THE

ONTARIO WEEKLY REPORTER

VOL. 24 TORONTO, JULY 10, 1913. NO. 16

HON. R. M. MEREDITH, C.J.C.P. JUNE 18TH, 1913.

COLLIER v. UNION TRUST CO., RE LESLIE AN INFANT.

4 O. W. N. 1465.

Infants—Power to Deal with Lands—Jurisdiction of Court—Discretionary Power—Advantage to Infant.

MEREDITH, C.J.C.P., refused to confirm a settlement of an action, approved of by all parties and the official guardian, where an infant's interests in land were affected and it was not shewn beyond question that the proposed scheme would work out in the future to the infant's advantage.

Power reserved to make later application on other material.

Application to the Court to give effect to a judgment agreed upon between the parties to this action, in settlement of the matters in question in it. The settlement affected very materially the interests of an infant in the lands which are chiefly the subject of it; and so, to confer greater power upon the Court, an application was also made by the official guardian in the infant's behalf, under the Act respecting infants, for leave to her to take such steps as may be needful to carry into effect the settlement.

The infant is the owner of two undivided shares of the land in question; her father, a defendant in the action, was the owner of the other undivided share; but under a deed of settlement, by which the infant benefits largely, he conveyed that share to a Trust Co. who are the defendants in the action. The plaintiff is a creditor of the father, seeking payment of his demand out of the trust property.

A. K. Goodman, for the petitioner.

D. C. Ross, for the Union Trust Co., trustees.

J. MacGregor, for the plaintiff in the action.

F. W. Harcourt, K.C., for infants.

HON. R. M. MEREDITH, C.J.C.P.:—Two questions are involved; one of law, the other of fact. Is there any power in the Court, either in the action or upon the application, to authorize or give effect to that which is sought, notwithstanding the infancy? If so, is it advisable to do so?

If the latter question cannot be answered in the affirmative, it is needless to consider the other; therefore it may save time to deal with the last question first.

Two points are made by those who support—and no one opposes—the application. It is said, in the first place, that unless this settlement be carried out, a sale, sooner or later, of the one-third undivided share in the land is almost unavoidable, and that ownership of it by a stranger would be detrimental to the interests of the infant. The property is situated in what is at present one of the most favoured and valuable business sections of Toronto, and is subject to a lease, which may be continued for eighteen years to come. At present valuations the lease is unfavourable to the owner. And it is said, in the second place, that in view of increasing values of land in the locality and of the favourable character of the terms upon which the infant can acquire the third undivided share of the land, the right to acquire it ought to be exercised; that no one *sui juris* would think of rejecting it.

But there are other things to be considered.

The infant is an invalid girl, still suffering from the effect of that which is said to have been an attack of infantile paralysis, when she was about two years old. It is hoped that the effects of that illness will, before long pass away, and that normal conditions will come to her. In dealing with the case, the hoped-for and wished-for better health and strength must have due weight.

But it is yet the case of an invalid girl, not of an active, strong, ambitious boy, who could far better risk much to gain more; because, even if it were all lost in the venture, he would still have that which might prove a greater asset; the health and strength of manhood, with which to win a fortune of his own.

To carry out the present scheme would reduce the infant's income materially until she attained the age of thirty-five years should she live; the property being hampered with the lease before mentioned. But it is said that by that time it may nearly double its present selling value. That may be so; and it may not. If a piece of land having only forty-five feet

frontage and having no especial value beyond the tens of thousands of feet of equally valuable land in the same and in other localities, should ever be worth any such sum, out of what is the rent to come? A merchant would need extraordinary profits upon his sales to make an initial expenditure of $50,000 a year, for ground rent on forty-five feet frontage, with which to begin his expense account.

And for what purpose deprive the invalid of her income for so many years, only to have a greater capital when more than half of the span of life of those who live long is past?

Should the infant gain normal health and strength, marry and have children, different considerations would be applicable; considerations which can be taken into account when the time comes if the property be then unsold.

Under existing circumstances even a sale now of the whole property at the sum which it is said it would bring, would, as it seems to me, be preferable, in the interest of the infant; but I see no good reason why it should be now a sale or this scheme irrevocably gone. There are other means by which a sale may be avoided, at least until, as it is said, a year or so may tell whether the hopes of better health are to be realized.

If that which seems to be deemed the worst, to those who advocate this scheme, should come, the worst, which will bring with it over a quarter of a million dollars—as I understand the witnesses' calculations—can hardly be deemed an altogether unmixed evil. At present, if there were the power to do so, I would not carry into effect the proposed scheme.

So far I have dealt with the case leaving out of consideration the right intended to be conferred upon the infant, by the deed of settlement, to purchase her father's share when she attains the age of 21 years, on the same terms as it is said should now be accepted by her. If that right exists, and no one has yet questioned it, why should she buy now? Why not wait and make sure as to appreciation or depreciation in value of the land. If she have this right what excuse could there be for exercising it now instead of leaving it till she is able to decide for herself, it being in the meantime substantially to her a case of heads I win and tails you lose?

Whether there is power or not need not be considered. Generally speaking, power to enable an infant to deal with land, as of age, exists upon statutory enactment only. I am, of course, leaving out of consideration any power over land of an infant in an adjudication in proceedings in which they

are involved. Apart from legislation, law and equity seems to have considered it safer to go the whole length of preventing persons from dealing with their land during minority. There must be difficulty either way. It is hard that because one may be a day, a week, a month, a year, or more, under age, favourable opportunities should be lost; whilst to allow an infant to deal with lands as if of full age, even with the approval of a Court, would have its risks and disadvantages.

This, however, is evident; that by virtue of different enactments very considerable power to deal with infants' lands has been conferred, and that that power is being from time to time increased, not curtailed; the legislature of this province in this year adding another word upon the subject.

Therefore neither of the applications now before me will be granted; no order will be made in either of them; but both, or either, may be renewed at any time if there be anything new to be shown upon the subject in any of its features.

MASTER-IN-CHAMBERS. JUNE 18TH, 1913.

ST. CLAIR v. STAIR.

4 O. W. N. 1486.

Pleading—Statement of Claim — Motion to Amend—Variation in Amendment—Costs.

MASTER-IN-CHAMBERS refused plaintiff leave to amend his statement of claim in the manner desired, but ordered that he be permitted to amend in accordance with a form suggested by the learned master.

Costs to defendant in cause.

Motion by plaintiff for leave to amend his statement of claim by adding certain clauses fully set out in the notice of motion. These were very fully discussed on the argument by all the counsel.

W. E. Raney, K.C., for plaintiff.

A. R. Hassard, for three defendants.

E. E. Wallace, for defendant Stair.

D. O. Cameron, for defendant Rutherford.

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

CARTWRIGHT, K.C., MASTER:—The facts of this case are sufficiently set out in previous reports. See 23 O. W. R.

740, 930. The proposed amendments set up that after the publication of the report by the plaintiff of the performance at the theatre of defendant Stair he acquired control of the Jack Canuck newspaper with a view to making therein the defamatory statements of which plaintiff complains. The way in which this was brought about is set out with considerable fulness and in parts at least alleges facts that are not material and might prejudice the defendants.

But so long as nothing of this kind appears the plaintiff should not be prevented from alleging any fact which in his opinion is material to his case and which may be held to be so at the trial.

Such a statement as the following would seem to be unobjectionable; and is submitted for the consideration of the parties.

6a. "At the time of the publication of the plaintiff's said report of the said performance the defendant Rogers was the owner and publisher of the said newspaper then being, as now, published at the city of Toronto. Thereafter and having in view the objects of the said conspiracy the defendants Stair and Rogers procured the sale of the said newspaper and its whole assets to a company incorporated on or about the 26th day of October, 1912, as the Jack Canuck Publishing Co., Limited, being the defendant aforesaid; and under the arrangements made thereupon the said defendant Stair acquired a controlling interest in the said newspaper.

6c. "The said defendant Stair advanced the money to pay the expenses of said incorporation and of the publication of the issues of said newspaper containing the defamatory statements concerning the said plaintiff of which complaint is made hereafter. He also paid the expense of the employment of private detectives to carry out the other objects of the said conspiracy as hereinafter more particularly set forth."

Subject to anything that may be suggested on the settlement of the order the plaintiff can amend as above. The defendants affected thereby to have eight days to amend if desired.

Costs of and incidental to this motion to the defendants in the cause.

MASTER-IN-CHAMBERS. JUNE 21ST, 1913.

ROGERS v. WAHNAPITAE POWER CO.

ROGERS v. IMPERIAL PORTLAND CEMENT CO.

4 O. W. N. 1489.

Trial—Motion to have Actions Tried together—Leave to Serve Jury Notice—Identity of Issue — Question as to — Application to Trial Judge.

MASTER-IN-CHAMBERS refused to make an order requiring two actions to be tried together where the issues were similar but not necessarily identical, but gave plaintiffs leave to serve a jury notice in one of such actions in order that the cases might be set down together and an application made to the trial Judge.

Motion for an order requiring two actions to be tried together.

M. Lockhart Gordon, for plaintiffs.

J. T. White, for defendant in first action.

H. S. White, for defendant in second action.

CARTWRIGHT, K.C., MASTER:—The first action is brought by the plaintiffs to recover the price of cement sold by them to defendant. This claim is resisted on the ground of the defective quality of the cement, and defendant company counterclaims for damages arising from such defect.

This cement is said by plaintiffs to be a part of what was bought by them from the Imperial Portland Co. — against whom the plaintiffs have brought action for the price of bags supplied to that company. It refuses to pay and sets off the price of the cement which plaintiffs have refused to pay until the question has been determined of its quality and sufficiency for the purposes for which it was bought by the Wahnapitae Co.

The plaintiffs allege that the main question in each action is as to the quality of the cement and make this motion.

A jury notice has been given by the defendant in the first action. The place of trial in each is Toronto. This at once creates a difficulty as to making any order. Either the jury notice already served must be struck out or the plaintiffs must be given leave to serve a jury notice in the second action—which I have power to grant.

Even then it does not seem possible to make any order of greater effect than will be gained by plaintiffs setting the

cases down together and then applying to the trial Judge to have the evidence common to both (if such there be) given once only. Whether there is such evidence can only be determined at the trial. As the cement furnished to the Wahnapitae Co. was only a part, and perhaps only a small part, of that supplied by the Imperial Portland Co. to the plaintiffs, it does not necessarily follow that the quality of the part sold to the Wahnapitae Co. was the same as that of the rest bought from the Imperial Portland Co., even if it was part of the same output. They cannot always have been subject to the same conditions after leaving the works at the Imperial Portland Co., even if the whole product was made at the same time and both parts were as similar as wheat taken from the same elevator. The only order possible now is to allow plaintiffs to file a jury notice in the second action; if the defendants in the first action desire to retain their jury notice. When this is made known the suitable order will issue—with costs to defendants in any event. *Smith* v. *Whichcord* (1876), 24 W. R. 900, is very different in its facts from the present case and under a different state of the practice. Even there the only order was in substance what plaintiffs can now apply for to a Judge of the High Court, as was done in the case cited.

HON. SIR JOHN BOYD, C. JUNE 18TH, 1913.

CAMERON v. SMITH.

4 O. W. N. 1459.

Mortgage—Action on Covenant — Statute of Limitations—Default in Payment of Interest—Acceleration Clause—Time of Commencement of Statute.

BOYD, C., *held*, that where there is an acceleration clause in a mortgage and default is made in the payment of interest, the Statute of Limitations begins to run from that date.

McFadden v. *Brandon*, 6 O. L. R. 277; 8 O. L. R. 610, followed.

Action by a mortgagee to foreclose and to recover money on the covenants.

J. E. Thompson, for plaintiff.

R. J. Slattery, for defendant.

HON. SIR JOHN BOYD, C.:—I disposed of this case at the close of the evidence in favour of the plaintiff, but reserved the legal question as to the effect of the Statute of Limitations.

So far as foreclosure is asked, the action is for the recovery of land, and must be brought within 10 years after the right of action first accrued. *Heath* v. *Pugh*, 6 Q. B. D. 364.

So far as the recovery of money due on the covenant to pay is concerned, the action must also be within ten years after the cause of action arose. 10 Edw. VII., ch. 34, sec. 49 (k). In mortgages made prior to 1894 the period of limitation was longer, but this mortgage is dated 1901. The statutory form of mortgage is used, and it provides that in default of payment of interest, the principal shall become payable. The principal of $1,500 was to be paid two years from date of mortgage, which would be on 18th May, 1903; the payment of interest was to be annually, and the first payment was due on 18th May, 1902, and was not paid, nor has anything been paid on the mortgage.

The action was begun on 16th July, 1912, over 10 years from the first default in payment of interest.

The effect of this acceleration clause on the Statute of Limitations has been considered in *McFadden* v. *Brandon*, 6 O. L. R. 277, and it was held that the cause of action in respect of the whole sum arose on the default respecting payment of the interest, and that the Statute began to run upon that first default. This decision of Mr. Justice Street was affirmed by the Court of Appeal: S. C. 8 O. L. R. 610. The reason of the thing is fully discussed by the Court in *Hemp* v. *Garland* (1843), 4 Q. B. 519, which has been a leading case ever since.

The inaction of the plaintiff for more than ten years since the first default has therefore (under the Statute) deprived him of all remedy upon this mortgage, and the action must be dismissed.

However, as the defendant raised various defences on the facts which failed, I think he should pay the costs in proportion, and to avoid the trouble of apportionment, I would fix the extent of his success as equivalent to one-fifth of the whole, and direct that the defendant pay four-fifths of the plaintiff's costs.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 25TH, 1913.

BINDON v. GORMAN AND MURRAY.

4 O. W. N. 1505.

Partnership—Accounting—Denial of Agreement—Statute of Frauds —Evidence—Meaning of "Division" of Profits.

LENNOX, J., 24 O. W. R. 98; 4 O. W. N. 839, in an action to establish a partnership in certain realty transactions, and for an accounting, *held* the partnership proven, and, on the evidence, gave judgment for plaintiff against defendant Gorman for $1,700 and costs, and for defendant Murray against defendant Gorman for $1,000 and costs. "A verbal agreement to divide profits of transactions in lands is valid, at all events, where no specific lands are referred to."

Gray v. *Smith*, 43 Ch. D. 208, and *Re De Nicol*, 1900, 2 Ch. 110, followed.

SUP. CT. ONT. (2nd App. Div.) *held*, that upon the facts of the case as disclosed, the partnership agreement had terminated and any subsequent dealings between the parties were not referable thereto.

Appeal allowed with costs.

Semble, that an agreement to divide profits, without more, implies an equal division.

Robinson v. *Anderson*, 20 Beav. 98, referred to.

Appeal from judgment of HON. MR. JUSTICE LENNOX (24 O. W. R. 98), in favour of plaintiff in a partnership action.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

G. F. Shepley, K.C., and J. J. O'Meara, for defendant Gorman.

G. E. Kidd, K.C., for plaintiff.

M. J. O'Connor, K.C., for defendant Murray.

HON. MR. JUSTICE RIDDELL:—The defendant Gorman is a man of some means but a very defective memory, living in Ottawa; the defendant Murray is a land speculator, and the plaintiff a common friend of these two.

In 1905 the defendant Murray was in need of money to enable him to go west to ply his business. Talking with the plaintiff in Ottawa about the "good many snaps" there

were lying about in the west and his own need of money, the plaintiff suggested seeing Gorman. The two went to Gorman's office; Gorman loaned Murray $300 on his note and Murray told him that he would let him and the plaintiff know of "anything good" and that if they cared to invest he was sure they would make good profits. Murray says: "We talked over a division of profits, he said if there was anything good he would furnish the capital and divide up the profits . . . between Mr. Bindon, Mr. Gorman and myself." Murray went west to Brandon and got an option on some property in Brandon which is now called Victoria park. He wrote to Bindon and in answer got a telegram from Gorman: "I authorise you to invest $10,000 in real estate and divide profits between Bindon, myself and yourself." The property was transferred to a syndicate managed by Mr. Curry of Toronto, and composed of Murray, Gorman and three others. Gorman, who had gone to Kansas City and elsewhere contributed some money to the scheme and ultimately made some profit. Murray had intended, apparently, to take up the option for Gorman, Bindon and himself but Gorman's money did not come soon enough and so he applied to Curry to finance the scheme with the result we have seen.

Afterwards Murray became interested in the Kensington park property in Montreal and induced Gorman to take $10,000 stock in a company handling that property. This was brought about by Bindon writing Murray to come up to Ottawa and see Gorman; but there was no new bargain made about sharing profits. What happened according to Bindon was that he drew Gorman's attention to the scheme and said it was a good investment: then he sent for Murray who came up from Montreal, the plaintiff again recommended the investment, Gorman went to Montreal, saw the property and did invest—nothing, however, seems to have been said about the plaintiff receiving any share in the profits. This statement of facts (except the last sentence) is derived from the evidence of Murray whose manner of giving evidence particularly impressed the learned trial Judge: and a careful perusal of the evidence does not enable me to say that his faith in Murray was misplaced. We must accept the findings of fact.

The case came on for trial before Mr. Justice Lennox at Ottawa without a jury: my learned brother gave judgment as follows:—

"I am not sure that it was stated that the profits would be divided equally, and after some hesitation, I have come to the conclusion that division of profits simply does not necessarily mean an equal division. . . . I am of the opinion that the defendant Gorman should pay to the plaintiff and Murray ⅓ of the profit of the Brandon transaction, say $1,700—of which $1,200 will belong to the plaintiff—and he should pay $500 to each of these parties in respect of the Montreal park realty stock transaction and interest from the date of suit. There will be judgment for the plaintiff against the defendant Gorman for $1,700 with interest from the 12th of August, 1911, and costs; and for the defendant Murray against the defendant Gorman for $1,000 with interest from the 12th of August aforesaid and Murray's costs of defence."

The defendant Gorman now appeals.

The pleadings are in rather a curious state. The plaintiff sues both defendants claiming a partnership with them for the purpose of dealing in real estate in Brandon and elsewhere, receipt of profits by Gorman and saying that Murray is a member of the partnership and entitled to participate in the profits; the pleader asks for a dissolution of the partnership and a taking of the partnership accounts; Gorman denies everything and pleads the Statute of Frauds. Murray admits everything and "submits his rights under said partnership agreement to the consideration of this honourable Court." It is fairly manifest that Murray desired the advantage of a favourable issue of the plaintiffs' claim without rendering himself liable for costs if it failed. At the trial he asked to amend by asking for a share in the profits and the case was thereafter treated as though the amendment had been made.

I am unable to agree with the learned trial Judge in his view of division of profits. He has either overlooked or discredited the evidence of the plaintiff that the profits were to be divided equally between the three. But even if this be wholly eliminated, an agreement that the profits are to be divided, in the absence of other evidence, means that they are to be equally divided.

Robinson v. *Anderson,* 20 Beav. 98, S. C. 7 D. M. & G. 239; *Peacock* v. *Peacock,* 16 Ves. 49; *Webster* v. *Bray,* 7 Ha. 159; *Farrar* v. *Beswick,* 1, M. Rob. 527; *Stewart* v. *Forbes,* 1 Man. & G. 137; *Webster* v. *Bray,* 7 Hare 159; *Copland* v. *Toulmin,* 7 Cl. & Fin. 349; and see in the case of a bequest

Peat v. *Chapman*, 1750, 1 Ves. Sr. 542; *Ackerman* v. *Burrows* (1813), 3 V. & B. 54. I can find no evidence to support any claim of plaintiff or defendant Murray, to a share in the profits of the Montreal transaction, unless it was looked upon by all parties as in continuance of a previously existing relation.

Murray says that the conversation in the first instance was about him placing "the money up there," and that the agreement was that Gorman would advance the capital—when the transaction "up there" was completed. I do not see that there was any new arrangement made—Murray did not say anything but left it to Bindon: while all that Bindon says is that he brought it to Gorman's attention and after talking the matter over Gorman made his investment. Bindon, however, tells us that he had advised Gorman in other transactions which realised for him a great deal of money—"supplied brains" as he puts it—and it does not appear that he was a partner or a gainer in these transactions. I am unable to see that the purchase of stock in a joint stock company in Montreal was a continuation of any relationship which may have existed between the parties or any two of them in connection with lands in the west. The judgment so far as it refers to the profits on the Montreal transaction must be set aside.

As to the Brandon transaction, the case is not so clear. The transaction was to be "to invest amounts in the west". "Brandon or elsewhere," "in real estate" (so far, Bindon in direct examination) "invest in real estate in the west" "for Murray to go out to the west and invest in real estate" "investments in the west" "for Murray to go out to the west to make a selection of lands for this new partnership" for Gorman "to put up money if suitable investments were got:" and the final arrangement was to invest $10,000 in those lands at Brandon, "there was no syndicate formed at the time he agreed to put up the $10,000 or when he sent the telegram to put up $10,000" (Bindon on cross-examination.) Murray's account is not materially different.

What happened was that Murray procured an option of certain lands and wrote Bindon. Bindon saw Gorman and Gorman sent a telegram authorising Murray "to invest $10,000 in real estate." This, I think, meant at the time "invest $10,000 in real estate, obtaining the fee in the land" in other words, "invest $10,000 in buying land" not "in buying an interest in land." Had it not been for

Gorman's not sending forward money promptly it seems that the transaction would have gone through in the manner contemplated. But there was danger of the deal falling through and Mr. Curry was appealed to and he sent the money. Curry was insistent that other friends he had should come in and says Murray: "I insisted on Gorman coming in as he had made this offer and that he was a good capitalist in that way and that we might want him for other deals, so Curry let him in," and "he was let in on a fifth of this deal." "He came in on the ground floor but not getting the whole space." At this stage, there can be no doubt that Gorman might have withdrawn when he was informed of the arrangement: but he did not do so, on the contrary he went into the syndicate of five who were to share equally in the profits.

The proposed transaction was an investment by Gorman of all the capital with an agreement that he should have one-third the profits, Bindon and Murray each one-third: what did take effect was an investment by Gorman of part of the capital with an agreement that he should have one-fifth the profits and Murray another fifth. This is so entirely different scheme from that proposed that unless Gorman and Murray were bound not to enter into any deal in real estate to the exclusion of Bindon, I do not see that Bindon can claim any share of the profit. It has not been argued that they could not have transactions with each other to the exclusion of Bindon, nor as I conceive can it be so argued. No doubt the admission of Gorman into the syndicate would not have taken place if he had not been expected previously to finance the whole deal; but it was not as carrying out in whole or in part the original scheme that he came in but on a new and different scheme.

Of course, this is not the case of a real estate agent suing for commission where the rules are very broad; but of one partner suing another for profit unduly made in what is alleged to be a partnership transaction. Nor is it the case of a partner attempting to secure for himself a benefit which it was his duty to obtain if at all for the firm. If Murray had acted in bad faith and after securing the property for the three had wrongfully turned it over to the syndicate, an action might have lain against him; but he is blameless in that regard, he could not do otherwise. And if Gorman had wrongfully permitted to be abandoned a contract which he was in a position to enforce and which would have procured

the property and the profits for the three it may be an action would lie against him—but he could not do any better than he did. If Murray and Gorman had conspired to defraud Bindon out of his share and took this way of doing it, an action might have laid against them. But the fact seems to be that a joint deal for purchasing real estate for three in the profits of which the three were to share because one was to furnish the money, another the work and the third the brains, fell through from nobody's fault and a new deal was made whereby five shared the expense and the profits. This is in my view not a partnership transaction of the three parties to this action.

If Bindon has any claim upon Gorman as a member f a partnership he must have the same claim against Murray; and that he repudiates.

While the right should be reserved to both Bindon and Murray to bring any other action they may be advised, I am of opinion that this action wholly fails and that the appeal should be allowed with costs payable by both the plaintiff and the defendant Murray—and in view of the position taken at the trial the action should be dismissed with costs payable also by these parties.

HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 25TH, 1913.

DIXON v. DUNMORE.

4 O. W. N. 1501.

Vendor and Purchaser—Specific Performance—Objections by Purchaser—Right to Rescind—Outstanding Mortgage—Not Matter of Title—Statute of Frauds—Memorandum to Satisfy—Amendment of Pleadings—Deficiency in Area—Right of Purchaser to Accept—Appeal—Allowance of.

SUP. CT. ONT. (2nd App. Div.) gave judgment for plaintiff in an action for specific performance, holding that there was a sufficient memorandum in writing to satisfy the Statute of Frauds and that where there is a deficiency in the property agreed to be sold the purchaser has a right to take what the vendor has.

McLaughlin v. *Mayhew*, 6 O. L. R. 174, referred to.

Judgment of WINCHESTER, Co.C.J., reversed.

Appeal from the judgment of His Honour Judge Winchester, Senior Judge of the County Court of the county of York, in an action for specific performance under an agreement in writing made by the plaintiff with the defendant Dunmore through one Moffat, Dunmore's agent.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

J. J. Gray for the plaintiff (appellant).

S. H. Bradford, K.C., for defendants (respondents).

HON. MR. JUSTICE CLUTE:—The defendant Taylor, it is alleged, had knowledge of this agreement, and having a legal estate, it was agreed by the parties that Taylor should convey direct to the plaintiff. Taylor signed the deed in question and in doing so attempted to close the matter, but plaintiff's solicitor objected that no plan had been filed and that there was an outstanding mortgage. The defendants allege that the plaintiff's solicitor refused to close the transaction and the deal was off.

The truth seems to be that both parties were ready to carry out the transaction, and there is no reason why it should not have been carried out if the parties and their solicitors had exercised a little more courtesy toward each other.

It is clear, however, that the plaintiff's solicitor never refused to carry out the deal, although he seems to have been abrupt when Taylor called to close the matter—the solicitor then being engaged with other clients.

The trial Judge was of opinion that the plaintiff "by his agreement, bound himself to treat the agreement as being null and void in case the vendor was unable or unwilling to remove any valid objection to the title which the plaintiff made, and having raised the objection, and the defendant not having the fee simple free from encumbrance in the property, he is bound by his agreement and it should be considered null and void. No deposit was ever paid to the defendant and no purchase money tendered to him before the matter was declared off between him and the plaintiff's solicitor. The defendant was unwilling to remove the objection raised by the plaintiff although no doubt he could have compelled

his vendor to have removed it had he been able to have paid him the balance due under his agreement; this apparently he was unable to do, or at any rate was unwilling to do. The action, in my opinion, should be dismissed with costs."

The defendant Dunmore authorised Moffat to sell for him two lots on the south side of Victoria avenue; the number is not given. A formal agreement was drawn up between the defendant Moffat and the plaintiff in which Moffat agreed to sell to the plaintiff 95 feet, more or less, on the south side of Victoria avenue, in the village of Weston, at seven dollars per foot, cash. This agreement provides that the purchaser be allowed twenty days to investigate the title, and if within that time he should furnish the vendor any valid objection to the title which the vendor shall be unable or unwilling to remove, the agreement shall be null and void and the deposit returned to the purchaser. Time to be of the essence of the agreement.

This agreement was not signed by Moffat, but was signed by one G. M. Fraser, who appears to have been a clerk in Moffat's office, or interested with him. A cheque was given upon the purchase on the same date for $25. The receipt given by Moffat to the plaintiff is as follows:—

"March 27th, 1912.

"Received from D. G. Dixon deposit $25 on 95 feet of land, more or less, on south side of Victoria avenue."

It appears that Dunmore owned but one lot or 50 feet on the south side of Victoria avenue in the village of Weston, and on the 29th March, 1912, Moffat wrote to Dunmore for the number of the lot, to which Dunmore replied as follows:—

"West Toronto, March 29th, 1912.

"In reply to yours of to-day re ground at Weston, the number is lot 2. Yours faithfully, H. W. Dunmore."

"P.S.: Dear Sir,—Will you kindly let me know the full name of the purchaser as I can have his name put on the deed instead of mine, as it will save me a transfer. Yours, etc., H. W. Dunmore."

Dunmore had purchased lot 2 from defendant Taylor on the 1st November, 1909, for $250, $25 down and the balance in half yearly instalments of $25 each with the option to the purchaser of paying off the balance of the purchase money at any time. The plan was afterwards registered. There was no difficulty as to the outstanding mortgage as Taylor stated he

could get the land discharged from the mortgage at any time, and as a matter of fact the mortgage was discharged before this action was brought, so that there was no reason why the transaction should not have been carried out. If the contract was binding upon the defendant an outstanding mortgage is no objection to title, nor did the plaintiff raise the objection as one of title, but desired that before the purchase money was paid the mortgage should be discharged.

It is also quite clear, I think, that the plaintiff, either by himself or his solicitor, did not relieve the defendant from completing the contract. The plaintiff, while admitting that the defendant could not convey to him the whole of the 95 feet, was willing to take what the defendant had to convey—that is lot 2.

The sole question, therefore, remains, is there a contract binding in law? There is no question that the parties understood perfectly what was intended to be sold. I do not think that the agreement of the 27th March is indefinite. It appears from the evidence of Mr. Gray, solicitor, that one Miles, who paid the deposit, wished to purchase the 45 feet, and that the plaintiff desired to purchase the 50 feet, being lot 2. The 45 feet was owned by Barker, and the deposit was paid upon both.

In the view I take of the matter, it is unnecessary to decide whether the agreement of the 27th March, 1912, is sufficiently definite or sufficiently signed to make a binding contract between the parties, because after this instrument was excuted, the matter was cleared up, the number of the lot was obtained, it was understood that the plaintiff should take the deed of lot 2, it was agreed by both defendants that such a deed should be given. This deed was prepared and executed by Taylor and his wife; and this deed, together with the agreement of the 27th March, the letter from Moffat to Dunmore and his reply, the cheque for the purchase and the receipt, together form a sufficient memorandum in writing to satisfy the Statute of Frauds.

The defendant Taylor was properly made a party, because having a knowledge of the agreement to sell, and having consented to make a conveyance direct to the plaintiff, and having that conveyance settled and approved by the plaintiff's solicitor and afterwards by himself, he had no right independent of the other defendant, to declare such an arrange-

ment off. I cannot accept the view of defendants' counsel in his able and ingenious argument that there is any lack of mutuality in such a contract.

Dixon had signed a written agreement to purchase the 95 feet, and was entitled to take so much of it as the defendant had. Dunmore expressly recognized his obligation to convey the lot by his answer to Moffat, and at the same time requested that the deed might be made direct to plaintiff by Taylor.

Reading all the documents together, the intention of the parties is perfectly clear, and but for the unfortunate differences that existed between the parties, the contract would have been carried out.

In my opinion, the plaintiff is entitled to succeed, and to have the contract specifically performed.

Reference may be made to the following cases where there is sufficient evidence in writing to satisfy the Statute of Frauds:—

Coles v. *Trecothick*, 9 Ves. 234, where it was held that the vendor is bound by the signature of the agent's clerk; thus: "Witness assents, but clerks of agents in general have no authority to bind the principle."

Gibson v. *Holland*, 1 C. P. 1: "Where there is a complete agreement in writing, a person who is a party and knows the contents, subscribes it as a witness only, she is bound by it for it is a signing within the statute."

In re Hoyle, 1893, 1 Ch. p. 84: As to objections to title where there is an outstanding mortgage.

Grieves v. *Wilson*, 25 Beav., p. 290: As to the right of amendment when the Statute of Frauds is not pleaded, see *Brunning* v. *Odhands*, in the House of Lords, 75 L. T. R. (N.S.), p. 602.

McMurray v. *Spicer*, L. R. 5 Eq. 527: As to the right of the purchaser to take what the vendor has.

McLaughlin v. *Mayhew*, 6 O. L. R. 174; *Campbell* v. *Croil*, 3 O. W. R. 860; *Bradley* v. *Elliott*, 11 O. L. R. 398.

Judgment of the Court below should be reversed, and judgment entered for the plaintiff with costs here and below.

HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed in the result.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 25TH, 1913.

SAUERMAN v. E. M. F. CO.

4 O. W. N. 1510.

Action—Minutes of Settlement of—Construction of—Alleged Defective Motor Car—Submission to Referee within one Month—Time Essence of Contract—Tender—Refusal to Accept—Reference—Appeal.

MIDDLETON, J., *held* (24 O. W. R. 415; 4 O. W. N. 1137) in an action to enforce minutes of settlement of another action between the parties for the return of the purchase-price of a motor car alleged to be defective that a provision that defendants were to have the car ready for inspection within one month by a referee agreed upon, meant that the car at that time was to be pronounced satisfactory or unsatisfactory by the referee and defendants were not to be given an additional six months to make alterations from time to time suggested by the referee to make it satisfactory to him.

SUP. CT. ONT. (2nd App. Div.) *held*, that there had been a waiver by plaintiff of the period of one month fixed by the minutes of settlement but that upon the day fixed by the parties subsequently for the decision of the referee he had not been able to give a final decision owing to the conduct of defendants, and plaintiff was therefore within her rights in finally refusing to accept the car.

Appeal dismissed with costs.

Appeal from judgment of MIDDLETON, J. (24 O. W. R. 415; 4 O. W. R. 1137), in favour of plaintiff in an action brought to enforce certain minutes of settlement.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

W. A. Loggie, for defendants.

J. L. Counsell, contra.

HON MR. JUSTICE RIDDELL:—The plaintiff bought an automobile from the defendants: finding fault with it she, October 11th, 1911, brought an action against the company for damages, etc. The case came on for trial before Mr. Justice Latchford, June 13th, 1912, and after it had been partly tried a settlement was arrived at, which was reduced to writing, and is in the following terms:

"This case is settled on the following terms: the plaintiff is forthwith to deliver the car in question to the defend-

ants, who shall forthwith proceed to put the same in complete repair in every respect (except tires) to the satisfaction of Russell, Esquire, who is accepted by both parties as umpire, or referee, between them, defendants to forego payment of the remaining note for $180 given by plaintiff in payment for the car. In event of the said Russell pronouncing the car in a satisfactory condition, the same to be delivered by defendants to the plaintiff in settlement of this case. If the said Russell pronounces the car unsatisfactory, then the defendants forthwith to pay the plaintiff back the sum heretofore paid by her to them; in either case the defendants to pay the plaintiff the sum of $350 in full of costs. Defendants to have the car ready for inspection by the said Russell within one month from delivery of same to them by the plaintiff. Dated 13th June, 1912."

This document was signed by eminent counsel for both parties, the trial Judge was informed that the case was settled and he endorsed the record "said to be settled," and the case did not proceed further. Forthwith the plaintiff delivered the car to the defendants, who proceeded to repair it, taking it to their factory in Walkerton, and returned it to Hamilton (where the plaintiff resides) about July 13th.

Mr. Russell was absent from the country; but the defendants had performed that part of the contract which provided that they were to have the car ready for inspection by Mr. Russell within one month of the time from delivery of the car to them by the plaintiff. He returned about the middle of August, and on August 17th proceeded to make an inspection. In the meantime experts for both parties had been examining the car and had disagreed about its condition; the plaintiff insisted upon an inspection by Russell. Russell reported that he had examined the car August 17th: "I beg to report that the car was in a satisfactory condition, with the exception of certain items which I requested to be put into shape for later inspection." He mentions the items, and adds: "These items are not difficult to determine, and I would expect the parties themselves could decide that the items I mentioned had been taken care of. If they cannot, please advise me and I will go up again to deal with them and to finally pronounce on the car."

This inspection having taken place at the instance of the defendants upon notice to the plaintiff who sent an expert to be present at the inspection, I should have considered that

this was a pronouncement by the referee that the car was unsatisfactory, and that he was *functus officio* were it not for what subsequently took place. The plaintiff, instead of bringing her action at once, on the agreement, gave notice September 9th "of an application to Mr. Justice Latchford for judgment." This was contained in a letter. The defendants' solicitor protested also in a letter September 10th that "the terms of the agreement have been lived up to by the defendants, and the automobile is now complete, ready for delivery, and has been since three days after the report by Mr. Russell. We now tender it to you and will oppose any application." September 30th, plaintiff's solicitor answers, saying that they were having an appointment before Mr. Justice Latchford. An application was made before the learned Judge October 29th, but, of course, he could not give any judgment.

By reason of what seems to have been a chance remark by my learned brother, Mr. Russell made another inspection. It does not appear how this came to be made, but in any case, Mr. Russell did attend at Hamilton, and in the presence of the plaintiff's solicitors, made another examination. The conduct of the plaintiff in insisting, as it is agreed she did, on another examination by Mr. Russell, operates as a waiver of her rights under the former inspection—and this is not seriously disputed before us.

Mr. Russell examined the motor on October 30th in the presence of the plaintiff's expert, and with this result, according to Mr. Russell:—

"Q. Then, Mr. Russell, the car stood from the 18th of August; you made another examination of it in the presence of all parties, when you were here on the 30th October? A. Yes.

Q. You came down for that purpose? A. Yes.

Q. On the 30th of October, tell us in what shape you found things in; had these repairs all been made? A. I think they had. I thought they had all been taken care of. I took the car out—it had been a couple of months, and I was told that there was objection to the performance of the motor, on the ground of a knock in it, so I took it out again for a further test.

Q. How was the motor when you started it? A. I did not think that the motor was in as good shape as when I left it, for some reason or another.

Q. You did not think it was as good as when you left it on the 18th of August? A. No. It did not give as good a performance.

* * * * * * * *

Q. What was the trouble you found that day, if any? A. One of them was, because it did not have as good power; where on the first examination I drove up, and did not have to change gears on James street until I got to the incline railway, I had to change at some point considerably this side of it, and there seemed to be an inability on the part of the engine to get as good a mixture, whatever was the reason, as on the former occasion, and the knock which was complained of, was audible to me.

Q. You then discovered that it did have a knock? A. Yes.

Q. On the 30th; it hadn't it in July? A. That I had not noticed in August.

Q. What kind of a day, a cold or a warm day? A. Rather a damp, cold day.

Q. What is the effect of a cold damp day on a machine that had been standing for some time? A. It does not make any real difference to the machine; it makes a little difference to the mixture, and to the adjustment of the carburetter.

Q. Tell what effect that would have upon the running of the car? A. It depends upon the carburetter a good deal, the device which mixes the air and gasoline for the purposes of getting the explosive mixture; some carburetters are adjusted for fine weather and dry conditions, but require a different adjustment under another condition. That is the only change I would say that the weather would have.

Q. Does that affect the power of the car? A. Yes, if it does not get a proper mixture.

Q. When you brought the car back to the garage, you then tested another car? A. Yes.

Q. Was that at your own request? A. Yes.

Q. That was an E. M. F. demonstrating car of 1912, I understand; when you tested that car, how did you find it? A. Better.

Q. What did you do then, Mr. Russell? A. It was getting pretty late; I had supper, thought the matter over, and told the solicitors for the defendant that I did not feel prepared either to pass the car as it stood, or to refuse to pass it; that I was going to go back to Toronto and ride in some

other E. M. F. cars, so that I would know that the standard I was trying it by was correct, and that I would come back and say whether I would finally pass that car or not."

On cross-examination he says:

"Q. What about this suggestion about a new engine; did you suggest a new engine; we have not any very clear evidence upon that? A. Perhaps I should clear that up. After we had driven in this car I asked to be driven in the other E. M. F. car, and I was driven, and also Mr. Counsell, the plaintiff's solicitor was driven, and when he came back to the garage he said: 'Give us that car, that is the only car, and we will be satisfied'; and I said later in the evening: 'Why don't you give them this engine and settle the matter up, that is what I would do if I was in a box like this,' and Mr. Shillington said he hadn't any authority, and I said: 'Well, that is not my end of it,' and that is all that passed with regard to that part of it.'"

Mr. Shillington was the officer of the defendant company on the spot; he communicated with the manager, and by him was directed to take the engine out of the 1912 car, a new engine, and put into the car in question, which he did October 31st. Mr. Russell came back November 1st, and made an inspection of the car so fitted. His direct examination continues:

Q. Do you know whether the 1912 gear is different from the gear of 1911? A. Do you mean the gear ratio?

Q. Yes the gear ratio? A. I believe I was told that the car I rode was of a lower gear ratio than the car in question.

Q. I am advised that other manufacturers changed their gear ratios in 1911 or 1912? A. I don't know of any general movement in that direction.

Q. Did you go down to Toronto? A. Yes.

Q. You wanted a test of 1911 cars? A. Of other E. M. F. cars.

Q. Of the 30 model of 1911? A. Yes.

Q. To see how they performed? A. Yes.

Q. And you came back to Hamilton? A. Yes.

Q. What did you find when you got back? A. They told me they had taken the motor out of the other car and put it into this one.

Q. Then did you take the car out again? A. Yes.

Q. And did you test it? A. Yes.

Q. How did you find it? A. I considered it satisfactory, and so reported."

On November 1st, 1912, Mr. Russell wrote the counsel for the plaintiff: "In further reference to this matter I beg to report that I have further examined the E. M. F. car in question, have ridden it some considerable distance and have also ridden in other E. M. F. cars both new and used to satisfy myself as to the relative performance of this particular car. After so doing I am now in a position to report that the car in question is in complete repair to my satisfaction." This seems to have crossed a letter from the plaintiff's solicitors asking for a report of his "examination of the E. M. F. car here on Wednesday the 30th October. From information with you that afternoon continues the letter "we gathered that you were going to report at once . . . from a conversation the writer had with Mr. Logie (solicitor for the defendants) he got the impression that your report might be delayed in order to give the E. M. F. company an opportunity of putting a new engine in the car. We do not think it would be proper for you to delay the making of your report for such a purpose, and we think you should report at once and then the Court will be in a position to deal with the matter upon your report"—a copy of this letter was sent to the solicitors for the defendants.

Upon the receipt by the plaintiff's solicitors of Mr. Russell's report they, November 2nd, wrote him for a report of the condition of the car on his inspection on October 30th adding "we are informed that you came back here last night and made a further test. Neither our clients nor the independent expert were present nor do we know what repairs or changes have been made in the car since you examined it on Wednesday. We are prepared to prove and will endeavour to establish the fact that on Wednesday the engine in the car was defective and it was not in complete repair in every respect at that time even to your satisfaction . . . Your conversation with the writer in regard to the changing of the engine would establish that" Mr. Russell answered "As I understand it, my report of the 1st inst. . . . covers all that I am called upon to report with regard to the car in question." Thereupon the plaintiff's solicitors wrote the defendants' solicitors with a copy of this letter and said: "Our clients refuse to accept the car on his report, until we are supplied with the information as to whether the engine that is now in the car is the same engine that was in

the car on Wednesday, the 30th day of October, when Mr. Russell made his examination. . . . On receipt of the information we will be in a position to discuss the matter with our clients."

It does not appear what (if any) answer was made the next day. November 6th, leave was obtained from Mr. Justice Latchford to serve notice of motion but no judgment seems to have been given. The plaintiff brought this action for the money to which she claims to be entitled under the agreement, and on the trial before Mr. Justice Middleton was successful, 24 O. W. R. 415. The defendants now appeal.

I think it clear that all that took plaec before October 30th may be left out of consideration and the case treated as though that day had been appointed by Mr. Russell and agreed to by all parties as the day upon which he was to "pronounce."

From an examination of the "consent minutes" I think the intention of all parties was that the defendants admitting that the car was not all it should be were given an opportunity to put the car in complete repair, that when they considered it was in such repair, Russell was to be called in as sole and final referee to decide whether they had succeeded —if in his judgment they had, the plaintiff took the car, and if not she was to get her money back. While there might not be any objection to Mr. Russell having been consulted by the defendants as to what would be required to be done in order that the car should be in perfect repair, either before the work was begun or when it was actually going on—on that I express no opinion—I think that the parties contemplated that when the defendants had done what they could "to put the car in complete repair in every respect. . . to the satisfaction of Russell," he was to be called upon to "pronounce." I do not think he could do anything else than "pronounce" —his duty was to act as judge, referee, arbitrator on the particular car as then submitted to him as "ready for inspection by the said Russell." I do not say he might not then reserve his decision but the decision was to be on the "car ready for inspection"—not the car as it might be some days after when further repairs had been made.

The day for inspection was by the consent of the parties fixed for October 30th, and it was the car as on that day upon which the referee was to exercise his judgment and "pronounce." It may well be that Russell had the right and

power to reserve his decision for a day or two and for experiment upon other cars of the defendants' make as seems to have been his first intention—but that decision must be upon the car as it was on that day.

The defendants by their conduct prevented him from giving such decision so as to be effective to enable the plaintiff to have the car upon which such decision should have been given—it is rendered impossible by their changing the engine for them to say that a car approved by Russell on October 30th or as October 30th is at the plaintiff's disposal. So that even if what was done by Russell on and as of October 30th is not a "pronouncing" by him in favour of the plaintiff (and I am inclined to think that it is), they have prevented a more formal "pronouncing" by their own conduct. They cannot set up as against this plaintiff as a condition precedent the want of an effective "pronouncing" which they have themselves prevented. *Thomas* v. *Fredericks* (1874), 10 A. & E. N. S. 775; *Hathan* v. *E. I. Co.* (1787), 1 T. R. 638; *Coombe* v. *Greene* (1843), 11 M. & W. 480; *Re Northumberland Av. H. Co.* (1887), 56 L. T. N. S. 833; and similar cases.

I am of opinion that the appeal must be dismissed with costs.

HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. MAY 27TH, 1913.

CHAMBERS.

KENNEDY v. KENNEDY.

4 O. W. N. 1370.

Lis Pendens—Order to Vacate—Terms—Payment of Proceeds into Court—Expedition of Trial.

MASTER-IN-CHAMBERS made an order providing for the vacation, in part, of a certificate of *lis pendens* and for the sale of the lands covered thereby, provided the money were paid into Court to abide the result of the action.

BRITTON, J., affirmed above order.

An appeal by the defendant from an order of the MASTER-IN-CHAMBERS, 24 O. W. R. 627.

A. McLean Macdonell, K.C., for the defendant.

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

HON. MR. JUSTICE BRITTON, dismissed the appeal with costs.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 28TH, 1913.

NATIONAL TRUST CO. v. BRANTFORD STREET RW. CO.

4 O. W. N. 1341.

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. c. 51, s. 6—Costs.

KELLY, J., 22 O. W. R. 839, 3 O. W. N. 1615, dismissed with costs the action of plaintiffs, trustees for certain bondholders, claiming the appointment of a receiver of the properties of defendant railway company on account of breach of certain covenants in the bond mortgage contained, holding that as the appointment of a receiver was not a remedy given plaintiffs by the terms of their mortgage, their only remedy was by action on the covenants.

SUP. CT. ONT. (2nd App. Div.) set aside above judgment and directed a new trial. Costs of former trial and of this appeal to be in the discretion of the Judge of the new trial.

An appeal by the plaintiffs from the judgment of HON. MR. JUSTICE KELLY, 22 O. W. R. 839.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

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

S. C. Smoke, K.C., for the defendants.

THEIR LORDSHIPS set aside the judgment dismissing the action, and directed a new trial. Costs of the former trial and of this appeal to be in the discretion of the Judge at the new trial.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. APRIL 29TH, 1913.

WALLBERG v. JENCKES MACHINE CO.

4. O. W. N. 1188.

Contract—Place of Delivery of Goods—"Site of Work"—Meaning of—Reformation of Contract.

MIDDLETON, J., *held*, 23 O. W. R. 891; 4 O. W. N. 555, that the phrase the "site of work" in a contract for the installation of two certain large steel pipes for use in a power installation was the immediate vicinity of the line of location of the pipes and not a dock a quarter of a mile away therefrom.

SUP. CT. ONT. (2nd App. Div.) varied above judgment by directing that the agreement should be rectified by adding a clause to the effect that the defendants were entitled to have material carried from one tramway to another and to have it distributed where the pipe was to be laid.

An appeal by the plaintiff and cross-appeal by the defendants from a judgment of HON MR. JUSTICE MIDDLETON, 23 O. W. R. 891.

The appeal and cross-appeal to the Supreme Court of Ontario (Second Appellate Division) were heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

G. H. Kilmer, K.C., and J. A. Rowland, for the plaintiff.

J. Bicknell, K.C., and M. L. Gordon, for the defendants.

THEIR LORDSHIPS allowed the appeal and directed that the agreement should be rectified by adding a clause to the effect that the defendants were entitled to have material carried from one tramway to another and to have it distributed where the pipe was to be laid. The plaintiff, by his appeal, claiming only the cost of transporting material from one line to another, the amount of that is to be added to the amount of the plaintiff's judgment as pronounced after the trial; and, if the parties agree, this amount is to be fixed at $400. If the parties do not agree, there is to be a reference to the Master in Ordinary to ascertain the amount, and the amount ascertained is to be added to the judgment without further application to the Court. The judgment below not to be otherwise disturbed. The plaintiff to have the costs of the appeal. Cross-appeal dismissed with costs.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 14TH, 1913.

HAYES & LAILEY v. ROBINSON.

4 O. W. N. 1280.

Judgment — Summary—Con. Rule. 608 — Application of—Special Circumstances—Claim on Overdue Promissory Notes.

Action by wholesale merchants against a retail merchant to recover upon nine promissory notes overdue and unpaid. Defendant had been selling goods without replacing them or accounting for the proceeds, nor had he insured the goods or paid his rent or taxes.

SUP. CT. ONT. (2nd App. Div.) *held*, that there was no defence to the action, that defendant was insolvent and the case came under Con. Rule. 608. That injury and injustice would result to plaintiffs unless they were granted immediate relief.

Appeal by the defendant from a summary judgment granted by HON. MR. JUSTICE LATCHFORD, on the 8th May, 1913, upon an application in the Weekly Court at Toronto, under Con. Rule 608.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON MR. JUSTICE LEITCH.

R. G. Smythe, for the defendant.

A. T. Davidson, for the plaintiffs.

The following authorities were referred to: *Kinloch* v. *Morton*, 9 P. R. 38; *Francis* v. *Francis*, 9 P. R. 209; *Greene* v. *Wright*, 12 P. R. 426; *Leslie* v. *Poulton*, 15 P. R. 332; *Molsons Bank* v. *Cooper*, 16 P. R. 195; *Lake of the Woods Milling Co.* v. *Apps*, 17 P. R. 496.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex. (V.V.):—The affidavits shew that the notes made by the defendant are overdue and unpaid; that many demands for payment have been made, but none complied with. The defendant has been selling goods without replacing them or accounting for the proceeds. Nor has the defendant insured the goods or paid his rent

or taxes. Admittedly he has no defence to this action, and he is insolvent.

We think the case comes within the authorities under Con. Rule 608, shewing that injury and injustice would result to the plaintiffs unless they are granted immediate relief. There are special circumstances entitling the plaintiffs to the application of the Rule; and we think the appeal should be dismissed with costs.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 1ST, 1913.

MAPLE LEAF PORTLAND CEMENT CO. v. OWEN SOUND IRON WORKS CO.

4. O. W. N. 1189.

Evidence—Estoppel—Passivity—Contract for Sale of Machinery—Repudiation of Agent by Principal—Laches.

KELLY, J., *held*, 23 O. W. R. 907; 4 O. W. N. 721, that defendants were precluded from denying their liability upon a contract for sale by them of certain machinery, or that one Moyer had been their agent in the making thereof, where they had received acceptances from plaintiffs of the proposal to sell bearing on their face a statement that they were subject to confirmation by defendants, had held plaintiffs' note payable to their order, and had twice drawn on plaintiffs in respect thereof, and where the whole correspondence between the parties shewed that plaintiffs thought they were dealing with defendants, and defendants had never repudiated the idea until the machinery sold proved worthless.

Keen v. *Priest*, 1 F. & F. 314; *Wiedmann* v. *Walpole* [1891] 2 Q. B. 534, referred to.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

(See, also, *Meikle* v. *McRae*, 20 O. W. R. 308, at p. 310.—Ed.)

An appeal by the defendants from a judgment of HON. MR. JUSTICE KELLY, 23 O. W. R. 907.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

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

W. G. Thurston, K.C., for the plaintiffs.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

MASTER IN CHAMBERS. JUNE 24TH, 1913.

CRUCIBLE STEEL CO. v. FFOLKES.

4 O. W. N. 1561.

Discovery—In Aid of Execution—Con. Rule 903—Scope of—Transfer Prior to Incurring of Debt—Action Pending against Transferees.

MASTER-IN-CHAMBERS *held*, that judgment creditors have no right to examine transferees of the assets of the judgment debtor under Con. Rule 903 where the debt was incurred subsequently to the vote of the transfer to the said transferees.

The plaintiffs move under Con. Rule 903, for an order for examination of two transferees of the judgment debtor.

Wright (Millar & Co.), for motion.

J. A. Worrell, K.C., contra.

CARTWRIGHT, K.C., MASTER:—An action was commenced on 28th March, 1913, to set aside the transfer of certain lands by the judgment creditor herein, to the transferees now sought to be examined. In that action of necessity these transferees are defendants. The transfer attacked is said in the endorsement on the writ to have been made on 30th May, 1910, as is shewn by the production of a copy of the certificate registered in the Land Titles Office on 2nd June, 1910.

No part of the debt in respect of which the plaintiffs have judgment was incurred before 9th November, 1910, as is shewn on the endorsement of the writ issued on 22nd May, 1911—in the action in which plaintiffs obtained judgment.

These facts are not in dispute and cannot be disputed. It was argued by Mr. Worrell that there was no power to order an examination under Con. Rule 903, when it was clear that the transfer was made before the liability which was the subject of the action had accrued.

In answer the case of *Ontario Bank* v. *Mitchell, et al.*, 32 U. C. C. P. 73, was cited.

That case, however, does not seem to be of any assistance here. It was also said in answer to the argument that as these transferees were defendants in the pending action, this was an attempt to get discovery before the time, that an examination under Con. Rule 903 would have wider scope than an examination for discovery. But the language of the rule itself at the close seems to negative this suggestion.

Such an examination should naturally precede an action such as is now pending. When the judgment creditor has issued his writ, it seems idle to have the examination sought for here. There is no record of any such order ever having been made. This is generally a proof that it cannot be made.

The motion is dismissed with costs as in *Smith* v. *Clergue*, 14 O. W. R. 31. Plaintiffs can appeal on Friday if they so desire.

APPELLATE DIVISION. JUNE 26TH, 1913.

POULIN v. EBERLE.

4 O. W. N. 1545.

Prescription—Action for Possession—Lost Title—Deeds—Admission of Evidence as to—Lost Grant — Presumption of—Continuous User of Property—Description in Deed—"Bank of Lake Erie"—Meaning of — Interpretation by Parties to — Tenancy—Estoppel to Deny Title—Appeal.

SUP. CT. ONT. (1st App. Div.) gave plaintiff judgment for possession of certain lands bordering on Lake Erie where he had continuously claimed and enjoyed possession of the same for over 20 years and defendants claimed under assignments from a lessee of plaintiff.

Judgment of Kent Co. Ct. affirmed and appeal dismissed with costs.

Appeal by defendants from a judgment of Kent County Court, in favour of plaintiff, for possession of 2⅛ acres part of lot 87 south of the Talbot Road west, in the township of Howard, pronounced after the second trial of the action. At the first trial the action was dismissed but Divisional Court ordered a new trial, 20 O. W. R. 301, 3 O. W. N. 198.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

O. L. Lewis, K.C., for the appellants.

W. E. Gundy, for the plaintiff.

HON. MR. JUSTICE MAGEE:—The plaintiff claimed 3 acres described as—commencing at the south-western extremity of the side line, between the said lot 87 and lot 86 on the bank of Lake Erie, thence north 45 degrees, west along the said side line 17 rods, thence west 45 degrees south to the

western bank of the adjoining creek, thence along the westerly bank of the said creek in a south-easterly direction to the lake bank, thence along the extremity of the said lake bank to the place of beginning. At this locality the water's edge of Lake Erie is approximately paralleled by a steep sloping bank or bluff, forty or fifty feet high, the foot of which is at a distance judging from the plan put in, of about sixty to one hundred feet from the water. The strip between it and the water shelves toward the lake, and is sandy next the latter and clay or earth next the bluff. The creek referred to, until it reaches the face of the bluff, flows through a deep gully or ravine. A side road runs south-easterly from the Talbot road at the east side of lot 87 and adjoins lot 86, but whether it extended to the water's edge does not appear. The greater part at least of the 3 acres is above or north of the edge of the bluff. The only practicable roadway from the lower land is by a waggon road leading upward along the side of the steep east slope of the creek ravine and up along a branching gully to the higher land at the north part of the three acres, and across it to the side road.

The defendants beside asserting title in fee simple in the defendants Frank Rose and Neil Rose, to the northerly 7/8 of an acre under a tax sale to one Matthew Wilson, made in November, 1885, and a right to possession of the remainder as tenants to the estate of one William Wilson, who died in 1877, deny the plaintiff's title to any part of the land, and say that in no case is he entitled to any part south of high water mark nor to any land south of the upper edge, or at best, the foot of the bluff—and they also set up that he is barred by the Statute of Limitations, and that the roadway down the creek ravine has become a public highway.

As the judgment for the plaintiff excepts the 7/8 of an acre sold for taxes, the only land here in question is the remaining 2 1/8 acres, more or less.

Lot 87 south of Talbot road west, was granted by the Crown to Ralph Hackney, on 18th June, 1848, as containing 200 acres more or less—no more particular description was given in the letters patent, but the words "Reserving free access to the shore of Lake Erie for all vessels, boats and persons" are written in immediately after the general description of the land. This would imply that the shore was

included in the lot granted, and nothing in any way to the contrary is indicated in the evidence.

Ralph Hackney by deed dated 1st March, 1856, granted to his son Ralph Hackney, Jr., the southerly or south-easterly 50 acres described as commencing on the shore of Lake Erie at the easterly angle of the lot, thence north 45 degrees, west along the allowance for road between lots 87 and 86, 25 chains to a post planted, thence south 45 degrees, west 20 chains, more or less to the side line between lots 87 and 88, then south 45 degrees, east 25 chains more or less to the lake shore, then north 45 degrees, east along the water's edge 20 chains more or less to the place of beginning.

By deed of 21st November, 1861, Ralph Hackney granted to Wm. J. Palmer, the 3 acres claimed by the plaintiff, and by the same description as set out in the statement of claim and by deed of 21 May, 1863, Palmer granted the same by the same description to William Wilson for $125.

The defendants contend that the words "bank of Lake Erie" and "Lake Bank" in these two deeds refer to the high bank or bluff, and that no land south of its uper edge was thereby conveyed. But the description begins at "the extremity of the side line," and that extremity being according to the deed to the grant of Ralph Hackney, Jr., at the water's edge gives an interpretation to the word "bank" as meaning the shore. The western bank of the creek is also referred to and a line crossing the ravine from it could hardly be well described as along the extremity of the lake bank.

It is undisputed moreover that William Wilson proceeded to erect below the high bank and partly cutting into it a large warehouse for grain, wool, and other commodities with a chute and tramway leading to it from a receiving house above and construced a dock leading to it and projecting into the lake, and a lime-kiln at the creek, making altogether an outlay of some $13,000, nearly all of which was expended on the low land. He carried on there a large business, his own and other vessels coming there with or for cargoes.

It is incredible that this would have been done or allowed if either Ralph Hackney, Jr., or his father or Palmer or Wilson had only meant by the word "bank" the high bluff, and considered that Wilson only owned the land north of its edge. The evidence of John Hackney brother of the patentee, who was called for the defence as to having heard

that Wilson claimed the measurement should be from the high bank, while so indefinite as to be valueless, even if admissible, does at least indicate that there was a dispute, and that the owner of the adjoining 47 acres was claiming that the 3 acres should like the 50 acres commence from the water's edge. No evidence is offered on either side as to the actual measurement of the land occupied by Wilson or the distance between the fence put up at its northerly or northwesterly boundary and the lake shore—or the edge of the bluff. So far as the acts of the parties enable one to judge they clearly intended the land below the bluff to be included, and we can thus interpret in what sense they used the word "bank," and there has been no dispute ever since between them or their assigns on the subject.

The northern fence referred to extended easterly across the side road and bars or a gate there gave access to the 3-acre parcel, which was thus practically secluded though at no time was there a fence on the low land nor across the 3 acres except at the northern boundary.

Wm. Wilson died in 1877. Before his death the business must have been discontinued for the property was considered to be worth only a few hundred dollars. The Registrar's abstract shews an undischarged mortgage made by him in 1875 for $1,200 on that and other property. By his will he appointed his wife, his brother Robert and his son-in-law Dr. Fraser, executors and trustees, and gave all his estate to the trustees to be by them sold and converted into money to be divided among his children as the trustees might think just and proper, subject to certain directions in the will—and with power to the trustees to lease—Dr. Fraser the survivor of these trustees died 15 or 20 years ago, and no new trustee was ever appointed.

The brother Robert Wilson took the most active part in the management of the estate. He generally consulted his son Mr. Matthew Wilson, then a law student, and afterwards barrister and solicitor. The latter called by the defendants says "we rented it when we could" and rental was received for it, but the only instance he can recollect before 1907, is "I have the impression that Cunningham leased it;" "my impression is I rented to Cunningham, but I have no clear recollection of that." He would not undertake to say there was not a deed to Cunningham, though he never heard of any —and he says it is so long ago that he would not undertake to say such a deed might not have been in his office. He did

not know of any renting since Dr. Fraser's death, and when told by a cousin about 1886, that the warehouse was being removed by the plaintiff, he did not think it worth prosecuting. It appears certain that there has been no interference with the party since 1886 by any one connected with Wm. Wilson's estate. On 26th November, 1885, the 3 acres were offered for sale for arrears of taxes up to December 31st, 1884. Matthew Wilson, brother of Wm. Wilson and the plaintiff bid against each other, but Matthew Wilson became the purchaser of the northerly 7/8 of an acre.

In 1886 we find the plaintiff claiming to be owner, alleging a purchase from Cunningham. On 30th December, 1889, he redeemed the whole 3 acres sold in 1888, for the taxes of 1885 and 1886. He has been paying taxes on the 2 1/8 acres ever since, and produces assessment notices against himself as owner as far back as 1897. In 1886 the dock was dilapidated and only half planked. It was subsequently gradually demolished and finally burned. From time to time in and between 1886 and 1898, and chiefly in 1897, he sold or took away the timbers and foundation stone of the warehouse and dock, and he gave away the building on top of the bank—and up to 1907, was the only person claiming to have interest in the land. In 1886, while he was taking away timber a son of Matthew Wilson the tax-purchaser came there at his father's instance, and being told by Poulin that he had bought the warehouse forbade him to take it down, but that was the last that was heard from the Wilson family although as already mentioned Mr. Matthew Wilson, the solicitor, was also informed of the warehouse being taken down by the plaintiff. The plaintiff did not reside upon or cultivate, and no one has at any time cultivated any part of the 2 1/8 acres, but he was exercising these acts of ownership, and he says that after completing the purchase from Cunningham he entered into possession, and from 1886 until 1890 he used it for storing timber in the winter, which in summer were rolled down the high bank and to the water for shipment, and after taking away the material of the building, he did not use the property for any other purpose than occasionally taking timber down to roll over the bank, which would be once a year for one or more shipments.

He swears that he bought it in 1886 for $220 from H. D. Cunningham, and then obtained a deed to himself from Cunningham and therewith a deed unregistered from the Wilson

estate to Cunningham, both of which he left with the solicitor at Ridgetown, who drew the deed to him to be registered. He says that before buying he went to Mr. Matthew Wilson, the solicitor, who told him to write to Dr. Wilson a son of William Wilson, that he did write and shewed the reply to Mr. Matthew Wilson and then bought from Cunningham. A witness named Stammers, whose veracity does not appear to be attacked, says that he was negotiating with one Henry, a partner of Cunningham, for the purchase of the property and being in Mr Matthew Wilson's office about it, was shewn by Mr Wilson a document as being a deed from the William Wilson estate to Cunningham, but was told it had not been carried out. This the witness says occurred twenty years ago, but meaning as I read it not less than 20 years ago. Mr. Wilson's inability to recall or deny the existence of such a deed has already been referred to. If it existed it may subsequently have been "carried out." That it as well as the alleged deed to the plaintiff was left unregistered, and both should be lost may be an unusual concurrence of events, but it is perhaps partly offset by the non-registration and burning of the deed of the 7/8 acre from the executors of Matthew Wilson to Barker, under which the defendants claim.

The plaintiff's assertion of ownership in and since 1886, the absence of any assertion, interference or claim by any one else, the public recognition by the assessment as owner, and the facts referred to all point to a substantial foundation for and the *bona fides* of his claim. It is said that after William Wilson's death, Sheppard Henry and Cunningham which I take to be the name of Cunningham's firm were in occupation and Sheppard once spoke of paying rent, but the witness admits having afterwards heard they had bought it. Cunningham was in occupation two years, it is said, and it may well be that he purchased. Mr. Matthew Wilson's inability to recollect such a transaction undoubtedly casts great doubt upon it, but on the other hand it would be more consistent with the inaction by the William Wilson estate for so many years.

Objection was made by the defendants to the admissibility of secondary evidence of the two missing deeds. They had been left about 1886 with the solicitor at Ridgetown. He left there about 1891—a student in his office said that his papers were left with his partner, who also removed from Ridgetown about 1893. It is evident that most of his papers were left in his office and cannot now be traced. The plaintiff has

apparently made reasonable search in Ridgetown for them—but he has offered no evidence of any enquiry as to the present residence or existence of the solicitor's partner, and has not called him or the solicitor himself to say that all these papers were in fact left in Ridgetown. The learned trial Judge was in consequence right in his view that sufficient proof of the loss of the deeds was not given to admit secondary evidence of their contents. The plaintiff has thus failed to give proof of his documentary title, but the circumstances might well warrant a jury in a finding of lost grant.

Apart, however, from such a title he has shewn a title by possession which the defendants must displace. It is clear that from 1886 till at least 1907, .no one for the estate of Wm. Wilson has been in possession or in receipt of rents or profits or obtained any acknowledgment of title. The plaintiff swears that in the spring of 1901, he rented the 2⅛ acres for fishing purposes to one Orlo Lee, who agreed by way of rent to repair the ravine road, which yearly suffered from land slides, and to cut ice for the plaintiff and furnish him with fish. Lee admits having done all this, but denies having rented. The learned trial Judge, however, accepts the evidence of the plaintiff. Lee held for three years, and then sold out his fishing business to O'Brien & Kohler with whom the plaintiff says he made a similar arrangement. This O'Brien denies though admitting knowledge that the plaintiff claimed ownership, and having gone to him before taking possession, but the learned trial Judge prefers the plaintiff's account. Reading the evidence I would also come to the conclusion that they as well as Lee held under an arrangement with the plaintiff and as his tenants. The assessment in the years 1901 to 1906, accorded therewith. In January, 1907, Poulin wished O'Brien to sign a lease at $50 per year and says that he promised to do so, and there is some corroboration as to it, but whether that be so or not, O'Brien did not sign, but having learned that in the Registry office the title stood in the name of William Wilson, he through a solicitor arranged by telephone with Mr. Matthew Wilson, the solicitor, who although the trustees were all dead took upon himself for the estate to rent the property to O'Brien at $6 per year. On 9th March, 1907, Kohler sold his interest to the defendant Eberle. On 18th March a written demand of possession for the plaintiff was served on O'Brien & Kohler, and in May, 1907, this was followed by proceedings, under

the Overholding Tenants Act against O'Brien and Kohler, in which the plaintiff alleged an agreement by the tenants to give up possession at any time. The trial took place on 4th June, 1907. The application was dismissed, but upon what ground does not appear and the right to possession at that time and existence or non-existence of a tenancy then or previously cannot be considered *res adjudicata*.

O'Brien and Eberle carried on business for one season and then O'Brien sold out to one Ward, who continued with Eberle in 1908 and 1909. In 1909 Ward sold out to the defendant Frank Rose—and later Eberle sold to the defendant Neil Rose. This action against Eberle and Frank Rose and Neil Rose was commenced on 17th November, 1909. On 24th October, 1910, Eberle and Frank Rose obtained a conveyance from Barker of the northerly 7/8 acre, and by deed of 28th December, 1910, reciting that that parcel was used in connection with the fishing Eberle conveyed his interest therein to Neil Rose.

During the currency of the oveholding tenant proceedings in 1907, the plaintiff went to Mr. Matthew Wilson to see about getting a deed from the Wm. Wilson estate, and although it was pointed out to him by Mr. Matthew Wilson that under William Wilson's will the property would not vest in his children, but in the trustees who were all dead he instructed Mr. Wilson to prepare a quit claim deed to him from the six children. This was done, the expressed consideration being $1, and the plaintiff took it to London where four of the sons executed it, the other son not being resident there and the only daughter being absent. It bears date 18th May, 1907. While it strongly corroborates the plaintiff's ownership of the land it cannot be said to convey to him the legal estate.

The possession of the land having been originally obtained by Lee and transmitted successively through Kohler and O'Brien and Ward to the defendants, and that possession being found to have been obtained by Lee and subsequently by O'Brien from Poulin as his tenants the defendants so long as they refuse to restore possession to the plaintiff are estopped from denying that in 1901 or 1904 he had title. This action being begun in 1909, even if no rent had ever been paid under those rentals the plaintiff must succeed as against these defendants. The verbal lease from Mr. Matthew Wilson in 1907, could not give them any right of possession as

he admittedly had no authority, and they only obtained it for what it was worth.

As to the ravine roadway, there is no evidence of any user by the public other than for the purpose of doing business with the owners or tenants of the property or occasionally perhaps with their permission for neighbours. There has been no dedication whatever, and the fact that in two or three years the tenants were allowed by the pathmaster to do their statute labour on the road, cannot effect their landlord's right or make it a public highway.

Objection was taken by the appellant to the admission as evidence for the plaintiff of statements by Lee since the action began, inconsistent with his testimony for the defence denying his tenancy to the plaintiff. But it does not appear that the learned Judge in any way relied upon the alleged statements and without them the weight of evidence would be against the truth of Lee's denial of tenancy.

The judgment should be affirmed and the appeal dismissed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE HODGINS, agreed.

HON. R. M. MEREDITH, C.J.C.P. JUNE 12TH, 1913.

RE EDGERLEY AND HOTRUM.

4 O. W. N. 1434.

Will — Construction — Vendor and Purchaser Application — Contingent Gift to Two Devisees "or" her Heirs—"Or" Meaning "and" — Doubtful Title not to be Forced on Purchaser — Principles Applicable.

MEREDITH, C.J.C.P., *held*, that where property was devised to two daughters, and by a subsequent clause it was provided that in case of either of the devisees dying without leaving issue, her share was to go to her survivor "or" her heirs, that a good title to the lands devised could be passed provided both devisees joined in the deed.

In re Bowman, 41 Ch. D. 525, referred to.

Motion under the Vendors and Purchasers Act by a vendor for a declaration that a certain objection to the title taken by the purchaser was not valid and that a good title had been shewn.

Shirley Denison, K.C., for the vendor.

D. L. McCarthy, K.C., for the purchaser.

HON. R. M. MEREDITH, C.J.C.P.:—If the purchaser's fears of the title have reasonable foundation in fact or law it ought not to be forced upon him.

The rule is, and always has been, that a doubtful title will not be forced upon an unwilling purchaser.

The saying that a title is either good or bad, and that the Court should determine which it is, leaving no room for a doubtful title, is blind to the facts: (1) that the Courts are fallible, and (2) that in such cases as this their judgments are not binding upon any but those who are parties to the application.

Then are the purchaser's fears well grounded; is the title in question a doubtful one?

But one point is made in the purchaser's behalf: it is said, for him, that, under the will in question, there is a possibility of issue of the devisees, yet unborn, at some time taking an interest in the land in question, which interest the parent cannot convey or bar. Is that the fact?

If the first clause of the will stood alone, each of the two devisees would take, absolutely, an undivided moiety; and so, obviously and admittedly, any fear such as the purchaser has would be quite unfounded.

But the second clause of the will unquestionably modified the effect of the first. Under it in the case of the death of either of the devisees without leaving issue, her share is to go to her survivor, or her heirs; putting it in the exact words of the will;—"I direct and it is my will that in case any of my said daughters should die without leaving lawful issue, the share of the person so dying shall go to the surviving daughter or her heirs."

The word "or" alone, of course, creates the difficulty, such as it is. If the testator meant that which she said, "surviving" daughter, then the word "and" must be substituted for the word "or." A devisee surviving must take; her issue could take only through her. If the testator did not mean "surviving" but really means "other," and had said so, a very different question would have arisen, and there might be no doubt that effect should be given to the purchaser's contention that he ought not to have the title forced upon him before it was quited, or the possible interests of unborn issue in some way bound by an adjudication in favour of the title.

But the word "surviving" cannot be rejected at the instance of the shorter and more frequently misused word "or." I have no reasonable doubt that unless one of the devisees, having issue, survives the other devisee, who has died without issue, each holds an undivided moiety under the first clause in the will; so that, the one having conveyed to the other, and the other being the vendor, can, notwithstanding anything contained in the will, convey to the purchaser a good title to the land in question: See *In re Bowman*, 41 Ch. D. 525.

SUPREME COURT OF ONTARIO.

1ST APPELLATE DIVISION. JUNE 26TH, 1913.

VICK v. TOIVONEN.

4 O. W. N. 1542.

Voluntary Society—Purposes of—Right to Divert Funds to other Purposes—Ultra Vires Resolution—Injunction—Appeal.

SUP. CT. ONT. (1st App. Div.) *held*, that assets of a voluntary society contributed for certain purposes cannot be diverted by a majority vote to purposes quite distinct and different and that therefore where a society was organized and conducted for some time as a Finnish temperance society having for one of its objects the encouragement of free speech, the society had no right to become a purely Socialistic organization from which anyone speaking in antagonism to Socialism was either expelled or debarred and to divert the assets to these new purposes.

Judgment of DIST. J., Sudbury, reversed and appeal allowed with costs.

Appeal by plaintiff from the judgment of the Judge of the District Court of Sudbury dismissing the action which he had brought on behalf of himself and the other members of the Copper Cliff Young People's Society to restrain the society from joining the Socialistic party of Canada, and from diverting the assets of the said society to the purposes of the said party.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

R. McKay, K.C., for the plaintiff, appellant.

W. T. J. Lee, for the defendants, respondents.

HON. MR. JUSTICE MACLAREN:—The plaintiff was one of the twenty-five original members of the society which was organised in February, 1903, and was an offshoot from the Finnish Christian Temperance and Fraternity Association of Copper Cliff, the members of the new society desiring to have more freedom than they had in the old society.

In their general rules they declare that while "adhering to the principle of absolute temperance, they will work for the advancement of education amongst their nationality," and that "the members of the society shall have complete freedom to express religious as well as other opinions." To realise its purpose the society was to "hold regular and special meetings, and prepare for lectures, discourses, educational courses, etc. Sub-societies for musical, singing, and sporting and other similar purposes were to be formed among the members, these to have their own rules, assented to by the society. They also provided for sick benefits for their members.

They erected a hall which was a source of revenue, and raised money by fees, bazaars, etc. The society prospered financially so that when the annual meeting for 1912, out of which the present difficulties arose, came to be held on the 7th of February, the society had their hall, worth about $3,000, completely paid for, and $1,240 in cash. The society was not incorporated but the property was held by trustees for them, the lease being to the "Trustees of Finland Temperance Hall."

The society appear to have been composed of about the same number of members until the annual meeting of February 7th, 1912, when over seventy new members were received. There was a good deal of contradictory evidence as to whether the reception of these new members was regular. The rule on the question is number 4: "Every person who is 10 years old and pledges himself to act in conformity with the rules of the society is entitled to become a member." Those under 16 are exempt from dues, and are not entitled to vote. The trial Judge held that these new members were regularly received, and I am of opinion that his decision on this point should be affirmed.

Later in the meeting, the object of the great influx of new members became apparent, when it was moved, "That the Young Peoples' Society join the Socialist Party of Canada."

After a stormy debate this was carried on a ballot vote by 74 to 24. The secretary was instructed to apply for a charter, which he did, and one was issued to them as "Local No. 31, Social-Democratic Party of Canada," the charter under which the Copper Cliff local socialist branch existed up to that time being surrendered. The Young People's Society paid $12 for the new charter.

The plaintiff objected to the above resolution on the ground that no previous notice had been given of it. The only rule of the society bearing upon this is number 25, which reads: "The rules cannot be altered, amended or changed otherwise outside of an annual or semi-annual meeting." Nothing is said about notice. The resolution, would, therefore, appear not to be invalid on this account.

There is, however, a more serious objection.

It is well settled principle of law that the property of a voluntary society like this, cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society, and the dissenting minority who adhere to these rules are entitled to have them restrained from so doing. The question is, has this been done in the present instance?

It is quite evident that there has been a complete merger of the two societies. Their funds have been combined in a common fund. The officers of the Young People's Society are the officers of the Socialist Local No. 31. The treasurer, a witness for the defence, says that to become a member of the Young People's Society, one must join the Socialist Party, and two members who wished to join the Athletic Association of the society would not be received because they would not become socialists or pay the socialist tax of 10 cents a month. The evidence is that this applies to all the subordinate societies.

The rules shew that the leading principle of the Young People's Society was that of "absolute temperance" or total abstinence, and that they were to work for the advancement of education amongst the Finnish nationality, and this they were to seek to accomplish by the means already indicated. They were also to have complete freedom to express religious as well as other opinions, something suggested, no doubt, by what they considered the narrowness of the older society from

which they had withdrawn, as stated in the preamble to the rules.

It can hardly be pretended that the proved objects and principle of the socialist party come within the scope of even the subsidiary objects of the Young People's Society. The mission of the party is stated in the charter issued to Local No. 31, in this case to be "to educate the workers of Canada to a consciousness of their class position in society; their economic servitude to the owners of capital, and to organize them into a political party, to seize the reins of government and transform all capitalistic property into the collective property of the working class."

Every applicant for membership must pledge himself to support the ticket of the party, and if he supports any other party he is expelled, or "kicked out" as one of the chief officers graphically puts it.

The original rules of the Young People's Society shew that its members, provided they kept their pledge of "absolute temperance" were to have perfect freedom to think and act on other questions as they saw fit, so long as they avoided "participation in low acts." Without expressing any opinion as to the merits of the principles of the party to which the majority have decided to affiliate the society, their compulsory and restrictive methods are at variance with the fundamental principles of freedom of opinion on which the society was founded, and those who contributed to the property and funds of the society for the proprogation of these ideas have a right to complain when it is sought to divert these funds into another channel, and to prevent them from enjoying the advantages of the society and its property, unless they submit to restrictions inconsistent with the principles on which the society was founded.

The resolution of the 7th of January, 1912, was, consequently *ultra vires* of the Young People's Society, and the defendants should be restrained from diverting the property or moneys of the society to the socialist party or depriving the members of the society of any rights or privileges unless they join or contribute to the said party.

The appeal should be allowed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, agreed.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 16TH, 1913.

WARREN, GZOWSKI & CO. v. FORST & CO.

4 O. W. N. 1284.

Broker—Balance due by Customer — Counterclaim—Alleged Conversion—Purchase on 90-day "Spread"—Tender—Few Minutes Late—Refusal—Reasonableness—Custom—Rules of Exchange—Application—Evidence.

Action by brokers, members of the Toronto Stock Exchange, against other brokers, non-members of the exchange, to recover $2,082, balance due upon certain stock alleged to have been purchased by them for defendants, which the latter refused to accept when tendered. Defendants counterclaimed for $10,000 damages for alleged conversion of the stock in question. The facts were in dispute, but appeared to shew that defendants had purchased the stock in question upon a 90-day buyer's option, called a "spread," under which the buyers had to accept delivery at the expiry of 90 days, but could call for delivery at any time within that period by giving due notice. This notice, according to the custom of the exchange and of brokers generally, is a 24-hour notice. There was dispute as to when the notice was given, but defendants claimed that the time expired at 3 o'clock on a certain day, and as plaintiffs could not deliver at that time, refused to take delivery thereafter. Plaintiffs had the stock for delivery a few minutes after 3 p.m. on the day in question (being late through the delay of a messenger), and tendered same, but defendants refused to accept it.

MIDDLETON, J., 23 O. W. R. 901; 4 O. W. N. 770, found the facts in favour of plaintiffs, that the tender was made in a reasonable time, and that the refusal of defendants to accept was unreasonable, having regard either to the nature of the transaction or the terms of the contract between the parties, as defendants had suffered no loss, the exchange being closed at 3 p.m. until the following day.

Judgment for plaintiffs for $2,082 and counterclaim, dismissed, both with costs.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment.

An appeal by the defendants from a judgment of Hon. Mr. Justice Middleton, 23 O. W. R. 901.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LEITCH.

I. F. Hellmuth, K.C., and A. McLean Macdonell, K.C., for the defendants.

F. Arnoldi, K.C., and D. D. Grierson, for the defendants.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.

HON. MR. JUSTICE LENNOX. JUNE 6TH, 1913.

CHAMBERS.

FRITZ v. JELFS AND GREEN.

4 O. W. N. 1408.

Pleading—Statement of Defence—Action for Assault and Forcible Ejectment from Premises—Defence of Police Constable—Alleged Instructions from Superior — Plaintiff Alleged to have been Drunk and Disorderly—Failure of Motion.

MASTER-IN-CHAMBERS, 24 O. W. R. 643; 4 O. W. N. 1371 in an action against a police officer for forcibly ejecting plaintiff from certain premises without authority, refused to strike out of the statement of defence an allegation that defendant was acting *bona fide* under the instructions of his superior officer and that plaintiff was at the time drunk and disorderly.

LENNOX, J., affirmed above order.

An appeal by the plaintiff from an order of the MASTER-IN-CHAMBERS, dated 29th May, 1913, 24 O. W. R. 643.

L. E. Awrey, for the plaintiff.

H. E. Rose, K.C., for the defendant Green.

HON. MR. JUSTICE LENNOX, dismissed the appeal; costs in the cause.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. JUNE 11TH, 1913.

RE EMPIRE ACCIDENT & SURETY CO. FAILL'S CASE.

4 O. W. N. 1411.

Company—Winding-up—Contributory — Evidence—Onus—Estoppel.

MEREDITH, C.J.C.P. (24 O. W. R. 208; 4 O. W. N. 926) dismissed with costs the appeal of an alleged contributory from the decision of the Official Referee, holding that he was a shareholder of the company upon the ground that the evidence shewed that the appellants had some two years after the date of allotment assumed to deal with the shares allotted to him as a shareholder, he having attempted to transfer the same and given proxies in respect thereof

SUP. CT. ONT. (2nd App. Div.) varied above order by allowing appellant credit for dividends.

An appeal by Alexander Faill from an order of HON. R. M. MEREDITH, C.J.C.P., 24 O. W. R. 208; 4 O. W. N. 926.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

R. E. H. Cassels, for the appellant.

J. O. Dromgole, for the liquidator, respondent.

THEIR LORDSHIPS dismissed the appeal with costs; adding, however, a clause to the order to the effect that the appellant should be at liberty to apply to the liquidator to have the dividends on the appellant's shares credited on the shares in respect of which he was held liable, and that in that regard the order was not to prejudice the appellant.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. MAY 14TH, 1913.

FARAH v. CAPITAL MANUFACTURING CO.

4 O. W. N. 1281.

Fraud—Lease—Subscription for Shares—Managing Director's Acts—Liability of Company—Rescission—Return of Moneys Paid.

KELLY, J., 23 O. W. R. 918, 4 O. W. N. 680, gave judgment for plaintiff for rescission of a lease to defendant company, and of an application for shares of the company, and for the return of all moneys paid, on the ground that plaintiff had been induced to enter into the transaction so set aside by the grossest misrepresentation and fraud of the company's managing director, for which the company was responsible.

Hilo Mfg. Co. v. *Williamson*, 28 T. L. R. 164, followed.

SUP. CT. ONT. (2nd App. Div.) affirmed above order.

An appeal by the defendants from a judgment of HON. MR. JUSTICE KELLY, 23 O. W. R. 918.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

J. T. White, for the defendants.

W. L. Scott, for the plaintiffs.

THEIR LORDSHIPS (V.V.), dismissed the appeal with costs.