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FALCONBRIDGE, C.J. JANUARY 25TH, 1909.

TRIAL.

AYERHART v. WEINSTEIN.

Trespass—Injury to Building—Damages—Injunction.

Action for damages for injury to plaintiff's house by raising an adjoining building.

A. F. Lobb and J. Nason, for plaintiff.

L. F. Heyd, K.C., for defendant.

FALCONBRIDGE, C.J.:—The defendant made a contract with one Litowitz to raise the extension of 118 Montrose avenue for a definite sum. It appears from the evidence of Mr. Galley, an independent inspector and witness, whose name was suggested by plaintiff's counsel, that some trifling injury may have been caused to plaintiff's building, not by the pushing or intrusion of defendant's building, but by the joint action of the use by Litowitz of the jack-screw and by the excavation done by plaintiff himself under his own building.

It is clear that plaintiff has no right of action against this defendant. It would have availed him very little if he had established such right, for the damages would not amount to $20, and there would have been no certificate assisting plaintiff in the matter of costs. There is no intrusion, pressure, or impact of defendant's house against plaintiff's house which would entitle the plaintiff to an injunction. The action is therefore dismissed with costs.

I give 10 days' stay, not to facilitate an appeal, but to enable plaintiff to prepare to pay up.

MOSS, C.J.O. JANUARY 25TH, 1909.

C.A.—CHAMBERS.

McLEOD v. CANADIAN NORTHERN R. W. CO.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Special Grounds.

Motion by defendants for leave to appeal from order of a Divisional Court, 12 O. W. R. 1279.

R. B. Henderson, for defendants.

J. B. Clarke, K.C., for plaintiff.

MOSS, C.J.O.:—I am unable to conclude that this case is one in which leave to appeal ought to be given. No special grounds appear for treating it as exceptional. The motion must be refused.

CLUTE, J. JANUARY 26TH, 1909.

WEEKLY COURT.

RE SHANNON.

Will — Construction — Bequest in Trust for Maintenance of Lunatic Child — Trustee to Retain Unexpended Balance —Child Dying before Testator—Claim of Trustee to Whole Sum Bequeathed—Intestacy—Lapsed Bequest.

Motion by the children and next of kin of Thomas Shannon, deceased, for an order declaring the construction of the will of the deceased.

W. F. Kerr, Cobourg, for the applicants.

H. T. Kelly, K.C., for the Revd. Father Whibbs.

Grayson Smith, for the executor.

CLUTE, J.:—The testator, after making a bequest of the money to his credit in the bank, provided as follows:—

"3rd. I devise and bequeath all the rest and residue of my estate, real and personal, of which I may die possessed

or seised of, to my said executor and trustee . . . . to sell the same as soon as conveniently may be after my decease, and to divide the proceeds thereof in equal shares amongst my children, namely," (8 in all, naming them, including) "Edith Shannon . . . subject to the conditions and limitations hereinafter mentioned . . . .

"4th. I hereby direct my said executor and trustee, the said James Forestell, to pay the share of my said estate hereinbefore bequeathed to my said daughter Edith Shannon, who is an inmate of the insane asylum at Kingston, to Rev. Father Whibbs, parish priest of Campbellford, upon the following trusts: firstly, to pay so much thereof as may be necessary for providing proper clothing for my said daughter Edith Shannon while she is an inmate of the said asylum, provided, however, that in case my said daughter Edith Shannon dies before her share of my said estate so bequeathed to her is exhausted by the payments hereinbefore mentioned, then I bequeath the remainder of her said estate to the said Rev. Father Whibbs, to be applied by him towards the liquidation of the debt on the Roman Catholic Church in the village of Campbellford, and I hereby direct that the receipt of the said Father Whibbs shall be a good and valid discharge to my said executor and trustee for the payment by my said executor of the share of my said estate so bequeathed as aforesaid to my said daughter Edith Shannon."

Edith Shannon died in the lifetime of the testator. It is now contended by the other children, heirs and devisees of the testator, that her share lapsed, and that Father Whibbs takes nothing under the last mentioned clause of the will.

In the earlier part of clause 3 it is clear that Edith Shannon would have taken her share absolutely, had she survived the testator, but for the conditions and limitations mentioned in clause 4, and it is this share bequeathed to her which the executor is directed to pay to Father Whibbs, upon trust, first, to pay so much thereof as may be necessary for providing her with proper clothing while an inmate of the asylum; provided, however, that in case she dies before her share of the estate so bequeathed to her is exhausted by the payments thereinbefore mentioned, then the remainder of the share is bequeathed to Father Whibbs.

It will be seen from the wording of this clause that the trust upon which Father Whibbs held her share was to

provide her with proper clothing. This trust cannot be fulfilled in any part. There is no suggestion that in case she dies before the testator her share is to go to Father Whibbs. It is only the remainder of her share which is to go to him in case she dies before such share is exhausted by payments for the purpose for which it was given. The wording shews that the testator was uncertain as to whether there would be anything left over after his daughter was provided for or not. But, if there was, he directed how it was to go. It is clear that the daughter was the chief object of his bounty; that, she having died in the lifetime of the testator, no part of the bequest to her could have been expended in the manner provided by the will; and there was, therefore, no remainder of the shares so bequeathed to her that could as such go to Father Whibbs.

It is urged, however, that reading the whole will and especially the clause which shews that the receipt of Father Whibbs should be a good and valid discharge, it clearly indicated an intention of the testator that he should be a beneficiary in any event. I do not think so. The latter part of the clause clearly shews that such was not the intention of the testator, in my opinion. His receipt would be a valid receipt if the occasion arose for payment, but it is still, even in that clause, recognized as a receipt for the share of his daughter Edith Shannon.

The principal cases relied on by counsel are collected in Theobald on Wills, 6th ed., p. 751, where it is said: "The interests of those taking in remainder do not fail by the death of a tenant for life before the testator. But if an absolute interest is given, and the testator then proceeds to settle the share, the question is whether what is settled is a share to which the legatee has become entitled by surviving the testator, or whether the settlement is of the share which the legatee would have taken if he or she had survived. . . . In the former case the gift fails if the legatee dies before the testator, in the latter case it does not."

For the first proposition are cited: Stewart v. Jones, 3 DeG. & J. 532; In re Roberts, Tarleton v. Bruton, 27 Ch. D. 346, and 30 Ch. D. 234; and for the latter: In re Speakman, Unsworth v. Speakman, 4 Ch. D. 620; In re Pinhorne, Morston v. Hughes, [1894] 2 Ch. 176; In re Powell, Campbell v. Campbell, [1900] 2 Ch. 525; In re Whitmore, Walters v. Harrison, [1902] 2 Ch. 66. These cases are all

quite different from the present, and do not help very much in the construction of the present will.

There was no life estate given in the present will. The daughter Edith, had she lived, would have been entitled to the benefit of the whole, or so much thereof as might have been required for the purposes of the trust. In my opinion, it would be adding to the will and introducing something not only not contemplated by the testator, but contrary to his manifest intention, if I were to hold that, although the daughter predeceased him, and therefore this part of the will could not be carried out, yet that the clause evidences an intention to make a gift of the whole share to Father Whibbs in the event of her death.

In In re Pinhorne, In re Powell, and In re Whitmore, a life interest only was given to the deceased child, and in other respects the wills there under consideration differ materially from the present; and no general principle in any of the cases cited was enunciated which, so far as I can see, governs the present case. See the judgment of Stirling, L.J., in the Whitmore case, [1902] 2 Ch. at p. 70.

It was not, I think, an aliquot part of his estate which was disposed of by the will, but the share of the daughter Edith, and, as she never became entitled to any share, the contingency has never arisen upon which only could the gift in favour of Father Whibbs take effect.

In my opinion, the legacy lapsed. Costs of all parties out of the estate. Executor's costs as between solicitor and client.

JANUARY 26TH, 1909.

DIVISIONAL COURT.

FISHER v. INTERNATIONAL HARVESTER CO. OF CANADA.

Master and Servant — Injury to Servant — Negligence of Master — Unprecedented Occurrence — Duty to Guard against — Question for Jury — Evidence — Findings — Contract of Service—Obligatory Contract—Condition of Hiring—Validity of Contract—Payments Made to Injured Servant—Acceptance with Knowledge—R. S. O. 1897 ch. 160, sec. 10 — Consideration — Adequacy — Improvidence —Just and Reasonable Contract—Release—Bar to Action —Costs.

Appeal by plaintiff from judgment of RIDDELL, J., 12 O. W. R. 1126, dismissing the action.

G. Lynch-Staunton, K.C., for plaintiff.

J. W. Nesbitt, K.C., for defendants.

The Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), allowed the appeal and directed judgment to be entered for plaintiff for $1,000, the damages assessed by the jury, less amounts paid by defendants for or on account of plaintiff, and costs of the action and appeal.

OSLER, J.A. JANUARY 27TH, 1909.

C.A.—CHAMBERS.

SMITH v. ENGLEFIELD OIL AND GAS CO.

Appeal to Court of Appeal — Leave to Appeal from Judgment at Trial — Amount Involved Less than $1,000 — Title to Land or Future Rights not Involved—Action for Money Demand—Construction of Lease—Petroleum Bounty Act, 1904.

Motion by the defendants for leave to appeal from the judgment at the trial, direct to the Court of Appeal.

Shirley Denison, for defendants.

F. S. Mearns, for plaintiff.

OSLER, J.A.:—The judgment is for less than $1,000. The action is by lessor against lessee upon the reddendum clause in an "oil lease," which, so far as material to be noted, is in the following terms: "Yielding and paying to the lessor during the continuance of this lease, delivered in tanks free of expense, the one-eighth part or share of all oil, coal, salt, or other substance or deposit produced or raised from the said lands, except gas. . . ."

The statement of claim alleges that the custom between the parties had been for the defendants to market the oil produced from the land, including the plaintiff's share, and, after deducting the cost of sale, &c., to pay the plaintiff the net proceeds of his share. This course the parties followed until 10th August, 1904.

The market price of crude petroleum fell in consequence of the removal of customs duties, and, by the Petroleum Bounty Act, 1904, 4 Edw. VII. ch. 28, a bounty of 1½ cents per gallon became payable on all crude petroleum produced

from wells in Canada. After the passing of the Act, the defendants continued to morket the oil as before, but declined to pay over to the plaintiff the bounty attributable to his share whereby the price of oil was reduced, and the defendants obtained the benefit of so much of the bounty as was payable in respect of the plaintiff's share. The plaintiff asked for an account of the quantity of oil produced or raised from the land, and payment of the amount which would be due and owing to him on account of his share.

The judgment in favour of the plaintiff proceeded upon the footing of the demand thus set forth, and being, as I have said, for less than $1,000, I am unable to see how the Supreme Court can attract jurisdiction, unless leave shall at a later stage of the case be given, as the matter in controversy on the present appeal is less than $1,000. No title to real estate or interest therein is in dispute, nor is any question of future rights involved in the decision. The only question is whether the plaintiff is entitled to be paid a share of the bounty on the oil gained by the defendants: purely a pecuniary demand, depending, it would appear, upon the proper construction of the lease and the Bounty Act.

I cannot, therefore, give leave to appeal direct to this Court, passing over the Divisional Court.

Motion dismissed. Costs in the cause.

CARTWRIGHT, MASTER. JANUARY 28TH, 1909.

CHAMBERS.

RE INDEPENDENT CASH MUTUAL FIRE INSURANCE CO.

Interpleader — Application by Stakeholder — Dispute as to Amount Due — Action Pending — Remedy by Payment into Court of Sum Admitted to be Due — Refusal of Application.

Application by the company for an interpleader order, in the circumstances set out below.

James Hales, for the company.

A. C. McMaster, for R. S. Cline, a claimant.

Casey Wood, for the Sterling Bank of Canada, claimants.

THE MASTER:—A firm of Bunton Bros. insured their stock with the applicants for $2,500. The whole stock was destroyed by fire. The loss is admitted except as to the amount, the company offering to pay $2,000 only. Bunton Bros. assigned to Cline for the benefit of their creditors, and the whole $2,500 is demanded by Cline. The bank also claim the same sum as mortgagees. The company now ask to be allowed to pay into Court $2,000. An action has been brought by Cline, as assignee, against the company and the bank for the $2,500.

It does not seem that the motion can succeed unless the whole $2,500 is paid into Court.

In 23 Cyc. 6, under "Interpleader," it is said: "It is an undeviating rule that where the (applicant) raises any question as to the amount of the claim which is the subject of the litigation, this alone will be fatal to the right to maintain a bill of interpleader." Many cases are cited. Of these it will be sufficient to mention Mitchell v. Hayne, 25 R. R. 151, 2 Sim. & Stu. 63. There the Vice-Chancellor said: "Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants (i.e., the claimants), as to which the plaintiff is wholly independent between the parties, and the right to which will be fully settled by interpleader between the parties." The effect of that particular decision has been modified by Con. Rule 1104 (a), but the principle otherwise is not affected, but was affirmed as late as Robinson v. Jenkins, 24 Q. B. D. 275.

If the company think they are only bound to pay at most $2,000, they could have tendered this before action to both the claimants. Even now they can pay that sum into Court under Con. Rule 419. In this way they will have every advantage that could accrue to them from an interpleader order, if such could be granted. That of itself might be a sufficient ground for refusing an order, as nothing would be gained by it. The action must still proceed as to the $500, and no expense would be saved.

The motion will be dismissed with costs in the action to the plaintiff therein in any event, and with costs to the bank, fixed at $10, to be paid by the company.

CLUTE, J. JANUARY 29TH, 1909.

WEEKLY COURT.

RE WATTERS.

Life Insurance—Policy Payable to Legal Representatives or Assigns of Insured—Designation of Beneficiaries by Will — Insurance Act, sec. 160 — Identification of Policy — Sufficiency — Revocation of Will by Second Marriage — Effect of.

Application under Rule 938, by Jessie Anderson and Agnes West, daughters of James H. Watters, deceased, for an order declaring that the proceeds of policy No. 5420 on the life of the deceased, in the hands of the administrator of his estate, was the property of and should be paid over to the applicants.

Grayson Smith, for the applicants.

C. W. Kerr, for the administrator and for Jane Watters, the widow, and William Johnston Watters, a son, of deceased.

C. A. Moss, for Thomas Watters, a son of deceased.

CLUTE, J.:—In 1888 the intestate, James H. Watters, insured his life for the benefit of himself and his legal representatives and assigns. On 6th December, 1893, the deceased made his will, which contained the following clauses:—

"I bequeath to my daughter Jessie Anderson (one of the applicants), wife of George Anderson, . . . the sum of $1,000, to be paid out of the insurance moneys on my life, at my decease.

"I bequeath to my daughter Agnes West (the other applicant), wife of William West . . . the sum of $,1000, to be paid out of the insurance moneys on my life, at my decease."

The policy of insurance the proceeds of which are now in the hands of the administrator is the only policy of insurance effected on the life of the deceased at the time the will was made or since.

In 1902 the deceased married again, the will being thereby revoked under sec. 20 of the Wills Act.

The applicants contend that there was a valid trust declared by the will, which enures to their benefit, and which is not affected by the will having been revoked by reason of the said marriage.

It is not suggested that any of the exceptions mentioned under sec. 20 apply to the present case. On the other hand, it is submitted on behalf of the widow and the other children: (1) that the will did not sufficiently identify the policy, within sec. 160 of R. S. O. ch. 203; (2) that the policy is not identified by number or otherwise.

The wording here is certainly very general, but, the fact being admitted that the policy in question existed at the time, and was the only policy of insurance upon the life of the deceased, either then or subsequent thereto until his death, there can be no doubt, I think, that the testator, at all events, referred to the policy in question, and, having regard to the facts, that there could be no question as to what policy he did refer to.

The applicants relied upon Re Cheesborough, 30 O.R. 639, and Re Harkness, 8 O. L. R. 720, 4 O. W. R. 533. The wording of the will in the Cheesborough case was, "all my property, real and personal, and including life insurance policies and certificates." Ferguson, J., was of opinion that, though not identified by number, the policies were "otherwise identified when all the policies are given. The policies that are meant seem to me to be made entirely certain in this way, and no room for doubt, error, or mistake is left remaining."

In Re Harkness the words were, "I give the residue of my property, including life insurance, to my wife," etc. Teetzel, J., held that the will sufficiently identified the policy within sec. 160 of the Insurance Act.

Counsel for the respondents, however, argued that the effect of the recent decision in Re Cochrane, 16 O. L. R. 328, 11 O. W. R. 956, is to modify or to overrule the earlier decisions. I do not think so. In the Cochrane case the assured, being the holder of a beneficiary certificate in a benevolent society, made payable to his wife, by his will bequeathed "out of my life insurance funds the sum of $200 to my sister, and all the rest and residue and remainder of my insurance funds to my daughter;" and it was held that this did not sufficiently identify the beneficiary certificate above mentioned; that is, the beneficiary certificate made payable to his wife. The Chancellor, while not disagreeing

with the decision in Re Cheesborough, points out that in that case there were 5 policies, 2 of which had been designated to beneficiaries—his son and his other children—and the decision affected only the other 3. The 2 policies which were designated to the son and his other children were not included in this decision. In the Harkness case the testator had one policy payable to his order or heirs, and by his will gave the residue of his property, including life insurance, to his wife and children; and it was there held that these words made it as certain and as clear as in the Cheesbro case what policy of insurance was meant, and that there was a complete identification, and, as the Chancellor says, "Both cases, therefore, apply to the situation where the policies dealt with and referred to are part of the testator's estate, and not policies which are not his, but are held subject to a trust for the designated beneficiary, and as to which he has power to alter the designation by his will."

In the present case, the policy being payable to "James H. Watters, the assured under this policy, or to the legal representatives or assigns of said assured," the case clearly falls within the Cheesborough and Harkness cases, and is not at all affected, in my opinion, by the Cochrane case.

The further question remains to be considered, namely, as to whether or not the applicants are entitled under a will which, though duly executed, was afterwards revoked by marriage.

In Re Jansen, 12 O. L. R. 63, 8 O. W. R. 17, the Chief Justice of the King's Bench held that a will invalidly executed is not an instrument in writing effectual to vary the benefit of an insurance certificate under sec. 160, sub-sec. 1. Here, however, the will was validly executed, though afterwards revoked.

In McKibbon v. Feegan, 21 A. R. 87, the question involved was, whether a valid declaration of trust can be made by will under a section of the Insurance Act corresponding to sec. 160; and it was held, following Re Lynn, 20 O. R. 475, and Beam v. Beam, 24 O. R. 189, that it could. In dealing with that question Hagarty, C.J.O., uses the following language, after pointing out that the Chancellor had decided that it was sufficient to make a declaration as to an existing insurance by will, and agreeing with that view: "There is no doubt but that our so holding may have the effect of, in some cases, making the trust for his wife

and children revocable, which it might not be when indorsed on the policy under the statute. So long as it can be done by will, it must necessarily be revocable. The answer would seem to be that it can only be effectually done by a last will." Maclennan, J.A., says: "What is suggested is, that a will is revocable, and that the legislature did not intend the declarations which it authorised to be revocable. I do not find anything in the Act which forbids a revocable declaration. . . ."

If then a policy of insurance may be validly settled by will, and that settlement may be revoked and a new settlement made by another will, I see no reason why, if the will is revoked by marriage, it will not have the same effect. It having been held in the Jensen case that the declaration to be effectual must be by a will duly executed, in other words, that the beneficiary must claim by a valid will, it would seem necessarily to follow that if for any cause the will is revoked, there is nothing left under which the settlement can be supported. I am of opinion that the revocation of the will by marriage annuls the declaration of trust previously made by the will.

The application must be dismissed, but without costs.

BRITTON, J. JANUARY 29TH, 1909.

TRIAL.

COLONIAL LOAN AND INVESTMENT CO. v. LONGLEY.

Vendor and Purchaser — Contract for Sale of Land — Attempted Cancellation by Vendors—New Agreement with Sub-purchaser — Evidence to Establish — Negotiations with Agent of Vendors—Assignment of Rights of Original Purchaser—Sub-purchaser Taking Possession—Improvements under Mistake of Title—R. S. O. 1897 ch. 119, sec. 30—Lien—Compensation—Costs.

Action to recover possession of lot 131 in block 2 in the town of Kenora.

P. E. Mackenzie, Kenora, for plaintiffs.

Allen McLennan, Kenora, for defendant Longley.

BRITTON, J.:—The plaintiffs claim to be owners, and allege that the defendant Longley wrongfully entered into

occupation of this land, and leased the same to the defendant Hamilton.

The defence is by the landlord Longley, and he sets up an agreement between the plaintiffs and one Robert J. Bunting, dated 21st October, 1904, for the sale to Bunting of this land, and an agreement in May, 1908, between plaintiffs and defendant Longley, by which defendant Longley was to be allowed to pay arrears of Bunting on the agreement at the rate of $50 a month, and, upon all arrears being paid, and upon the defendant purchasing from Bunting and procuring a conveyance from Bunting of his interest, the defendant Longley was to stand in Bunting's place in the matter of this agreement for sale. The defendant says further that in pursuance of his agreement with the plaintiffs he paid the first instalment of $50 on the arrears, and purchased and obtained a conveyance of Bunting's interest in the land, and proceeded to make repairs to the building on the lot, to the amount of $280. The defendant Longley paid to Bunting $35, and he tendered to plaintiffs the next month's instalment of $50, on arrears, and he is willing now to pay all arrears on the Bunting agreement, and asks to be allowed to stand instead of Bunting, to have the agreement continued in force, and, upon payment in full, to have a conveyance of the land.

In the alternative the defendant Longley asks to have the amount expended by him paid by the plaintiffs.

The plaintiffs in reply deny the alleged agreement between them and the defendant Longley, and they allege cancellation on the 25th May, 1908, of the Bunting agreement for purchase.

The facts are as follows:—

The plaintiffs, by the agreement of 21st October, 1904, agreed to sell to R. J. Bunting the land in question for $1,200. This was to be paid by paying $47.04 on or before 15th January, 1905, and the balance in 176 equal monthly instalments of principal and interest, of $11.76 each, interest being calculated at the rate of 8½ per cent. per annum.

The agreement is a very full one, but the only clauses that, in my view of the case, need now be referred to are:—

(1) "Provided that the purchaser may occupy and enjoy the said premises until default shall be made in the payment of the said monthly instalments or any part thereof in the manner above set forth, subject nevertheless to impeachment for voluntary or permissive waste."

(2) "And the purchaser hereby attorns to and becomes the tenant of the company of the said premises, and holds the said premises at a monthly rental of $11.76, payable on the days and times hereinbefore appointed for payment of the monthly instalments."

(3) "If the purchaser fail or neglect to comply with the stipulations and agreements herein contained, the company shall be at liberty to rescind this agreement by 5 days' notice in writing to be given by mailing the same to the purchaser —addressed Robert James Bunting, Esq., Rat Portage, Ontario."

(4) "Provided, and it is hereby agreed between the parties hereto, that the purchaser has the privilege of paying off, of the principal, at any time if desired, a sum equal to 12 monthly instalments."

(5) "Time shall be the essence of this agreement."

The defendant has failed to establish any express agreement with the plaintiffs, by which, upon purchase of the land from Bunting, he was to be permitted to pay up arrears and to be accepted in the place of Bunting. Negotiations were commenced and carried on with Mr. McGillivray, the agent, called by plaintiffs their general district agent, but Mr. McGillivray did not assume, as such agent, to close an agreement. He submitted to head office the defendant's proposition. He reported to head office the negotiations, and the defendant knew that McGillivray was doing this, and the plaintiffs declined to make any agreement with the defendant. In the absence of any express agreement, the position of the defendant Longley must be considered, first, in reference to possession and improvements he made upon the premises, and second, as to his rights, if any, against the plaintiffs, by reason of the conveyance of Bunting, defendant having gone into possession with the sanction of Bunting and in ignorance of any attempt by plaintiffs to cancel the Bunting agreement.

The negotiations were carried on between McGillivray and the defendant Longley in perfect good faith. They began on 6th May, 1908, and McGillivray on that day reported to plaintiffs. On 15th May plaintiffs refused to entertain defendant's proposition, and at the same time informed McGillivray that they had by registered letter cancelled the Bunting agreement, but that they would "also cancel by personal service," and accordingly they enclosed cancellation notices in duplicate for service upon Bunting. Longley

knew that McGillivray was the agent of plaintiffs, and some years ago, upon the instructions of McGillivray, made repairs upon plaintiffs' buildings. On the 6th May Longley told McGillivray that this property was badly in need of repair, and that he thought of helping Bunting out, and McGillivray then suggested Longley's first getting a quit-claim from Bunting. McGillivray wrote to plaintiffs on the subject. Plaintiffs replied on 15th May. This letter was received at Kenora on 20th May, when McGillivray at once wrote to Longley informing him of plaintiffs' refusal to treat, but again suggesting his getting a quit-claim from Bunting. Longley obtained the quit-claim on 1st June, and took it at once to McGillivray. What took place between McGillivray and defendant is clearly shewn in McGillivray's evidence and in the correspondence. From 1st June until the receipt by defendant of McGillivray's letter of 19th June the defendant thought himself the owner, subject to the agreement with plaintiffs, which he expected to carry out. The evidence of McGillivray and the defendant is in substantial accord.

Upon the evidence I find that whatever improvements were made on this property on and after 1st June to and inclusive of 19th June were made under a bona fide mistake of title, within the meaning of R. S. O. 1897 ch. 119, sec. 30, and the defendant Longley is entitled to a lien upon the land for these improvements. Before the quit-claim was executed in favour of Longley, both he and McGillivray thought that the plaintiffs' objection to dealing with Longley was that he was a stranger in the transaction, and that it would be different, once Longley obtained an assignment of Bunting's interest, and it was because of that that McGillivray said in his letter to defendant of 20th May, "If you could obtain a quit-claim deed from Jas. Bunting, I have very little doubt but that the company would accept payment of the arrears from you at the rate you mention, but they apparently cannot see their way clear to making any such arrangement while Bunting still remains in the position of purchaser."

It must be kept in mind that at this time the defendant had no notice of the alleged cancellation by registered letter of the agreement to purchase. On the contrary, defendant was informed that a notice had been sent for service upon Bunting.

The defendant, with such a letter from the general district agent of the plaintiffs, might well feel that he could safely make improvements after securing the deed. The plaintiffs declined on 5th June the request of 1st June, but this was not at once communicated to defendant, as McGillivray naturally thought there was some misunderstanding, and he wrote to plaintiffs on 11th June as to this. Plaintiffs finally and absolutely refused on 16th June. This was receoved at Kenora on 19th June, and defendant was at once informed of it. In the meantime this further had occurred. The defendant's cheque for $50 had been sent to plaintiffs at the early stage of the negotiation, and the defendant found that the cheque had been cashed. This cheque was on a bank at Kenora, and had been in fact used by plaintiffs under circumstances told to McGillivray, but of which the defendant was ignorant. Used at Toronto on 4th June, paid by bank at Kenora, and charged to defendant's account on 8th June.

The need for repairs to make the premises tenantable was urgent, as the premises had for a considerable time been vacant. It seems to me within the true meaning of the Act and entirely just that the defendant should have the lien for these improvements "to the extent of the amount by which the value of the land is enhanced by such improvements."

Apart from the lien for improvements, what rights, if any, has the defendant against the plaintiffs under the quit-claim deed from Bunting?

It was admitted on trial that the alleged notice of cancellation was mailed at Toronto, postage and registration fee paid, on 25th February, 1908, addressed to R. J. Bunting, Rat Portage, Ontario, and that R. J. Bunting never in fact received the notice, but that it was returned to the plaintiffs, as a letter not called for. At that time R. J. Bunting had paid to the plaintiffs $445.68 on account of his purchase money and interest, and $10 costs, and was in arrear up to 15th December, 1907, only $60.40: see exhibit 10. Nothing is said in the agreement to purchase as to what is to become of the amount paid in the event of cancellation. The notice of cancellation is a 5 days' "notice of cancellation of the said agreement for sale and purchase, and the forfeiture of all moneys already paid by you, as by the said agreement provided in case of default for payment of any of the monthly instalments of the purchase money."

There is not in the agreement for sale any express provision as to forfeiture of all moneys in case of default. It certainly would not be equitable to permit vendors to irrevocably declare a forfeiture, after all but a comparatively small sum of the purchase money had ben paid. That is not the present case as to payment, but that apparently is what the plaintiffs claim as their right under the agreement now being considered. The agreement for sale provides for resale in case of default, and that the purchaser shall be liable for deficiency, if any, together with all costs attending resale, and that all loss may be recovered by the vendors from the purchaser as liquidated damages. It also provides that the whole amount of the purchase money shall at once become due and payable. By the agreement also a monthly tenancy is created, the purchaser attorning to the vendors as a tenant, at the monthly rent equal to the monthly payments, calling the payments rent, and only rent, in so far as there has been an actual appropriation in that way. If that is the true meaning of the agreement, there might be in case of default a forfeiture of money paid as rent, while the purchaser remained in possession. The agreement is not clear, and in a case where not even the month's notice to give up possession was given, the Court should relieve against any forfeiture declared or attempted by the plaintiffs.

The action is for possession and for mesne profits.

The statement of defence alleges an express agreement between plaintiffs and defendant under which defendant should be allowed to continue in possession and carry out Bunting's purchase. The defendant further says, as an alternative defence, that the repairs were made under such circumstances that an agreement to pay for them should be implied. As I have said, in my opinion the defendant Longley is entitled to a lien upon the land for a sum of money by which the value of the land is enhanced by such improvements. Having regard to R. S. O. 1897 ch. 119, sec. 30, I think that the defendant Longley is entitled to, and may be required to retain the land, making compensation therefor, as I think this, under all the circumstances of the case, to be most just. The compensation shall be as follows: The defendant Longley shall, within 30 days after this decision shall be absolute, if it becomes so in the absence of or upon appeal, pay to the plaintiffs all arrears of instalments and interest, and interest

upon such arrears, upon the agreement for purchase by Bunting from the plaintiffs. The said defendant shall also assume and pay all the other instalments as they mature, and shall stand in the place of Bunting, but for his own benefit in the agreement, which, so far as the defendant Longley is concerned, and with the plaintiffs, shall be in full force. Upon the arrears which the defendant Longley shall pay under this judgment, he will be entitled to credit for any sum already paid to the plaintiffs on account of Bunting's agreement, and said defendant shall be entitled to pay rent due and to become due from the tenant or tenants of the premises. If any dispute about the amount of arrears and interest on the agreement which the defendant shall pay, I will determine the true amount, or, if either party desires a reference, such reference may be had to the local Master at Kenora. In the event of a reference, the costs of such reference and further directions reserved.

There will be no costs to either party against the other down to and inclusive of the trial.

Upon default of payment of arrears by defendant as above, the plaintiffs shall be entitled to possession.

As the defendant Longley expressed himself at the trial as willing to give up the land on being paid for improvements, this may be done, if the plaintiffs so elect, upon the following terms: if the plaintiffs elect within 20 days after this judgment to pay $250 for repairs, and to pay all taxes, if any, and other proper charges and expenses, apart from repairs, paid by defendant upon said property, and pay the defendant's costs of this action, which I fix at $75, then upon such payment the plaintiffs shall be entitled to possession of said premises. The plaintiffs shall be entitled to set off against the said sum payable for repairs any rent collected by defendant, or that ought to have been collected by him, but defendant not to be liable for any vacancy of premises, or for any rent collected, if any, prior to the date of the quit-claim deed from Bunting. The defendant upon such payment to give up possession and to be absolutely barred as against the plaintiffs from any right or title to the property or the possession thereof. If the plaintiffs elect to get possession of the property, they should pay $75 costs, fixed as above, as they, after becoming aware of defendant's efforts to improve the condition of the property, did not recognize any claim, although the defendant was acting throughout in perfect good faith, so far as I can see from the evidence.