not know of any fraudulent intent on the part of any one in the transaction.

Mr. Stanworth, counsel for the plaintiff, in his able argument, cited a great number of cases, all of which I have examined. Many of these were cases where the conveyances were attacked by the grantor on the ground of fraud, or improvidence, or want of capacity, or where made without independent advice. These do not assist me. This is a creditors' action, and the question is fraudulent intent on the part of Tew, the assignor of the agreement, and of his daughter, or on the part of either. I have fully considered the cases bearing upon this point. I think the plaintiff has not succeeded in establishing the fraud.

Then I am of opinion that the assignment must be considered an assignment for value. That follows from what I have said, concluding, as I do, that the defendant Lillian, from her own earnings, through her mother, made the monthly payments to the company, and. in addition to that, borrowed from Mrs. Scott $450 on mortgages on this property, of which the $413 was paid over to the company, and she became liable on her covenant in the mortgage for the $450. Admitting that the father was entitled to the earnings of his daughter until she was 21, that happened in 1903. And since then, if her story is true, she has paid as stated. It so happens that the mortgage to Scott is dated 28th May, 1906. The assignment of the agreement is dated 5th June, and deed from the company 6th June. These facts warrant the inference that Lillian thought she was entitled to a conveyance from the company upon payment of the balance without any formal assignment of the agreement from her father. Her solicitor had ascertained the amount required, and had prepared the mortgage, before the company asked for an assignment of the agreement. This affords a slight corroboration to Lillian's evidence as to her dealings with this property. She got no rent from the property; she paid nothing for board. It is a family matter. No other evidence is available except that of the father, and his present place of residence is not known.

The plaintiff complains that having no notice of the assignment of the agreement, or of the daughter's claim, he was misled and induced to give the father credit upon the belief that the father was the owner. The agreement itself was never registered. There was nothing to shew that James R. Tew had any claim. He had formerly been a tenant, and the public, apart from what might be told, could know of no change. The plaintiff probably asked no questions, and gave credit to an extent he ought not to have done; very likely he was misled by statements of the debtor.

There is this further to be said about the agreement, the assignment of which is attacked. On 6th June, 1906, the date of the assignment, the monthly instalments due on 1st May and 1st June, 1906, had not been paid. By the terms of the agreement it was in the power of the Dominion company to say that the agreement on their part to sell was forfeited, and that all the money paid should be applied on rent. The company were not bound to recognize the

claim of either defendant as purchaser; that they did recognize the claim of the defendant Lillian M. Tew was an act of indulgence to her. If this agreement had stood, upon the absconding of James R. Tew, without any assignment of it having been made, the company would not be obliged to recognize the claim of any creditors.

No one appeared for any creditor to make any monthly payment. If the company had objected to recognize the alleged rights of creditors, and had stood upon their legal right, this property could not, in my opinion, after these defaults and under the agreement, have been reached under an execution against James R. Tew.

The action against the defendant Lillian M. Tew should be dismissed with costs.

NOVEMBER 11TH, 1907.

DIVISIONAL COURT.

ALEXANDRA OIL AND DEVELOPMENT CO. v. COOK.

Fraud and Misrepresentation—Sale of Oil Leases to Syndicate —False Representations as to Value—Formation of Company—Assignment of Leases to—Secret Profits—Promoters —Account—Action by Company—Measure of Damages—Claims of Individual Members—Reservation of Rights.

Appeal by defendants from judgment of TEETZEL, J., in favour of plaintiffs in an action to recover secret profits made by defendants in the sale of oil leases to a syndicate out of which was formed the plaintiff company.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

E. D. Armour, K.C., and T. F. Slattery, for defendants.

G. H. Watson, K.C., and J. F. Edgar, for plaintiffs.

RIDDELL, J.:—This action arose out of a barefaced swindle practised by the defendants Cook (residing in the township of Marmora, in North Hastings) and Boerth (residing in Detroit.) Their victims were a number of persons in Ontario. . . . This fraud has been found by the

trial Judge; and before us no attack was made upon his findings. It appeared to me upon the argument that most of the matters pressed upon us for the respondents had no relevancy to the matters really in dispute, the whole question being: "Granted the facts as found, can the plaintiffs succeed? Suppose that the defendants did deceive and defraud these gentlemen, must the relief given in the judgment appealed from necessarily follow?"

The facts seem to be as follows. Cook became the owner of certain "oil leases" or an option in such "oil leases" (it is of no importance which.) He did this with the intention of selling out to a company which he intended to form to take over the property and to make a profit in so doing. He associated with him Boerth, who is said to have a glib tongue, and the two laid siege to a number of friends of Cook's. Cook and Boerth represented that they could get valuable oil leases, and invited these "friends" to join and form a syndicate with them, paying $1,000 each, and to form a company to take over these oil leases. They were guilty of the grossest fraud in their statement of the price to be paid, giving a figure which was much in excess of the true amount paid or to be paid. The friends, dazzled by the glowing prospects held before their eyes, each contributed $1,000, and thereby became a member of the syndicate and entitled to a one-twentieth interest in the enterprise. They were defrauded and cheated by the defendants, but the legal effect was that, after the payment by each "friend" of his $1,000, he became a cestui que trust of Cook in the property acquired or to be acquired by him. After a number of subscriptions had been obtained, Cook started operations, and "struck oil."

Then about 31st August, 1905, a meeting was held at the Rossin House (Toronto) by the members of the syndicate, or some of them, to take steps to form a company. At that meeting false and fraudulent statements were presented by Cook and Boerth as to the price of the oil leases, and these statements apparently accepted as true by the others present. A committee was selected to form the proposed company, this committee being composed of Cook and two others, against whom no imputation is made. A charter was obtained 11th October, 1905, upon the application of five persons named by Mr. Edgar, but having no financial or other

interest in the concern—they were merely selected for the formal constitution of the company.

At a meeting of the board of directors of the company holden 13th November, 1905, an indenture of assignment of leases, dated 30th November, 1905, by Cook to the company, was read to the meeting.

This assignment recited that Cook was the holder of certain leases as trustee for himself and 19 other persons (naming them); that he, at the request and with the approval of the said persons, had agreed to sell, etc., these leases to the company for $60,000, to be paid by the issue to the 20 persons (including Cook) of 600 fully paid up shares of $100 each, in equal proportions, i.e., 30 shares to each; and then the indenture went on to assign over the leases to the company.

Upon this indenture being read, the directors passed a by-law, No. 3, which recites that "Cook is the holder in trust of certain oil and gas leases . . .," and that "Cook holds the said leases in trust for himself and the following persons in equal shares, namely (naming them); and that "Cook, at the request and with the approval of the said . . persons, has agreed to sell . . . to the company . . for . . $60,000, to be paid by the issue to the said 20 persons, including the said Cook, of 600 fully paid up . . . shares of $100 each, in equal proportions, that is to say, 30 of such shares to each of the said persons," and "the said Cook has . . assigned," etc. The by-law then enacted that 30 fully paid up shares should accordingly be issued to each of the 20 named persons.

The stock to be issued was fixed at $60,000, instead of $20,000, as had been originally intended, because, as Mr. Edgar tells us, they had discovered oil, and consequently it was thought that the leases which with oil undiscovered were worth $20,000, with oil discovered were worth 3 times as much. It would seem that everything in the way of forming the company, making contracts . . for and in the name of the company with Cook, the by-laws passed, etc., was done at the direction of Mr. Edgar.

The leases having cost a much less sum than represented by the defendants, and they having made up for and presented at the meeting of the syndicate a false and fraudulent statement of such cost, what are the rights of the parties?

. . . .

While it is manifest from the evidence that it was the intention of Cook from the beginning to form a company to take over the leases, and while the receipts given by him to his victims indicated this, it may not necessarily follow that he must account for secret profits. . . . .

The receipts read: "Received from . . the sum of one thousand dollars in payment for a one-twentieth interest in certain oil leases consisting of 2,647 acres, more or less, located in the county of Essex, Ontario, for which I agree on or before the first day of September, 1905, to form an oil development company, absorbing the above mentioned oil leases, and to give to the said . . . a certificate duly authorized by the said prospective company, entitling him to a one-twentieth interest in said company. John W. Cook."

I take it that, all that was done in forming the company being done in pursuance of the agreement set out in the receipts, Cook not objecting, but himself a member of the committee, the company must be considered as having been formed by Cook. Had he objected to the company being formed as it was, the case might be different, but, in the circumstances, he must be held to have formed the company in performance of his contract set out in the receipts—and I consider it a matter of perfect indifference that there were nominal shareholders and nominal directors who affected to act for the company. Cook then was, in my judgment, so far a "promoter" of the company; and I am unable to distinguish this case in principle from Gluckstein v. Barnes, [1900] A. C. 240. . . .

]In re Lady Forrest Gold Mine, [1901] 1 Ch. 582, distinguished.]

In the case now under consideration we must hold, upon all the evidence, that there was the grossest fraud practised upon those who were expected to form the company: and upon the formation of the company the fraudulent representations were continued to the directors of the company in that they were mere figure heads, and the real actors were Cook, the tort-feasor, and Edgar, his innocent victim.

But this resulted in the sale to the company of property not of Cook and Boerth, but of a syndicate of 20 persons, including these—and consequently (as regards the company) the gain to Cook and Boerth was not the difference between the pretended and actual price of the leases, but a fractional portion thereof.

Must they, then, account for the whole difference in price? I think so. It was their clear duty as trustees to have disclosed the whole transaction. Instead of that, they neglect this duty and induce the company to purchase property as having been bought for $20,000, which really cost much less. The measure of damages in that case would be the loss to the company, and that is the difference in value of the leases in fact and as represented. The value in fact, in the absence of other evidence, is the price paid, and therefore the defendant Cook should pay the difference between the $20,000 represented value and the actual amount paid for the leases originally. In the circumstances of this case, no evidence should now be allowed as to the value of the leases in fact.

Hirsche v. Sims, [1894] A. C. 654, may be looked at as containing some remarks not inapplicable here.

I have read the many cases cited by counsel and some others, but I find nothing authoritatively laid down opposed to my conclusions.

In addition to the claim of the company, it may well be that each of the persons defrauded has a cause of action. This is not the same cause of action as that of the company, and the trial Judge was right in not giving relief of that character in this action. But the damage to these will not necessarily be made good by the payment to the company. Some may have sold, or there may be other circumstances. Therefore the judgment should have expressly provided that it was without prejudice to any action to be brought by any one claiming to have been defrauded. The position of Boerth canot be successfully distinguished from that of Cook; they were partners in this fraudulent scheme.

With the modification mentioned, the judgment below should be affirmed, and the appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., also concurred.

CARTWRIGHT, MASTER. NOVEMBER 12TH, 1907.

CHAMBERS.

HARCOURT v. BURNS.

Executor—Renunciation of Probate — Previous Intermeddling—Action on Promissory Note Signed by Defendant as Executor—Personal Liability—Leave to Enter Conditional Appearance.

Motion by defendant to set aside the writ of summons and service thereof, or for leave to enter a conditional appearance.

W. H. Blake, K.C., for defendant.

W. H. Price, for plaintiffs.

THE MASTER:—The defendant is sued as executor of the will of his brother. He moves, "personally and not as executor," before appearance. . . .

One J. W. Burns died on 12th November, 1906, having made a will, of which the defendant was made sole executor. He never took out letters probate, though it was stated that he had made application therefor, and on 27th February, 1907, he executed a formal renunciation, which seems to have been filed in the Surrogate Court some time afterwards. Thereupon, at the request of the widow, letters of administration with the will annexed were granted to the Toronto General Trust Corporation. Before all this was done, the defendant on 18th December, 1906, gave a promissory note to the plaintiff for $2,000, which he signed as executor of J. W. Burns. This on 21st January, 1907, was renewed in like form, and the renewal is the note sued on herein. . . .

It was argued for the plaintiffs that, as the defendant had intermeddled, he could not be afterwards allowed to renounce: Jackson v. Whitehead, 3 Phillim. 579; and that a slight act of intermeddling with the assets will preclude an executor from afterwards renouncing: per Sugden, L.C., in Cummins v. Cummins, 3 Jo. & Lat. at p. 91. Counsel for the plaintiffs also referred to Williams on Executors, 10th Eng. ed., p. 199, to the same effect and as shewing that a renunciation is not effective until recorded and filed, as until then it may be withdrawn. Wentworth on Executors

(1829), pp. 91-94, was cited as shewing what is such an intermeddling as will preclude an executor from afterwards renouncing. To the same effect, it was contended, is the judgment of North, J., in In re Stevens, [1897] 1 Ch. 422, affirmed [1898] 1 Ch. 162 (see p. 171).

It will be for the plaintiffs to consider whether they should not apply to have the grant to the Toronto General Trusts Corporation revoked, and the defendant required to take probate, or else have the corporation added as defendants to this action. It is not shewn whether the acts of the defendant were known to the Judge of the Surrogate Court, and none of the papers leading to the grant are in evidence on this motion.

If one of these courses is not taken, it will be useful, if not necessary, for the plaintiffs to consider whether a recovery in this action in its present form will be of any practical benefit to the plaintiffs. . . .

It seems right to allow the action to proceed if plaintiffs so desire, giving defendant leave to enter a conditional appearance, so as to allow him to plead "ne unques executor," and have the whole matter decided by a Court which shall have heard all the evidence to be given on both sides.

If consideration can be proved, might not the defendant be liable personally, even if the estate is not held to be bound?

The defendant should appear forthwith. Costs will be in the cause.

CARTWRIGHT, MASTER. NOVEMBER 13TH, 1907.

CHAMBERS.

MADGETT v. WHITE.

Parties—Addition of Defendant—Agent—Authority—Costs.

Motion by plaintiff for an order adding one Moore as a party defendant.

T. N. Phelan, for plaintiff.

Grayson Smith, for defendants.

THE MASTER:—The case is ready for trial. . . Moore acted as agent for defendants in the matter out of which this action arose. . . The statement of claim alleges that

it was a term of the agreement between the parties that defendants should give plaintiff indemnity against all claims which the Goodison Co. might have against him, and that Moore represented that he had authority from defendants to so agree. It further states that defendants have refused to give such indemnity, and repudiate Moore's authority to make any such bargain.

This statement of claim was delivered on 27th June last, and it was on account of the repudiation of Moore's authority before action that the suit was instituted. The defendants are, therefore, at a loss to understand why Moore was not made a party in the first instance or what has occurred since to make the plaintiff wish to have him added.

It was further objected that this action was really being brought by the Goodison Co., and that it would be time enough to bring in Moore when that company attacked Madgett. It does not concern us at present whose action it is really. The plaintiff makes the giving of an adequate indemnity part of his agreement, and as one reason why he gave the notes now sought to be recovered.

Moore might have been joined as a defendant in the first instance, and this would not have been objectionable: see judgments of the Chancellor in Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, 614, and Evans v. Jaffray, ib. 614. . . .

This being so, the only matter for consideration is the disposition of the costs. As plaintiff seems to have known all along that defendants denied any authority of Moore to give a promise of indemnity, I think that all costs lost or occasioned by this order should be to defendants in any event.

ANGLIN, J. NOVEMBER 13TH, 1907.

CHAMBERS.

CANADA SAND LIME BRICK CO. v. OTTAWAY.

Mechanics' Liens — Statement of Claim — Computation of Time for Filing—Commencement of Action—Long Vacation—Statute and Rules of Court.

Appeal by plaintiffs from order of Master in Chambers, ante 686, striking out the statement of claim.

W. Proudfoot, K.C., for plaintiffs.

W. A. McMaster, Toronto Junction, for defendants.

ANGLIN, J.:—The proceedings are under the Mechanics' Lien Act to enforce a claim for materials. The last materials supplied by the plaintiffs were furnished on 30th May, 1907. Plaintiffs' lien was registered on 29th June, 1907. The statement of claim was filed on 23rd September, 1907.

Section 24 of the Mechanics' Lien Act, R. S. O. 1897 ch. 153, provides that "every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of 90 days after the . . . materials have been furnished or placed . . . unless in the meantime an action is commenced to realize the claim," etc.

Section 31 provides: (1) The liens created by this Act may be realized by action in the High Court according to the ordinary procedure of that Court, excepting where the same is varied by this Act. (2) Without issuing a writ of summons, an action under this Act shall be commenced by filing in the proper office a statement of claim verified by affidavit."

For the appellants it is contended that the 90 days allowed by sec. 24 must be computed exclusively of long vacation. If this contention is correct, the statement of claim was delivered in time; if not, the lien had ceased to exist at the time the statement of claim was delivered.

Under Rule of the Supreme Court of Judicature No. 352, the time of long vacation is to be excluded in computing the times appointed or allowed by the Rules for filing pleadings. The time in this case is appointed not by a Rule, but by statute. Rule 352, therefore, has no application.

Rule 351 prohibits the delivery of pleadings in long vacation except by consent or direction of the Court or a Judge. I am informed that the practice in the central office is to receive and file statements of claim under the Mechanics' Lien Act during long vacation without such consent or direction. Assuming that Rule 351 would otherwise be applicable, sec. 31 excludes its application, if the procedure or practice prescribed by that Rule is varied by the statute. The statute prescribes for the commencement of mechanics' lien actions a period of 90 days with-

out regard to vacations. This provision, in my opinion, involves such a variation of the procedure under the Rules in regard to delivery of pleadings as necessarily precludes the application of Rule 351 to pleadings delivered under the Act. Were Rule 351 applicable, having regard to the unqualified terms of sec. 24 of the Act, the lien-holder would, in my opinion, be bound to obtain either the consent of the defendant or the direction of a Judge for the filing of his pleading during vacation, and could not in default claim to have the time prescribed by sec. 24 extended.

In my opinion, the decision of the Master is entirely right, and the appeal must be dismissed with costs.

ANGLIN, J. NOVEMBER 13TH, 1907.

CHAMBERS.

REX v. FARRELL.

Liquor License Act — Conviction as for Second Offence—Sentence to 4 Months' Imprisonment—Motion for Discharge under Habeas Corpus—Right of Court to go behind Conviction Regular on its Face—Jurisdiction of Police Magistrate—Clerical Error in Date of Warrant of Commitment—No Recorded Evidence of Existence of Prior Conviction—Provision of Act Requiring Evidence to be Taken down in Writing—Admission of Defendant—Variance between Information and Conviction—Defendant not Allowed Fair Opportunity to make his Defence—Refusal of Adjournment.

Motion by defendant, upon returns to writs of habeas corpus and certiorari, for his discharge from custody in the common gaol of the county of Peel, under a conviction by Robert Crawford, police magistrate for the town of Brampton, for selling liquor without a license, after a previous conviction for a similar offence. The defendant was sentenced to 4 months' imprisonment as for a second offence. He based his claim for discharge upon the following grounds:—

(1) That the police magistrate for Brampton had no jurisdiction, the offence being charged as having been com-

mitted in the township of Toronto, and without the limits of the town of Brampton.

(2) That the warrant of commitment under which the prisoner is held bears date 7th October, 1907, whereas the information upon which the conviction is based was laid upon 8th October, and the conviction bears date 9th October.

(3) That upon the papers returned there appears no evidence of a former conviction.

(4) That the inquiry as to a former conviction took place, if at all, before the defendant had been found guilty upon the then pending charge.

(5) That he was not allowed a fair or reasonable opportunity to make his defence.

T. J. Blain, Brampton, for defendant.

J. R. Cartwright, K.C., for the Attorney-General.

ANGLIN, J.:—The following facts are established by the evidence before me:—

The information as originally laid appears to have charged offences committed in the township of Toronto on 1st and 7th October. The summons served upon defendant in the afternoon of 8th October required him to answer on the next day a charge laid in these terms. Upon being served, the defendant immediately telegraphed his solicitor, Mr. Blain, notifying him that he wished him to attend at the Brampton court house on the following afternoon. In reply he received a telegram requesting him to meet Mr. Blain at Brampton in the morning. He did so, and, having then for the first time informed Mr. Blain of the nature of the charge laid against him, learned that it would be impossible for Mr. Blain to attend in the afternoon, owing to a previous engagement requiring his presence in the city of Toronto. Mr. Blain explained to the defendant the steps which it would be necessary to take to properly present his defence, including having an analysis made of the beverages sold by him, in order to shew that they were non-intoxicating, the defendant contending that he had sold only "local option beer," which he alleged to be non-intoxicating. Mr. Blain and the defendant then attended on the police magistrate, and Mr. Blain explained to him the reasons why he would be unable to be present at the trial in the afternoon, and why, in any event, he could not be prepared to proceed with the defence at the time appointed, and requested an

adjournment to afford an opportunity of preparing a proper defence. Mr. Blain urged the magistrate to telegraph or telephone to Mr. Ayearst, the provincial inspector, who was prosecuting, notifying him that the proceedings could not go on at the time appointed, and would be adjourned. The magistrate refused to communicate with Mr. Ayearst and declined to consent to any adjournment. Being obliged to leave town immediately, Mr. Blain thereupon gave to the defendant a letter addressed to Mr. Ayearst, explaining to him the position, and asking him in fairness to agree to an adjournment, expressing his willingness to attend at any future date which might suit the convenience of the prosecutor and the magistrate.

The defendant attended, pursuant to the summons served upon him, at the court house in Brampton, at 2 o'clock in the afternoon of 9th October, 1907. He delivered Mr. Blain's letter to Mr. Ayearst. He again applied for an adjournment. The magistrate refused, and, in answer to the explanation of the defendant that he had no lawyer to take his case or advise him, the magistrate stated that he would get a lawyer for him. He then left the bench, and on his return informed the defendant that Mr. Morphy, a solicitor of Brampton, would be present in a few minutes, and that he could have Mr. Morphy act for him.

When Mr. Morphy appeared, the defendant explained to him his desire for adjournment. Mr. Morphy pressed for an adjournment, which the magistrate again refused; but, upon Mr. Morphy persisting in his demand for an adjournment, the magistrate offered to grant an adjournment upon payment of costs of the day, which he said would be about $10. The magistrate says in his affidavit that the defendant proceeded with the case rather than pay this sum of $10. The defendant, on the contrary, says that he expressed his willingness to pay the $10 rather than proceed with the trial on that day, but that the magistrate, notwithstanding his (defendant's) readiness to pay, then refused to adjourn the case, and directed the trial to proceed.

Mr. Morphy, for the defendant, took exception to the information upon which the magistrate was proceeding, which, as it appears, as then framed, charged that the defendant had committed the offence of selling liquor without a license "between the 1st and 8th days of October, 1907." Thereupon the information was changed so as to charge

the defendant with selling intoxicating liquor without license on 2nd October, 1907. Notwithstanding this amendment, upon the making of which the defendant again pressed for an adjournment, representing that with the date thus fixed he could produce a witness who could give material evidence on his behalf, the magistrate refused to adjourn, and proceeded with the trial.

The evidence taken was sufficient to warrant a conviction for selling liquor without a license. The notes, however, as returned, disclose nothing in regard to any prior conviction. The magistrate makes affidavit that after he had found defendant guilty he asked him whether he had been previously convicted of a similar offence, to wit, on 30th March, 1907, and that the defendant then admitted that he had been previously so convicted. The magistrate adds that this admission was not reduced to writing, and was inadvertently omitted from the evidence. The defendant, however, says that "immediately after I gave my evidence, and before anything further was done by the magistrate, I was asked by . . the magistrate if I had been previously convicted, no time being mentioned as to when I was convicted, and I denied having been formerly convicted, whereupon John D. Orr, license inspector for the county of Peel, was called as a witness and sworn, and some questions asked him, and I was then asked what I had to say to that, and I did not reply."

Mr. John Ayearst makes affidavit corroborating the magistrate as to the defendant having declined to accept an adjournment on payment of $10 and as to his admission of a previous conviction. Except upon these two points, the affidavit of the defendant as to what took place before and during his trial is uncontradicted.

The information returned with the papers refers to the former conviction of the defendant as a conviction for having "unlawfully sold intoxicating liquor." The conviction returned refers to the former conviction as a conviction for having "unlawfully sold intoxicating liquor without the license therefor by law required."

Counsel for the Crown contended that the conviction returned being upon its face regular and sufficient, the Court should not, on a motion for discharge under habeas corpus, go behind the conviction and consider the sufficiency

of the evidence to support it. While it is established by many authorities that the Court will not upon such a motion re-hear the case or weigh the evidence or sit in appeal, upon some of the same authorities it is clear that in this province the Court will examine the depositions to see if there is any evidence to sustain the conviction, and, if none is found, will discharge the prisoner, "since it is only reasonable that a person should not be detained in custody on a conviction which would be quashed if brought before the Court in another form." Of these authorities it is sufficient to refer to Regina v. St. Clair, 27 A. R. 308, from which the sentence that I have quoted is taken (p. 310). See also Ex p. McEachern, 17 C. L. T. Occ. N. 18; Rex v. Collette, 10 O. L. R. 718, 6 O. W. R. 746, 10 Can. Crim. Cas. 286.

Indeed, our statute authorizing the issue of a writ of certiorari in aid of habeas corpus (R. S. O. 1897 ch. 83, sec. 5) states the object of conferring this right to be that the Court may view and consider the evidence, depositions, conviction, and all the proceedings, to the end that the sufficiency thereof to warrant the confinement may be determined. Without authority, the very language of this enactment would seem to require, when papers have been returned pursuant to the certiorari, that the Court should look into them, and should, if it finds the conviction bad and insufficient to justify the commitment, or the evidence and depositions inadequate to sustain the conviction, order the discharge of the prisoner.

There does not appear to be any similar statutory provision in England, and there the return of a conviction regular in form and on its face valid and sufficient is, unless there be a question of jurisdiction, a conclusive answer to a motion for discharge on habeas corpus. The fact that no similar statutory power exists in the Canadian Supreme Court fully accounts for the decision in Regina v. Trepannier, 12 S. C. R. 113.

(1) Robert Crawford . . is police magistrate for the town of Brampton. H. H. Shaver . . is police magistrate for the township of Toronto, in which the offence is charged to have been committed. The conviction recites that Mr. Crawford sat at the request of Mr. Shaver. I think Mr. Crawford's jurisdiction to try the offence charged not open to question: R. S. O. 1897 ch. 87, secs. 17, 27, and 30;

Rex v. Holmes, 14 O. L. R. 124, 127, 9 O. W. R. 750; R. S. O. 1897 ch. 245, secs. 97, 101.

(2) I cannot regard the dating of the warrant of commitment as of 7th October as anything more than a mere slip or clerical error. This certainly would not warrant the discharge of the prisoner held under the warrant. The error in date only appears upon examination of the conviction returned to the writ of certiorari, and is such that no Court should hesitate to permit it to be cured by amendment.

(3) Section 99 of the Liquor License Act (R. S. O. 1897 ch. 245) requires that "the justices shall in all cases reduce to writing the evidence of the witnesses examined before them, and shall read the same over to such witnesses, who shall sign the same." The Ontario Summary Convictions Act, R. S. O. 1897 ch. 90, prescribes that magistrates trying offences against Ontario statutes shall, as to procedure and the conduct of the Court, comply with the requirements of the Dominion Criminal Code respecting summary convictions. By the Criminal Code, sec. 721 (3) and 683, the magistrate is required to put the evidence taken by him in writing.

For the first offence of selling liquor without a license the offender is liable to a maximum penalty of $100 and costs, and is liable to imprisonment only in default of payment; for a second offence he must, on conviction, be sentenced to 4 months' imprisonment: R. S. O. 1897 ch. 241, sec. 72. The proof of the prior conviction is, therefore, of the utmost importance when a charge is laid as for a second offence. In fact such proof is essential to the jurisdiction of the magistrate to impose imprisonment. Having regard to the requirements as to taking the evidence in writing, it was, I think, clearly the duty of the magistrate to put in writing, as part of the evidence in this case, the admission of the accused or the testimony of the inspector, Mr. Orr, whichever it was—upon which he found that the accused had been previously convicted of a similar offence. The return shews that he failed to do so. It would, in my opinion, be most unsafe to permit the evidence returned to be supplemented here by affidavits of the magistrate and the prosecutor as to what evidence was given or what admissions were made by the accused at the trial, upon this vital matter. I must decline to do so.

If the magistrate proceeded as required by the statute (R. S. O. 1897 ch. 245, sec. 101), after finding the accused

guilty upon the pending charge, he could have asked him "whether he was previously convicted as alleged in the information." In the information returned to the certiorari the allegation as to previous conviction is merely that the accused was formerly convicted before H. H. Shaver . . police magistrate for the township of Toronto, of having on 11th March, 1907, sold intoxicating liquor. If the defendant, upon being asked by the magistrate, did admit a conviction as alleged in the information, the offence so admitted might well have been something entirely different from selling without a license, because intoxicating liquor may be sold unlawfully by persons holding licenses. The magistrate had no personal knowledge of the prior conviction, as was the case in Regina v. McGarry, 31 O. R. 486. The prior conviction had to be either admitted or proved before him by competent evidence. If, as his affidavit states, he asked the defendant "if he had previously, to wit, on the 30th day of March, 1907, been convicted of a similar offence," he departed from the statute, in that he inquired concerning an offence other and different from that alleged in the information. If he followed the statute and inquired concerning the prior conviction as alleged in the information, he obtained an admission which was entirely insufficent. This would make it still more dangerous to accept the magistrate's affidavit as to what transpired, in the absence of the record which the statute required him to make. There is no evidence returned to warrant the conviction for a second offence of selling intoxicating liquor without a license, which was essential to support the adjudication of imprisonment for 4 months. It follows that the defendant is entitled to his discharge upon this ground.

(4) It is not necessary to deal with this point, though, had the return shewn evidence or an admission of a prior conviction for the like offence, I should have been inclined to accept the magistrate's statement as to stage of the proceedings at which such evidence or admission was given.

(5) Perhaps the most serious complaint of the defendant, however, is that he was not allowed fair or reasonable opportunity to make his defence. His statement as to the time at which he was served—his inability to procure the attendance of his own solicitor—his repeated requests for an adjournment—the refusal of the magistrate to grant him any time—stand uncontradicted. The offer made by the magis-

trate to grant an adjournment on payment of $10—even if not withdrawn, as the accused swears it was—scarcely requires consideration. The defendant was served on one afternoon in Streetsville to answer a charge on the next afternoon in Brampton. His solicitor was unavoidably absent. His proposed defence, if honest, required an analysis of the beverages he had sold to support it. These facts were all presented to the magistrate. Upon the opening of the trial the information which the defendant had been summoned to answer, and which charged two offences, in contravention of sec. 710 (4) of the Code, was amended so as to charge one offence, and that on a date different from either of the dates named in the summons served. The defendant was then for the first time made aware of the actual charge which he was called upon to meet. Yet he was refused even an adjournment of a few hours, and was compelled to proceed with his trial without witnesses, without opportunity to present a defence, apparently substantial and bona fide, and defended by a counsel chosen not by himself but by the magistrate who tried him.

Section 713 of the Criminal Code enacts that "the person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor, or agent on his behalf." And sec. 104 of the Ontario Liquor License Act permits the amendment of informations before judgment only upon the terms that "if it appears that the defendant has been prejudiced by such amendment . . . the magistrate shall thereupon adjourn the hearing to some future day, unless the defendant waives such adjournment." The defendant was, in the circumstances of this case, entitled to a reasonable adjournment, not as of grace, but as of right—not upon terms, but unconditionally. To refuse to grant such adjournment was in fact and deed to deny him that opportunity "to make full answer and defence" which the Code says he shall have. The distinction between pressing on proceedings so that the defendant has no reasonable opportunity to make his defence, and refusing to hear a defence which he offers to make, is more apparent than real. I have rarely heard of magisterial authority being more arbitrarily and unfairly exercised than it appears to have been by the police magistrate in this case. His course was entirely contrary to

the spirit which happily pervades the administration of justice in this country. While inclined, as far as possible, to disregard trivial and highly technical objections to convictions, and, even when obliged to quash, disposed to protect magistrates when they err through human frailty, while honestly endeavouring to discharge their duties to the best of their ability, Superior Courts may not countenance such a lack of fairness and such a departure from the rules of elementary justice as these proceedings disclose. To permit the confinement of the defendant to continue "would, under the circumstances, be contrary to natural justice and to the principles of our laws:" Regina v. Eli, 10 O. R. 727, 733.

An order will issue for the discharge of the prisoner from custody.

ANGLIN, J. NOVEMBER 14TH, 1907.

WEEKLY COURT.

RE SILVERTHORN.

Will—Construction—Devise—Life Estate—Power of Sale—Disposition of Proceeds.

Motion by the executors for the opinion of the Court upon the construction of the following clause in the last will and testament of James F. Silverthorn, deceased:—

"To my dear wife Elizabeth A. Silverthorn I give and devise all my personal estate of every description for her own use, and that my landed property and the balance that may be coming due on the Samuel Silverthorn mortgage shall be disposed of after the death of my wife, and shall be made into 15 parts, of which 15 parts each of my sons shall receive two-fifteenth parts and each of my daughters one-fifteenth part, and that for as long as my wife Elizabeth A. Silverthorn lives she shall have the use of the landed property, and either use it, rent it, or sell it, and use the money as she thinks best."

W. E. Middleton, for the executors.

W. H. Blake, K.C., for Elizabeth A. Silverthorn.

ANGLIN, J.:—The absolute title of the widow to the personal property is admitted. As to the Samuel Silverthorn mortgage it was conceded by counsel for Mrs. Elizabeth Silverthorn that she took only the income thereof for life. The question for consideration is as to the disposition made of the landed property.

Mr. Blake, for the widow, asks a declaration that she is entitled absolutely to this property. On the other hand, Mr. Middleton, representing the executors, submits that she only takes a life interest in it. I have examined In re Jones, Jones v. Richards, [1898] 1 Ch. 348, Lloyd v. Tweedy, [1898] 1 Ir. R. 5, In re Richards, Uglow v. Richards, [1902] 1 Ch. 76, and In re Tuck, 10 O. L. R. 309, 6 O. W. R. 150, cited by counsel. I have also considered Espinasse v. Luffingham, 3 Jo. & Lat. 186, In re Bush, [1885] W. N. 61, and In re Pounder, 56 L. J. Ch. 113. As pointed out in more than one of these cases, this testator, when desirous of making an absolute gift of property, knew how to do so, as evidenced by his disposition of the personal estate.

Were it not for the concluding words of the devise of the realty—that she may "sell (it) and use the money as she thinks best," there would be no room for the contention that the widow has more than a life interest in the landed property. Mr. Blake, however, argues that the right given her, as he puts it, to use the money arising from the sale of the realty as she thinks best, is inconsistent with any limitation upon her interest in the property itself.

It is a cardinal rule of construction that effect must be given, if possible, to every disposition of property made by a testator; that no words of disposition, no portions of a will, are to be rejected or deemed inoperative, if it is possible, by putting upon other portions of the documents any reasonable construction, to remove apparent inconsistencies and make them effective. If the contention presented on behalf of the widow is to prevail, the careful directions of the testaor as to the disposition of his landed property after his wife's death, and its division into 15 parts, of which the sons shall receive each two-fifteenth parts and the daughters one-fifteenth part, would be entirely ineffectual and inoperative. It is impossible to suppose that if the testator intended to give to Elizabeth A. Silverthorn the entire interest in his landed property, he should have made this careful disposition upon the assumption that there would

still be some remaining interest in that property which might in that event be the subject of disposition by himself. As pointed out in several of the cases above cited, the disposition in favour of the sons and daughters would be repugnant and invalid for uncertainty, if it must be read as intended to operate only upon such portion of the capital received from the sale of the landed property, if it be sold, as might remain after the death of Elizabeth A. Silverthorn, she having the right to use, in her untrammelled discretion, any part of such capital. This, therefore, is not a construction to be favoured.

If the words "as she thinks best" refer to the use to be made of the money arising from the sale of the realty, it might be difficult to maintain that the widow's interest is not absolute. These words, however, do not necessarily relate to the use to be made of the money. I think they rather relate to the widow's option to use the property herself, or to rent it, or to sell it. Any one of these things she may do "as she thinks best," and this quite consistently with her own interest being a life interest only. But in the event of sale she is given the use of the money. So, in the event of not selling she is given the use of the land itself. The testator apparently applies the word "use" to the money—proceeds of the sale of the land, standing in the place of the land itself—in the same way as he applies it to the land. The widow, I think, is limited to the enjoyment of the income to be derived from the investment of the money should she sell the land, her discretion as to the place, manner, and kind of investment being apparently unrestricted. As already pointed out, it is impossible to read the disposition in favour of Elizabeth A. Silverthorn as to the landed property in any other way without rejecting, as wholly inoperative, the preceding disposition in favour of the sons and daughters.

For these reasons, in my opinion, the interest of Elizabeth A. Silverthorn in the landed property should be declared to be a life interest only, with a power to sell the land, if she so desires, and, in that event, a right to invest the proceeds as she deems best, and enjoy the income derivable therefrom during her life. Costs of all parties to be out of the estate, those of the executors as between solicitor and client.

ANGLIN, J. NOVEMBER 15TH, 1907.

CHAMBERS.

RE ARGLES.

Infant—Custody—Issue between Parents—Welfare of Child —Custody Awarded to Mother—Terms—Access of Father —Costs—Direction for Sealing up of Papers.

Petition by the mother of the infant Marion G. Argles for an order awarding her the custody as against the applicant's husband, the father of the child.

George Bell, for petitioner.

J. D. Montgomery, for respondent.

ANGLIN, J.:— . . . While I entertain no doubt as to the proper conclusions upon the issues of fact presented, I refrain from formulating my findings, solely because, if expressed, they must unavoidably reflect seriously upon the moral character, the habits of life, and the conduct of the respondent. The possibility of an appeal from the order which I shall pronounce would afford the only reason for any further expression of my views upon the evidence. But an appellate tribunal dealing with this evidence, all upon affidavits, will have the same opportunities and facilities whch I have for forming a correct appreciation of it.

The welfare of the child—in this case a girl 8 years of age—is the supreme consideration in determining, as between father and mother, who are living apart and whose wishes differ, to which parent its custody shall be intrusted: Re Young, 29 O. R. 665; Re Davis, 25 O. R. 579; the welfare of the child in the largest and widest sense of the term: Re McGrath, [1893] 1 Ch. 143.

Although Dr. Fisher, her own physician, had already deposed that the petitioner is now mentally sane and in a fit state of health to be intrusted with the care of her child; ex majori cautela, the petitioner having been for some two years (1903-05) a patient in the Mimico Asylum for the

Insane, I asked for a report from Dr. Beemer, superintendent of that institution, upon her present condition. In an eminently satisfactory report, shewing that his examination has been most thorough, Dr. Beemer states that there is no reason to doubt Mrs. Argles's present sanity and her fitness from a medical point of view to be intrusted with the care of her child.

Upon the material now before me I am entirely satisfied that the care and custody of her daughter may with perfect safety be committed to the petitioner. I am equally satisfied that the father is not a suitable person to intrust with the responsibility of caring for and supervising the education of this young girl. His past conduct warrants this conclusion. His present mode of life—without a home of his own, a mere lodger in a boarding house—renders it inevitable. The age and sex of the child but confirm it.

The child will now be delivered to the petitioner. An order will issue that she shall have its custody during minority, subject to further order. Provision may be made that the father shall have access to the child and an opportunity of seeing it at the home of the mother on such day and at such time as may suit her convenience for two hours once in each week. The material now before the Court is insufficient to enable me to pronounce any order providing for payments by the father for the maintenance of the child. Leave will, however, be reserved to the petitioner to apply at any time for such an order.

The respondent must pay the petitioner's costs or this application, including Dr. Beemer's fee for examination and report made pursuant to my direction.

In the interests of the child I direct that the material filed in connection with this application—which I declined to hear in camera—be now sealed up by the Clerk in Chambers and forwarded to the central office, to be there retained under seal unless required for use on an appeal from my order, or for future use in other proceedings before the Court.

NOVEMBER 15TH, 1907.

C. A.

REX v. MOYLETT AND BAILEY.

Criminal Law—Keeping Common Betting House—Peripatetic Bookmakers Making and Recording Bets on Racecourse of Incorporated Association—No Booth or other Structure — "House, Office, Room, or other Place"—Criminal Code, secs. 227, 228.

Case stated for the opinion of the Court by the police magistrate for the city of Toronto, after conviction of the defendants on a charge of keeping a disorderly house, to wit a common betting house, at the Toronto Woodbine race track. The charge was laid under secs. 227 and 228 of the Criminal Code, R. S. C. 1906 ch. 146, which correspond with secs. 197 and 198 of the former Code.

The case was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A., and ANGLIN, J.

C. H. Ritchie, K.C., and T. C. Robinette, K.C., for defendants.

J. R. Cartwright, K.C., and E. Bayly, for the Crown.

MOSS, C.J.O.:—The findings of fact set forth in the stated case raise once more, though under a somewhat different aspect, the vexed question as to the meaning and effect of secs. 227 and 228 of the Code. We had occasion to consider them recently in . . . Rex v. Saunders, 12 O. L. R. 615, 8 O. W. R. 534, affirmed in the Supreme Court, 38 S. C. R. 382. In the present case the question is free from the complications introduced by sec. 204, now 235 (2).

The most important findings of fact are the following, viz.:—

The Ontario Jockey Club, a duly incorporated racing association, own and control the Woodbine racecourse. The bets upon which the Crown seeks to convict the defendants of the offence charged were made upon the racecourse upon races being run during the actual progress of a race meeting. During the race meeting those of the general public

desirous of seeing the races were admitted to a fenced enclosure, spoken of as "the general enclosure," and to every part of it, including the large grand stand and an open space in front and to the east of the grand stand, upon payment each day of an entrance fee. There was no place in the enclosure or the open space specially reserved for the purpose of making bets. Among others who paid the usual admission fee from day to day were a large number of bookmakers, who laid bets with such of the general public as desired to bet with them.

The defendants were bookmakers, and were two of those who did bet from day to day, through their assistants, with members of the general public who, like themselves, had paid for admission to the enclosure.

The greater part of the betting done by the defendants was done in an uncovered and unfenced portion of the general fenced enclosure—about 1-6 of an acre in extent—at the easterly part of the general enclosure, though some betting was done in another portion of the open general enclosure in front of the grand stand. The defendants and their assistants did not use any desk, stool, umbrella, tent, or booth, or erection of any kind, to mark any place where bets were made. No part of the general enclosure was especially allocated to the defendants or any other bookmakers; they were not restricted as to the use of any portion of the general enclosure, and no one had any rights or privileges therein. The defendants did not occupy a fixed position, but made their bets moving about within a small radius, and there was nothing in or on the ground to fix a place where the defendants could be found. The bookmaker and his assistants during the betting on each race stood as much as possible about the same spot in a radius of from 5 to 10 feet. There were 50 of these bookmakers with their assistants operating mainly in about 1-6 of an acre.

The bookmaker carried in his hand a small board, on which was written the names of the bookmakers and the horses, odds, etc. The cashier's bag carried the names, and 3 or 4 assistants stood close together. The defendants had advance information in reference to starters, scratches, jockeys, weights, etc., procured from one Mahoney, who had obtained from the Jockey Club the exclusive right to such information.

Upon this statement of facts it may be conceded that the defendants were present in the enclosure, with all necessary assistance and equipment, for the purpose of betting, and that they did enter into bets with all such members of the general public within the enclosure as were disposed to deal with them. But the question is, whether what has been shewn to have been done by the defendants constitutes the keeping of a disorderly house, to wit, a common betting house, within the meaning of the two sections of the Code under which the conviction has been made.

If, while considering this question, the general definition of a common betting house, given by sec. 227, viz.. a house, office, room, or other place opened, kept, or used for the purpose of betting between persons resorting thereto and the owner, occupier, or keeper thereof, any person using the same, any person procured or employed by or acting for or on behalf of any such person, or any person having the care or management, or in any manner conducting the business thereof, is borne steadily in mind, there can be very little difficulty in reaching a conclusion.

Viewed apart from the authorities by which we are bound, the words themselves seem almost naturally to suggest a structure of some sort, and to import fixity or localization. They also import rights peculiar to the person designated as the owner, occupier, or keeper, which rights are not shared by others. It is obvious that there must be not only a house, office, room, or other place, but it must be one capable of being opened, kept, or used for the purpose of betting. And there must also be some person who is entitled to exercise the right of opening, keeping, or using, to the exclusion of the exercise of a similar right by others except with his permission.

Whatever doubts may have been entertained upon these points before the decision of the House of Lords in the leading case of Powell v. Kempton Park Racecourse Co., [1899] A. C. 143, affirming the decision of the Court of Appeal, [1897] 2 Q. B. 242, must now be considered as set at rest by the result of that case. And, unless the findings in the stated case disclose a condition of affairs different from those appearing in that case, the conviction cannot be sustained, for in the main the facts of that case correspond closely with the findings of the special case.

There are no facts found which would justify our drawing an inference as to the enclosure in question here, and the user made of it by the defendants, contrary to that which was held to be the proper one in the Kempton Park case.

In this case it is not and could not be seriously contended that the defendants could be regarded as the owners, occupiers, or keepers of the enclosure.

The contention is that the use made by the defendants of a portion or portions of the enclosure constituted such portions "a place," and made the defendants keepers thereof, within the meaning of the sections. Mr. Cartwright, for the Crown, argued that, taking the statement in the case that the defendants did not occupy a fixed position, but made their bets moving about within a small radius, and there was nothing in or on the ground to fix a place where the defendants could be found, along with the further statement that the bookmaker and his assistants during the betting on each race stood as much as possible about the same spot in a radius of from 5 to 10 feet, the fair inference should be that the defendants had and were keeping "a place" corresponding in its use to a house, room, office, or other structure stationed on the grounds for the purpose of attracting people to it in order to bet—that mingling with other bookmakers and keeping within a radius of 5 to 10 feet was so localizing his business there as to make it a fixed and ascertained spot, and therefore "a place" within the language and meaning of sec. 227. . . . .

Hawke v. Dunn, [1897] 1 Q. B. 579, which in its facts more nearly resembled this case than any other of the numerous cases in which the question has been dealt with in the Courts in England, was expressly overruled in the Kempton Park case. . . . And in every case that can now be regarded as binding authority, there was something more than the mere presence of the persons on the ground to indicate that measure of localization, fixity, and exclusive right of user which is necessary in order to constitute "a place." Dealing with the question of user, Lord Esher, M.R., said in the Kempton Park case, [1897] 2 Q. B. at p. 258: "The facts seem to me to shew that no one of the bookmakers described in the evidence does claim to use and does use any part of the enclosure as his part exclusively as against any one. To say that he uses or claims to use the spot of ground on which he is at the moment standing as his

room, office, or place exclusively, as against all the world, as if it were his room or office, is beyond reason." This statement . . . seems to cover the present case, and is decisive of the question involved.

The question submitted should be answered in the negative, and the conviction quashed.

OSLER and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

GARROW, J.A., and ANGLIN, J., also concurred.

NOVEMBER 15TH, 1907.

C. A.

FAULKNER v. CITY OF OTTAWA.

Municipal Corporation — Sewer — Sufficiency — Backing up Water into Cellar of House—Extraordinary Rainfalls—Absence of Negligence—Non-liability of Corporation.

Appeal by defendants from judgment of TEETZEL, J., 8 O. W. R. 126, awarding damages to the plaintiff.

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

W. E. Middleton and T. McVeity, Ottawa, for defendants.

G. F. Henderson, Ottawa, for plaintiff..

MOSS, C.J.O.:—The plaintiff is tenant of shop premises situate on the south-east corner of Clarence and Dalhousie streets, in Ottawa. A sewer constructed by the defendants runs in the centre of Clarence street, and the plaintiff's premises are drained by means of a drain pipe connecting them with the sewer. Through this drain pipe flows the surface water, the water from the roof of the building, and the sewage from the closets on the premises.

The plaintiff's complaint in this action was that on the night of 30th June or the morning of 1st July, 1903, and on 1st August and 2nd September, 1904, the basement of

his premises was flooded and a quantity of his goods injured or destroyed by water backed up from the sewer through the drain pipe upon his premises.

In the statement of claim it is alleged that the flooding and backing up complained of resulted from the negligence of the defendants, and a history is attempted of the construction of and dealing with the sewers on Clarence street, but the vagueness of the statements and the absence of dates render it difficult to follow.

The evidence, however, shews that there were two sewers constructed along Clarence street, one in or about the year 1885 under by-law No. 610, and the other in 1891 under by-law No. 1175.

The first sewer was constructed in two sections, one part having a diameter of 18 inches, the other part having a diameter of 15 inches, but it was all completed under one plan and as one work. This sewer did not extend to the part of Sussex street on which the plaintiff's premises are situate. The work was done according to a plan prepared by the then city engineer, and it is not suggested that there was any departure from the plan either in material or workmanship. Its capacity appears to have been calculated and the sewer designed in accordance with the standard recognized at that date by engineers as the rule in sewage construction, and it is scarcely disputed that at the time it was constructed it was a sufficient conduit for the area it was intended to serve.

The sewer constructed under by-law No. 1175 is 12 inches in diameter, and extends in front of the plaintiff's premises and for 700 or 800 feet beyond them to Sussex street. It is with this part of the now one continuous sewer that the plaintiff's premises are connected. The evidence is somewhat vague, but it would seem that at first the drain from the plaintiff's premises was used only for carrying the drainage from the basement or cellar and the sewage from the closets. Later the drain pipe from the roof was carried into the same drain. So far as the evidence shews, the only uses to which the 12-inch sewer along its entire length was put were of the same kind. There were no subsidiary sewers or drains of the nature of sewers led into it. According to the testimony of defendants' city engineer, there are 104 buildings on Clarence street, but only 9 downspouts, of which 6 are directly or indirectly connected with

the sewer. In the other cases the water is carried from the front and rear of the roofs to the ground, the fall from the front roofs going towards Clarence street, and that from the rear escaping in the other direction. The sewage is a very small percentage of the flow. The chief flow is from the rainfalls and natural seepage.

In 1903 the defendants put down an asphalt pavement and granolithic sidewalks on Clarence street, with a number of gratings or openings for the escape of the surface water into the sewer. Before that time the plaintiff seems to have experienced no serions trouble, though, according to the testimony of Oliver Paquet, a salesman in the employ of the plaintiff, and who was one of his witnesses, there was flooding in 1896, 1898, and 1901 or 1902. This witness entered the plaintiff's employ in 1901, and it is not explained how he was able to speak of 1896 and 1898. However, beyond some complaint, no action was taken concerning any flooding prior to that of 1903, and there is nothing in the evidence to account for the earlier cases, if they actually happened.

The construction of the asphalt pavement and the granolithic sidewalks is now put forward by the plaintiff as a most important factor in bringing about the flooding of which he complains. He charges that the flooding is due to the defendants' action in laying down the pavement and sidewalks without providing for the additional burden thus imposed upon the sewer with which the plaintiff's premises are connected. On the other hand, the defendants contend that the system, as it exists at present, is quite sufficient to cope with the usual and ordinary rainfalls, and that the rainfalls from which the plaintiff suffered on the days specified were extraordinary and unusual and such as would not be reasonably anticipated by a competent engineer in providing a sewer system for the area of which the plaintiff's premises form part. It is agreed on all hands that the effect of the work done in 1903 has been to produce a greater and more rapid flow of surface water into the sewer. The weight of evidence is that, as a consequence, no less than from 50 to 75 per cent. of rain falling upon the street finds its way into the sewer, a great, or at all events considerable, accession to the quantity formerly finding its way to the sewer. This change in the conditions, it is admitted, was not

contemplated or provided for when the 12-inch sewer was constructed, and was not dealt with when the laying of the asphalt pavement and granolithic sidewalk was projected.

There is a conflict of testimony as to whether, even with the changed conditions, the capacity of the sewer is not sufficient to carry all the flow occasioned by ordinary rainfalls such as may be usually expected in the climatic conditions existing in and in the vicinity of Ottawa. All are agreed that, according to the now recognized rule, it is good engineering to provide for a rainfall of 1½ inches an hour, and the defendants' city engineer admits that if he was now constructing the sewer he would not build it as it is. But, while conceding that the 12-inch sewer was only designed, in accordance with the engineering rule of construction then prevailing, to provide for a fall of one inch in an hour, the defendants have given evidence to shew that it is actually capable of carrying off the water resulting from a fall of as much as 1½ inches an hour.

On the other hand, skilled and experienced engineers testify to the contrary view, and, balancing as best one can the conflicting statements, it would seem that the plaintiff has established, as a scientific proposition, his contention on this branch. But, as a matter of actual experience, the preponderance of evidence goes to shew that with the exception of the 3 occasions now complained of the sewer has proved sufficient. And with much deference, I am unable, in face of the evidence, to agree that the rainfalls on these occasions were not of such a character as to be classed with extraordinary and unusual storms. As to the rainfall of 30th June, it is shewn that for a time between 5 and 5.30 o'clock in the afternoon the rainfall was at the rate of 3 inches an hour, and it was at or about this time that the flooding occurred. The other storms, though not at all equalling the first, were very severe, and there seems very little reason to doubt that each fall exceeded the rate of 1½ inches an hour. But, according to all the scientific testimony, any competent engineer constructing a sewer in the city of Ottawa would be acting with proper skill and in accordance with good engineering if he provided for a rainfall of 1½ inches an hour.

In this case I think that while the sewers in question were not so constructed, probably because at the date of their construction the engineering rule had not been so

definitely fixed, and while the new pavement and sidewalks have so altered the conditions as to render necessary a capacity of 1½ inches an hour, the plaintiff's damage was not due to these deficiencies, but to the extraordinary and unusual character of the rainfalls, and the abnormal strain thus put upon the sewers.

Apart from these occasions, there is really no evidence to shew that the sewers have failed to answer their purpose, notwithstanding the additional burden imposed by the new pavement and sidewalks.

No doubt, their presence conduced to the rapidity with which the sewer filled and backed up the waters on these occasions, but it is not shewn that the same flooding would have happened if the rainfalls had been less or more than at the rate of 1½ inches an hour.

I am unable to find in the evidence any proof that after the construction of the 12-inch sewer there were other sewers or subsidiary drains led into it. The only substantial increased demand on its capacity was that occasioned by the new pavement and sidewalks, and, in my opinion, it has not been shewn that such increase was the cause of the flooding of which the plaintiff complains.

I think the appeal should be allowed and the action dismissed with costs throughout.

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

MACLAREN, J.A., also concurred.

OSLER, and GARROW, JJ.A., dissented for reasons stated in writing.

NOVEMBER 15TH, 1907.

C.A.

BOWMAN v. SILVER.

Trust and Trustees—Action against Executors to Establish Trust — Purchase by Second Mortgagee of Mortgaged Premises from First Mortgagee—Alleged Trust for Mortgagors—Failure of Evidence to Establish—Unexecuted Agreement — Corroboration — Statute of Frauds—Purchase of Chattels—Account.

Appeal by defendants and cross-appeal by plaintiffs from the judgment at the trial of TEETZEL, J., in an action

against the executors of Isaac Silver for an account of his dealings with certain chattel property at one time owned by the plaintiff A. M. Bowman, and of the rents and profits of certain lands also at one time owned by him or by his wife and co-plaintiff, and for a declaration of trust as to such lands to the extent of a one-half interest, and for a reconveyance or sale. TEETZEL, J., dismissed the portion of plaintiffs' claim relating to the chattel property, but declared that Isaac Silver held the real estate (subject to certain incumbrances) as trustee in equal shares for plaintiffs and himself.

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

I. F. Hellmuth, K.C., and H. E. Choppin, Newmarket, for defendants.

G. H. Watson, K.C., and Irving S. Fairty, for plaintiffs.

GARROW, J.A.:—Isaac Silver died on 22nd November, 1903, and defendants are the executrix and executors of his will.

The sale of the chattels at which Silver purchased, it is said, upon account of Bowman, and in respect to which the account was asked, took place as far back as . . June, 1893. And, in the circumstances, I entirely agree with the reasoning of the learned Judge and in his conclusion denying relief in respect of that transaction. The learned Judge, however, was of the opinion that as to the lands plaintiffs were entitled to the relief claimed, a conclusion in which I am, with deference, unable to concur.

The lands . . . were subject to a mortgage to a loan company for $10,000, and also, with other lands, to a second mortgage to Silver for $4,800 and interest at 10 per cent. Default having been made in payment, the first mortgagees served a notice of sale under the power contained in their mortgage, and on 13th June, 1896, sold and conveyed the lands to Silver for the expressed consideration of $9,000.

The plaintiffs in the pleadings allege that some time prior to the sale it was agreed between them and Silver that he should manage the lands as trustee for plaintiffs,

and should become responsible to the mortgagees for payment of the mortgage money and interest, and that the profits which might be derived from the lands should be shared equally between the plaintiffs and Silver. And that subsequently, and before the sale, it was further agreed that if Silver deemed it necessary for the better management of the property he should be at liberty to take a conveyance thereof in his own name, and that he should hold and manage the property as trustee for the purposes aforesaid.

And this is the trust to which effect has hesitatingly been given by the learned Judge. In his judgment he said that if obliged to depend alone upon the evidence given by plaintiffs he would have had great hesitation in believing that such an arrangement was made. But, as he further said, he regarded the evidence of the witnesses Wallace, Levesconte, and Sheppard, as pointing to the conclusion that Silver was holding the lands for the benefit of Bowman upon some understanding between them, and therefore that such evidence was corroborative of the evidence of the Bowmans as to the specific trust alleged in the pleadings and supported by their evidence.

No reference is made in the judgment to the defence of the Statute of Frauds, which was pleaded and was also relied on in the argument before us.

I will deal first with the facts which appear to be established by the evidence. The trust, whatever it was, was wholly verbal; there is not a particle of anything in writing, prior, contemporaneous, or subsequent, to which we were referred, which supports or in any way tends to support it, unless it is the unexecuted paper prepared by Mr. Wallace, then the solicitor for the male plaintiff. And the only verbal evidence which pretends to set forth the nature and terms of the trust is that of the plaintiffs themselves. Mrs. Bowman, in whose name the property stood, said that she remembered one interview at which her husband and Silver were present, and she only speaks of one interview. At that interview, the date of which she could not remember, she said Silver said that he thought if he had the running of the business he could run it in a better way and "help us every way," and he used that offer "so that I would sign the paper he had." . . . "He said that if I would sign off these properties . . . he thought it would be for the benefit

of both of us if I would sign this. . . . He said that when the property was sold and things were settled we were to have our share of it as well as himself." Q. "Was the share spoken of?" A. "Well, we always considered it would be half, and he *thought* it would be half." Q. "Who thought?" A. "Mr. Silver." Q. "What did he say?" A. "That is just the words he used." Q. "Did he use the word 'half' or 'share?'" A. "Yes, I think it was half, yes." Q. "When was that to be?" A. "When the property was sold." Q. "And was there anything said about when it would be sold?" A. "No, whenever he got a chance to sell it." In cross-examination she admitted that at that time she was aware that the loan company were pressing for payment and threatening to sell, and hearing that a notice of sale had been served. She does not explicitly say that she did at that interview execute the "paper" which Silver had, but the fair inference both from her evidence and her husband's is that she did. And, as she is shewn to have executed only one document, it is quite clear that the document in question is exhibit 17. That document is dated 8th July, 1895, made between the plaintiff Sarah Bowman, of the first part, and Silver, of the second part. It recites the lease to Chambers, the mortgage to the loan company and to Silver, that Silver had, by an agreement of even date, agreed to become security for the payment of the loan company's mortgage, in consideration of an extension of time granted by the company, and that the party of the first part had agreed to assign to Silver the Chambers lease and the rents thereby secured, as security collateral to his said mortgage and in respect of his said liability. And the document then expressed the assignment accordingly of the lease before mentioned. . .

There is substantial agreement between the Bowmans as to the main terms of the alleged trust agreement, and that at the time some document was executed by Mrs. Bowman, and, as no other document than the one before referred to was ever executed by her, that must be the one. And it is also established that its execution completed the matter as far as terms were concerned, because Bowman says the conveyance to Silver from the loan company was afterwards obtained by him upon the understanding then arrived at.

The document itself, exhibit 17, not only does not support the alleged trust, but it clearly contradicts it. It shews

Mr. Silver then anxious to protect himself and his security, rather than to help the Bowmans further then as an extension of time might help them both. It is not such a document as would reasonably have followed upon an arrangement such as that deposed to; and there are other circumstances which shew that at that time no completed arrangement of any kind had been made, that document having apparently formed only one step towards an arrangement which afterwards fell through. The property covered by the loan company's mortgage is said by Mr. Massie, the company's manager, to have been a somewhat doubtful security even for the amount of the first mortgage. The cost of the property in "brick and mortar and land valuation," as he puts it, was about $14,000 to $15,000, but livery stables were going down, the company were pressing for payment, and were evidently very anxious to get as additional security the personal covenant of Silver. And the arrangement which resulted in the preparation and execution of exhibit 17 was made with that view, Silver having apparently at one time been willing to give such a covenant. But in the end he refused, and in the month of April, 1896, an action was brought against him by the loan company after a long correspondence, on the assumption that he had gone so far as to have become bound personally. He defended, and the action was not pressed. The company continued to press for payment. The property was offered for sale by auction, and was not sold for want of buyers. Then Silver offered $9,000 for it, and his offer was accepted, although that sum was somewhat less than the amount due upon the first mortgage, and the conveyance before mentioned followed.

Silver was apparently a man of some means, and by reason thereof was able to obtain a loan from the company for the full amount of the purchase money at a reduced rate of interest. And two years later he obtained a greater reduction by giving a further mortgage on other property of his own. The conveyance by the loan company to Silver is dated 13th June, 1896. In the previous month of March, Mr. Wallace, a solicitor acting for Bowman, prepared an agreement between Bowman and Silver, which recites the mortgages to the loan company and to Silver, that Bowman is owner of the equity of redemption, that Silver is in receipt of the rents and profits (of which there is otherwise no evidence), that the loan company have advertised the lands for

sale under the power of sale contained in their mortgage, and that Silver has agreed that if he should purchase the lands he will hold the same in trust for Mrs. Bowman. And the document provided that if Silver purchased he would hold the lands in trust for Mrs. Bowman, and would at any time thereafter, upon payment to him of the amount which he had paid for the lands and the amount of his own mortgage, with interest on all such sums at 6 per cent., convey the lands to Mrs. Bowman. Mr. Wallace says in his deposition (he was examined abroad under commission) that this document was prepared under instructions from Bowman and Silver jointly, who were both present; he believed he wrote a letter with the agreement, and sent both to Silver at Newmarket, where Silver then resided, and requested its execution, but it was not executed or returned. And it otherwise appears that the document was found, after Silver's death, unexecuted, in the office of his solicitors in Toronto. Mr. Wallace further says that he does not know why it was not executed. Bowman always expected Silver to sign it, and was himself willing to carry it out. Bowman said he thought Silver wanted to "beat" him, when he did not get this agreement back signed. Silver always professed he wanted to help Bowman; but the "always" must be clearly confined to the "once," for he states elsewhere in his evidence that he had only the one interview that he could remember at which Silver was present when the land was discussed.

Several conclusions seem to be justified as flowing from this evidence by Mr. Wallace. First, it is apparent that Bowman had a solicitor and was acting under advice; second, that the unsigned document prepared by Mr. Wallace expresses a totally different trust from that sworn to as having been agreed to in the previous month of July in the presence of Bowman and his wife; and third, that Bowman, when he did not get back the document signed, was of the opinion that Silver, instead of acting for and helping him, proposed to "beat" him, which expression can only mean, of course, that if Silver did purchase, as his position of second mortgagee might compel him to do for his own protection, he would do so for himself, and not for the Bowmans, and was thus put upon his guard against Silver. And yet for a period of nearly 3 months he apparently left matters exactly as they were. He did not write or get his solicitor to write and insist on getting the document back executed, but, on the

contrary, did nothing. And, although he knew of the sale to Silver at once, he even then made no further written demand, either by himself or through his solicitor, for the execution of the document or for the performance of the alleged trusts, while Silver lived, a period of over 7 years, during which, so far as appears, Silver was in possession of the lands, and exercising the usual rights of an owner. It is true that Bowman says he demanded a settlement from Silver from time to time, but all his demands were verbal, and there is no evidence of them but his own. And his evidence is, for many reasons, unsatisfactory, and was apparently so regarded by the Judge at the trial. One instance has been given, namely, the contradiction between what was put in writing by Mr. Wallace as the trust and what was deposed to by the Bowmans as the trust actually agreed upon. And in this connection, and as shewing further how little reliance can safely be placed upon Bowman's evidence, I may mention that in his examination in chief he made no mention of the interview in the office of Mr. Wallace or of the preparation of the unsigned document before mentioned. In his cross-examination he does refer to the two interviews at that office with Silver, the first concerning the chattels, when an earlier document intended to settle the accounts between them (but also unsigned) was prepared, but he did not even then speak of the document prepared in March, 1896. And the case was closed without that document having been put in evidence. Then, after the case had been closed, Mr. Watson, for the plaintiff, moved for leave to give further evidence, and Mr. Wallace was examined and the document proved, and Mr. Levesconte, the plaintiffs' solicitor, was also called and said that he had received some hint of such a document from Bowman before the trial, that he had searched for it, and, failing to find it, had concluded that Bowman was mistaken. He then explained how in the end he searched for and found it in Mr. Millar's office, apparently after the evidence at the trial had been closed, and said that he had not conveyed to counsel for the plaintiffs the suggestion received from Bowman that there had been such a document. Then Bowman was called and was asked by his own counsel to explain why he had not mentioned the facts in connection with the document either in his examination in chief or in his cross-examination, and his reply was that he did mention it to his solicitor, who seemed

to pay no attention to it, so he did not afterwards mention it. Then Mr. Watson (counsel for plaintiffs) proceeded to get from him a much-needed explanation of the discrepancy between the trust as set forth in the document and the verbal trust formerly sworn to, and the explanation was that the document had been prepared before the verbal trust arrangement had been made, which superseded the writing, because it did not give Silver enough, only 6 per cent., and he could not get him to sign it. But it is shewn, as clearly as reasonably can be, that the verbal agreement whereby Silver was to get one-half of any surplus was made, if it ever was made, at the time when Mrs. Bowman executed the document before referred to as exhibit 17, or long before the preparation of the unsigned document, thus, in conjunction with all the other circumstances, putting it out of the question to place any dependence upon Bowman's evidence, and Mrs. Bowman's must share the same fate, and very much for the same reasons.

No doubt, the Bowmans were anxious to obtain help from Silver. He had apparently befriended them for years, but he had evidently grown tired. The margin in the property was extremely small, if any, and in the end he apparently concluded, with at least a shew of wisdom, to protect himself by purchasing, and that he did so, so far as is proved, without any kind of understanding or agreement with the plaintiffs, or either of them, is the only position consistent with the proved conduct of both parties from the time of the sale to him onwards to his death.

This renders it unnecessary, in my opinion, to consider the alleged corroboration upon which the learned Judge relied, all of it of the most general and indeed vague nature, involving simply what no one disputes, that Silver at one time was befriending the Bowmans; or the defence of the Statute of Frauds and the cases upon it to which we were referred.

The appeal should be allowed and the cross-appeal and the action dismissed, all with costs.

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

MOSS, C.J.O., OSLER and MACLAREN, J.J.A., concurred.

NOVEMBER 15TH, 1907.

C. A.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED

Conspiracy—Trade Competition—Procuring Incorporation of Company to Compete with Plaintiffs—Inducing Plaintiffs' Servants to Leave Employment—Using Information Obtained in Plaintiffs' Employment—Appropriation of Plaintiffs' Documents and Chattels—Master and Servant—Breach of Confidence—Injunction—Damages—Appeal—Costs—Evidence

Appeal by defendants and cross-appeal by plaintiffs from judgment of CLUTE, J., 8 O. W. R. 888.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. F. Shepley, K.C., and W. H. Irving, for defendants.

W. E. Raney and A. Mills, for plaintiffs.

MOSS, C.J.O.:— . . . The gist of the action . . . is that the individual defendants were for a long time before 14th June, 1905, in the employ of the plaintiffs under contracts to serve them in various capacities, for terms extending, in the case of defendant King to 31st January, 1906, in the case of defendant Baird to 1st December, 1907, in the case of defendants Harcourt and Trout to 31st January, 1907, in the case of defendant Archibald to 31st August, 1906, and in the case of defendant Hoose from week to week; and that while in such employment they maliciously colluded and conspired together to effect the following purposes: (1) to procure the incorporation of a company to engage in business in competition with the plaintiffs; (2) to procure other servants of the plaintiffs to break their contracts of service with the plaintiffs and associate themselves with defendants; (3) to communicate to such servants and other persons private and confidential information with reference to plaintiffs' business, the knowledge of which was acquired by these defendants while in plaintiffs' employ;

(4) to print and publish false and malicious statements in relation to plaintiffs' business; (5) to abstract from plaintiffs' office and to appropriate to the use of defendants certain valuable records, documents, and drawings, the property of plaintiffs; (6) to abstract from plaintiffs' machine-shop and appropriate to defendants' use all plaintiffs' fine tools which had theretofore been or were then being used in the manufacture of machines or appliances for use in the manufacture of plaintiffs' products; (7) to use the said tools to duplicate the plaintiffs' machines and appliances; (8) to make use of private and confidential information acquired by defendants Baird and Hoose while in plaintiffs' employment to duplicate plaintiffs' special machinery; and (9) to make use of private and confidential information acquired by defendants King, Harcourt, and Archibald while in plaintiffs' employment to make for defendants' use a list of plaintiffs' customers in Toronto; and by the aforesaid means to deprive the plaintiffs and get for the defendants the business which the plaintiffs and their predecessors in title had built up. . . . The conspiracy to pirate the plaintiffs' business, and the acts done in alleged pursuance of the conspiracy, are the gravamen of the action.

The learned Judge has found all the defendants guilty, and has awarded an injunction and an inquiry into damages of a very far-reaching character, and has declared that all the defendants are liable to pay the damages when ascertained, together with all the costs of the action (with some slight exceptions) down to and inclusive of the judgment.

Included in the relief thus granted, which affects all the defendants, there is one matter which specially affects the defendant Hoose. He claims to be the owner of certain tools, 88 in number, which he took away with him when he left plaintiffs' employment. The judgment declares these tools to be plaintiffs' property, and directs that a bond which was given . . . as a term of the tools being handed to the plaintiffs pending the action, be delivered up to be cancelled. . . . He is not and never was a shareholder in the defendants' company, and has no financial interest in it or the business carried on by the other defendants, save the salary which he receives for his services. The only other matter in which he is interested is the title to the 88 tools. Yet he has been joined with the other defendants in the charges of conspiracy and wrongdoing launched against them,

and by the judgment he has been involved in all the consequences to the same extent as the other defendants. The trial Judge finds that he did not take any active part in the early stages of the conspiracy, but that he left the plaintiffs' employ at the other defendants' solicitation and assisted them in their undertaking by carrying away plaintiffs' tools and using them in furtherance of defendants' business.

Now, so far, assuming that these findings are supported by the evidence, they do not appear to furnish any sufficient reason for joining him as a party to the alleged conspiracy and rendering him liable for the consequences of all the other acts charged against his co-defendants. . . .

There is literally no evidence to shew that Hoose was at any time found in conference with his co-defendants with reference to their project, that he was even consulted or gave his advice upon it, or that he was even offered, much less accepted, any share in or financial benefit from the business. He was not shewn the prospectus or any of the correspondence. He had no hand or part in its publication or in the attempts to procure other of the plaintiffs' employees to leave their service, or in the abstraction of records, documents, and drawings, or in their use in defendants' business, or in the compilation of lists of customers. . . . It is not even proved that he made use of any of the tools in question while working for defendants. Much time was spent at the trial in an effort on the part of the plaintiffs to shew that the tools were in use in defendants' factory, but in the outcome there was a failure to establish it. It is to be borne in mind that it lay upon plaintiffs to establish the fact, which they apparently considered very material. Here the testimony was that of defendants called as witnesses by plaintiffs, and they denied the user. Plaintiffs are, therefore, driven to urge that, notwithstanding the denials, the Court may disbelieve the testimony, and assume the affirmative to be proved. But, as pointed out by James, L.J., in Nobels Explosive Co. v. Jones, 17 Ch. D. 722, at p. 739, it is a fallacy to suppose that the affirmative is proved because the witness for the negative is not wholly and entirely to be believed. . . . See the same case, 8 App. Cas. 5 . . . Louis v. Smellie, 73 L. T. at p. 228. . . .

The plaintiffs suffered no appreciable damage from the mere fact of Hoose leaving their employ, and it would be out of the question to hold him responsible on that account

for all the other damages the plaintiffs may have incurred. With regard to the 88 tools, there seems to be an effort to make a mountain out of a molehill. There are different estimates of their value. . . . Probably $175 would be a fair if not a high value. . . . A very considerable part of the long and expensive trial of this action, extending over 10 days, was devoted to the issue as to the ownership of these tools. The issue has been determined in plaintiffs' favour, but that conclusion cannot be supported upon the evidence. . . . The onus was on plaintiffs to prove their property in the tools. . . . It was shewn that the practice of the plaintiffs' shop was to stamp and number all tools belonging to them. At the time the 88 were taken they were not stamped. Upon an interlocutory application made by plaintiffs early in the action . . . they were delivered to the plaintiffs. In the course of the trial it developed that plaintiffs had stamped them as soon as they had obtained possession of them, but had not used them in the business during the whole time they were in their custody. . . . The plaintiffs contended that tools made during Hoose's employment, no matter under what circumstances, became plaintiffs' property. But the preponderance of testimony goes to shew that every tool-maker's kit is made up of tools made, as some of these were, in the shops, at intervals, and out of material purchased or procured by the tool-maker himself. There are times in the course of a tool-maker's day's work when the machine of which he is in charge is engaged in doing some piece of work which calls for no special personal attention. During such periods the tool-maker is idle, and if he choose to sit with folded hands the employer would have no cause of complaint. Is there any reason why he should not employ that time on a piece of work for himself, if he is so disposed? And if he does so, does the law enable the employer to demand the benefit of the work done? In the absence of a covenant expressly to the contrary, a servant's spare time is his own, and he is not accountable to his master for benefits derived from its use . . . Hoose was under no covenant other than that implied from his engagement, and if there were times when he was unable to utilize his time for the benefit and advantage of the plaintiffs, he might properly make other use of it. . . .

[Reference to Jones v. Linde British Refrigerator Co., 2 O. L. R. 428; Sheppard Publishing Co. v. Harkins, 9 O. L. R. 504, 5 O. W. R. 482.]

The utmost complaint that plaintiffs could make would be that the use of their power was improper. But that use would not convert the tools so made into property belonging to plaintiffs.

The result, so far as the defendant Hoose is concerned, is that the appeal should be allowed as to him, and that it should be declared that he is entitled to a return of the 88 tools, and that the action be dismissed as against him with costs as well below as of the appeal.

Then as to the case against the other defendants. There is no doubt that the conduct of the defendants in regard to some of their doings and dealings in respect of which complaint is made. was reprehensible and wrong.

It is self-apparent that persons of more refined temperament, and more generous regard for the company in whose service they had been so long engaged, would have refrained from many of the methods and from the language of which the defendants made use in their endeavours to obtain subscribers to their share list, and to get persons in the plaintiffs' employ to join them or enter their service. In many instances these efforts proved unavailing, and the defendants missed their mark, and the plaintiffs lost nothing by them. Yet the animus thus created has tinctured the whole proceedings in the action.

On the other hand, it has been sought to attribute to some things an importance out of all proportion to their real consequence.

There was nothing legally or morally wrong in the defendants deciding to embark in business for themselves and to form a company for the purpose. Nor did the fact that the business was to be of the same character as the plaintiffs'—a rival business in fact—prevent them from so deciding. Competition is itself no ground of action, whatever damage it may cause, and there was no contract or covenant to hold the plaintiffs and the defendants, or any of them, which enables the plaintiffs to say that the defendants could not, after leaving their employ, engage in a similar kind of business. And it is almost needless to say that the joining together or combining or "conspiring," as the plaintiffs term it, of the defendants to do these acts, does not render them unlawful any more than would the doing of them by one person. . . . . .

[Reference to judgments of Bowen and Fry, L.JJ., in Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598, and of the law Lords in the same case, [1892] A. C. 25.]

It is clear upon the evidence that the primary and main design of the defendants was to establish a business out of which they expected or hoped to obtain profits and gain, and it is out of the question to say that their object was the destruction of the plaintiffs' business. It is one thing to say that with the object of building up their own business they resorted to means which were unfair and wrong as against the plaintiffs, but it is quite another to say that these means were resorted to only for the purpose of destroying plaintiffs' business. Partial colour is perhaps lent to the latter argument by some of the defendant King's correspondence, but after all, as remarked by Lord Morris in the Mogul case, [1892] A. C. at p. 50, "the use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it."

The adoption by the defendants of the words "Business Systems" as their corporate name has been put forward and has been accepted by the trial Judge as another act done in pursuance of the alleged conspiracy to fraudulently obtain plaintiffs' business. No complaint of this nature appears in the voluminous pleadings. Neither is there included in the many claims for relief and injunctions one against the use by the defendants of their corporate name, and upon the evidence no such claim could be supported. There is no ground for the contention that the phrase "Business Systems" ever became so associated with plaintiffs' business, or the articles produced by them in their business, as to be specially identified in connection therewith. It appears that not only persons carrying on business similar to plaintiffs', but persons engaged in other kinds of business, are in the habit of using the phrase as indicating one of the classes of their business.

The plaintiffs, so far as appears, did not make objection to the Governor in council or take any steps under the Companies Act to impeach the right of defendants to incorporate under the name adopted by them, and there is no apparent reason for saying that their use of the name is in any way unlawful.

Much was also attempted to be made of the fact that defendants "ticked off" in a telephone book the names

of the plaintiffs' Toronto customers, and the plaintiffs have cross-appealed in respect of it. It appears that the book so used did not belong to plaintiffs, if that would have made any difference, and what appears to have been done was to go over it and pick out the names and addresses of business firms who were likely to use the loose leaf system of book-keeping, not necessarily the plaintiffs' customers, but others as well. For the same purpose they ordered and obtained from the Might Directory Company a list of the business concerns, including of course the plaintiffs' customers in Toronto, but the plaintiffs say they make no complaint of that. It is not easy to see what distinction is to be drawn between the cases. The defendants' object in both cases was to gather information as to the persons in trade with whom it would be desirable to deal for the supply of the articles they were intending to produce and sell. The fact that in the one case they used their own means and were assisted by their own knowledge and in the other employed third persons to obtain the information can make no substantial difference. . . .

[Robb v. Green, [1895] 2 Q. B. 315, distinguished. Lamb v. Evans, [1893] 1 Ch. 218, and Louis v. Smellie, 73 L. T. 228, referred to.]

The trial Judge points out that the plaintiffs are not making any claim for damages by reason of this particular act on the part of the defendants, and he refused an injunction in respect of it. A great deal of time was devoted to it at the trial and on the argument of the appeal, the plaintiffs by way of cross-appeal again contending that they were entitled to the injunction; but, for the reasons stated, the learned Judge's conclusion should be affirmed.

The remaining charges against the defendants (apart from the general one of conspiracy) are more substantial in their nature, but it remains to consider the nature and extent of the relief to which the plaintiffs are entitled. It is obvious from what has been said that a considerable part of the present judgment cannot stand. . . .

The judgment will be:—

(1) To set aside the judgment at the trial.

(2) To declare that the 88 tools are the property of the defendant Hoose, and to order their delivery to him, and dismiss the action as against him with costs.

(3) To direct an inquiry as to the damages (if any) sustained by the plaintiffs by reason of the defendants other than Hoose having communicated to any other person or persons the amount or rate of profit of the plaintiffs or the cost of production or manufacture of any commodity or commodities manufactured by the plaintiffs, obtained by the defendants other than Hoose, or any of them, while in the plaintiffs' employment, and also by reason of the use by defendants in carrying on their business of patterns of sheets and records of sizes of blank sheets taken from the plaintiffs' factory; the costs of the reference to be disposed of by the Master.

(4) The payment by the defendants other than Hoose of such damages when ascertained as aforesaid.

(5) To direct payment by defendants other than Hoose of the general costs of the action, and payment by plaintiffs to defendants of the costs occasioned by the issues in respect of which the plaintiffs fail.

(7) To direct payment by plaintiffs to defendants of the general costs of the appeal and payment by the defendants of the costs of such parts of the appeal as they have failed in.

In view of the nature of the inquiry as to damages, and in order to facilitate the termination of the litigation, if the plaintiffs are willing to forego the inquiry as to damages and accept a sum to be now fixed, the judgment may now direct payment to the plaintiffs of $400 as and for their damages, and the inquiry directed will be omitted.

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

OSLER, GARROW, and MACLAREN, JJ.A. concurred.

NOVEMBER 15TH, 1907.

C.A.

PENSE v. NORTHERN LIFE ASSURANCE CO.

Life Insurance—Action on Policies—Question whether Policies in Force at Death of Insured—Construction of Policies—Payment of Premiums—"Annually"—Limits of Year.

Appeal by defendants from judgment of MABEE, J., 9 O. W. R. 646, in favour of plaintiff in an action to recover

from defendants $2,000, the amount of two insurance policies issued by them upon the life of George Ziegler junior, and assigned to plaintiff. The defence was that the policies had lapsed by reason of non-payment of the premiums, but MABEE, J., upon his construction of the peculiar wording of the policies, held that they were in force at the time of the death of the insured, on 8th November, 1906, and gave judgment for $2,000, less the current year's premium on the second policy, with interest from teste of writ and costs.

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

T. H. Purdom, K.C., for defendants.

A. B. Cunningham, Kingston, for plaintiff.

MEREDITH, J.A.:—There is no just reason for applying a different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt as to the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof—if I may use such a term in reference to the interpretation of a writing—is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.

Dealing with this case with all these things in mind, I have found no difficulty in reaching the conclusion that the action ought to have failed at the trial as to each of the policies.

In regard to the first, 5 yearly premiums were paid, but the 6th was not paid. The day for payment, if the insured saw fit to renew the policy, was 20th May, 1906: the insured died on 8th November, 1906, without having paid, or, so far as the evidence shews, having had any intention or desire

to pay, it; and without having made any sort of application, demand, or claim to the insurers in respect of the policy: but, on 9th June, 1906, he assigned it to the plaintiff. No application, demand, or claim, nor any payment, was made by the assignee to the defendants until after the insured's death; but notice of the assignment was given to the insurers immediately after it was made.

One of the conditions of this policy was that after non-payment of a premium for one month the policy should cease to be in force. Under this condition, therefore, this policy came to an end in June, 1906. But under two other conditions certain rights remained in the insured; those conditions are in these words:—

1. That if, after the payment of 3 full years' premiums, this policy shall lapse for the non-payment of any premium note, cheque, or other obligation given on account of a premium, the company will, upon application, the payment of all indebtedness hereon, and the surrender of this policy and the last renewal premium receipt, within 3 months after such lapse, issue a non-participating paid-up policy, with the same provisions as this policy, for as many twentieth parts of the principal amounts as complete annual premiums shall have been paid in cash hereon, or apply the same towards the purchase of extended insurance in accordance with the schedule indorsed hereon.

2. That if, after the payment of 5 full years' premiums, this policy shall lapse for any of the reasons aforesaid, the company will, upon application, the payment of the indebtedness hereon, and the surrender of the policy and the last renewal premium receipt, within 3 months after such lapse, pay to the holder of this policy the cash surrender value shewn in the schedule hereon indorsed, or, at the option of the holder of this policy, the said company will lend to him any sum not exceeding the sum shewn in the said schedule for one year, interest to be paid thereon at the rate of 6 per cent. per annum, the premium for the ensuing year, and the said interest, being first deducted.

But the insured did not, nor did his assignee, make or attempt to make any election under either condition, nor take any steps whatever to obtain any advantage from them; they seem rather to have abandoned the insurance.

It will be observed, in the first place, that each of these conditions is based upon the fact that the policy has lapsed

by reason of non-payment of the premium, and then provides for the acquisition of new rights, notwithstanding such lapse; and the conditions upon which such new rights may be acquired seem to me to be plainly stated; there must be an application for such of them as the applicant elects to take, there must be payment of all arrears, and a surrender of the policy and of the last renewal receipt, all within 3 months after the lapse of the policy. None of these things was done within that time, or at all, and so neither the insured nor his assignee ever became entitled to any such new right, but the policy remained a lapsed one, if indeed not also an abandoned one. But it is contended, and has been held, that that is not so, that the provisions as to applying, payment of arrears, etc., apply only to the first of the two new rights provided for in each of these conditions, and that each is, therefore, to be read as if there were inserted in it, immediately before the provision as to the secondly mentioned right, and after the word "or," the words "without any such application, payment, or surrender, the company will," or words to the same effect By inserting apt words the Court can, of course, give the plaintiff almost any sort of relief that may be desired, but it is the contract which the parties actually made, not a new one constructed by any Court, which ought to be enforced. By what possible fair reading of these conditions can it be considered that the application, the payment, and the surrender, all within the 3 months, do not apply to the one new right which may be acquired notwithstanding the lapse of the policy, just as much as the other? If a defendant had promised, upon application, payment of an indebtedness, and surrender of the contract, within 3 months, to deliver to a plaintiff a white or a black horse, could it be contended that the application, payment, and surrender within 3 months applied only to the white horse, and the plaintiff was entitled to the black horse, which the defendant must deliver because of the plaintiff's default in all these things? The literal meaning of the words in question, as well as all things else, save our sympathies, are against the ruling of the trial Judge. Why should not application, payment, and surrender, within the limited time, be made for the one right just as much as the other? It was said by the trial Judge that, as to the second in their order of statement, no new policy would be necessary; but, if that were so,

how could it materially affect the question? Would it absolve from payment of arrears or do away with an application or time limit in the one case any more than the other? However, it is not so; a new policy would be necessary; the old policy, requiring payment of premiums and providing for lapse in default of payment, would be obviously inapplicable. Again, in the second, in their order, of the conditions, the second right is to a loan of money, which could hardly be effected without an application, and wholly by the defendants. And again, why is the second right under the first condition the one which the insurers must confer unasked and unconditionally; why not the second right of the second condition, which condition more nearly fits this case, for 5, not merely 3, premiums had been paid?

It is surely unnecessary to pursue the subject further. The meaning of a provision which the plaintiff is obliged to set up, and upon which alone he can rely in support of this action, instead of being plainly in his favour, is, in my opinion, plainly against him. The onus certainly has not been satisfied. The policy ceased to exist one month after the non-payment in May, 1906; and no new rights were acquired under the conditions which I have read. It is not necessary to consider whether both, or only the second, of these two conditions, apply to a policy upon which 5 premiums have been paid; but it may be helpful to point out that the schedule referred to in these conditions is not one applicable only to lapsed policies, but is applicable to those in force as well, and those policy-holders who are in default are not to be put on more favourable terms, under it, than those who are not.

As to the other policy the case seems to me to be at least equally clear.

Under it the first premium was to be paid in advance, on delivery of the policy, and the subsequent premiums were to be paid annually, the first of them on 20th March, 1904—that is, in advance. Three premiums were paid, one in 1903, when the policy was made, another in 1904, and the third in 1905; no payment was made in 1906. The policy was assigned to plaintiff on 8th June, 1906, and the insured died, as was before stated, on 8th November, 1906. The policy contained a provision that it should "cease to be in force," if any premium remained unpaid for one calendar month after it became payable. The sole question is whether

the premiums were payable in advance, for, if so, it is indisputable, and it is not disputed, that the policy has ceased to exist long before the insured's death. It is difficult for me to understand upon what possible ground it can be considered that the premiums were not payable in advance. How else could they be payable under the ordinary contract of life insurance? The contract is unilateral in this sense, that the insured is not bound to continue the insurance, but the insurer is, so long as the premiums are paid. Is the insurer to carry the risk for the year, and then, according as it may suit the insured, be paid or not paid for having carried it? The very nature of the transaction necessitates payment or some obligation to pay in advance. In this case the contention is that the risk was carried although there was no payment nor any sort of obligation to pay. But thus, without any consideration, the contract would be nudum pactum, unless, under seal, the defendants had covenanted to so carry the risk. The policy, however, instead of containing any such extraordinary covenant, clearly provides for payment in advance: a payment when it was first brought into force by delivery; a payment a year after that; and payments annually thereafter. "Annually" surely means each year, and yet it has been held that it means each year after skipping a year. Again, is it necessary, is it excusable, to pursue so plain a matter further?

I would allow the appeal, and dismiss the action.

OSLER and MACLAREN, JJ.A., concurred, for reasons stated in writing.

MOSS, C.J.O., and GARROW, J.A., also concurred.

NOVEMBER 15TH, 1907.

C.A.

JARVIS v. JARVIS.

Husband and Wife—Land Purchased by Husband—Conveyance Taken in Name of Wife—Gift or Settlement—Intention—Evidence—Improvidence—Absence of Relation of Confidence—Undue Influence—Want of Independent Advice—Reformation of Conveyance—Intention of Settlor—Life Estate.

Appeal by plaintiff from order of a Divisional Court (8 O. W. R. 902) allowing an appeal by defendant from judgment of MAGEE, J., at the trial, and dismissing the action.

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

A. H. Marsh, K.C., for plaintiff.

H. H. Strathy, K.C., for defendant.

MOSS, C.J.O.:—This action is between husband and wife, the former claiming to have set aside a conveyance of a parcel of land in Orillia, made by one Sanderson, from whom the plaintiff had purchased, and whom he paid for it, to the defendant. The conveyance as executed grants the land to the defendant in fee. In the statement of claim the plaintiff alleged that the conveyance was so made without his knowledge or consent, and he claimed that it should be cancelled, or that the defendant should be declared a trustee for him. The defendant asserted that the plaintiff intended to give her the land, and that the conveyance was so drawn by his direction, and she insisted that the land was hers absolutely. During the trial before Magee, J., leave was given to the plaintiff to amend by alleging improvidence on his part as an additional ground of relief. . . .

The trial Judge reached the conclusion that plaintiff had not intended to make an absolute gift of the land to the defendant, and that the conveyance did not give effect to his desires, and that when he executed it he did not understand its nature and effect, and he gave judgment vesting the lands in the plaintiff in fee. The defendant thereupon appealed to a Divisional Court, where it was held that the conveyance was in pursuance of plaintiff's intention, and was made in accordance with his directions, and the action was dismissed. The plaintiff in his turn appealed to this Court. After the argument the plaintiff, acting upon a suggestion of the Court, submitted a further amendment to the statement of claim, to the effect that the true intention was that the defendant was to have an estate for her life in the lands in the event of her surviving the plaintiff, and, subject thereto, the lands were to be vested in the plaintiff in fee, and praying that it be so declared. The defendant urges in opposition that the amendment should only be permitted on proper terms as to costs, and that in any event, if the conveyance is not to be upheld in the whole, the trusts shewn by the evidence should be declared. The case seems a proper one for allowing the amendment. The question still

remains, should the conveyance be upheld, and, if not, to what extent should it be set aside or varied?

Although the trial Judge adjudged that the plaintiff was entitled to have the lands vested in him, thereby in effect cancelling the conveyance in so far as it vested any beneficial interest in the defendant, he expressed the opinion that in his view of the evidence the plaintiff intended that the defendant should have an estate for life in the lands in the event of her surviving him. And in not awarding her such an estate or interest he, no doubt, acted upon the doctrine that where a voluntary settlement is intended to be made according to the settlor's declared wishes, and the conveyance, as drawn and executed, fails to properly express the settlor's intentions and wishes. it cannot be reformed, but must be wholly set aside. And, no doubt, the general rule is as stated by Lord Hatherley in Turner v. Collins, L. R. 7 Ch. at p. 342: "It has always been said and truly that there is great difficulty in reforming a voluntary deed, because, if any part of it is shewn to be contrary to the intention of the parties, you can only deal with it by setting the whole aside as in Hoghton v. Hoghton." But, as the case before Lord Hatherley shews, there are exceptions to the general rule. While in a case in which the voluntary settlor's desires have not been properly or effectively carried out, he cannot be prevented from changing his intentions, and cannot be compelled to adhere to what he had previously intended, there is nothing to prevent the Court from giving effect to such parts of the instrument as he may be willing to let stand.

In the present case I think that it appears from the evidence not only that it was not the plaintiff's intention that the lands should be conveyed absolutely to the defendant, but that the plaintiff did not understand, and no proper attempt was made to explain, the nature and effect of the conveyance. It is not necessary to decide upon whom lay the duty, or whether the relationship of the parties, coupled with the plaintiff's age, inability to read or write, ignorance of transactions of the kind, and complete separation from disinterested friends or advisers, cast upon the defendant the duty of making sure that the matter was fully explained, and that he understood its nature and effect. It now appears that, owing to the want of any such precautions and to the fact that the carrying into effect of the plaintiff's desires was

intrusted to persons wholly inexperienced in conveyancing, and almost utter strangers to the plaintiff, the conveyance does not express his intention. Allowing the widest scope to what has been deposed to as having been said by the plaintiff and the other parties present on the occasions when Sanderson put down something in a memorandum which has been mislaid and cannot be produced, and when the conveyance was executed by the plaintiff, it falls far short of proof that the plaintiff intended and directed that the land should be conveyed to the defendant in fee. The fact that he made his mark to the conveyance is the only tangible piece of evidence in that direction. And, in the circumstances disclosed in the evidence, he should not be held to the strict consequences of that act.

That he did not intend to deprive himself of all interest is apparent, and so the conveyance as executed did not express his mind. But, upon the evidence and the pleadings as they now appear before us, it is proper to preserve to the defendant the interest which the trial Judge was of opinion the plaintiff contemplated she should have, viz., an estate for life. The evidence amply sustains the trial Judge's view in this respect.

Therefore, instead of vesting the lands absolutely in the plaintiff, it should be declared that the defendant is entitled to an estate therein for the term of her natural life, in the event of her surviving the plaintiff, and that, subject thereto, the lands are vested in the plaintiff in fee simple.

The case is not one for costs to or against either party.

OSLER, GARROW, and MACLAREN, JJ.A. concurred.

MEREDITH, J.A., for reasons stated in writing, was of opinion that the defendant should be declared a trustee of the lands in question for the plaintiff for the term of his natural life, and as to the remainder for herself and her heirs and assigns forever.

ANGLIN, J. NOVEMBER 16TH, 1907.

WEEKLY COURT.

MACLAREN v. MACLAREN.

Life Insurance—Preferred Beneficiaries — Designation by Will—Identification of Policy — One of Four in Same Terms—Insurance Act—Bequest of "Policy" Held not to Include More than One—Evidence—Admissibility—Application for Insurance—Letter of Insured.

Motion by the plaintiffs, the executors of the will of the late John MacLaren, for judgment on further directions, pursuant to leave reserved by BRITTON, J., in a judgment pronounced in November, 1903.

J. F. Orde, Ottawa, for the plaintiffs.

M. C. Cameron, for the infant defendants.

ANGLIN, J.:—The late John MacLaren, of Brockville, died in British Columbia on 20th May, 1903, as the result of injuries sustained in an accident 2 or 3 days before. He left an estate valued at $830,000, against which there were liabilities of $535,000.

By his will made two days before his death, he bequeathed all his estate to his wife, subject to payment of his debts and 4 legacies of $50,000 each to his four children.

The will also contained the following provision: "I also bequeath to each of the above named children one-quarter of the proceeds from a 5 per cent. gold bond policy issued by the Travellers of Hartford, Conn."

The testator had 4 such policies in the Travellers Insurance Company of Hartford, each for $25,000. These policies bore the same date and were identical in their terms. The questions presented for the opinion of the Court upon this motion are:—

(1) Whether the children are entitled under this bequest to the four policies or to one of them only.

(2) If the children are entitled to one policy only, the proceeds to be divided equally amongst them, whether they are entitiled to the proceeds of such policy as preferred beneficiaries under the Ontario Insurance Act.

Upon the argument Mr. Cameron offered in evidence, upon the first question, the application for the insurance, and a letter of the late John MacLaren, dated 4th July, 1901, in which he says: "I beg to acknowledge receipt from you of policy for $100,000 on a 5 per cent. twenty year gold bond issued by the Travellers Insurance Company of Hartford, Conn. I have much pleasure in stating that I find the policy satisfactory in every respect." And an affidavit by William McCaw, the insurance agent who took Mr. MacLaren's application, in which he says that Mr. MacLaren desired one policy of $100,000, and that it was divided into 4 policies at Mr. McCaw's suggestion, for convenience, and that he knows that Mr. MacLaren always considered the transaction as one insurance for $100,000.

I think the application for the insurance, which is by each policy made part of the insurance contract, and a copy of which is attached to each policy, is properly admissible in evidence.

The application shews that the insurance applied for was "$100,000 in 4 policies of $25,000 each," and describes the kind of policy desired as "principal and income bond, 20 year endowment, $2,500 a year for 20 years, then $50,000," and the annual premium is stated to be $3,056. In describing the kind of policy and stating the amount of premium, the transaction is apparently treated as a single transaction for a $100,000 policy.

Even if the letter of the decesased and the affidavit of Mr. McCaw be admissible (I think they are not), I do not find in them anything which would enable me to say that the testator, who must have known he had 4 policies, each for $25,000, meant, when he bequeathed "a policy," to give the whole 4 policies. Speculation in construing wills is unsafe and contrary to rule: Re Sherlock, 28 O. R. 638.

The cases are numerous in which a testator, having several articles of property of the same kind, makes a bequest of one of them. For instance, a testator having several horses bequeaths to the legatee "a horse." The authorities are uniform that such a bequest is not void for uncertainty, but entitles the legatee to only one article or piece of property, which he may select out of the property designated. Of these it is sufficient to refer to the comparatively recent cases of O'Donnell v. Welsh, [1903] 1 Ir. R. 115; and Tapley v.

Eagleton, 12 Ch. D. 683. Other cases may be found in Jarman on Wills, 5th ed., p. 331.

Richards v. Patteson, 15 Sim. 501—not cited at Bar—would seem at first blush to support the contention that the bequest of "the proceeds of a 5 per cent. gold bond policy in the Travellers of Hartford, Conn.," may be read as a bequest of the proceeds of all of the testator's insurance of that description. There the bequest of "all my property in the Austrian and Russian funds," and "also that vested in a Swedish mortgage security," was held, as to the latter words, to be equivalent to a bequest of "all my property vested in Swedish mortgage security." The preceding words apparently satisfied the Court that the testator's clear intention in this bequest was to deal with all his property invested in Swedish mortgages, of which he had several, precisely as he had dealt with all his property invested in the Austrian and Russian funds, and that the little word "a" had slipped in by inadvertence. In the present case there are no words in juxtaposition to aid the contention that by "a policy, etc., in the Travellers," the testator meant all his insurance of that description. Because of the absence of any such context as is found in Richards v. Patteson, the bequest construed in that case is clearly distinguishable from that now under consideration. I have found no other decision which lends any colour to the argument advanced by counsel for the infant sons of the testator.

It is, in my opinion, impossible to read the bequest in question, which is absolutely free from doubt or ambiguity on its face, and which is not rendered doubtful or ambiguous by the proven fact that the deceased had four policies, otherwise than as it is expressed, that is, as the gift of a single policy.

Upon the second question the case is, I think, if anything clearer. The statute (R. S. O. 1897 ch. 203, sec. 159), has been held by authority binding upon me to permit the designation by will of preferred beneficiaries, either originally or by way of substitution. The designation, however, where made by will or by any instrument in writing other than an indorsement on the policy, must "identify the contract by number or otherwise." That this statute was passed to secure benefits to wives and children, and should receive such construction as will tend to effectuate that purpose, may be admitted. The Courts have gone far to place upon the statute

a liberal construction in favour of beneficiaries of the preferred class. Thus in Re Cheeseborough, 30 O. R. 639, where the testator had 5 policies of insurance, in two of which the beneficiaries were designated, a bequest of all his estate, including his insurance policies, was held a sufficient identification under the statute of the three insurance policies in which beneficiaries had not been named See too Re Harkness, 8 O. L. R. 720, 4 O. W. R. 533. In the present case, however, if I were to hold that the bequest of one of 4 policies, all answering a particular description, suffices as an identification of the policy which the beneficiaries designated may select under the bequest, I would go far beyond any decision yet pronounced in favour of preferred beneficiaries upon the question of identification under the statute.

In my opinion, it is not possible to maintain that a bequest of one of 4 policies, any one of which may be selected to answer the bequest, is such a designation as meets the requirement of the statute that the policy shall be identified by number or otherwise.

An order will issue containing declarations in accordance with the foregoing expressions of opinion. The costs of all parties will be paid out of the estate of the testator, those of the executors as between solicitor and client.

TEETZEL, J. NOVEMBER 16TH, 1907.

WEEKLY COURT.

DIXON v. GARBUTT.

Contract—Remuneration for Work and Services Rendered to Deceased Person—Promise to Pay for Services, but No Rate Fixed—Claim against Estate—Quantum Meruit—Evidence—Report Varied in Appeal by Reducing Amount Allowed.

Appeal by plaintiff from report of senior Judge of County Court of Wentworth, upon a reference to him to ascertain the amount due to the defendant for services performed by her for the late Isabella Brown, finding the sum of $3,055.50.

W. Laidlaw, K.C., for plaintiff.

G. Lynch-Staunton, K.C., and E. F. Lazier, Hamilton, for defendant.

TEETZEL, J.:—This action by an administrator arose out of an unsuccessful attempt by the defendant to establish a gift to her by the intestate of upwards of $20,000; and the defendant counterclaimed to have specific performance of an alleged agreement by the intestate to leave her by will $5,000 in cash and a house and lot, and in the alternative for payment for work and labour performed by the defendant for the intestate from February, 1903, to May, 1906.

At the trial the plaintiff succeeded in having the alleged gift declared void, and also in defeating the defendant's counterclaim for specific performance; but, the plaintiff having submitted to payment of a reasonable sum for defendant's work and services, a reference was directed to Judge Snider, as special referee, to ascertain what, if anything, is due the defendant in respect of her counterclaim for work and labour performed . . . for the late Isabella Brown (of whose estate the plaintiff is administrator) during the period above mentioned; and this motion is by way of an appeal from the report made upon the reference.

No rate of wages was fixed between the parties, but it was established that the intestate agreed that the defendant should be "well paid for her services."

The defendant was employed in all 159 weeks and 3 days. The referee allowed $25 per week for 66 weeks and 3 days, and $15 per week for 93 weeks, making the total allowance $3,055.50.

As reasons influencing the referee in making the above allowances, he mentions in his memorandum of judgment: "Particularly objectionable and arduous work done by the defendant for the deceased Isabella Brown, in addition to services as nurse; the fact that the defendant was the only person with whom the deceased would be content; and in consideration of the defendant's standing in life and family and financial circumstances, and the measure of the sacrifices she made at the deceased's earnest desire."

The appellant contends that the allowance was unreasonable and exorbitant and not warranted by the evidence.

Beyond proving in a general way the nature of the services, and the usual wages for a trained nurse, the defendant put in no evidence of the monetary value of the services.

The evidence disclosed that for 20 weeks prior to 1st July, 1903, the defendant, besides doing the ordinary house work for the intestate, performed at her request the duties

of nurse during the last illness of a sister of the intestate, and that those duties involved work of a most disagreeable kind. After the last mentioned date and until the beginning of the last illness of the intestate, about 20th December, 1905, the services performed by the defendant were at most those of a lady's maid and housekeeper. From about the last mentioned date until 5th May, 1906, when the intestate died, the services performed were similar to those performed during the last illness of the intestate's sister.

The defendant is not a professional nurse, and the plaintiff offered the evidence of two physicians of good standing and experience, in whose opinion the services of a professional nurse could have been obtained for about $18 per week, while $5 per week would be fair wages for a non-professional nurse.

The sole question for determination is the fair value of the services rendered, bearing in mind the intestate's promise that the defendant would be well paid, which I would interpret to mean, liberally paid.

In short, the defendant's claim is upon a quantum meruit, which Stroud defines to be a reasonable amount to be paid for services rendered or work done where the same is not fixed by contract; and it is further stated in Smith's Master and Servant, 6th ed., pp. 158, 159, that where there is an agreement to pay, but the amount is not settled and the action is upon a quantum meruit, the amount to be awarded is such sum as the employer acting bona fide would or ought to have awarded in payment for the services.

After careful perusal of all the evidence as to the services rendered and the value thereof, and assuming the intention of the intestate to pay liberally, I am of opinion that the amount awarded is considerably more than the intestate, acting bona fide under the agreement, would or ought to have paid for the services.

The intestate, who was a cousin of the defendant, was an unmarried woman possessed of large means, and it is quite apparent from the evidence of the defendant and her daughter that the defendant and her family were very kind and attentive to the intestate, and that the defendant personally sacrificed the comforts of her own home to serve the intestate, and that she entertained from the beginning the hope that the intestate would out of her abundant means deal bountifully with her by her will.

While the relationship of the parties, the great kindness of the defendant to the intestate, and the personal sacrifices she made in serving her, in addition to the services performed, would probably have furnished good ground for supporting a settlement at a sum as large as the amount awarded, I cannot, in the absence of agreement, judicially add to the value of the defendant's services any sum as compensation for personal sacrifices or disappointed hopes, even if I were able to find, as the referee suggests, that the defendant was the only person with whom the deceased would have been content; but, with very great respect, I do not think the evidence warrants any such conclusion.

I award the defendant the following sums, which are, to my mind, very liberal compensation for the services rendered, namely: for the 20 weeks from 10th February, 1903, to 1st July, 1903, at $20 per week, $400; for the 19 weeks and 3 days from 20th December, 1905, to 6th May, 1906, at $20 per week, $390; for all the balance of the period, 120 weeks, at $10 per week, $1,200: total $1,990.

The report will be amended accordingly. Costs of the appeal to be costs in the cause.

MACMAHON, J. NOVEMBER 16TH, 1907.

TRIAL.

KILGOUR v. TOWN OF PORT ARTHUR.

Crown—Letters Patent Demising Crown Land—Derogation from Previous Grant — Description — Bed of River — Cancellation of Crown Lease.

Action for cancellation of a Crown patent for land and for other relief.

Hamilton Cassels, K.C., for plaintiff.

C. A. Moss, for defendants.

MACMAHON, J.:—On 10th March, 1870, the Crown granted to George D. Ferrier all that parcel or tract of land

situated, lying, and being in the district of Algoma (now in the district of Thunder Bay), in the province of Ontario, containing by admeasurement 267¼ acres, be the same more or less, which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of mineral location "S" in the township of McIntyre, as shewn on a plan of survey by provincial land surveyor Hugh P. Savigny, dated May, 1868, and marked "George D. Ferrier," of record in the department of Crown lands, and the metes and bounds of which are described as follows by the said Hugh P. Savigny, that is to say: commencing where a post has been planted at the north-west angle of location 10, Savigny's survey; thence due north astronomically 65 chains 55 links to where a post has been planted; thence due east 41 chains 50 links to where a post has been planted; thence due south 65 chains 60 links, more or less, to a post planted at the north-east angle of location number 10; thence due west 40 chains, more or less, to the place of beginning: reserving an allowance of 5 per cent. on the acreage of the lands hereby granted for roads, and reserving also the right of the Crown to lay out roads where necessary: To have and to hold the said parcel or tract of land hereby granted, conveyed, and assured unto the said George D. Ferrier, his heirs and assigns forever; saving, excepting, and reserving, nevertheless, unto Her Majesty, her heirs and successors, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters which should or might be thereafter found on or under or be flowing through or upon, any part of the said parcel or tract of land.

It was admitted by the defendants that "save and except as to all mines and minerals in, under, and upon the said lands, together with the rights of ingress and of working and mining for minerals in and under said lands, whatever estate, right, title, and interest in mineral location 'S' in the township of McIntyre passed to George D. Ferrier under said grant of 10th March, 1870, is vested in the plaintiff Joseph Kilgour, and proof of the plaintiff's title is at the trial dispensed with."

It was also admitted that the said patent was registered in the registry office for the district of Thunder Bay in March, 1870. And the plaintiff admitted that the lease from the Crown to the defendants which is attacked in this action was registered in February, 1907.

On 20th February, 1907, under and by virtue of letters patent, the Crown demised and leased to the defendants all and singular that certain parcel or tract of land under the water of Current river, passing through and within the limits of mining location "S" in the township of McIntyre, in the district of Thunder Bay, containing by admeasurement 10 acres more or less, as shewn on plan of survey by provincial land surveyor Hugh P. Savigny, dated May, 1868, of record in the department of lands, forests, and mines.

Clause 20 of the said latters patent provides as follows: "It is further expressly agreed and understood that should any litigation arise with regard to the title of the land hereby demised, the lessees, their successors and assigns, will, at their own costs and charges, defend their title and carry on the said litigation and will indemnify Us, as representing the province of Ontario and government and officers thereof, in respect of all costs which may be awarded in connection with the litigation, and in respect of all claims as well for costs as for damages, if any, which may arise or be incurred, or which may be established, against Us, as representing the said province of Ontario, or any officers thereof, by reason of this lease and any connection with the property hereby demised."

The statement of claim alleges (paragraph 5) that the tract of land under the waters of the Current river which His Majesty by the said letters patent purported to demise to the defendants is a part of the parcel or tract of land granted to the said Ferrier, and is now vested in the plaintiff.

The plaintiff asks to have it declared that the letters patent to the defendants, dated 20th February, 1907, are null and void as against the plaintiff, and form a cloud upon the plaintiff's title to the lands covered by the patent of 10th March, 1870; to have the letters patent of 20th February, 1907, delivered up to be cancelled, and to have the registration thereof vacated.

Robert R. Wickam, a civil engineer, who was with Hugh P. Savigny, provincial land surveyor, in May, 1868, when he laid out mining location "S" and planted a boundary post at the north-east corner thereof, stated that the Current river is 64 feet wide where it enters location "S" about two chains from the north-west angle thereof, and runs through the

whole length of the lot, leaving it near the south-east corner. The river is very rough and rapid, and is not navigable, being almost a continuous rapid and having a fall of 453 feet from the north end of location "S" to its mouth, a distance of 6 miles. Logs could not be floated down it without considerable improvements being made.

James F. Whitson, chief clerk in the Crown lands department, said that the 10 acres described in the lease to the defendants formed part of the area embraced in the boundaries of the 267 acres covered by the patent of location "S" granted to Ferrier, and covered the bed of Current river.

The patent to Ferrier included the Current river, and, there being no reservation of the waters of the river, the Crown could not derogate from its grant and grant a lease of the land under the waters of the Current river to the defendants.

The Crown had doubts as to its right to grant the lease to the defendants, as it is expressly stipulated that should litigation arise as to the title the lessees are to defend their title at their own costs and charges, and indemnify the Crown against all costs and damages by reason of the lease and any connection with the property thereby demised. The Attorney-General refused a fiat to allow the Crown to be made a party to the action.

There will be judgment for the plaintiff with a declaration as asked in the 1st and 2nd paragraphs of the prayer, together with the costs of the action.

BOYD, C. NOVEMBER 16TH, 1907.

TRIAL.

MCNICHOL v. MCPHERSON.

Execution — Sale of Interest in Land under, by Sheriff — Action by Execution Debtor to Set aside—Purchase by Execution Creditor — Irregularities — Advertising—Inadequacy of Price—Resale by Purchaser to Wife of Plaintiff—Charge on Land—Declaration—Costs.

Action by John McNichol against G. G. McPherson and John A. Davidson, members of a firm of solicitors, and G. G.

McPherson individually, and Mary McNichol, wife of the plaintiff, to have it declared that a pretended sale of the lands of the plaintiff, under an execution issued by the defendants the solicitors against the lands of the plaintiff, by the sheriff to the defendant G. G. McPherson, was unconscionable, invalid, and void as against the plaintiff, and an alleged resale or transfer to the defendant Mary McNichol unsubstantial, untenable, and void as against the plaintiff; and for possession and mesne profits; or, in the alternative, to have it declared that the defendants G. G. McPherson and Mary McNichol held the land in trust for the plaintiff, subject to the payment of the execution, if valid as an incumbrance or otherwise tenable against the plaintiff.

H. B. Morphy, Listowel, and J. M. Carthew, Listowel, for plaintiff.

J. C. Makins, Stratford, for defendants.

BOYD, C.:—No evidence has been given to support the allegation in the plaintiff's claim that the plaintiff reposed confidence in the defendants the solicitors respecting the land in question, or that the said solicitors intervened in any way to influence the action of the sheriff in taking proper steps to advertise and sell the interest of the plaintiff in the lands in question under the execution in his hands at the suit of the said defendants the solicitors. As far as the evidence shews, the sheriff took his own course in the execution of the writ, and at the appointed time sold the property seized to the defendant solicitor for the sum of $70. There was an arrangement between the said solicitors and the other defendant, wife of plaintiff, that if they became purchasers they would allow her the benefit of the transaction, if she so desired, on paying or securing to them the full amount of their account for costs against the plaintiff. This is the only matter brought out in the evidence affecting the defendants in regard to the sale. Evidence was also given to shew that the sale price was far less than the real value of what was sold.

The history of the transaction is this. The defendant Mary McNichol sued the plaintiff for alimony several years ago, and the defendants the solicitors then acted for the

husband, and had against him an unsatisfied claim for costs. The alimony action was not prosecuted at length, owing to an arrangement by which (among other things) the husband leased the land in question to his wife for 7 years at a nominal rent. She accepted this in lieu of alimony, and has since then lived on the land and brought up a numerous family of small children, most of whom are now of age. At the end of the 7 years, in February, 1906, the husband demanded possession from the widow, and she objected to going off the land, but asked him to return and maintain his family. That he refused to do, and till this action she remained unmolested on the land with 4 infant children, the eldest, a girl, being 16 years of age. They have worked the place as well as they could, and lived on the proceeds. In September, 1905, the defendants the solicitors recovered judgment against the husband for their costs, to the amount of $97, and duly placed in the sheriff's hands an execution, which attached upon the interest of the plaintiff, and under which the sale took place in October, 1906. It appears that the sheriff advertised the sale in the official Gazette and in a local paper, but what other steps he took does not appear. The sheriff died pending this action, and the plaintiff made no attempt to prove, from his books or otherwise, what had been done by him before the sale.

It also appears that in October, 1905, the plaintiff made application by other solicitors, to have determined by the Court certain questions arising as to the estate of the plaintiff in the land in question under the will of Colin McNichol, in which proceeding costs of the various parties interested were taxed at the sum of about $200, and were made a charge upon the said lands. By the said will the plaintiff has a life estate in the land, and the wife has also a life estate after the death of her husband, with the remainder in fee as the plaintiff may appoint, and, in default of appointment, to persons named.

By the pleading complaint is made that this land, worth as alleged $3,500, was sold for $70. But the interest sold was not the fee simple, which the plaintiff had not, but only his life estate. Evidence was given that the land would rent for $150 per year, but based on the supposition that it was in good condition. And evidence was given that the average chance for life of a person aged 59 (said to be the

plaintiff's age) would be about 14 years. However, the evidence as to the fair value of the life estate was vague and unsatisfactory, first because the two witnesses who spoke had not been on the land, and it appeared that it could not be very well worked during the occupation of the wife and children, and that it would not pay to call in a hired man to assist them—and again because the habits of the defendant were probably not such as to ensure an average length of life. In addition to this, and as affecting the saleability of the interest, there was the charge for costs, $200, and the possession of the wife, and her claim to be supported if she were dispossessed of the land.

As to the law applicable to these circumstances, it is clear that the defendants as execution creditors, had the right to purchase to protect their claim. The mere fact that there was no greater audience at the sale than the wife and the purchaser was a matter which appealed to the sheriff's discretion in proceeding with the sale; if he thought that a fair price (under such an enforced sale) was not being offered, he had the power to withdraw the property and postpone the sale. In the absence of evidence, I must assume that he did his duty according to the best of his judgment, and took the risk of being called to account if he acted negligently. I cannot say he acted recklessly—he may well have thought that, having regard to the situation, a fair sum was being offered—it was certainly not a nominal but a substantial sum for what was in essence a precarious property, depending on the length of the husband's life. The sale is under process of law, and is conducted by an officer of the law, and the execution creditor has the right to purchase, and is not affected by any irregularities or omissions on the sheriff's part: Stratford v. Twynan, Jac. 418, followed in McDonald v. Cameron, 13 Gr. 100.

In these sales under process of law, mere inadequacy of consideration or price does not count, unless, perhaps, it is so grave and extreme as to compel a conclusion of fraud or malversation: Laing v. Matthews, 14 Gr. 38.

Where the conveyance has been executed by the sheriff, and where the purchaser has entered into a binding agreement to sell at an advance to another person, I find no authority to justify interference to invalidate the deed.

though, it may be, the sheriff has laid himself open to the charge of negligence in disposing of the property. I do not say that any such evidence has been given in this case inculpating the deceased officer. If such evidence can be given, this action will not bar a direct attack upon his sureties or his estate: Watson v. McDonell, 6 O. S. 450.

The action must stand dismissed with costs (one set), and declaration that the interest sold is to be vested in the wife of the plaintiff, subject to the charge for costs of construing the will and to the payment of her note held by the defendants the solicitors. It is for $142, I think, which includes all defendants' costs against the husband's interest and sheriff's fees, etc.

NOVEMBER 11TH, 1907.

DIVISIONAL COURT.

PARKER v. TAIN.

Trusts and Trustees—Action of Ejectment—Counterclaim for Declaration of Trust and to Set aside Conveyance as Fraudulent—Improper Joinder of Causes of Counterclaim—Amendment—Election—Statute of Frauds.

Appeal by defendant Minnie A. Henders from judgment of BOYD, C., ante 36, in favour of plaintiff in an action to recover possession of land, and dismissing the counterclaim of the appellant for a declaration that the plaintiff held the land in trust for the plaintiff, and in the alternative to set aside the conveyance of the land to the plaintiff by her son as fraudulent.

W. Proudfoot, K.C., for appellant.

W. J. Tremeear, for plaintiff and defendants by counterclaim, was not called upon.

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

MEREDITH, C.J.:—The plaintiff sued to recover possession of the land in question, and the appellant counterclaimed setting up that the grantor of the plaintiff, who was her son, was trustee of the land for her, the appellant, and that the plaintiff obtained the conveyance with notice of the trust, and in fraud of her, the appellant, and alleging that the transaction was colourable, but without any allegation that the appellant is a creditor; without bringing, if indeed it could be brought, the counterclaim on behalf of herself and all other creditors of the grantor, she alleges that the transaction is fraudulent as against creditors; and it may be said that the pleading probably indicates that she seeks to have the conveyance set aside as fraudulent.

With regard to the first point, the Statute of Frauds is pleaded, and that is a complete answer to the appellant's claim. The trust, if there was any—we express no opinion upon the facts—was one resting in parol, and, there being nothing to take the case out of the provisions of the Statute of Frauds, the Chancellor rightly held that the first branch of the appellant's case failed.

With regard to the second branch, for reasons which I have indicated already, no case is made upon the pleading for setting aside the transaction as fraudulent against the creditors of the grantor; as I have said, it is not even alleged that the appellant is a creditor, and the counterclaim is not on behalf of all creditors.

Even assuming that the appellant would be entitled to counterclaim in the same way as a plaintiff would sue, the Rules shew that a plaintiff is prevented from setting up two distinct causes of action, unless they arise out of the same transaction. For that, Stroud v. Lawson, [1898] 2 Q. B. 44, may be cited; and there are other cases to the same effect.

The appellant asks that leave should be given to amend; but, admittedly, if she amended, it would be for the purpose of electing to abandon the other cause of action and proceeding upon the claim to set aside the transaction as fraudulent as against creditors. We think that leave to amend should not be given in such circumstances, but that the appellant should be left to bring her action, if she so desires to set aside the transaction as fraudulent as against creditors.

The result is that the appeal will be dismissed with costs; but a provision may be inserted in the judgment that it is to be without prejudice to any action which the appellant may be advised to bring to set aside the conveyance by the grantor to the plaintiff.

NOVEMBER 11TH, 1907.

DIVISIONAL COURT.

QUACKENBUSH v. BROWN.

Mortgage—Discharge—Intention to Take Assignment—Mistake—Subrogation—Chargee of Land Joining in Mortgage as Surety for Owner—Extension of Time to Owner—Release of Surety—Declaration of Priority—Redemption—Costs.

Appeal by the adult defendant, Amanda Brown, from judgment of MAGEE, J. (7 O. W. R. 284), and from his subsequent judgment in June, 1907, after the addition of parties and hearing further evidence, finding that plaintiff is entitled to have his rights under his father's will in priority to defendant's title, and that plaintiff as a surety had been discharged by giving time to William Allen Quackenbush.

C. J. Holman, K.C., for the appellant, contended that there was mere passive inactivity and no binding bargain to extend time.

J. H. Spence, for plaintiff, contra.

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

MEREDITH, C.J.:—The law is simple enough, and the question in issue is one of fact only.

We are not embarrassed by any finding of fact of the learned Judge, in the sense of his pointing to any specific

thing that was agreed upon as amounting to a bargain to extend the time upon the acquisition of the mortgage by the appellant.

The part of the case that is in question is dealt with in a very few words, at p. 290 of 7 O. W. R. After referring to the fact that the respondent had notice that William was the principal debtor and the respondent a surety, the learned Judge says: "Having this knowledge imputed to her, she entered into an agreement, oral but binding upon her in equity, from the execution of the deed, to give a substantial extension of time to William. That agreement, so binding, would ordinarily relieve the surety from liability and entitle him to have his property released from the mortgage, unless in as far as she reserved her remedies against him or it."

Apparently the learned Judge's view was that, inasmuch as the purpose of the whole transaction was that more time should be given to the mortgagor, and a deed had been executed on the faith of that, a contract must be inferred to extend the time for payment of the mortgage debt. At first sight it struck me that the reasoning was well founded, but, on further consideration, I find considerable difficulty in following the reasoning.

All that the evidence shews, at most, is that the respondent expressed her willingness or her intention to be lenient to the mortgagor in respect of the mortgage indebtedness. There was nothing, it seems to me, in the shape of an agreement binding her to extend the time for payment, and, while it might have been an unexpected thing if she had, immediately after having acquired the mortgage, proceeded to foreclose it, I do not see what answer the mortgagors would have had to an action for that purpose. If she had brought an action the next day after the assignment, it would have been necessary for the mortgagors to have proved an agreement which tied the hands of the mortgagee from suing. I can see no evidence of an agreement which would do that. I can see nothing more than the extension of generosity and kindness from the one to the other in relieving them from one that was pressing, or who it was feared might press, for the debt.

With great respect for the view of my brother Magee, I think his judgment must be reversed, and that so much

of the judgment as postpones the claim of the appellant to the respondent's claim must be set aside.

The action should not be dismissed. Technically the plaintiff is entitled to redeem.

The judgment should be drawn declaring the rights of the appellant as we have found them, and the usual judgment will be drawn up to follow that.

The costs will be added to the mortgage claim.