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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 6TH, 1920.

*RE OTTAWA GAS CO. AND CITY OF OTTAWA.

Municipal Corporations—Injury to Pipes of Gas Company Laid in Highway—Compensation under Municipal Act—Right of Gas Company to—Property of Gas Company—Injurious Affection—Company's Special Act, 28 Vict. ch. 88—Pipes Maintained in same Place for 40 Years—Presumption of Legality—Onus—Forfeiture—Evidence—Pipes Used for other than Lighting Purposes—Question whether User Unwarranted—Determination in Action—Effect of Unwarranted User.

Appeal by the Corporation of the City of Ottawa from the award of the Official Arbitrator for the City of Ottawa that the city corporation should pay to the Ottawa Gas Company the sum of $892.39 as compensation to the company for injury occasioned to the gas-mains and service-pipes of the gas company when opening up a trench in Gloucester street, Ottawa.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

F. B. Proctor, for the appellant corporation.

G. F. Henderson, K.C., for the gas company, respondent.

MASTEN, J., reading the judgment of the Court, said that the city corporation contended that, by the terms of the instruments under which it was incorporated, the gas company was limited to the use of its pipes for the conveyance of gas for lighting purposes, and that it was exceeding its rights in conducting gas through its mains to be sold and used for cooking and heating purposes; that none of the gas passing through the Gloucester

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

street pipes was used for lighting; and that this action of the company ipso facto worked a forfeiture of the pipes and of the right to place and have them under the street, and precluded the gas company from recovering any compensation for their injurious affection.

The appeal was argued on the assumption by both parties that the case was a proper one for claiming compensation under the Municipal Act rather than by an action against the city corporation for negligence in laying its water-pipes, and on the assumption that the rights originally conferred by by-law 110, passed in 1854, were still in force. The city corporation allowed the company to move and relay these pipes, and had not assumed to cancel the license to have the pipes there.

The appeal ought to be disposed of, in the learned Judge's opinion, upon the short and simple ground that the pipes always had been and were still the property of the gas company and that they had been injuriously affected by the city corporation.

Reference to the Act respecting Gas and Water Companies, 1853, 16 Vict. ch. 173, under which the company was incorporated and to the company's special Act, passed in 1865, 28 Vict. ch. 88.

It was admitted that the pipes were laid by the gas company more than 40 years ago. They had always been and were now connected with and formed part of the general distributive system of the gas company, and were, for many purposes, real estate: Consumers Gas Co. v. City of Toronto (1897), 27 Can. S.C.R. 453.

Quite apart from the express words of the special Act, it was clear that, the pipes having been laid and having remained for so many years in the same place, there was a presumption that such use of the street by the gas company was legal. See the cases collected in Abell v. Village of Woodbridge and County of York (1917), 39 O.L.R. 382, at p. 389.

The onus was, therefore, on the city corporation to establish that the property in these pipes and the right to retain them where they were had become forfeited. So far from this onus being discharged, the arbitrator had found that the city corporation had failed to shew by evidence that the company was not using the main for the conveying of gas for lighting. He had also found positively that a portion of the gas passing through this main was used for lighting purposes.

No act on the part of the city corporation purporting to declare or enforce a forfeiture was shewn; but, even assuming that some such act had been shewn, and assuming further that the use of the pipes for the conveyance of gas for heating and cooking was unwarranted, that unwarranted user could not confer on

the city corporation the right to divest the gas company of its property in these pipes or give the corporation a right to injure or otherwise interfere with them.

The company's right to have the pipes where they are has not become forfeited, lessened, or otherwise affected. The pipes are still the property of the gas company, placed as of right where they are, and have been injuriously affected by the action of the corporation; and the gas company is entitled to damages.

If the corporation desires to question the right of the company to conduct gas through its pipes for purposes other than gas lighting, it should do so by direct action; and this decision should not affect the rights of either party in such an action.

Appeal dismissed with costs.

MACLAREN, J.A., IN CHAMBERS. JULY 10TH, 1920.

RE HODGINS.

Appeal—Motion for Extension of Time for Appealing from Order of Judge in Court—Delay—Intention to Appeal—Dismissal of Motion—Proceeding to Enforce Claim for Dower not to be Prejudiced—Costs.

Motion by the former wife of the testator to extend the time for appealing from the order of MIDDLETON, J., of the 15th May, 1920, ante 231, declaring that she was not entitled to dower out of the lands of the testator.

G. T. Walsh, for the applicant.
George Bell, K.C., for the executors.
A. N. Morine, for the purchasers of the lands.

MACLAREN, J.A., in a written judgemnt, said that no notice of appeal was given, nor was there any evidence that the applicant had any intention of appealing until notice was given a few days ago, and no sufficient reason was shewn for the delay.

The motion should be dismissed, but without prejudice to any proceeding which may be taken by the applicant to enforce any claim she may have; no costs.

HIGH COURT DIVISION.

ROSE, J. JULY 5TH, 1920.

SUTTON v. PURSEL.

Assignments and Preferences—Money Lent by Wife to Husband—Repayment by Deposits Made by Husband in Bank to Credit of Wife's Account—Preference of Wife over other Creditors—Intent to Prefer—"Payments of Money"—Assignments and Preferences Act, sec. 6 (1)—Deposits of Cheques not "Payments of Money"—Property Bought by Wife with Moneys Deposited—Charge in Favour of Creditors upon Property to Extent of Amount of Cheques and Interest—Gift of Property by Husband to Wife—Insolvency of Husband—Rights of Creditors.

Action by a judgment creditor of H. W. Pursel, suing on behalf of himself and of all other creditors, for a declaration that certain funds which Pursel deposited in a bank to the credit of his wife, the defendant, as well as certain property, real and personal, which she bought, and partly paid for with moneys drawn from the bank, and by the transfer of a pair of horses which Pursel had given her, were available for the satisfaction of the creditors' claims, and for consequent relief.

The action was tried without a jury at Simcoe.

T. J. Agar, for the plaintiff.

F. C. Kerby, for the defendant.

ROSE, J., in a written judgment, said that Pursel was an hotel-keeper. In 1910 he moved from Windsor to Forest and bought an hotel, in which he carried on business until 1913, when he sold out and moved to Simcoe, where he took a lease of an hotel, which he kept until about August, 1916, when he gave up business and went to Leamington.

The defendant said—and was believed by the learned Judge—that, when she and her husband moved to Forest, she lent him, to assist in making the first payment on account of the purchase-price of the hotel there, $1,100, part of a larger sum which she took with her from Windsor; that she lent him in Forest $300 for the purchase of stock; that, when they moved to Simcoe, she lent him $500 for use in making the first payment on account of the price of furniture which he bought for the hotel which he there leased; and that, later on, she lent him, at Simcoe, something over $300.

Pursel fell into arrears in his payments to the plaintiff for supplies of liquors and other things; and, for some time before the business at Simcoe was given up, the plaintiff was selling to him for cash only, was pressing him for payment of his old balance, and was collecting from him $50 a week on account of it.

In August, 1916, the plaintiff sued and entered judgment against Pursel for $1,186.16 and costs.

In 1916, Pursel was doing a large business over his bar. In May of that year he began to make deposits to the credit of his wife's savings account, depositing between the 7th May and the 7th August $2,867.90. These deposits were, the learned Judge thought, intended to be repayments to the defendant on account of her loans, which, with interest at 5 per cent., amounted at that time to approximately $2,725. No doubt, they were intended to give her a preference over the plaintiff; but, even so, the transaction was unimpeachable if she was a creditor, as the learned Judge thought she was, and if the deposits were payments of money to her within the meaning of sec. 6 (1) of the Assignments and Preferences Act, R.S.O. 1914 ch. 134. Payments of money to a creditor's banker seemed to the learned Judge to be payments of money to the creditor within the meaning of the Act; but some of the deposits were of cheques for various small sums, amounting in all to $762.90, and these cheques were not money within the meaning of the Act: Davidson v. Fraser (1896), 23 A.R. 439, affirmed in Fraser v. Davidson and Hay (1897), 28 Can. S.C.R. 272; and therefore the transaction, in so far as the cheques were concerned, could not be supported. The reasoning of the case cited was just as applicable to a cheque payable to bearer and held by the debtor as to a cheque payable to the debtor.

The transaction was, therefore, valid so far as the moneys deposited were concerned; aliter as to the cheques.

The defendant bought a motor-car, a pop-corn machine, a moving picture business, and a house in Leamington. Such payments as she made on account of the first three were made out of the moneys which she had to her credit in the bank, and these moneys constituted a fund in which the proceeds of the cheques had become inextricably mixed with moneys of her own. The payment which she made on account of the purchase of the house was made by handing over the pair of horses, valued at $200, which Pursel had given to her; and the gift of which could hardly stand as against creditors.

The learned Judge thought, therefore, that 13 (2) of the Assignments and Preferences Act entitled the plaintiff to the declaration which he asked; that the defendant's interest in the property mentioned was available for creditors, as was also the sum of

$559.74, paid into Court by the bank at Leamington, representing the balance of the moneys which she had in the bank.

There should be a judgment declaring that the deposit of the cheques was fraudulent and void, as against creditors of H. W. Pursel and that the money in the bank and the defendant's interest in the above described property, real and personal, were charged, in favour of the plaintiff and all other creditors of H. W. Pursel, with the sum of $762.90 and interest at the rate of 5 per cent. per annum upon the amount of each cheque from the date of its deposit, and directing realisation of the charge and distribution of the moneys realised.

The defendant should pay the plaintiff's costs of the action.

KELLY, J. JULY 6TH, 1920.

FLEMING v. ROYAL TRUST CO.

Trusts and Trustees—Conveyance of Land to Trustees without Explanation of Nature of Trust—Evidence—Attempt to Establish Parol Declaration—Testimony of Interested Parties—Need of Corroboration—Statute of Frauds—Effect of Deed—Resulting Trust in Favour of Grantor—Lands Subject of Trust Treated as Part of Residuary Estate—Costs.

Action for a declaration that a certain trust alleged by the plaintiffs had been established and that it was effective to vest the lands, the subject thereof, in the plaintiffs.

The action was tried without a jury at Ottawa.

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

M. G. Powell, for the defendants.

KELLY, J., in a written judgment, said that the plaintiffs and the defendants, other than the company, were the surviving children of the late Sir Sanford Fleming, and entitled under his will to the residue of his estate; the defendant company was the trustee under the will and codicils.

By deed of the 26th June 1907, registered on the 17th August, 1907, Sir Sanford Fleming conveyed to his four sons then living, Frank, Sanford, Walter, and Hugh, trustees, certain lands, referred to as "the homestead property," the deed being otherwise in pursuance of the Act respecting Short Forms of Conveyances,

and containing nothing expressly explanatory of the nature of the trust intended.

The deed was not delivered to the grantees or any of them until November, 1913. In the meantime, on the 4th June, 1913, the son Frank had died. On the 16th June, 1913, Sir Sanford executed a codicil revoking all provisions of the will in favour of Frank.

On or about the 11th November, 1913, the testator executed a conveyance, dated the 30th October, 1913, of lands fronting on Besserer street, Ottawa, to his sons Walter and Hugh, two of the plaintiffs, who then, at their father's request and by his direction, executed a declaration of trust (exhibit 5) in favour of the plaintiffs of these Besserer street lands and other lands (not the homestead property) which also had been conveyed to them. It was at this time that he handed over the conveyance of the homestead property; and the plaintiffs now alleged that what then happened and a statement which their father, as they alleged, then made, constituted a parol declaration of trust of the homestead property, in their favour, sufficient to vest these lands in them beneficially.

The defendants, the only other surviving children of the testator, denied that there was at any time any declaration of trust in respect of the homestead property sufficient to satisfy the Statute of Frauds.

There was nothing in the deed of the 26th June, 1907, to indicate that the grantor had any other intention than to sever the legal from the equitable or beneficial estate, and there was evidence indicating that that, and that only, was his intention. The effect was a resulting trust in favour of the grantor or his heirs: Lewin on Trusts, 12th ed., p. 163. If a trust is clearly intended, the trustees cannot take beneficially: Smith's Principles of Equity, 4th ed., p. 41.

The grantor remained in possession of the homestead property as the owner thereof, and nothing further happened until the occurrences in November, 1913.

The evidence of the plaintiffs as to what took place on that occasion and what their father said, even if it was sufficiently definite to get at the grantor's meaning, which it was not, was not admissible to establish a trust, in the face of the obvious effect of the conveyance itself. The testimony was that of interested persons, which, if admissible at all, should be corroborated by surrounding circumstances: Fowkes v. Pascoe (1875), L.R. 10 Ch. 343.

The plaintiffs' contention failed; there was a resulting trust with respect to the homestead property; and it was now held in

trust for the persons entitled to share in the testator's residuary estate.

There should be a declaration accordingly; and, if all parties consent, then costs should be paid out of the estate; if all parties do not consent, counsel may mention the question of costs to the learned Judge.

KELLY, J. JULY 6TH, 1920.

WILSON v. WILSON.

Husband and Wife—Action for Alimony—Farm Conveyed to Wife—Husband Leaving Farm upon Order of Wife—Payment of Allowance Fixed by Order under Deserted Wives' Maintenance Act—Failure to Prove Cruelty—Desertion not (in Circumstances) a Ground for Alimony—Counterclaim—Ownership of Farm and Chattels—Improvements Made by Husband—Lien—Costs.

An action for alimony, and a counterclaim by the defendant to establish his title to a farm which had been conveyed to the plaintiff and to certain chattels upon the farm.

The action and counterclaim were tried without a jury at Kenora.

H. P. Cooke, for the plaintiff.

J. A. Kinney, for the defendant.

KELLY, J., in a written judgment, said that, as between the plaintiff's evidence and that of the defendant, the latter should be accepted, even if it were not supported by other testimony. The evidence of John Wilson, their son, coupled with that of the defendant, put it beyond any doubt that the cause of the unhappy relations of the parties was the plaintiff's unreasonable, overbearing, and irritating conduct towards her husband. The plaintiff ordered the defendant to leave the farm, which had been purchased in her name, and he did leave, and had not lived with the plaintiff or his family since July, 1917. In August, 1919, he inserted in the local newspaper a notice that he would not be responsible for her debts. He had then been for several months paying the plaintiff a weekly sum of $10, under an order made in February, 1919, under the Deserted Wives' Maintenance Act, R.S.O. 1914 ch. 152; and he continued to make these pay-

ments after that time. His explanation of the notice was, not that he was objecting to provide what the plaintiff needed, but that he desired to prevent unauthorised expenditure in his name, and so adopted this means of preventing credit being given without his consent.

The plaintiff was responsible for the living apart, and she was not inclined to do anything towards effecting a reconciliation. The learned Judge said that he knew of no law requiring a husband, in such circumstances, to pay alimony. None of the plaintiff's general charges of abuse, neglect, or ill-treatment, had been so substantiated as to stand the test of liability laid down by the Appellate Division in the recent case of Bagshaw v. Bagshaw (1920), ante 334; and evidence was wanting to prove either desertion or such failure to support or maintain her as would justify an order for alimony. Her claim, therefore, failed. The effect of this action and its result upon the order made in the plaintiff's favour under the Deserted Wives' Maintenance Act was determined by Re Wiley and Wiley (1919), 46 O.L.R. 176.

Upon the counterclaim, there should be a declaration that the plaintiff is the owner of the farm, subject to any unpaid purchase-money, and subject also to any moneys expended or paid thereon by the defendant which have gone into the farm itself or towards its improvement since the 7th July, 1917; the learned Judge finds that the moneys so expended amounted to $190, and directs that the defendant shall have a lien for that sum and interest from the commencement of the action upon the plaintiff's interest in the farm.

As between the plaintiff and defendant, the learned Judge finds that all the livestock, implements, and furniture upon the farm, are the husband's, with the exception of a team, set of harness, and a waggon, which are the wife's.

The plaintiff's action should be dismissed, and the defendant should pay such costs thereof as are payable under Rule 388. On the counterclaim there should be judgment in accordance with the above findings, but without costs.

ROSE, J. JULY 7TH, 1920.

SWAYNE v. SYNOD OF DIOCESE OF ONTARIO.

Church—Rectory Lands—Rents and Profits and Revenue from Proceeds of Sale—Excess over $2,000 per Annum Distributable among Incumbents of Churches in Township other than Original Church—Act to Amend Synod and Rectory Sales Act Affecting Diocese of Ontario, 1876, 39 Vict. ch. 109, secs. 3, 4 (O.)—Accounting by Rector of Church and Synod of Diocese—Sale of Lands not Coming within Description in Statute—Rent not Chargeable in Respect of Rectory and Parish-house—Deduction of Taxes Charged against Rectory—Proceeds of Sale of School-house and Land, Sanctioned by 2 Geo. V. ch. 159 (O.)—Application of Excess-revenues—Basis of Accounting—Costs.

Action by the rector and wardens of Christ Church, Belleville, against the Incorporated Synod of the Diocese of Ontario and the incumbent of the Church of St. Thomas (rector of Belleville) for an account of the rents, issues, and profits of certain lands held for the benefit of the rectory of Belleville and of the income derived from the invested proceeds of the sale of certain lands, and for payment to the incumbent of Christ Church, or to him and the incumbents of any churches of the Church of England in the township of Thurlow, of any amount by which such rents, issues, profits, and income have exceeded $2,000 in any year since 1902.

The action was tried without a jury at Napanee.

E. G. Porter, K.C., and G. F. Ruttan, K.C., for the plaintiffs.

J. B. Walkem, K.C., for the defendant Synod.

W. S. Herrington, K.C., for the defendant Beamish, the rector of Belleville.

ROSE, J., in a written judgment, said that the claim was based upon the Act to amend the Synod and Rectory Sales Acts affecting the Diocese of Ontario, 1876, 39 Vict. ch. 109 (O).

The first question was as to the revenue derived from the investment of the proceeds of the sale of land conveyed to the Grand Trunk Railway Company in 1862. The plaintiffs contended that this revenue, the annual sum of $192, ought to be taken into account as part of the revenues dealt with in sec. 4 of 39 Vict. ch. 109. The learned Judge said that the contention was not well-founded. The fund from which the $192 a year was

derived did not come within the description contained in sec. 4.

The second question was, whether, in arriving at "the rents, issues, and profits of the lands of the rectory remaining unsold," the rectory and parish-house ought to be treated as earning rent. As to this, the words of the grant (1830) of the land on which these buildings stand made it plain that the land and buildings could not be charged with rent.

The third question was, whether taxes charged against the rectory were to be taken into account in ascertaining the net rents, issues, and profits of the unsold lands. The learned Judge could not find any basis upon which it would be proper to charge the revenue-producing lands with the expenses of carrying such lands as the rector uses for his own purposes. This question should be answered as contended by the plaintiffs.

The fourth question was, whether the proceeds of the sale of a school-house and of the land on which it stood ought to have been invested by the Synod and the revenue from the investment taken into account in applying sec. 4 of the Act of 1876, or whether the Synod was justified in handing the money back to the wardens for use in the erection of a new school-house. The wardens of the Church of St. Thomas were not before the Court, and the point could not well be decided in favour of the plaintiffs in their absence; but the question of parties was not considered, as the learned Judge's opinion was against the plaintiffs' contention on the merits. The money derived from the sale, which was sanctioned by an Act of the Ontario Legislature, 2 Geo. V. ch. 159 (O.), was not affected by the Act of 1876. The sale was not under the authority of that Act, and the land was land granted by the Crown as a site for a church and burial-ground.

If, in any year, the sum of the revenues arising from the investments held by the Synod and of the rents, issues, and profits of the lands of the rectory remaining unsold—the remnant of the 18 acres granted in 1830—exceeds $2,000, the surplus must be apportioned to and divided among the incumbents of the other churches of the Church of England in the township of Thurlow, in such proportions as the defendant Synod shall, by resolution, by-law, or canon, from time to time order and direct. The defendant Beamish should file a further statement as to taxes, etc., from 1912 to 1919; and, if the parties cannot agree upon the amount of excess in each of the years from 1912 to 1919, the Registrar may fix it.

There is a difference of opinion as to whether Christ Church is the only "other church," within the meaning of sec. 4 of 39 Vict. ch. 109; but that must be settled by the Synod.

There should be a judgment declaring: (1) that, in arriving at the net rents, issues, and profits of the lands unsold, there is

no right to take credit for taxes paid in respect of lands occupied in the way above stated; and (2) that the defendant Beamish ought to account to the Synod for, and the Synod ought to collect from him and deal pursuant to the Act with, any sums which, upon the footing of the first-mentioned declaration, he has received or retained in excess of $2,000 in any of the years 1912 to 1919, inclusive.

As between the plaintiffs and the defendant Beamish, there should be no order as to costs. The defendant Synod, being in the position of a trustee, should have its costs out of the fund in its hands.

LENNOX, J. JULY 8TH, 1920.

NEELEY v. REID.

Vendor and Purchaser—Agreement for Sale of Land—Failure of Purchaser to Complete Purchase on Day Named in Agreement—Readiness of Vendor to Complete—Rescission by Vendor—Justification—Dismissal of Action for Specific Performance—Conduct of Vendor—Costs—Assumption of Mortgages by Purchaser—Substitution of Name of Grantee in Draft Conveyance—Covenant.

Action by a purchaser for specific performance of the vendors' (defendants') agreement to sell a lot of land and house thereon, situated in Indian Grove avenue, Toronto.

The action was tried without a jury at a Toronto sittings.

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

R. McKay, K.C., for the defendants.

LENNOX, J., in a written judgment, said that $500 was paid by the plaintiff to the defendant, as a deposit or in part payment of the purchase-price, but no claim of forfeiture was asserted. It is to be repaid if the plaintiff does not get the property, and he holds a cheque for the amount. There were two mortgages upon the property. The first had not matured, and could not be paid off. The second mortgage was for a small sum; the mortgagee had agreed to accept payment and discharge it. The plaintiff was told of the existence of this mortgage at the time of his agreement to purchase, and it was understood and agreed at that time that he would pay it off, out of the purchase-money. That did not conflict with the terms of the written agreement. The plaintiff was to assume and be responsible for the first mortgage.

The defendants submitted a draft deed for approval. The purchaser's solicitor struck out the purchaser's name as grantee, substituted the name of the purchaser's daughter, and returned the deed. There was no covenant added that the grantee would pay off the mortgage and protect the grantor. This was relied on as an incidental ground of defence; but there was a sufficient answer to the plaintiff's claim without this.

The plaintiff alleged that he purchased for his daughter, and so informed the defendants.

The defendants made all necessary preparations and arrangements to complete the contract on their part on the day fixed by the contract, and were ready to vacate the premises on that day if the plaintiff did what was to be done on his part on that day. The plaintiff did not tender the purchase-money or make any offer to complete the purchase on the day fixed or for several days afterwards.

There was evidence by the plaintiff of a conversation in which he offered to extend for a couple of weeks the time for changing the occupation of the premises; but, if there was such an offer, the defendants did not avail themselves of it, or apparently entertain it. It could not help the plaintiff.

Reference to Brickles v. Snell, [1916] 2 A.C. 599; Walsh v. Willaughan (1918), 42 O.L.R. 455.

Counsel for the plaintiff endeavoured to obtain from the defendants a specific declaration of their reason for rescinding the contract. The motive was quite manifest—they wanted to slip out of their bargain, and took prompt advantage of the plaintiff's accidental delay. They could legally do so.

The learned Judge did not doubt the plaintiff's sincerity and good faith. He acted honestly and honourably, and had been put to serious inconvenience. The defendants acted harshly and arbitrarily and to an extent that justified the learned Judge in refusing costs.

Action dismissed without costs.

LENNOX, J. JULY 8TH, 1920.

RICE v. KNIGHT.

Vendor and Purchaser—Agreement for Sale of Land—Time Made of Essence—Action by Vendor for Specific Performance—Defence—Delay of Vendor—Purchaser not Ready to Close on Day Named in Agreement—Alleged Misrepresentation as to Width of Lots—Claim by Purchaser for Abatement of Price.

Action by a vendor for specific performance by the purchaser, the defendant, of his agreement to purchase two lots in the city of Toronto, described in the written agreement as lots 112 and 113, plan 344E., on the south side of Roxborough drive, having a frontage of 100 feet, subject to registered building restrictions. The purchase was to be completed on or before the 15th August, 1919, and time was to be of the essence of the agreement.

The action was tried without a jury at a Toronto sittings.
R. McKay, K.C., for the plaintiff.
J. M. Ferguson, for the defendant.

LENNOX, J., in a written judgment, said that at the trial the defence was narrowed to the question of the plaintiff's delay and the question of the right of the defendant to an abatement in price if the contract was enforceable against him.

Upon the evidence, there was no ground for complaint upon the score of misrepresentation as to the width of the lots.

The very brief delay which occurred was occasioned by the necessity of obtaining a deed from one Corrigan, a former owner—his deed to the plaintiff having, by error, unduly restricted the right to build. Neither the plaintiff nor the defendant was aware of this at the date of the agreement, which in terms compelled the defendant to accept the title as it was; but the plaintiff did not take this position. Instead, he set about promptly to have the error corrected by a deed from Corrigan, which was dated the 16th August, 1919; the execution was sworn to on the 18th August, 1919. The defendant's solicitor did not submit a mortgage for the balance of the purchase-money, and there was no pretence that the defendant's solicitor was ready to close on the 15th August.

The delay was really occasioned by a requisition made by the defendant's solicitor.

Time may be insisted upon as of the essence of the agreement by a litigant who has shewn himself ready, desirous, prompt, and eager to carry out his agreement: Mills v. Haywood (1877), 6 Ch.D. 196; who has not been himself the cause of the delay or in default: Brickles v. Snell, [1916] 2 A.C. 599; and who has not subsequently recognised the agreement as still subsisting. He must not play fast and loose at his pleasure: Springer v. Gray (1859), 7 Gr. 276, 277.

The defendant was satisfied with his agreement, intended to carry it out without strict reference to time, and proceeded on that basis until he obtained the survey on the 19th August; and even then he did not intend to rescind the agreement, but to obtain an abatement in price.

Courts of equity cannot, any more than Courts of law, make a new agreement for the parties: Seaton v. Mapp (1846), 2 Coll. C.C. 556; Sugden on Vendors and Purchasers, 14th ed., p. 268. But the parties can modify or change their agreement as often as they will, and the right of the Court to look at all the circumstances is the same, notwithstanding recent decisions, as it was 50 years ago, when Tilley v. Thomas (1867), L.R. 3 Ch. 61, was decided.

Judgment for the plaintiff for specific performance with costs.

MASTEN, J. JULY 8TH, 1920

KRANZ v. McCUTCHEON.

Contract—Option for Purchase of Oil-leases—Undertaking of Purchaser to Drill Wells and Develope Property during Option-period—Failure to Implement—Misrepresentations—Failure to Prove—Construction of Contract—Obligation to Fulfil Undertaking—Breach—Damages—Measure of—Evidence—Reference to Master to Assess Damage—Costs.

Action for damages for breach of a contract; and counterclaim by the defendant for damages for deceit.

The action and counterclaim were tried without a jury at Kitchener and Toronto.

G. Bray, for the plaintiff.

R. S. Robertson and R. Bradford, for the defendant.

MASTEN, J., in a written judgment, said that the action was brought on behalf of the members of an oil syndicate, who were the holders of certain oil-leases on lands in the township of Mosa, and by the agreement in question they gave the defendant an option for the purchase of the leases and other property owned by them, as described in the agreement (exhibit 1).

The defendant contended that the agreement was unenforceable because founded on misrepresentations, and, in the alternative, counterclaimed for damages for deceit. In regard to this contention, the learned Judge finds as a fact that the defendant did not enter into the contract relying on the representations made to him as to the production of the oil-wells upon the property, but did enter into it relying on the inspection made by himself, and

relying on the general reputation of the field. The defendant's claim in this respect, whether as a defence or a counterclaim, failed.

The defendant's second contention was, that, upon the true construction of the agreement, he was entitled at any time to throw up the option and cease operations. The learned Judge was of opinion that the consideration for the option was the undertaking to operate the wells and to prospect and develope and prove the possibilities of the oil-leases; that this was obligatory upon the defendant; and that he had no right to throw up the option at any time, as he did, nor to cease operations or decline to drill at least five wells. By the terms of the agreement it was provided that the defendant should commence drilling upon the lands and put down and equip at least five wells, within the option-period. It was common ground that only two wells were bored, and that operations ceased long before the expiry of the option.

The plaintiff's claim for failure on the part of the defendant to pump all the oil that was obtainable from the producing wells was not pressed.

The remaining question was that of damages—what damages the plaintiff was entitled to recover for the defendant's failure to continue boring operations and drill five wells.

The plaintiff should recover such a sum as would, so far as money could do it, put him in the same position as if the contract had been fulfilled.

The two wells which were bored proved failures. The general evidence was that, while no one could forecast with certainty what the result of boring three more wells would be, yet the general reputation of the oil-field had greatly declined. At the same time, it was possible that, if the remaining wells were bored, oil would be struck in paying quantities.

The broad, general rule is, that damages which are uncertain, contingent, and speculative in their nature, cannot be made a basis of recovery; but this rule against the recovery of uncertain damages is directed against uncertainty as to the cause rather than as to the extent or measure. See Chaplin v. Hicks, [1911] 2 K.B. 786, 797; Sapwell v. Bass, [1910] 2 K.B. 486; Wood v. Grand Valley R.W. Co. (1913), 30 O.L.R. 44, 50.

In the present case there is a clear liability for breach of contract, and the damage is not too remote; but, as in the Grand Valley case, the evidence was misdirected; there was no evidence before the Court such as ought to be given in order to ascertain the damages.

There should be a judgment declaring that there has been a breach by the defendant of the contract, and that substantial

damages are recoverable in respect thereof; referring the action to the Local Master at Kitchener to assess such damages; and dismissing the defendant's counterclaim. Upon the Master's report becoming absolute, judgment will be entered for the amount which shall be found due by him, without any motion for further directions. The plaintiff's costs of the action down to and including the trial will be paid by the defendant; the costs of the reference will be in the discretion of the Master.

LENNOX, J. JULY 10TH, 1920.

DOUGLAS v. HANNAH.

Execution—Renewal of Fi. Fa. Lands—Time for—Sheriff's Sale under Writ not Renewed in Time—Possession of Land.

Action to recover possession of land and for an account in respect of use and occupation.

The action was tried without a jury at Belleville.
M. Wright and W. Carnew, for the plaintiff.
M. H. Ludwig, K.C., for the defendant.

LENNOX, J., in a written judgment, said that the plaintiff's right depended on the validity of a deed from the Sheriff of the County of Hastings, purporting to convey the land in question, in pursuance of a writ of execution against lands of the defendant, issued on the 8th April, 1911. The writ was renewed on the 8th April, 1914, and again on the 7th April, 1917. The land was advertised for sale on the 2nd January, 1917, and on the 19th April thereafter declared to be sold to the plaintiff as the highest bidder. The recital in the deed that the writ was tested on the 22nd March appeared to be an error.

The defendant gave evidence at the trial that he sold and conveyed the land to his son on the 24th August, 1907, and that he, the defendant, had not since that date been the owner or in possession of the land. The learned Judge said that he had not to decide the question raised by that statement.

The point for decision was, whether the writ of execution was properly renewed in 1914, or whether it had expired on the 8th April, 1914, the date of the alleged first renewal.

Reference to Lowson v. Canada Farmers Mutual Insurance Co. (1882), 9 P.R. 309, and the cases there cited; Goldsmiths' Co. v. West Metropolitan R.W. Co., [1904] 1 K.B. 1.

The learned Judge said that, in his opinion, the alleged renewal was too late—the writ was issued on the 8th April, 1911.

Action dismissed with costs.

RE CRAIK AND KESTLE—KELLY, J.—JULY 8.

Vendor and Purchaser—Agreement for Sale of Land—Title—Requisitions as to Unregistered Deeds Necessary to Shew Right to Discharge Mortgage—Evidence—Satisfaction of Requisitions.]—Application by the vendor under the Vendors and Purchasers Act, heard at the London Weekly Court. KELLY, J., in a written judgment, said that the vendor had made out a prima facie case that there was a re-assignment by John B. Jackson to John Newell of the mortgage from Daniel Clement to Newell, dated the 2nd January, 1884, and registered as No. 8579; also that there was a re-assignment by the Complin trustees to John Newell of the same mortgage; and that these assignments were sent to the mortgagee, John Newell. They did not appear on registry, however: hence this application. There was also evidence of one of the present trustees of the Complin estate that the trustees had now no claim in respect of this mortgage, or of the lands described in it. On the material now before the learned Judge (including affidavits submitted since the argument), the purchaser's requisitions numbers 1, 2, and 3, relating to re-assignments of the mortgage, had been satisfactorily answered. On the argument the purchaser's counsel expressed his willingness to accept evidence which the vendor was then able to produce in answer to the other requisitions. Therefore there should be no further declaration as to these. Order declaring that the purchaser's requisitions had been satisfactorily answered; no costs. C. G. Jarvis, for the vendor. J. W. G. Winnett, for the purchaser.

CROMPTON V. MORGAN—SUTHERLAND, J.—JULY 9.

Deed—Rectification—Omission of one Lot in Description of Lands Conveyed by Trustee—Inadvertence or Error—Conveyance of Omitted Lot to Innocent Purchaser—Action to Set aside Conveyance —Costs.]—Action for the rectification of a deed of conveyance of five lots of land in the township of Woodhouse, from which deed, the plaintiffs alleged, "by inadvertence or error" lot 12 was omitted, and to set aside a deed executed by the defendant Morgan, as trustee of the estate of Andrew Thompson, deceased, conveying lot 12 to the defendant Leaney. The action was tried without a jury at Simcoe. SUTHERLAND, J., in a written judgment, said, after stating the facts, that the action failed, on the ground that no proof of actual knowledge of or notice to the defendant Leaney, or collusion on his part with the defendant Morgan, had been proved. The action should, therefore, be dismissed, but, in the circumstances, without costs. H. P. Innes, for the plaintiffs. J. Cowan, K.C., for the defendant Morgan. T. J. Agar, for the defendant Leaney.

CORRECTION.

In PARRY V. PARRY, ante 365, for "the plaintiff," where those words first occur in the 10th line from the bottom of the page, read "them."