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HIGH COURT OF JUSTICE.

FALCONBRIDGE, C.J.K.B., JULY 12TH, 1912.

*VOLCANIC OIL AND GAS CO. v. CHAPLIN.

Water and Watercourses—Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Lands beyond—Right of Grantee to Lands Encroached upon by Water—Crown Assuming to Make Lease of same Lands—Trespass by Lessee—Action—Parties—Attorney-General—Injunction—Damages.

Action by the Volcanic Oil and Gas Company, John G. Carr, and the Union Natural Gas Company of Canada Limited, plaintiffs, against Chaplin and Curry, defendants, for a declaration of the plaintiffs' right of ownership of certain lands, and for an injunction and damages in respect of trespasses alleged to have been committed by the defendants thereon.

G. F. Shepley, K.C., and J. G. Kerr, for the plaintiffs.
O. L. Lewis, K.C., for the defendant Curry.
W. Stanworth, for the defendant Chaplin.

FALCONBRIDGE, C.J.:—The plaintiff Carr is the owner and occupant of the westerly half of lot 178, Talbot road survey, in the township of Romney . . . granted by the Crown by patent dated the 29th January, 1825, to Carr's predecessor. . . .

The plaintiffs allege that the original Talbot road, which formed the south-westerly boundary of the lands included in the patent, ran near the bank of Lake Erie, which at this point is many feet above the beach, and rises perpendicularly therefrom, having a clay front facing the waters of the lakes. The plaintiffs further allege that along the shore of Lake Erie in that locality the waters of the lake have been encroaching upon the lands,

*To be reported in the Ontario Law Reports.

undermining the bank, causing it to subside, and then gradually washing it away; that, by reason of this encroachment of the lake, Talbot road, at an early period, grew dangerous and unsafe for public travel, until, about 1838, it was abandoned as a means of public travel, and a new road, which has been for many years known as the Talbot road, was opened up and dedicated to public travel; that this road still continues to be the travelled road known as Talbot road, but the original Talbot road, across the lake front, has long since been washed away by the waters of the lake, and now those waters have advanced beyond where they were at the time of the original Talbot road survey; so that they have washed away the reserve left in front of the Talbot road, also the Talbot road itself, and some rods of the front of the surveyed lots; so that now so much of the lands patented to Carr's predecessor and now owned by him as are now above the waters of Lake Erie border on the waters of the lake and not on the original Talbot road.

These statements were denied by the defendants; but I find them to have been proved, as I shall hereafter state.

On or about the 4th July, 1908, the plaintiff Carr executed and delivered to the plaintiffs the Volcanic Oil and Gas Company, a grant and demise of the exclusive right to search for, produce, and dispose of petroleum and natural gas in, under, and upon the said lands. . . .

By instrument under the Great Seal of the Province of Ontario, dated the 1st August, 1911, known as Crown lease No. 1836, the Government of the Province demised and leased unto the defendant Chaplin . . . the whole of that parcel . . . of land under the waters of Lake Erie in front of this lot, amongst others. . . .

About the month of September, 1911, the defendant Chaplin made a verbal contract with the defendant Curry for putting down a well for the production of petroleum and natural gas in and upon the lands so demised by the Crown to Chaplin; and Curry, acting under such contract, entered upon what the plaintiff Carr claims to be his land, with men and teams, and constructed a derrick and engine-house, etc.

The plaintiffs, asserting that this entry was wholly unlawful, made objection thereto; and, on the defendants persisting in their operations, the plaintiffs brought this action and obtained an interim injunction, which was continued till the trial.

The plaintiffs now ask: (1) that the injunction be made perpetual; (2) a declaration of their rights as to the ownership of the land and as to riparian rights; and (3) damages.

The defendants maintained that, if the waters of the lake have washed away the bank and encroached in and upon lot 178, the lands up to the foot of the high bank before-mentioned became the property of the Crown, and that the south-westerly external boundaries of the lot shifted as the waters of the lake encroached thereon, giving full right to the Crown to enter into the Crown lease before-mentioned.

The point involved is extremely interesting, and is one which, if I correctly apprehend the English and Canadian cases, has never yet been expressly decided, either in the old country or here. . . .

The evidence is overwhelming . . . and I find it to be the fact, that the locus now in controversy is part of the lot 178 north of the old Talbot road.

From this conclusion, it follows that, if the plaintiffs' contention in law is well founded, it is quite immaterial whether or not the construction of the derrick is entirely in the water, or partly in the water and partly on the beach—the fact being that it is on Carr's property.

In Gould on Waters, 3rd ed., sec. 155, pp. 306 to 310, inclusive, after stating the general rule that "land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made; and that, conversely, land gradually encroached upon by navigable waters ceases to belong to the former owner" . . . the author proceeds (p. 309): "But, when the line along the shore is clearly and rigidly fixed by a deed or survey, it will not, it seems, afterwards be changed because of accretions, although, as a general rule, the right to alluvion passes as a riparian right." . . .

[Reference to Saulet v. Shepherd (1866), 4 Wall. S.C.U.S. 502; Chapman v. Hoskins (1851), 2 Md. Ch. 485.]

Now, in the case in hand, the plaintiffs say that they could gain nothing by accretion, by alluvion, or other cause; and, consequently, they should not lose by encroachment of the water upon their land, to which fixed termini were assigned by the grant from the Crown. This doctrine seems to be well supported by decisions of Courts which are not binding upon me, but which command my respect, and which would seem to be accurately founded upon basic principles. . . .

[Reference to Smith v. St. Louis Public Schools, 30 Mo. 290; Blackstone, bk. 2, Lewis's ed., pp. 261, 262; Bristol v. County of

Carroll (1880), 95 Ill. 84; Doe dem. Commissioners of Beaufort v. Duncan (1853), 1 Jones (N.C.) 238; Cook v. McClure, 58 N.Y. 437; The Schools v. Risley, 10 Wall. S.C.U.S. 90; In re Hull and Selby Railway (1839), 5 M. & W. 327, 333; Giraud's Lessee v. Hughes (1829), 1 Gill & Johnson (14 Md. App.) 115.]

The defendants' counsel, in the course of a very elaborate and careful argument, cited numerous authorities in support of the view that the plaintiff Carr had lost the land by the encroachment of the water. . . . I do not think that there is any case in which it has been expressly held that a person in the position of this individual plaintiff loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiff's land. He could not have gained an inch of land by accretion, even if the lake had receded for a mile; and, therefore, it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him. . . .

[Reference to Foster v. Wright (1878), 4 C.P.D. 438; Widdicombe v. Chiles (1903), 73 S.W. Repr. 444.]

In considering authorities which are not binding upon me, and when I have to decide "upon reason untrammelled by authority" (per Werner, J., in Linehan v. Nelson, 197 N.Y. 482, at p. 485), I prefer those United States decisions which I have earlier cited. There have also been cited to me authorities which, it is contended, dispose completely of the Widdicombe case, viz.: Lopez v. Muddun Mohun Thakoor, 13 Moo. Ind. App. 467; Singh v. Ali Kahn, L.R. 2 Ind. App. 28; and Theobald on Land, p. 37. . . .

I do not see that the statute 1 Geo. V. ch. 6 has any application to this case; nor do I see that the Attorney-General ought to bring the action or is a necessary party—the plaintiffs being concerned only with the trespass upon their lands and not with any supposed public right.

The good faith, or the opposite, of the defendants, in making the trespass, is a matter of no consequence in the disposal of the action.

I find, therefore, that there has been a trespass by the defendants upon the plaintiffs' lands, and that the plaintiffs are entitled to have the injunction made perpetual, with full costs on the High Court scale, and $10 damages.

KELLY, J., IN CHAMBERS. JULY 15TH, 1912.

GUNDY v. JOHNSTON.

Summary Judgment—Con. Rule 603—*Action by Solicitors for Costs—*2 *Geo. V. ch.* 125, *sec.* 6—*Sum Fixed as Solicitor and Client Costs—Solicitor's Lien—Taxation of Costs—Defence.*

Appeal by the defendant from an order of the Local Judge at Chatham, dated the 6th July, 1912, under Con. Rule 603, allowing the plaintiffs to enter summary judgment against the defendant in an action by solicitors to recover sums alleged to be due by the defendant for costs.

Shirley Denison, K.C., for the defendant.
H. S. White, for the plaintiffs.

KELLY, J.:—On the evidence adduced, I do not think summary judgment should have been given in this case. The defendant shewed a reasonable ground for his objection to the claim put forward by the plaintiffs that the $1,800 directed by sec. 6 of 2 Geo. V. ch. 125 to be paid by the Corporation of the Township of Tilbury East to the defendant, as his costs as between solicitor and client in the litigation therein referred to, was intended to be in payment of the plaintiffs' solicitor and client costs against him in that litigation, and that they are entitled to all of that sum.

The defendant's objection is bona fide and of such a kind that opportunity should have been afforded of disposing of the matter in dispute in the ordinary way, and not on a summary application for judgment.

Then as to the items in the endorsement on the writ of summons, other than the $1,800 item, the defendant has taken the objection that those items are subject to taxation before judgment being given upon them; and his objection is well taken.

For these and other reasons, the judgment should, in my opinion, be set aside.

It is stated that the township corporation, in whose hands the $1,800, or part of it, is, have been notified of the solicitors' lien claimed by the plaintiffs, and that the defendant acknowledges such lien to the extent of whatever may be the true amount due by him to the plaintiffs.

In view of this, the money should not be withdrawn from or paid over by the township corporation pending the determination of the question in dispute.

The costs of this appeal, and of the motion for the judgment now set aside, are reserved to be disposed of at the trial or other final disposition of the matter.

FALCONBRIDGE, C.J.K.B. JULY 15TH, 1912.

FULLER v. MAYNARD.

Vendor and Purchaser—Contract for Sale of Land—Time for Completion—Extension—Evidence—Notice to Complete—Reasonableness—Right of Vendor to Determine Contract—Specific Performance — Refusal — Discretion — Return of Part of Purchase-money Paid—Costs.

Purchaser's action for specific performance of a contract for the sale of land.

G. Kappele, K.C., for the plaintiff.

A. J. Russell Snow, K.C., for the defendant.

FALCONBRIDGE, C.J.:—Exhibit 1 is the contract whereof specific performance is sought by the plaintiff.

Wherever Messrs. C. Kappele and Nasmith differ in their recollection of what was said, either face to face or by telephone, I am bound by law to find the statements of the former not proven. These two witnesses are on the same plane as regards worldly position and demeanour in the box, and there are no compelling outside circumstances to turn the scale in favour of Kappele's statements.

On the contrary, it is quite manifest from Kappele & Kappele's letter to their client of the 1st September that they were then attaching very little importance to their requisitions on the title. The only faint suggestion in the argument about title was one calling for an outstanding mortgage and discharge thereof. This is a mere question of conveyance, and not of title: Armour, 3rd ed., pp. 47, 150, 151; Townsend v. Champernown (1827), 1 Y. & J. 449 (incorrectly cited in cases and text-books as "Champerdown.")

There was, therefore, no verbal extension of time granted by the defendant's solicitors, and they had no reason to believe that their answers to the requisitions were not satisfactory, nor that any question of title stood in the way of closing the matter. That was the position before and on the 17th September—the day fixed for completion according to the terms of the contract.

The plaintiff was in England, and his solicitors, being pressed by Nasmith to close, cabled him on the 6th October: "Maynard Tilley titles satisfactory, cable moneys." And again on the 10th October: "Vendor threatening, cable."

The plaintiff answered on the 12th October: "Wait my arrival 23rd day of October;" and this was communicated to the defendant's solicitors.

On the 14th October the defendant's solicitors write to the plaintiff's solicitors: "Without waiving the benefit of the clause making time the essence of the contract, and in order that your client may not have any cause of complaint, we now notify you on behalf of our client that the sale must be completed on or before Thursday the 19th day of October, 1911, inclusive; otherwise," etc.

The plaintiff's solicitors say that this did not reach them until the 16th. The plaintiff arrived in Toronto on the 24th October. The defendant's solicitors waited until the 28th October, and then wrote to say that the sale was off. They now suggest (and the circumstances lend colour to the theory) that the plaintiff did not arrive with the money to carry out the transaction, but was marking time in order to turn his bargain over to some one at a profit. This he thought he had succeeded in doing; and on the 8th November his solicitors signified to the defendant's solicitors their readiness to close out the purchase.

A tender of money (temporarily supplied to the plaintiff for the purpose by certain persons to whom he had apparently succeeded in reselling the property) and documents was made by the plaintiff on the 10th November—the deeds and mortgages not being in the form settled by the defendant's solicitors, in this respect at least that a lady's name was inserted along with the plaintiff's and the grant made to them "as joint tenants and not as tenants in common," and the two were made mortgagors. This, it is said, was done with the view of preventing Mrs. Fuller's dower attaching—she being in England, and the plaintiff having forgotten, he said, to bring out the mortgages which had been sent to him there for execution.

Assuming that the stipulation in the original contract that time should be of the essence thereof was waived by conduct of

the parties, e.g., by Nasmith urging Kappele to cable to his client, etc. (Devlin v. Radkey (1910), 22 O.L.R. 399, at p. 411; Fry, sec. 1120): was the notice of the 14th October a reasonable one? That is a question of fact: Fry, 5th ed. (Can. notes), sec. 1128.

The 14th October was a Saturday. The defendant's solicitors knew that the plaintiff was in England or on the sea. In Hetherington v. McCabe (1910), 1 O.W.N. 802, my brother Britton held a notice given on Friday the 7th to close at or before 3 p.m. on Monday the 10th of the same month, not to be a reasonable notice. Vide Crawford v. Toogood (1879), 13 Ch. D. 153. So here it might be considered that the notice was not reasonable. But the defendant did not assume to act promptly or strictly upon it. The utmost consideration and leniency were extended to the plaintiff. The defendant waited till the plaintiff had been four days in Toronto, when it was manifest that he was only playing fast and loose with the defendant so as to get some one to step into his shoes. Nasmith says that, if the plaintiff had come in on the 24th October, he believes Ryrie (the man behind the defendant) would have accepted the money.

The jurisdiction in specific performance is in the discretion of the Court—Fry, sec. 44—a discretion not to be arbitrarily or capriciously exercised, but only in cases where circumstances dehors independent of the writing are shewn making it inequitable to interpose for the purpose of specific performance: per Plumer, V.-C., in Clowes v. Higginson (1813), 1 V. & B. 524, 527.

That eminent civilian and equity Judge, Strong, J., says, in Harris v. Robinson (1892), 21 S.C.R. 390, at p. 397, that "the exercise of the jurisdiction is a matter of judicial discretion, one which is said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shewn to the conduct of the party seeking the relief." And further on (p. 404): "The rule which governs the Courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must shew that he has been always ready and eager to carry out the contract on his part." See also Lamare v. Dixon (1873), L.R. 6 H.L. 414, 423; Coventry v. McLean (1892), 22 O.R. 1, at p. 9.

Judged by these standards, the plaintiff fails to qualify himself to invoke the interposition of the Court by way of specific

performance, even if the other issues involved were decided in his favour—e.g., if there were no valid rescission by the defendant.

Therefore, I will not decree specific performance; and, as to this, his action stands dismissed.

But he will have judgment for the $500 paid on account. This was, in the present state of the real estate market, a minor, nay, an inconsiderable, side-issue. The disposition of the costs will, therefore, be, that the defendant shall have full costs, minus the sum of $50, representing costs of the issue as to the $500. The defendant will retain the balance of his costs out of the $500.

KELLY, J., IN CHAMBERS. JULY 16TH, 1912.

RE WATSON AND ORDER OF CANADIAN HOME CIRCLES.

Life Insurance—Benefit Certificate—Apportionment of Benefit—Change of Beneficiaries by Will—Identification of Certificate—Sufficiency—Insurance Act, R.S.O. 1897 *ch.* 203, *sec.* 160.

Application by the executor of the will of Catharine A. M. Watson for an order determining the disposition to be made of certain insurance moneys.

James Fraser, for the executor.
J. E. Jones, for the Order of Canadian Home Circles.
F. W. Harcourt, K.C., for the infants.

KELLY, J.:—On the 13th February, 1893, the Order of Canadian Home Circles issued a beneficiary certificate to Catharine Ann Minerva Watson for $1,000, made payable on her death as follows: $500 to her husband Daniel Webster Watson; and $500 to her son Richard J. T. Watson.

On the 30th December, 1911, Catharine A. M. Watson made her will, and she died on the 5th January, 1912. The will contains this provision: "My Home Circle policy for $1,000 to be divided as follows: to my daughter Margaret Minerva Watson, $500; the balance of $500, in equal shares to my husband, Daniel Webster Watson, my son James Richard Watson and my son Daniel Ross Watson."

The question to be decided is: does the will alter the apportionment of the moneys represented by the certificate, or alter or vary the certificate as to beneficiaries?

Section 160 of the Insurance Act, R.S.O. 1897 ch. 203, provides that "the assured may, by an instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise, vary a policy . . . previously made, so as to restrict or extend, transfer or limit, the benefits . . . and may, from time to time, by instrument in writing attached to or endorsed on the policy, or referring to the same, alter the apportionment as he deems proper; he may also, by his will, make or alter the apportionment of the insurance money . . . and whatever the assured may, under this section, do by an instrument in writing attached to or endorsed on or identifying the policy, or a particular policy or policies, by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by number or otherwise."

Does, then, the will in this case identify the policy (or certificate) in such a manner as to satisfy the requirements of sec. 160?

The question of identification was considered in Re Cochrane, 16 O.L.R. 328, a judgment of a Divisional Court; at p. 332, the Chancellor said that identification of a policy by its number "or otherwise" would include reference by date and amount and other means of incorporating one document with another.

Here we have identification by the name of the Order or body which issued the certificate and the amount of the certificate, and I know of no better means of identification by an instrument not attached to or endorsed upon a policy, unless it be in cases where the identification is by the date of the certificate as well.

My view is, that a change as to the beneficiaries and an altering of the apportionment of the moneys has been effected, and that the moneys represented by this certificate are to be divided as directed by the will.

The shares of these moneys to which the infants are entitled will be paid into Court, to be paid out to them as they respectively come of age. Costs of all parties to be paid out of the fund.

KELLY, J. JULY 16TH, 1912.

EVERLY v. DUNKLEY.

Will—Testamentary Capacity—Claim by Daughter to Moneys Deposited in Bank—Trust—Evidence—Joint Account—Survivorship—Conduct of Bankers.

Action by the executor of Elizabeth Kenny, deceased, against Esther Dunkley and the Canadian Bank of Commerce, to recover for the benefit of the estate of Elizabeth Kenny a sum of $542.17 in the hands of the defendants, or one of them, and to restrain the defendants from dealing with these moneys.

J. A. Walker, K.C., and M. Houston, for the plaintiff.

W. G. Richards, for the defendant Dunkley.

O. L. Lewis, K.C., for the defendant the Canadian Bank of Commerce.

KELLY, J.:— . . . The defences . . . relied upon by the defendant Esther Dunkley are: first, that the moneys in question were held by her mother, Elizabeth Kenny, in trust for her after her father's death, under an alleged understanding between her father and mother in 1896; secondly, that the money in the bank was held by the mother and this defendant in joint account with a right of survivorship in the latter; and, thirdly, that the mother was mentally incapable of making the will.

Dealing with the last of these claims, I find that at the time of making the will the testatrix was of sound mind and fully capable of making a will and disposing of any assets which she had. . . .

[Review of the evidence.]

The defendant Esther Dunkley, to establish her claim that the moneys in question were held by her mother in trust for her, after her mother's death, alleges that in 1896 a purchase of some property was made by Esther Dunkley's father, Lewis Kenny, and that the deed thereof was made to his wife, Elizabeth Kenny, on the understanding that the daughter, Esther Dunkley, would have it after her death. The father died about eleven years ago; and Elizabeth Kenny in 1909 sold the property; and the daughter asserts that $800 out of the proceeds of the sale was deposited in the Canadian Bank of Commerce in the account now in question, and that the moneys sued for are part of that $800

To support her contention, she produced a will made by her mother, in January, 1899, when she was suffering from an attack of typhoid fever, by which she purported to devise to her husband, Lewis Kenny, and this daughter, the lands acquired by her in 1896, to hold to them jointly during the lifetime of the husband and at his death to the daughter, her heirs and assigns.

To corroborate this, John H. Barnes, one of the witnesses to that will, was called, and swore that, at the time of the making of the will, he heard Mrs. Kenny say she wanted Mrs. Dunkley to have the place; that that was the understanding between her and her husband.

Mrs. Liddy says she was in the adjoining room when the will was being made, and that she heard Mr. and Mrs. Kenny say the property would go to the daughter after their death.

The evidence of Charles Kenny, on the other hand, is, that, at the time the prior will was made, his mother was so ill as not to be able to recognise him, and that a few months before her death she informed him that she did not know of the will until two weeks after she had been returned from the hospital after her recovery from the fever.

There is some doubt, too, about the ownership of the money with which the purchase of the property was made in 1896; and I am unable to say on the evidence that it is clear that it belonged to Lewis Kenny, and not to his wife.

I am not prepared to accept the evidence of the trust as sufficient to establish it. I believe that the defendant Esther Dunkley's account of the terms of the alleged understanding that the property was to be hers on the death of both her parents, was suggested to her largely by reading the prior will. . . .

Though Esther Dunkley alleges that there was the understanding at the time of the purchase of the property that she would be entitled to it after the death of her parents, and that she knew of the understanding at that time, her subsequent conduct in no way indicated that she believed or relied upon such understanding. . . .

It would, to my mind, be most dangerous to allow a trust to be established on evidence such as has been put forward in this instance.

The further claim of the defendant Esther Dunkley, that she is entitled to the money in the bank by way of survivorship, is based on the happenings in August, 1911. There was then on deposit the sum of $574.71 in the savings department of the Can-

adian Bank of Commerce at Chatham, in the name of Elizabeth Kenny, the account being numbered K. 68. Elizabeth Kenny was then in St. Joseph's Hospital, Chatham, suffering from bronchitis, and on that day she signed a memorandum in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911."

Esther Dunkley says this memorandum was drawn by her at her mother's dictation, and was signed by her mother, who requested her to take it to the bank and have it arranged so that either could draw it. On the same day she took it to the bank; and, on its being presented to the accountant of the bank, he changed the heading of the deposit account so as to read as follows: "Made joint a/c, August 18th, 1911. Elizabeth Kenny & Esther Dunkley or either;" after which she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in possession of the deceased until the time of her death.

Between the 18th August and the death of Elizabeth Kenny, three withdrawals were made from the account: one on the 26th August, for $5, by Esther Dunkley; another on the 20th September, for $5; and a third on the 24th October, for $35; these two being by Elizabeth Kenny.

Esther Dunkley further says that, at the time the memorandum was drawn, the mother said to her: "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it;" and that the mother requested her to pay her funeral expenses.

During Mrs. Kenny's last illness, the wife of the plaintiff went to the bank and asked the manager if any one could draw the money in the event of Mrs. Kenny's death; but the manager says that the question was a hypothetical one, and he replied something to the effect that executors only could draw the money. He also says that, at that time, he had no personal knowledge of the account.

On the 9th March, less than two weeks after the death of the testatrix, the defendant Esther Dunkley went to the bank and drew from the account the full balance then standing, namely, $542.17, and deposited it in the same bank, in a private account in her own name, which she had had there for some months previously. Before this was done, there had been talk of trouble being caused over the ownership of the money, and this had come to the knowledge of the manager of the bank before the money was paid over to Mrs. Dunkley.

Subsequent to the 9th March, and prior to the service of the injunction order, Mrs. Dunkley drew from her account two sums, one of $99 and the other of $245, out of which she says she has paid $88, for her mother's funeral expenses, and $37.25, the accounts of two doctors who attended her mother. Even if the money is found to be hers, she makes no claim for repayment of these sums.

Are these facts sufficient to entitle Esther Dunkley to the moneys on her mother's death? If the claim is to rest on what was said to her by her mother at the time the change was being made in the bank account, i.e., that, if anything should happen to the mother while in the hospital, Esther was to take the money and furniture and do the best she could with it, she cannot succeed, for this would simply amount to an ineffectual attempt at making a testamentary disposition: Hill v. Hill (1904), 8 O.L.R. 710.

On the other hand, did the signing of the memorandum authorising a change in the bank account so that the daughter could draw on it, give the daughter any right to or ownership in the moneys, either during the mother's lifetime or at her death?

I cannot find in the evidence any expression of intention on the part of the mother so to benefit the daughter, or that the mother intended anything more than to make an arrangement by which, for convenience sake, the daughter could draw the money, the mother at the time being unwell and unable to go to the bank. . . .

[Reference to Payne v. Marshall (1889), 18 O.R. 488.]

The present case is not one where the money became the property of the mother and daughter jointly; it was the mother's; and, though the memorandum authorised its being placed in the daughter's name so that she could draw it, it remained the property of the mother, the daughter's powers or rights being limited to the power to draw. . . .

[Reference to Marshal v. Crutwell (1875), L.R. 20 Eq. 328; Low v. Carter (1839), 1 Beav. 426; Re Ryan (1900), 32 O.R. 224; Schwent v. Roetter (1910), 21 O.L.R. 112.]

I, therefore, find that there was no intention on the part of the mother to make the daughter the owner or part owner of the money, or to give it to her by survivorship; the money continued to belong to the mother, and on her death it became part of her estate.

Then as to the claim against the bank. The memorandum signed by Mrs. Kenny clearly stated that the object of making

the change in the bank account was "so that she (the daughter) could draw it," and nothing more. The authority of the bank was limited to doing what this memorandum directed; and, in so far as the bank or its officers or clerks went beyond what was directed, they exceeded the authority given. The bank took upon itself too much when it altered the bank account as it did.

It is a question in my mind whether the daughter would have made any claim to the moneys if the words "joint account" had not been used in altering the account. The use of these words may well have suggested ownership by survivorship to the daughter or some person representing her.

The bank, too, had notice, before any of the money was drawn out, that there was trouble contemplated over the ownership of it; but it disregarded the warning and allowed the money to be transferred into the name of the daughter, and a considerable portion of it to be afterwards drawn by her.

I think, in the circumstances, the bank, as well as its co-defendant, is liable to the plaintiff for the amount of the deposit (less, however, the sums which Esther Dunkley has paid as the funeral expenses and doctors' bills of the deceased) with interest from the commencement of the action. The defendants are restrained from dealing with these moneys otherwise than to pay them to the plaintiff.

Judgment will go accordingly with costs.

DIVISIONAL COURT. JULY 17TH, 1912.

ZOCK v. CLAYTON.

Crown Lands—Patent—Misdescription—Application for same Lands—Dispute—Finding of Minister of Lands Forests and Mines—Patent for same Lands Issued to Second Applicant—Certificate of Title—Action by First Patentee to Establish Title—R.S.O. 1897 *ch.* 138, *sec.* 169—*Parties—Attorney-General—Intervention.*

Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiff, in an action for a declaration that he was the owner in fee of a certain island, and for an injunction restraining the defendants from entering thereon, and for other relief.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

E. D. Armour, K.C., for the defendants.

M. C. Cameron, for the plaintiff.

RIDDELL, J.:—The learned Judge's findings of fact are, in my opinion, after a careful perusal of the evidence, entirely justified. Some of his conclusions which are complained of might, indeed, have been the other way; and, perhaps, a reading of the words used by the witnesses as they appear in cold black and white would suggest that his view of the conduct of the defendants was unduly severe; but my brother saw the witnesses and could best judge of them: and I cannot say that his conclusions are not wholly warranted.

Duncan, who had been shooting in the neighbourhood of Bolger lake, in Burton township, district of Parry Sound, and who with three others was the owner of a lot of 28 acres upon which they had a shooting camp, was desirous of buying an island in the lake. He knew quite well the island he wanted to buy, the largest Island in the lake; he saw Mr. Aubrey White (Deputy Minister of Lands Forests and Mines), told him he wanted to buy the largest island in the lake, and put in a formal application, in which, being misled by the departmental map, he described the island as being intersected by a certain line. The extent of the island was, by an officer of the department, estimated at 2½ acres. Duncan paid $25, the purchase-price, got his patent and then his certificate of ownership from the Local Master of Titles at Parry Sound. This all took place before the end of the year 1907. Thereafter, the island was commonly known as "Duncan Island;" and Duncan had no idea that he had not become regularly the owner of the island he had desired to buy, until April, 1909; and in the meantime, in 1908, sold to the plaintiff. The island he claims as having been patented to him is not intersected by the said line, and it contains in fact about 7½ acres, being admittedly the largest island in the lake. The defendant Clayton, hunting in the vicinity, was told by the guide Brownell that the large island was Duncan Island; Brownell suggested some difficulty in the title. Clayton then made up his mind "to play for it and take a chance in getting it any way." I do not think there is any doubt that Clayton knew perfectly well that the island was claimed by Duncan. But he put in an application for the island—Duncan was notified, as was Zock—and the Minister took the matter into his consider-

ation, heard witnesses, and finally decided that Duncan's patent did not cover the island in question, and directed a patent for the island to issue to the defendants. Zock had in the meantime filed a caution; but, upon receiving a notice under R.S.O. 1897 ch. 138, sec. 169 (2), he withdrew his caution. A certificate was produced whereby it appeared that the claim arising upon Zock's patent had been considered by the Commissioner and disposed of by him before the issue of the defendants' patent; and thereupon the defendants received their certificate of title.

The plaintiff brought his action, alleging: (1) patent to Duncan; (2) transfer to himself; (3) patent of same land to the defendants; and claimed: (a) a declaration that he is owner in fee of the island; (b) an injunction restraining the defendants from entering, etc., the same; (c) an injunction restraining the defendants from transferring or mortgaging, etc., the same; (d) costs; (e) general relief.

At the trial my learned brother gave the plaintiff his claims (a), (b), and (d) only.

The defendants now appeal.

So far as the facts are concerned, upon the evidence there can be no doubt that the Crown did grant a patent to Duncan of the island, not quite accurately described indeed. No doubt it was thought that there were only 2½ acres, instead of 7½, probably because the water had been high when the original surveyors were in the neighbourhood. The exact position topographically also was not correctly represented. But that the large island for which the patent was afterwards issued to the defendants was bought and paid for by Duncan, and that it was intended that the patent he got should cover this island, upon the evidence adduced before the trial Judge and before us, there can be no doubt.

But it is contended by the defendants that the Court cannot go behind the finding and judgment of the Minister (Commissioner). There are several cases in our own Courts in which there was a dispute between parties as to who was entitled to a patent to certain lands; and it has been invariably held that, where the Government have examined into and considered the claims of such opposing parties to receive the patent, and decided in favour of the one and issued a patent accordingly, the other cannot successfully appeal to the Court—the Court will not and cannot interfere. . . .

[Reference to Boulton v. Jeffrey (1845), 1 E. & A. 111; Barnes v. Boomer (1864), 10 Gr. 532; Kennedy v. Lawlor

(1868), 14 Gr. 224; Farmer v. Livingstone (1882), 8 S.C.R. 140.]

But in none of these cases was there a prior patent issued to the plaintiff on the strength of which an attack was made on the defendants' patent or its validity, as in the present case.

Section 169 of R.S.O. 1897 ch. 138, which was the enactment in force at the time of the transactions in questions, is relied upon by the defendants. The Local Master found Duncan's patent registered (sec. 169 (2)), and gave notice accordingly to Zock; he received a certificate under sec. 169 (3), and thereupon discontinued the proceedings and disallowed the objection and claim founded on the Zock-Duncan instruments, as was his duty under that section. The legislation, it seems to me, makes the position of the defendants under their patent and the decision of the Commissioner unassailable—and the plaintiff must get rid of that patent before he can say that the defendants have no right in the island.

"A long line of decisions has settled that an action to declare void a patent for land, on the ground that it was issued through fraud or in error or improvidence, may be maintained, and that measure of relief granted, at the suit of an individual aggrieved by the issue of such patent, and to such an action the Attorney-General as representing the Crown is not a necessary party: Martyn v. Kennedy (1853), 4 Gr. 61; Stevens v. Cook (1864), 10 Gr. 410. See also Farah v. Glen Lake Mining Co. (1908), 17 O.L.R. 1:" per Moss, C.J.O. in Florence Mining Co. v. Cobalt Lake Mining Co. (1909), 18 O.L.R. 275, at p. 284.

If it were quite clear that there is nothing more in the way of evidence, etc., available, one might now declare the defendants' patent void: but it must not be forgotten that the Commissioner has had before him witnesses and documents—perhaps he had personal knowledge or information which is not before us. It would not be proper—if the responsible advisers of the Crown desire to insist upon the propriety of the Commissioner's decision and to contend that Duncan's patent did not cover this island—for us, in the absence of the Attorney-General and without affording him an opportunity of supporting by evidence and argument the view of his former colleague and the validity of the patent issued in accordance with such view, to decide in favour of the plaintiff. I have been careful to say that the conclusions of fact arrived at are such as are justified by the evidence before Mr. Justice Latchford and this Court: but these conclusions may be in fact quite erroneous, and by further evidence shewn to be erroneous.

I think that the Attorney-General must be given an opportunity to state and if necessary to justify the stand taken now by the Crown. If he, upon being applied to by the plaintiff, states that the Crown does not desire to intervene, the case may be disposed of upon the evidence now before the Court without further argument; if he desires to be heard in argument, such argument may be heard on some day to be arranged; if he desires to cross-examine witnesses already heard and (or) adduce further witnesses, he may be made a party to the action, all proper amendments made in the pleadings, and the trial continued before Mr. Justice Latchford at some convenient time, the evidence already taken to stand.

In the meantime this motion will be retained.

FALCONBRIDGE, C.J., agreed, for reasons stated in writing.

BRITTON, J., (dissenting) was of opinion, for reasons stated in writing, that the appeal should be allowed and the action dismissed.

KELLY, J. JULY 18TH, 1912.

NATIONAL TRUST CO. v. BRANTFORD STREET R.W. CO.

Mortgage—Security for Bonds of Railway Company—Interest in Arrear—Acceleration of Payment of Principal—Action for Principal and Interest—Claim for Foreclosure and Possession—Payment of Interest pendente Lite—Right to Possession—Receiver—Breaches of Covenants—Default in Payment of Taxes—10 *Edw. VII. ch.* 51, *sec.* 6—*Costs.*

A mortgage action, tried at Toronto, without a jury.

J. A. Paterson, K.C., for the plaintiffs.
S. C. Smoke, K.C., for the defendants.

KELLY, J.:—On the 1st July, 1902, the defendants the Brantford Street Railway Company executed to the plaintiffs an indenture by which the company granted, bargained, sold, transferred, set over, mortgaged, conveyed, and confirmed to the plaintiffs certain properties and assets for the purpose of secur-

ing payment of an issue of bonds to the amount of $125,000. The indenture (or mortgage, as we may term it) was expressed to be made "in pursuance of the Act respecting Short Forms of Conveyances."

On the 2nd July, 1907, the defendants the Brantford Street Railway Company granted to the defendants the Grand Valley Railway Company the properties and assets so mortgaged. Subsequent thereto, the defendants the Grand Valley Railway Company mortgaged to the Trusts and Guarantee Company Limited, not only the properties and assets so granted to them (subject to the said bond mortgage for $125,000), but also other assets of their own, which were then subject to a prior mortgage.

The time of maturity of the $125,000 of bonds is in the year 1932.

The mortgage to the plaintiffs contains this provision: "In case default shall be made in payment of the interest on said bonds or debentures or any of them secured by these presents when the same shall become due and payable according to the terms hereof, the principal of all the said bonds and debentures shall immediately become due and payable."

On the 1st January, 1912, the half-yearly payment of interest on these bonds became due; and, this interest not having been paid, the plaintiffs on the 27th February, 1912, brought this action against the defendants the Brantford Street Railway Company and the Grand Valley Railway Company, claiming payment of the whole sum of $125,000 and interest, and foreclosure, and possession of the lands and premises and assets covered by the mortgage, and for a receiver. Later on, an amendment was made, adding a claim for sale of the properties and assets.

On the 29th May, 1912, on the application of the Trusts and Guarantee Company Limited, Edward B. Stockdale was appointed receiver on behalf of the applicants, as trustees for the holders of mortgage bonds issued by the defendants the Grand Valley Railway Company, of "all that company's railways, undertakings, revenues . . . property . . . with power to pay out of any money coming to his hands, as such receiver, any debts of that company having priority over the claims of the said debenture-holders."

The action came on for trial on the 5th June, 1912, before the Chancellor, when he ordered that the receiver be added as a party defendant, that he be forthwith served with the order and the pleadings and that the action should be set down for trial on the 12th June.

On the opening of the trial on that date, it was shewn that on the 11th June the defendants had paid to the plaintiffs all arrears of interest, and an undertaking satisfactory to the plaintiffs was given for payment of the plaintiffs' costs up to the time of such payment.

It was conceded by the plaintiffs that, the arrears of interest having been paid, they could no longer claim that the principal was overdue by reason of non-payment of interest.

The plaintiffs, notwithstanding this, contended that they were entitled to possession of the mortgaged properties and assets and to the appointment of a receiver, on the ground that the defendants had committed breaches of their covenants contained in the mortgage to pay taxes and to repair and not to suffer or permit any other lien, charge, or mortgage on the mortgaged property, etc. Taxes were then in arrear; evidence was given tending to shew a breach of the covenant for repair; and the plaintiffs argued that the making of the sale and transfer by the defendants the Brantford Street Railway Company to the defendants the Grand Valley Railway Company, and the making of the mortgage subsequently by the latter company, constituted a breach of the covenant not to suffer or permit any other lien, charge, or mortgage on the mortgaged property; and, further, that the legal estate in the mortgaged properties and assets being in them as mortgagees gave them the right to possession on breach of any of the covenants.

There is no express provision in the mortgage entitling the plaintiffs either to possession or to a receiver on the non-performance or non-observance of covenants. On the contrary, it is expressly provided that, until default shall be made in payment of the interest on the bonds or debentures or some part thereof, the grantors (the defendants the Brantford Street Railway Company) and their assigns shall be suffered and permitted "to hold, use, occupy, possess, manage, operate, maintain, and enjoy the said property," etc.

No authority was cited in support of this proposition put forward by the plaintiffs, and I have been unable to find any such authority. A breach of the covenants did not, in my opinion, entitle the plaintiffs to possession or to have a receiver appointed. Their remedy is on the covenants themselves.

Apart from this, the plaintiffs further contended that, under the provisions of sec. 6 of 10 Edw. VII. ch. 51, there was implied in the mortgage a covenant that "on default, the mortgagees shall have quiet possession of the said lands free from all incumbrances," and that, as the default referred to in that Act in-

cludes default in payment of taxes, and there being such default in this case, they are entitled to possession.

In the case of a conveyance by way of mortgage, this covenant on the part of the person who conveys is implied only, as stated in clause (a) of sec. 6, when that person "is expressed to convey as beneficial owner."

In the mortgage in question here, the grantors or mortgagors are not expressed to convey as beneficial owners; and the statute, therefore, does not apply.

I am unable to find that there was at the time of the trial such default as entitled the plaintiffs to possession of the mortgaged properties and assets or the appointment of a receiver.

The defendants are, therefore, entitled to judgment dismissing the action with costs from the time of payment of the interest on the 11th June, 1912; the plaintiffs being entitled to the costs to that time.

RE DOMINION MILLING CO.—KELLY, J., IN CHAMBERS—JULY 16.

Company—Winding-up—Sale of Lands of Company by Mortgagee—Leave to Proceed with Sale after Winding-up Order—Terms—Costs.]—On the 28th May, 1912, a liquidator of the Dominion Milling Company Limited was appointed. Proceedings for the sale of lands of the company by the applicant, under power of sale in a mortgage from the company to him, were then in progress, the sale having been advertised to take place on the 5th June. On that day, and a short time before the hour fixed for the sale, it came to the knowledge of the applicant's solicitor that the company had gone into liquidation, and the property was offered for sale and a sale made, "subject to the right that any liquidator may have in law, under winding-up proceedings, should it hereafter prove that he has any right to interfere with the sale, or that, under the circumstances, the mortgagee had not the right to go on with the sale on account of the winding-up proceedings." The applicant applied to be permitted to continue the proceedings for sale and to carry out the sale made on the 5th June. The motion came on for hearing on the 28th June, and was adjourned to the 4th July, to enable the liquidator to continue his inquiries about the sale, and the selling value of the property. On the 4th July, he was still unable to say what course he should pursue; and my decision upon the motion was reserved in order to allow him still further

time. KELLY, J., said that the liquidator had had several weeks within which to inform himself; but, so far, there was nothing to indicate what course he intended to take in respect to this claim. The applicant appeared to have advertised the property extensively, and to have given reasonable opportunity to possible purchasers to appear at the sale; he was in danger of losing the benefit of the sale if there should be further delay; and the property was one not readily saleable. Unless the liquidator, not later than twelve o'clock noon on the 17th July, should pay the amount properly due to the applicant on this claim, including the costs and disbursements of the sale, and the costs of this application, or give the applicant satisfactory security for such payment, the applicant was to be at liberty forthwith thereafter to continue the sale proceedings and carry out the sale; and be entitled to add to his claim the costs of this application. B. N. Davis, for the applicant. D. Inglis Grant, for the liquidator.

DOUGLAS v. BULLEN—KELLY, J.—JULY 16.

Trespass—Boundary—Interim Injunction.]—Motion by the plaintiffs for an order continuing until the trial an interim injunction granted on the 10th June, 1912, restraining the defendant from trespassing upon the plaintiffs' lands on the south side of Braedalbane street, in the city of Toronto. The plaintiff lands run southerly to the lands of the defendant, which front on the north side of Grosvenor street. The plaintiffs alleged that the defendant, in preparation for the erection of an apartment house on his lands, encroached to a small extent on their property, and that the proposed building would so encroach. KELLY, J., said that the amount of land in dispute was so small, and the value, having regard to its location at the rear of the two properties must be so insignificant, that it was surprising that an amicable arrangement had not been arrived at. It would be of service to neither party to continue the injunction as already granted, namely, restraining the defendant from entering upon the plaintiffs' lands, as the very matter in dispute was, what land at the place in question belonged to the plaintiffs. The final disposition of the dispute involved the settlement of the ownership of the disputed land and the fixing of the true boundary. This could not be done on the present application. Motion dismissed; costs to be disposed of by the trial Judge. A. McLean Macdonell, K.C., for the plaintiffs. F. C. Snider, for the defendant.

GRAY v. BUCHAN—KELLY, J.—JULY 16.

Broker—Purchase by Customer of Shares on Margin—Contract—Terms—Failure to Keep up Margin—Resale by Broker.] —Action by customer against brokers for rescission of a contract or contracts for the purchase by the plaintiff of 3,000 shares of Dome Extension mining stock, and for a return of the moneys paid by the plaintiff on account of the purchase, or for damages for the wrongful resale of the shares. The total purchase-money of the 3,000 shares was $1,260, to which was added the defendants' brokerage of $15, making $1,275. The plaintiff bought on margin, and paid $300, and afterwards $95, when the stock fell in value and more margin was required. The full amount demanded for margin was not paid, and the defendants sold the stock at the market-price and realised sufficient with the $95 to pay all that was due to them, except $18.10, for which they counterclaimed. KELLY, J., said that, after a careful consideration of all the facts and circumstances, he had come to the conclusion that the plaintiff was not entitled to succeed. Dealing in stocks was not new to him. A full explanation of the defendants' methods, terms, conditions, and rules of business in dealing in such stocks, the amount of deposit required on the purchase, and the amount of margin required to be maintained, was given to him before he entered on the purchase. He knew the character of the stock he was dealing in; that it was subject to rapid and serious fluctuations in value; and that, unless the margin agreed upon was kept up, the stock was liable to be promptly sold. When the price of the stock declined, the defendants, by the means agreed upon between them and plaintiff, demanded as an additional payment a sum which, under the circumstances, they were entitled to demand. The plaintiff did not have the money necessary to make payment of the amount demanded. His efforts to induce the defendants to accept on account unmarked cheques for a smaller sum than he was bound by his bargain to pay, and they were entitled to receive, were unsuccessful. Had he promptly responded to the demand by forwarding the amount required to keep up the margin, as agreed upon, the stock, no doubt, would not have been sold, or if, after such payment, the defendants had sold it, he would have had a good cause of complaint against them. The plaintiff also set up that he had signed the orders for purchase without having read them, and on that ground sought to be relieved from the terms they contained. There is

nothing in the evidence entitling him to escape liability on that ground. He failed to live up to the bargain which he made, and he knew or should have known its meaning, and the consequence of his failure to keep up the payments which, it had been made clear to him, he would have to make if the stock declined. Judgment dismissing the action with costs, and allowing the defendants the amount of their counterclaim, $18.10. The plaintiff, in person. A. G. Slaght, for the defendants.
