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COURT OF APPEAL.

JANUARY 16TH, 1912.

REX v. JESSAMINE.

Criminal Law—Murder—Insanity—Appreciation of Nature and Quality of Act—Irresistible Impulse.

The prisoner was tried on a charge of murder before RIDDELL, J., and a jury, at Toronto, on the 13th November, 1911.

It appeared that he had watched for one Lougheed upon the street and shot him several times, killing him almost instantly.

The defence was insanity.

The medical evidence was, that the prisoner was insane, incurably so; that he understood the nature and quality of the act, and that it was wrong in the sense that it was forbidden by the law; but he had lost the power of inhibition, and could not resist the impulse he had to kill Lougheed.

Riddell, J., charged the jury: "It is not the law that an insane man may kill whom he will without being punished for it. It is not the law that an insane man may kill another and escape punishment simply because he is insane. There have been hundreds of insane persons who have killed others, and who have been executed, both in England, whence we take our law, and in Canada, in which we live. . . . Life would not be safe under such circumstances. There is one in every three hundred persons in most countries . . . of persons who are insane, in one way or another, and it would never do if the law were such that one man out of every three hundred—that is, in Toronto, something over a thousand people—could go out and slay at will without being brought to task and punished by the strong arm of the law. . . A man is not to be acquitted on the ground of insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was wrong. It is not the law

here, as it is said to be in some countries, that, if an insane person, who is capable of appreciating the nature and quality of the act and of knowing that it is forbidden by law—for that is the meaning in this connection of the word 'wrong'—yet has what is called an impulse to do the act, which impulse he cannot resist, then he is to be acquitted on the ground of insanity. . . I charge you as a matter of law that it is not enough for the prisoner to have proved for him . . that he had lost the power of inhibition—the power of preventing himself from doing what he knew was wrong. . . . It is your duty to find a verdict of guilty if you find that the prisoner killed Lougheed . . . and at the same time it has not been proved to your satisfaction that the condition described by Dr. Bruce Smith was not his actual condition—in other words, if he killed the man, and it has not been proved that his condition was not as Dr. Bruce Smith says it was, he is guilty of murder, and it is your duty to find so."

The prisoner was convicted and sentenced to death.

RIDDELL, J., refused to reserve a case upon the question whether the prisoner, being undoubtedly insane, could be executed.

RIDDELL, J., reserved a case, upon the above charge, as follows: "Was I wrong (to the prejudice of the prisoner) in charging the jury that, even if the prisoner was insane, if he appreciated the nature and quality of the act and knew it was wrong, they should not acquit on the ground of insanity, and that the existence of an irresistible impulse did not (even if they believed it to exist) justify an acquittal on the ground of insanity?"

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

T. C. Robinette, K.C., for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown, were not called upon.

THE COURT answered the question in the negative, and affirmed the conviction.

[Cf. The King v. Creighton (1908), 14 Can. Crim. Cas. 349.]

HIGH COURT OF JUSTICE.

LATCHFORD, J. FEBRUARY 22ND, 1912.

ALEXANDER v. HERMAN.

Landlord and Tenant—Lease—Action to Set aside—Fraud and Misrepresentation—Right of Renewal—Term of Renewal—Indefiniteness — Agreement for Sale — Purchaser Affected with Notice of Lease—Estoppel—Res Judicata—Acceptance of Rent—Recognition of Tenancy—Act respecting Short Forms of Leases—Contract for Renewal not Binding on Assigns—Renewal in Perpetuity.

An action by two plaintiffs, Alexander and Johnston, for possession of a portion of a building now occupied by the defendant, or to have a certain lease made to the defendant reformed or set aside as having been obtained by misrepresentation, and on the ground that it is too indefinite, in that the term is not specified.

J. W. Hanna, K.C., for the plaintiffs.
S. C. Smoke, K.C., for the defendant.

LATCHFORD, J.:—At the trial I found that the lease in question in this action was not obtained by fraud or misrepresentation, as the plaintiffs allege.

Alexander, like Herman, resided in Detroit, and there carried on, in partnership with his son, a combined dry-goods and grocery business. He was the owner of a property in Windsor known as "The Old City Hall.' Herman, under the name of "The Diamond Power Specialty Company," was a manufacturer of labour-saving and fuel-saving devices; and, desiring to establish a branch in Ontario, he applied to Alexander for a lease of the latter's property in Windsor. Herman desired to obtain a lease for three years. This Alexander refused. The negotiations ended, according to Alexander, in an agreement that a lease was to be made for one year certain, with right of renewal for another year, "if the property was not sold."

The defendant's brother, who conducted most of the negotiations with Alexander, says the arrangement was, "we were to have the privilege of renewing as long as we desired," and his evidence is corroborated by the defendant himself. The preparation of the lease was wholly in the hands of the defendant and his brother.

Alexander says: "They brought the lease to my place, I signed it, and they took it away." It was made in duplicate, but a part was not left with the lessor. Ten days later, he wrote to Herman for what he called "a copy," and was sent one of the parts.

The lease, while expressed to be made in pursuance of the Act respecting Short Forms of Leases—R.S.O. 1897 ch. 125—is not in fact made pursuant to that Act. It is not under seal; and the Act has application only to leases that are under seal (sec. 1). It purports to demise and lease to Herman "The Old City Hall," with its appurtenances, for a term of one year—from the 1st July, 1908, to the 1st July, 1909—at a monthly rental of $25. There are two clauses regarding renewals. The first, which is not questioned—though not limited to the event of a sale—is as follows: "And it is further agreed that, if the said lessee so desires, at the end of the said term of one year, he shall have the privilege of renewing the said lease for a period of one year from the said date, at the same rental and on the same terms and conditions as the present lease." Then follows this provision: "The lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year, so long as he may care so to do."

Alexander alleges that this clause is contrary to what was agreed to between him and the defendant; that he executed the lease without knowledge that it contained this provision; and that it came to his knowledge only after he had agreed to sell the property to his co-plaintiff Johnston.

Herman entered into possession in July, 1908. On the 12th February, 1909, he sublet a part of the building to Johnston for a term of one year from that date, at $20 per month, with a right of renewal, if desired, for a further term of five months.

During the term of the original lease, on the 1st April, 1909, Johnston agreed to purchase and Alexander to sell the property. The agreement is in writing, and is expressly subject to the lease to the defendant. On the same day, a formal assignment to Johnston was indorsed upon the duplicate lease in the possession of Alexander, and duly executed.

It, therefore, appears that Johnston agreed to purchase the premises, with notice of the terms of the lease. He swears that he was not aware of the clause regarding renewals until two or three days after he agreed to purchase. This I regard as improbable. The evidence on the point is unsatisfactory. It may be that he did not consider the right of renewal to be binding on a grantee from Alexander. But that Johnston thought a

renewal might be had for a third year from the date of the lease is indicated by the fact that in his sublease from Herman he himself obtained a right of renewal which, if exercised—and it was exercised—extended his term twelve days beyond the end of the year covered by the first renewal clause.

In May, 1909, there was correspondence between the defendant and Alexander in regard to a renewal. Alexander did not disclose the fact that he had in April entered into a formal agreement to sell the property to Herman's sub-tenant Johnston. Ultimately, however, Alexander — notwithstandin his agreement with Johnston—agreed by his letters of the 16th and 31st May to renew for one year. This the defendant ratified by his letter of the 2nd June, adding, "This does not thereby affect my privilege at the end of next year or any subsequent year." No formal lease was executed.

In January, 1910, notice of the defendant's desire to renew for a year, under the second renewal clause of the lease, was given to Alexander. No formal assent was given to this; but, after the third year began, Alexander continued to accept rent from the defendant, and thereby recognised, as existing, the relation of landlord and tenant. Johnston continued in occupation of part of the premises, and paid rent therefor to the defendant.

On the 5th October, 1910, Johnston, while still a tenant of the defendant, issued a writ from a County Court against the defendant, claiming, as grantee from Alexander, that the lease should be set aside as too indefinite, and asking for possession—the precise issues in the present case.

The action was tried on the 4th April, 1911, and dismissed with costs. No reason is stated for the decision. The judgment was not appealed from, and it is pleaded in the present case as a bar to Johnston's right to maintain the action. The County Court is a Court of record, and a judgment entered in it determines once for all the issues between the parties to a suit. The County Court action was against the Diamond Power Specialty Company; while in this case that company and Herman are made defendants. Upon the evidence, the company is but Herman's business name, and both actions are against the same defendant. Johnston asserts now no claim that he did not assert then; and his suit herein fails and must be dismissed.

I do not adopt the contention that his co-plaintiff Alexander is in the same position; although upon his examination for discovery an answer was elicited from him that he had no interest in the property. Such an answer should be considered in the

light of the circumstances under which it was made; and where, as here, it expresses merely the assent of a dull or clouded mind to a question cleverly put by able counsel, it should not, in my opinion, be regarded as of any great weight, especially when it is, as here, contradicted by documentary evidence.

Alexander, when he brought the action, was the owner of the legal estate in the land. That estate has not been conveyed to Johnston. It constitutes a substantial interest in the land, and continues until ended by a proper conveyance or by operation of law. Manifestly, when Alexander said he had no interest in the land, he was under a misconception as to his rights, or answered the question without understanding it.

Nothing that Johnston did can, I think, operate as an estoppel against Alexander; and, as Alexander was neither party nor privy to the action in the County Court between Johnston and the defendant, the defence of *res judicata* as against Alexander fails.

But Alexander, by his acceptance of rent, even after he had issued the writ in this action, unequivocally recognised, according to well-settled law, that the defendant was his tenant—at least for the year from the 1st July, 1910, to the 1st July, 1911; and his claim for possession must, therefore, fail.

There remains only the contention that the lease should be set aside on the ground that the second clause providing for renewals is too indefinite.

The agreement contained in this clause derives no strength from the Act respecting Short Forms of Lease. It is not a covenant, and does not bind the land. It is not expressed to bind—and does not, I think, bind—the heirs, assigns, or personal representatives of the lessor. I also think that it confers no rights on the heirs, assigns, or personal representatives of the lessee. It is a simple contract between Alexander and Herman by which Alexander gives to Herman the privilege of renewing the lease from year to year so long as Herman may desire. The lessee's desire must, of course, be signified to the lessor: Brewer v. Conger, 27 A.R. 10 at p. 14. When that is done, the only uncertain element in the agreement is made certain.

It is argued that the lease is void because it provides for renewals *in perpetuo*. Even if it provided for perpetual renewal, it would not necessarily be void. The Courts lean against such renewals, but recognise them when properly expressed: Baynham v. Guy's Hospital, 3 Ves. 295. In Clinch v. Pernet, 24 S.C.R. 385, it was held that the lease in question in that case was renewable in perpetuity.

But the lease between Alexander and Herman is not renewable in perpetuity. It can, in my opinion, be renewed only while Herman personally, and not any one claiming by, through, or under him, "cares so to do;" and the right may be exercised only while Alexander lives and continues to own the property. Alexander has already passed the age which few survive, and he may dispose of the property at any time. He could admittedly have given a right to renew during his lifetime, and has in fact done no more.

The action fails on all grounds, and must be dismissed with costs.

MIDDLETON, J. FEBRUARY 23RD, 1912.

RE GRIFFIN.

Executors—Compensation—Commission—Costs—Quantum.

An appeal by the residuary legatee under the will of G. H. Griffin, deceased, from an order of the Judge of the Surrogate Court of the County of Lambton fixing the compensation and costs of the executors.

R. C. H. Cassels, for the appellant.
J. D. Montgomery, for the executors.

MIDDLETON, J.:—The testator appointed as his executors two members of the firm who acted as his solicitors, with the direction that one executors should "have the sole winding-up of the said estate, and that whichever of my said executors shall wind up my estate that he shall be entitled to charge the ordinary solicitor's fees against the said estate; the legacies herein given to my executors not being given for services to be rendered in connection with my said estate by them or either of them."

This is consistent only with the idea that the acting executor was to receive for his remuneration such fees as a solicitor would charge for the services rendered, and is quite inconsistent with the idea that the executors were to have not only this remuneration for professional services, but also commission.

The Surrogate Court Judge has allowed $376.02 costs and $3,000 under the Trustee Act for care, pains, and trouble "to the present time."

The parties on the argument agreed that I should deal with the matter upon the footing that the amount to be allowed

covers the entire services rendered and to be rendered by the executors, as the residuary legatee elects to take over the estate in specie; and nothing remains to be done save to hold a small sum, comparatively, to answer an annuity.

The estate was all well invested in stocks, etc., and the executors have had to sell some of these to pay specific legacies.

The testator died on the 10th October, 1910, and the trust is not one for investment and reinvestment as in Re Williams, 4 O.L.R. 501.

The income secured is	$4,022.67
And per sub. acct.	983.65
	$5,006.32

None of this had to be "collected" in the ordinary sense, as it consisted of twenty-five dividend cheques, which had only to be indorsed and deposited.

Some stock was sold through brokers, and the cheques for the proceeds deposited. This (covering five transactions) amounted to less than $16,000. Life insurance, amounting to $3,643, was received from two policies.

A sum of $4,200 was borrowed from the Lambton Loan Company upon stock, and was repaid.

About $4,000 was in the bank to the testator's credit.

About forty cheques were issued to legatees, and less than twenty in payment of debts, funeral and testamentary expenses, and succession duty.

The solicitors' bill of $376 is not produced; but it must cover practically all that was done.

All that remains to be done is to set apart two sums of $4,000 and $2,000—$6,000 in all—to answer legacies to R. S. W. Heighem and F. W. Griffin, and to pay $450 for a monument. The rest of the estate, about $60,000, consisting of $1,600 in the bank and stock in eight companies, can be transferred to the residuary legatee.

If one per cent. is allowed on the dividend cheques ($5,000) and on the stock sold ($16,000), and one per cent. on the money paid out (about $27,000)—say 500 in all—there would be a most liberal allowance in addition to the $376 charged for costs.

The residuary legatee on the argument expressed willingness to allow $1,000 in all; and I would, therefore, fix the commission at $1,000, including the costs, or say $625 in addition to the costs.

In a very similar case of Re West, determined by Mr. Justice

Osler in 1894, he confirmed an allowance of a very much smaller sum for commission.

The learned Surrogate Court Judge gave no reason for fixing the commission at $3,000; and counsel for the executors stated that it was 2½ per cent. on the cash received and 2½ per cent. on the cash disbursed. It is really about 10 per cent. on the amount passing through the executors' hands, if the temporary loan is ignored.

A second question is raised as to the costs allowed. For attending the audit of these simple accounts, the Judge, in addition to the usual solicitor's charges, has allowed, by fiat, a counsel fee to the executors of $100 and $50 to counsel for the residuary legatee, and has allowed $59.03 to the agent for the Official Guardian, including a fee of $50.

The infants were in no way interested, as their specific pecuniary legacies were paid in full.

Assuming that any counsel fee is proper, the Rules limit the power of the Judge to an allowance, as a maximum, of $25.

Re Morrison, 13 O.W.R. 767, determines that the provisions of the tariff govern—if any authority is needed for so self-evident a proposition.

The order of the Surrogate Court Judge must be amended in accordance with the above, and the appellant should have his costs against the executors, if asked.

CLUTE, J. FEBRUARY 28TH, 1912.

RE CORKETT.

Will — Construction — Division of Residue — Maintenance of Children—Sale of Residence.

Motion by the executors of George Corkett, deceased, for an order, under Con. Rule 938, determining questions arising upon the construction of his will.

Featherston Aylesworth, for the executors.
B. F. Justin, K.C., for W. George Corkett.
E. C. Cattanach, for the infants.
R. G. Agnew, for Mrs. Kegg (Margaret Jane Corkett).

CLUTE, J.:—The testator, George Corkett, by his will devised his farm, the west half of lot 4 in the township of Albion, to

his executors and trustees until his son William George should arrive at the age of twenty-five years, and then to his said son in fee simple. He directed the rents and profits thereof to be applied to the support, maintenance, and education of his children.

He then devised his house and lot in Brampton to his trustees to hold in trust until his youngest child arrived at the age of twenty-one years, the residence to be used as a home for his children "until such time;" and, after the youngest child arrived at twenty-one years, he directed a sale and division of the proceeds to be made equally among his three children.

He also gave his executors power to sell the residence before the youngest child arrived at twenty-one years of age, and purchase another, if they thought proper, for the use of his children until the youngest child arrived at twenty-one years of age, the new purchase to be held upon the same conditions and trust as his said residence.

He directed his executors and trustees to invest the residue of his estate, and to apply the interest, dividends, and profits arising from such investment, as might be necessary, to the support, maintenance, and education of his children until his daughter Margaret should have attained the age of twenty-one years, at which time he directed the executors to pay over to her the sum of $1,000, and to keep the residue invested and apply the interest therefrom to the support of his children until his said daughter should have arrived at the age of twenty-six years, at which time he directed that she should be paid "the one-third of the said residue of my estate, after deducting the $1,000 previously paid to her," and that the trustees should keep the residue then remaining invested and apply the interest arising therefrom to the support, maintenance, and education of his children William George Corkett and Cecil Mansfield Corkett till William George should have arrived at the age of twenty-five years, at which time he directed the executors to pay over to his son William George one-half of the residue then remaining, and thereafter directed the executors and trustees to invest the then residue and apply so much of the interest arising therefrom as might be necessary for the support and maintenance of his son Cecil Mansfield Corkett till he should have attained the age of twenty-one years, at which time the balance or residue then remaining should be paid to his said son Cecil Mansfield.

He directed, if necessary, portions of the principal to be used for the support, maintenance, and education of his children.

In his codicil, after reciting that he had bequeathed to his son William George one-half of his estate, after payment to his daughter Margaret her one-third share, he declared it to be his will that, "instead of my said son being bequeathed the said one-half of the residue as aforesaid, he be and he is hereby bequeathed the sum of $1,500 in cash and the one-third part or share of the proceeds of the sale of my said residue, the balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my said will."

The questions submitted in the notice of motion do not cover the grounds taken in argument, as to the construction of the will. I am of opinion that, by the true construction of the will, the expense for the maintenance of the dwelling-house as a residence for the children for the period limited by the will should be paid out of the income of the estate, if that be sufficient, as it would appear that it is, and, if not sufficient, out of the corpus.

That such support shall continue for the benefit of the three children until Margaret arrives at the age of twenty-one years, when she shall receive $1,000, and that the interest upon the residue shall then be applied for the support, maintenance, and education of all the children until Margaret arrive at twenty-six years of age.

That she is then entitled to receive one-third of the residue of the estate, after deducting $1,000 previously paid to her; that is, as I understand the rather obscurely expressed will, that, whatever the residue may be, she is entitled to one-third of that; but, inasmuch as she has received the $1,000, that sum is to be deducted from her share. Thus, if the residue before the $1,000 was paid was $6,000, she would be entitled to $2,000, and, having received $1,000, she would be entitled to the balance of $1,000. It does not mean, I think, that the $1,000 paid to her is to be first deducted from the residue, that from that sum then she is to receive one-third, and that the $1,000 should again be deducted from it. That would, in effect, be deducting the $1,000 twice.

I am also of opinion that the children Margaret and William George are entitled to what is a fair allowance for their maintenance, whether that maintenance, support, and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors.

It will be noticed that the one-half of the residue given to William George is the one-half remaining after one-third of the whole residue had been paid to Margaret, that is, it is one-third of the residue. In the codicil it is this one-third of the whole residue or one-half of the remaining residue that is referred to; and, instead of William George being bequeathed one-half of the residue after the payment to Margaret, he is bequeathed the sum of $1,500 in cash, and he is also given a one-third share of the proceeds of the residence.

Then comes the expression, the meaning of which is disputed: "The balance to be divided between my said daughter Margaret Jennie Corkett and my son Cecil Mansfield Corkett according to the terms and conditions specified as to the other bequests made by my will." What balance? Does it mean the balance of the residue after paying one-third to William George, or the balance of the residue of the estate, or both? Some light is thrown upon it by the last clause. The division is to be made according to the terms and conditions specified in the other bequests of the will. What other bequests? Clearly, I think, the bequests which affect the half residue mentioned, and also the bequests upon the sale of the residence.

By a former provision, upon a sale of the residence, the proceeds were to be equally divided "amongst my three children in equal shares." Before the codicil was made, Margaret had received her $1,000 and one-third of the residue, and was yet entitled to receive one-third of the proceeds from the sale of the residence, and any amount remaining unpaid for maintenance, etc.

William George Corkett, by the codicil, is now given $1,500 and one-third of the proceeds of the residence, instead of his one-half of the residue after Margaret had been paid. The residue of the estate, in my opinion, goes to the younger son, Cecil Mansfield Corkett, each of the three children receiving one-third of the proceeds from the sale of the residence.

Costs out of the estate. The costs of the executors between solicitor and client.

KELLY, J. FEBRUARY 28TH, 1912.

UNDERWOOD v. COX.

Contract—Settlement of Claims—Action to Enforce—Fraud and Misrepresentation—Undue Influence—Absence of Independent Advice—Confidential Relationship—Validity of Claims—Document Signed without being Read.

Action by William J. Underwood and his sister, Catharine Laurie, against their sister, Jane Cox, for payment of $964.70 and interest, claimed as their two-thirds share of an amount agreed by the defendant to be paid to the plaintiffs and another sister, Mary Ann Cox, by an agreement dated the 5th May, 1910.

The defence set up was, that the defendant was induced to sign the agreement by the misrepresentation, fraud, intimidation, duress, and undue influence of the plaintiff Underwood and Joseph Laurie, husband of the plaintiff Laurie, and that the defendant signed it without knowing its contents and without legal advice as to her rights.

R. U. McPherson and J. W. McCullough, for the plaintiffs.
Gordon Waldron, for the defendant.

KELLY, J.:—The parties to the agreement are children of Francis Underwood, deceased, who by his will, dated the 2nd August, 1902, and a codicil thereto, dated the 1st March, 1905, gave to Ida Frances Cox, the minor daughter of the defendant, an organ and a mortgage which he held for $1,000 on the property of the defendant and her husband, and all the rest of his estate to the defendant.

The testator died on the 27th March, 1910, and his executors applied for probate of the will; the plaintiffs and Mary Ann Cox filed a caveat against the issue of probate, alleging that the will was not executed by the testator, or, if so, that it was executed under undue influence and duress, and that he was not of sound mind, memory and understanding.

The real ground, however, of the plaintiff Underwood's objection to the disposition made by the testator of his estate is found in the claim which he had, or believed he had, against the testator and his estate, arising out of an agreement or understanding between the father and son. Several years prior to his death, the father obtained from the son a conveyance of certain

property, at a price much less than its real value, on the promise that, at his death, the son would be given a substantial part of his estate. The son honestly believed that he was entitled to enforce this claim against his father's estate, or to share in the assets of the estate; he also claimed the organ which his father bequeathed to the defendant's minor daughter, and which, the evidence shews, had been at some time looked upon as belonging to him. The claim of plaintiff Catharine Laurie was, that she had been promised by her father consideration for having nursed and cared for him for a considerable time prior to his death, and that the estate was therefore indebted to her. Mary Ann Cox, the other party to the agreement sued on, is not a party to these proceedings; it was stated by the defendant's counsel, during the progress of the trial, that she was not pressing her claim.

On the 4th May, 1910, the plaintiff Underwood, who lives in London, went to the defendant's residence in the township of Markham, and during an interview of considerable length proposed a settlement. The defendant's husband, Walter Cox, was not present; and Underwood, after stating to the defendant why he claimed to be entitled to a settlement, named an amount which would be accepted for the plaintiffs and Mary Ann Cox in full, the terms proposed being exactly those which were afterwards embodied in the agreement sued upon. The defendant, as was natural, said she wished to talk it over with her husband; and Underwood left the house with the understanding that he would return next day for her answer.

On the 5th May, Underwood, accompanied by Joseph Laurie, husband of the plaintiff Catharine Laurie, returned to the defendant's house and had a further interview with the defendant and her husband. The proposal made on the day previous was fully and freely talked over and considered by those present, and the defendant and her husband decided to accept it; and it was suggested by the defendant's husband that the plaintiff Underwood draw the agreement to carry out the settlement. This Underwood refused to do. It was then suggested, and, so far as the evidence shews, by the defendant, that Underwood, Walter Cox, and Laurie go to one of the executors, who lived near by, and have him draw the agreement. They went. The executor also refused to draw it, and suggested the parties going to Markham to have it drawn by a solicitor. These same three persons went together to Markham, a distance of 5½ miles, and instructions were given to a solicitor to prepare the agreement, on the terms which had been agreed on at the defendant's house, all three being with the solicitor when the instructions were given.

The plaintiff Underwood and the defendant's husband returned to defendant's house with the agreement, which, on the way from the solicitor's office, had been signed by Mary Ann Cox.

The defendant did not then read the agreement, but she admits that she understood the proposal for settlement made by her brother on the 4th and discussed by the parties assembled at her house on the 5th. There is no doubt, and the defendant admits it, that the agreement is in the exact terms then proposed. Under these circumstances, its not having been read over at the time of its execution is not a ground for repudiating the agreement: North British R.W. Co. v. Wood (1891), 18 Ct. of Sess. Cas. (4th series) 27.

The defendant shewed some hesitation about signing, and the plaintiff Underwood said to her: "Now, Jane, you do not need to sign that paper, and don't sign it unless you feel that you are giving what you feel that I should have; I consider this is a just claim, and if you don't consider so, don't sign that paper;" and further, "You don't have to sign it." The defendant's husband then said, "What will happen if she don't sign it?" Underwood replied: "We will let it stand on its own merits, will let the case stand on its own merits, and the case will settle itself."

At the trial it was admitted that there was no duress; and there was no evidence of it; but it was attempted to be shewn that there was fraud and misrepresentation on the part of the plaintiff Underwood, and that he had intimidated the defendant and obtained undue influence over her.

The evidence does not satisfy me that these contentions are well founded. I do not find that the plaintiff Underwood or Joseph Laurie made any misrepresentations to, or perpetrated any fraud upon, the defendant; nor do I think that any fiduciary relationship, or relationship of confidence, existed or was established between these parties such as would justify the assumption of undue influence; nor is there any evidence of intimidation.

The defendant asserted that she was in a weak state of health; that she had no independent advice; and that she was unduly pressed by the plaintiff Underwood, and was hastened into the settlement.

It was true that she was not then in the best of health, but she was not so unwell as not to be able to attend to her household duties, which she was doing unaided at that time, including the preparation of dinner for those who assembled at her house on the 5th May. She was not unduly pressed or hurried into the

settlement. When, on the 4th May, she expressed her desire to be given until the following day to consult with her husband, her brother readily consented. She had from some time on the 4th May until the afternoon of the 5th May to confer with her husband, and obtain other independent advice, had she desired to do so, and I do not find that any circumstances arose which threw the burden on the plaintiffs of doing more than they did: see Walter v. Andrews, 16 Gr. at p. 640.

In Harrison v. Guest, 2 Jur. N.S. 911, the Lord Chancellor held the absence of professional advice no objection, when the party dealt with did not occupy a fiduciary relationship. It was also there laid down that the burden of proof is on the party seeking to set aside the transaction to shew that he has been imposed on, and it is not for him to say, "I had no professional advice," unless he can shew that there has been contrivance or management on the part of the person who was dealing with him, and whose transaction is sought to be set aside, to prevent him having that advice.

Nothing has happened in this case to throw that burden on the plaintiffs.

The defendant endeavoured to shew that the plaintiff Underwood had used an incident in her early life as a threat to compel her to make the settlement. I do not find this to have been the fact. The defendant's evidence is, that she did not know whether her brother knew of this incident, that he had never mentioned it to her; and, when she herself mentioned the subject on the 4th May, she cannot remember his making any reply. Her brother denies having alluded to it.

It was argued on behalf of the defendant that the filing of the caveat was not the proper procedure by which Underwood could establish his claim. He, however, believed that whatever procedure was adopted by his solicitor in London, who prepared the caveat, was the necessary procedure by which to establish his claim.

The settlement was, to my mind, deliberately made, and the fact that one party to it afterwards became dissatisfied with it, is not of itself a sufficient reason for seeking to be relieved from it. In many instances compromises or settlements are entered into which are at the time not altogether satisfactory to one or other of the parties, but which they, nevertheless, enter into so as to avoid the expense and anxiety attendant on litigation, or to settle doubtful claims, or for some such consideration, and the Courts uphold these compromises or settlements.

It is not unusual for a compromise to be effected on the

ground that the party making it has a chance of succeeding in it; and, if he bonâ fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration: Callister v. Bischoffsheim, L.R. 5 Q.B. 449; Miles v. New Zealand Alford Estate Co., 32 Ch. D. 266.

These plaintiffs not only believed that they had a chance of success, but there is nothing in the evidence to shew that their claims were, in their minds, at least, other than honest ones, or that they were otherwise than honestly made. By the agreement sued upon, they and Mary Ann Cox, in consideration of the payment which the defendant agreed to make, released their father's estate from all claims which they had against it, and withdraw, without costs, the caveat.

After a very careful consideration of the evidence, I can only conclude that the plaintiffs are entitled to succeed.

There will, therefore, be judgment in their favour for the amount prayed for and costs.

TEETZEL, J. FEBRUARY 29TH, 1912.

WILSON v. KERNER.

Landlord and Tenant—Lease—Covenant—Renewal—Perpetuity —Construction—Acts of Parties.

Action by the executors and the sole devisee under the will of Samuel Wilson, deceased, for the specific performance of a covenant in a lease, dated the 6th June, 1907, from the defendant to the plaintiffs' testator, in the words following: "And it is hereby further agreed by and between the parties hereto that the said lessee, his executors, administrators, and assigns, shall be entitled to a renewal of this lease for a further period of five years from the expiration of the term above demised, at the same rental and upon the same terms and conditions in all respects, if said lessee shall desire to hold the same for such extended term."

The lease expired on the 1st July, 1911; and the only dispute in carrying out the covenant for renewal and resulting in this action arose from the claim of the plaintiffs that the renewal of the lease should contain a similar covenant for renewal to that contained in the lease of the 6th June, 1907.

S. F. Washington,, K.C., and W. A. H. Duff, K.C., for the plaintiffs.

C. J. Holman, K.C., and J. M. Telford, for the defendant.

TEETZEL, J.:—The position of the plaintiffs is, that they are entitled to have the lease perpetually renewed, while the defendant contends that only one renewal is called for by the covenant.

The proper construction to be placed upon this form of covenant has long been settled, both in England and in Canada, to be, that the lessee is not entitled to a renewal in perpetuity, but only to one renewal, unless the language used in the covenant, expressly or by clear implication, shews that the parties intended a renewal in perpetuity. In order to establish such a construction, the intention must be unequivocally expressed; and a proviso in general terms that the renewal lease shall contain the same covenants and agreements as the lease containing the covenant for renewal has been repeatedly held not to extend to the covenant for renewal. See Woodfall, 18th ed., pp. 424, 425, and 426, and Halsbury's Laws of England, vol. 18, p. 463, where the leading cases are cited. See also The King v. St. Catharines Hydraulic Co., 43 S.C.R. 595.

Taking the language of the covenant sued on, which must be the sole guide in determining the intention of the parties, there is nothing whatever to indicate that either party intended that the defendant should be under any irrevocable obligation to renew the lease, either perpetually or as long beyond one renewal term as the plaintiffs, without any obligation on their part to accept further renewals, might choose to require it to be done.

One circumstance urged for the plaintiffs as indicating that such intention could be gathered from the covenant was the fact that in a prior lease of part of the same premises made by the defendant's husband to the plaintiffs' testator, the precaution had been taken of inserting in a similar covenant for renewal the words "except renewal." It is quite clear that this circumstance or any other act of the parties cannot be invoked to affect the interpretation of the plain and unambiguous language of the covenant: Baynham v. Guy's Hospital, 3 Ves. 294; Iggulden v. May, 9 Ves. 325; Foa on Landlord & Tenant, 3rd ed., p. 272.

The defendant before action was and she still is willing to perform the covenant according to its proper interpretation, and only refused to execute the renewal lease tendered because of the insertion of the covenant for renewal.

The action must, therefore, be dismissed with costs.

UNION BANK OF CANADA v. AYMER—MASTER IN CHAMBERS—FEB. 24.

Summary Judgment—Con. Rule 603—*Application by Defendant for Reference under Con. Rule* 607—*Practice.*]—Motion by the plaintiffs for summary judgment under Con. Rule 603. The action was brought to recover $1,548.37 due by the defendant to the plaintiffs, as set out in the indorsement of the writ of summons and affidavit of the plaintiffs' manager filed on the motion. The defendant made affidavit that he believed that the above amount was not correct, without giving any reasons for this belief, and desired to have a reference to ascertain the amount. He did not deny the affidavit of the manager that he (the defendant) "repeatedly admitted his liability in respect of the indebtedness sued for herein." The Master said that all that the defendant was entitled to know could be found out on cross-examination of the manager upon which books and vouchers would be produced. There was as yet no defence disclosed under Rule 607. This was all that the defendant could ask for; and the motion would be adjourned for that purpose. A reference is not to be had in those cases merely because the defendant wishes for it. The other party is not to be put to the resulting expense and delay without some good reason being shewn for such a proceeding. A. H. F. Lefroy, K.C., for the plaintiffs. F. J. Hughes, for the defendant.

DOMINION BELTING CO. v. JEFFREY MANUFACTURING CO.—MASTER IN CHAMBERS—FEB. 24.

Third Parties—Claim against for Relief over—Absence of Connection with Main Action.]—Motion, before appearance, by third parties to set aside the order for the issue of the third party notice. The facts, as shewn in the third party notice and the affidavit on which the order was granted were as follows. The defendants Archer and Gerow were sales agents of the defendants the Jeffrey Manufacturing Company. As such agents, they ordered from the plaintiffs belting to the value of $1,520, to fill an order which they had obtained from the third parties on the 23rd June, 1910. This order was filled, and the full price paid by the third parties to Archer and Gerow at the end of September, 1910, by the acceptance of a draft of Archer and Gerow, which was met at maturity. But the proceeds were never paid to the plaintiffs or to the Jeffrey company. There

was no suggestion that the plaintiffs or the third parties were in any way aware of the precise relations between the Jeffrey company and their agents. Nor was there any defence set up which the third parties would be interested in supporting. All the Jeffrey company could say was, that Archer and Gerow had no authority to pledge their credit to the plaintiffs, as appeared from the statement of claim. The Master said that there was here, admittedly, no case either of contribution or indemnity, and it did not appear to be one of other relief over. There was no question raised as between the Jeffrey company and the third parties which could be decided in the action as originally instituted. The Jeffrey company admitted by the affidavit of their solicitor that the plaintiffs had not been paid, though the price of the goods was paid to Archer and Gerow by the third parties. The question, therefore, as between the Jeffrey company and the third parties was simply whether this payment to Archer and Gerow discharged the third parties. This had nothing at all to do with the main action. It was the common case—who is to bear the loss occasioned by a defaulting agent? All that the Jeffrey company could usefully do would be to notify the third parties of the facts, and state that they did not recognise the payment to Archer and Gerow, so that the third parties might, if so advised, aid them in settling with the plaintiffs without the Jeffrey company being obliged to take action against the third parties. This did not require the formality of a third party notice. Order made setting aside the order and notice, with costs to the plaintiffs in any event and to the third parties forthwith after taxation, unless the defendants consent to their being fixed at $25. The Master referred to what he said in Wade v. Pakenham, 2 O.W.R. 1183, that the test is: "Are there any common questions or question between all the parties, which, if decided in favour of the plaintiff, would give the defendant a right to indemnity (or other relief) against the third party?" There was nothing in the present case to meet that condition. Grayson Smith, for the third parties. H. McKenna, for the defendants. E. C. Cattanach, for the plaintiffs.

TRADERS BANK OF CANADA v. BINGHAM—DIVISIONAL COURT—FEB. 24.

Contract—Construction—Sale of Goods—Agent for Sale or Purchaser—"Time of Sale."]—Appeal by the defendant from the judgment of the Senior Judge of the County Court of the

County of Middlesex, in favour of the plaintiffs, in an action upon a money claim assigned to them. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ. The judgment of the Court was delivered by MIDDLETON, J., who said that the sole question was, whether, upon the true construction of the agreement of the 6th June, 1910, the defendant was merely appointed agent for the Folding Bath Manufacturing Company (the plaintiffs' assignors), or whether he became the purchaser of the baths in question. The County Court Judge took the view that, under that agreement, the defendant became the purchaser, and undertook to pay for the baths within thirty days from the date of invoice. The Court was unable to agree in this. By the agreement, the company gave Bingham the selling rights of the bath in question for certain counties; and Bingham agreed to pay $4 for each bath-tub supplied "to him or his agents, in cash at the time of sale, or notes or drafts due in thirty days from the date of invoice," and the company "to accept, in payment for bath-tubs, reliable customers' paper in settlement of accounts." Bingham was to be entitled to retain for himself the difference between the $4 and the price for which the bath was sold; and he further agreed to "handle" not less than twenty-five bath-tubs per month. The agreement was terminated, and Bingham was paid for all the baths sold by him, and desired to return the baths on hand. These had been tendered and refused. The Court thought that the agreement as a whole indicated that Bingham was merely an agent, and that the property in the tubs had not passed to him; and, upon the termination of the agency, it would follow that he had a right to return the goods on hand, and was not bound to keep and pay for them. The "time of sale" means the time of sale to a purchaser. The appeal should be allowed, with costs throughout. There was no appeal as to the counterclaim, but only as to the claim for $120. The plaintiffs should have the $23 paid into Court, but this would not interfere with their liability for costs of the action. J. M. McEvoy, for the defendant. G. N. Weekes, for the plaintiffs.

UNION BANK OF CANADA v. AYMER—MASTER IN CHAMBERS—FEB. 28.

Summary Judgment—Con. Rule 603—*Application by Defendant for Reference under Con. Rule* 607—*Doubt as to Accuracy of Affidavit—Omission.*]—After the disposition of the

motion for summary judgment made on the 24th February (ante 771), it was discovered by the defendant, and admitted by the plaintiffs, that a dividend of $167.92, under an assignment for the benefit of creditors made by the defendant in June last, and paid to the plaintiffs on the 30th November last, ought to have been credited to the defendant on his indebtedness. On the motion being brought on again before the Master, he said that he thought that this threw sufficient doubt on the accuracy of the affidavit in support of the motion for judgment, and disclosed such facts as were sufficient to entitle the defendant to have the accounts investigated on a reference, if the defendant still thought it would be of any advantage to him to be saddled with the costs of that proceeding. The Master suggested, however, that it would be better, even now, to have an examination of the plaintiffs' books and see what was the real liability of the defendant, who was said to be only an accommodation maker or indorser. The defendant should elect as to this in four days. In view of his financial position, the delay would not seriously prejudice the plaintiffs, who could not complain if the important omission above-mentioned gave them some trouble. The very recent case of Symons v. Palmers, [1911] 11 K.B. 259, shews how strictly plaintiffs should comply with the requirements of Con. Rule 603. A. H. F. Lefroy, K.C., for the plaintiffs. F. J. Hughes, for the defendant.

KING MILLING CO. v. NORTHERN ISLANDS PULPWOOD CO.—MASTER IN CHAMBERS—FEB. 28.

Pleading—Statement of Claim—Action by Creditors of Company to Set aside Transfers of Property—Want of Authority of Officers of Company—Parties.] — This action was brought on behalf of the creditors of the defendant pulpwood company to set aside certain transfers made by that company to the defendants the Imperial Bank of Canada, on the usual grounds. By the 9th paragraph of the statement of claim the plaintiffs alleged that these transfers were executed by the officers of the company without authority. The defendants the Imperial Bank of Canada moved to have this paragraph struck out as embarrassing. The Master said that the motion was entitled to prevail, as these plaintiffs had no locus standi to bring any such action. That could only be done by the company itself or by some of the shareholders, if they could not obtain the use of the name of the company as plaintiff. See International Wrecking Co. v. Murphy, 12 P.R. 423, and cases cited. The

paragraph in question with the corresponding prayer for relief must be struck out with costs to the moving defendants in any event. M. L. Gordon, for the applicants. Featherston Aylesworth, for the plaintiffs.

WELLAND COUNTY LIME WORKS CO. v. SHURR—DIVISIONAL COURT —FEB. 29.

Contract—Construction—Supply of Natural Gas—Joint or Several Contract—Oil and Gas Lease—Right to—Enforcement of Contract.]—Appeal by the defendant from the judgment of SUTHERLAND, J., ante 398. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and MIDDLETON, JJ. The Court was unable to agree with the conclusion of the trial Judge. MIDDLETON, J., said that, in the opinion of the Court, the matter must be determined upon the terms of the written memorandum of the 20th November, 1903. In it must be found the term for which the leases mentioned were to be granted. Augustine and Shurr were to lease their respective farms; but the lease was "to continue so long as the parties of the second part continue to comply with the conditions agreed upon." The condition agreed upon was "to supply, free of charge, sufficient gas to heat the houses of the parties of the first part." This clause could not be read as meaning that each lease was to continue so long as the company supplied to each lessor sufficient gas to heat his house. It was rather an agreement on the part of these two land-owners with the company that the company should be at liberty to sink wells upon the land of either, provided the company should supply sufficient gas to heat the houses of both. On the fact of the agreement, there was a joint venture on the part of these two farmers. They jointly contributed the money necessary for the laying of the pipe line; and the agreement was, that gas should be supplied to both. The plaintiffs were not now entitled to demand a lease from Shurr; they had ceased to supply gas to Augustine; and, therefore, the term on which the lease was to be granted had been ended by the action of the plaintiffs. If the evidence were referred to, it went to shew that this was the true construction and the real agreement between the parties; but the case fell to be determined entirely upon the written document; and it was not necessary to deal with the defendant's claim for the reformation of the agreement, as the agreement accurately expressed the intent. BRITTON, J., gave reasons in writing for the same conclusion. FALCONBRIDGE, C.J., concurred. Appeal allowed with costs, and action dismissed with costs. S. H. Bradford, K.C., for the defendant. W. M. German, K.C., for the plaintiffs.