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DIVISIONAL COURT.

AUGUST 9TH, 1912.

RE CLARKSON v. WISHART, AND TWO OTHER CASES.

3 O. W. N. 1645; O. L. R. .

Mines and Minerals—Execution—Interest in Unpatented Mining Claim—Certificate of Record Issued—Not Exigible under Execution.

DIVISIONAL COURT *held* that an interest in an unpatented mining claim for which a certificate of record had been issued under The Mines Act cannot be seized nor sold by a sheriff under a writ of execution.

Reilly v. *Doucette*, 19 O. W. R. 51; 2 O. W. N. 1053, followed.

Judgment of Mining Comr. affirmed.

Per RIDDELL, J.—"A tenancy at will is not exigible."

"The intention of the Mines Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent and consequently the holder of a certificate of record is made a tenant-at-will.

Review of authorities.

An appeal from a judgment of the Mining Commissioner in three cases, which are treated as one, the same points for decision arising in each case.

J. W. Bain, K.C., and M. L. Gordon, for appellant.

J. M. Godfrey, for respondent, Wishart.

HON. MR. JUSTICE RIDDELL:—One Wishart was the holder of an undivided interest in a mining claim for which a certificate of record had issued, but which had not been patented, nor was the patent applied for nor the purchase money paid. Judgment having been obtained against him by Clarkson, and a writ of *fi. fa.* issued the judgment creditor took proceedings before the Mining Commissioner to be declared entitled to the interest of Wishart in the mining claim (sec. 72 (2)). This application the Mining Commissioner refused.

Then the sheriff proceeded to sell, as goods, the said interest, made a deed, and the purchaser Forgie, who holds and held a miner's license, endeavoured to have this deed recorded. The Recorder refused and Forgie appealed to the Mining Commissioner who dismissed his appeal.

In the meantime Wishart had transferred his interest pursuant to the Act, and this transfer was recorded. Forgie took proceedings to have this set aside—the Mining Commissioner refused.

The execution creditor and the purchaser at the sheriff's sale, Forgie, now appeal—and the real question to be decided is whether the interest of one in the position of Wishart is exigible—or rather was exigible before the recent Act 2 Geo. Vict. ch. 8, sec. 7.

The position of a licensee under the Mining Act is rather anomalous. He may, sec. 34, prospect on certain Crown lands without being or being considered a trespasser: if he discover valuable mineral he may (sec. 35) stake out a claim in a certain specified form, but not more than three in any one division during a license year (sec. 53)—then he may (sec. 59) apply to have the claim recorded, and on certain conditions he may (sec. 64) receive a certificate of record. Up to this time he has no right, title, interest or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent (sec. 68), and he is a mere licensee of the Crown; but after the issue of the certificate he is a tenant-at-will of the Crown until he procures his patent (sec. 68).

He may transfer his interest in the claim to another licensee or may work the claim subject to the other provisions of the Act (sec. 35)—this transfer may be in form 11, but it shall be signed by the transferor, or by his agent authorized by instrument in writing" (sec. 72), and "except as in this Act otherwise expressly provided, no transfer . . affecting a mining claim or any recorded right or interest acquired under the provisions of this Act shall be entered in the record or received by a Recorder unless the same purports to be signed by the recorded holder of the claim or right or interest affected, or by his agent authorized by recorded instrument, nor shall any such instrument be recorded without an affidavit (Form 12), attached to or endorsed thereon made by a subscribing witness to the instrument. But after the issue of the certificate of record "the mining claim shall not in the absence of mistake or fraud be liable to impeachment or

forfeiture except as expressly provided by this Act" (sec. 65) though if issued in mistake or obtained by fraud "the Crown shall have power to revoke and cancel it on the application of the Crown or an officer of the Bureau of Mines or of any person interested" (sec. 66).

To the application of the execution creditor to be recorded, I think section 73 is an effective answer: and that part of the appeal should be dismissed with costs.

And the same considerations apply to the application of Forgie to have his deed from the sheriff recorded.

Whether the appeal against Myer's record is to succeed will or may depend upon both law and fact. The fact whether he had actual notice of the claim of Forgie or of that of the sheriff and execution creditor may have to be tried—but the questions of law are to present alone before the Court.

Was the interest of Wishart exigible? and if so whether as "lands" or as "goods"?

Had his position been that of a tenant at will simply and without more, there would be little if any doubt. "Every estate at will is at the will of both parties landlord and tenant; so that either of them may determine his will and quit his connection with the other at his pleasure." Blackstone's Commentaries II., p. 145, Co. Litt. 55. It is of such a character "that the death of either party determines the will." *James* v. *Dean* (1805), 11 Ves. at p. 341, per Lord Eldon, C., *Scobie* v. *Collins* (1895), 1 Q. B. 375, at p. 377 per Vaughan Williams, J., *Turner* v. *Barnes* (1862), 2 B. & S. 435 at p. 452, per Blackburn, J., *Doe Stanway* v. *Rock* (1842), 1 Car. & M. 549; S. C. 6 Jur. 266 per Patterson, J., *Doe Kemp* v. *Garner* (1843), 1 U. C. R. 39, Robinson, C.J., giving judgment of the Court. No sale or lease by the landlord determines the tenancy. *Doe* v. *Thomas,* 6 Exch. 854; *Jarman* v. *Hale* (1899), 1 Q. B. 994; *Dinsdale* v. *Iles,* 2 Levinz 88; *Hogan* v. *Hand,* 14 Moo. P. C. 310. And sale or assignment by the tenant has the same effect. Co. Lit. 57 (a), although notice must be given to the landlord before he will be bound. *Penhorn* v. *Songster* (1853), 8 Ex. 763, at pp. 772, 773 per Parke, B., giving judgment of the Court. *Carpenter* v. *Colins* (3 Jac. 1) Yelv. 73. Neither landlord (*Doe Kemp* v. *Garner*), nor tenant (*James* v. *Dean*), could bequeath such a tenancy; nor can the tenant assign to any other. Black. Com. II. 145. While leaseholds are exigible at the common law as chattels, no instance has been cited and

I can find none in which it was held that a tenancy at will was such a leasehold.

It does not seem to have been the subject of any English or Ontario decision, and consequently there is no express authority.

Cyc. Vol. 17, 954 says: "The better rule seems to be that the interest which a tenant at will has in another's real estate is not such an interest in land as can be sold in execution." Of the cases cited in support of this, *Bigelow* v. *Finch* (1851), 11 Barb. N. Y. 498; S. C. (1853), 17 Barb. N. Y. 394; *Colvin* v. *Baker* (1848), 2 Barb. N. Y. 206, are upon a statute which says in so many words "estate at will or by sufferance shall be chattel interests, but shall not be liable as such to sale in execution." See R. S., N. Y., 1852, part II. c. 1, art. 1, s. 5. *Waggoner* v. *Speck*, 3 Ohio (not Ohio State) 292 is not in point. *Wildey* v. *Barnes* (1853), 26 Miss. 35, however does decide that the interest of "a tenant at sufferance . . . is not capable of transfer or transmission" 4 Kent 117, and "the sheriff's deed could convey no more than" . . the tenant's "own deed could . . which . . could convey nothing."

Freeman on Executions, 3rd ed., s. 119, p. 495: "It is undoubtedly true as a legal proposition that a defendant having no estate in property which he can transfer has none which is subject to execution for the judgment the levy and the sale and execution ordinarily accomplish no other purpose than might have been realized by a transfer made by the defendant." Accordingly where the hiring, &c., amounts to a mere personal right or license, this is not exigible. *Reinmuller* v. *Skidmore*, 7 Lans. 16; *Williams* v. *McGrade*, 13 Minn. 174; *Kile* v. *Giebner*, 114 Pa. St. 381.

The same author sec. 177, says: "Copyhold estates and all other tenancies at will or by sufferance are not subject to execution." No authorities are quoted except those found in 17 Cyc., and already considered—the author proceeds: "The reason of this rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence he has no interest in the title nor in the possession susceptible of transfer by execution."

It seems in the only case in England which I can find at all bearing on the matter to have been taken for granted that such an estate could not be taken in execution.

In *Doe* v. *Smith* (1827), 1 Man. & Ry. 137, the defendant had entered upon land under an agreement for a lease and had thereafter paid rent to the landlord agreeably to the terms of the intended lease. The sheriff under a *fi. fa.* sold the interest of the defendant to the lessors of the plaintiff. The seizure of course did not vest the term in the sheriff, but it remained in the debtor until actual assignment. *Playfair* v. *Musgrove,* 14 M. & W. 239, and the sheriff could not put the purchaser into possession. *Taylor* v. *Cole,* 3 T. R. 292; *R.* v. *Deane,* 2 Show. 85; *Playfair* v. *Musgrove,* 14 M. & W. 239; and so he had to bring his action in ejectment. *Doe* v. *Masters,* 6 M. & S. 110. Objection was taken by the defendant that there was not such a tenancy from year to year as could be seized by the sheriff. It is quite plain that if it could be supposed that a tenancy at will might be seized the defendant's case was hopeless—and his counsel in term argued that the holding was a tenancy at will. This, however, was not acceded to by the Court. That the difference between a tenancy from year to year and a tenancy at will is the crux of this case is seen by the reference by the reporters to two cases, *Martin* v. *Lovejoy* (1826), 1 Ry. & Moo. 355, and *Hamerton* v. *Stead* (1824), 3 B. & C. 478, in both of which the question was tenancy from year to year or tenancy at will, and in the latter of which at p. 483 Littledale says: "Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement they become tenants from year to year."

When we consider that a sheriff cannot seize what he cannot sell: Com. Dig. tit. Execution (ch. 4); *Legg* v. *Evans* (1840), 6 M. & W. 36; *Universal, &c.,* v. *Gormley* (1908), 17 O. L. R. at p. 136, I think it quite clear that at the common law, a tenancy at will is not exigible.

And this particular interest has not been covered by legislation none of the amendments applying to such a chattel interest. The history of the legislation is to be found in *Universal Skirt, &c.* v. *Gormley* (1908), 17 O. L. R. at p. 136—the present Act is 1909, 9 Edw. VII. ch. 47.

Legislation extending the classes of property to which execution will attach is always construed strictly. See for ex-

ample the judgment of Armour, C.J., in Morton v. Cowan (1894), 25 O. R. 529 at pp. 534, 535.

Nor could it be considered "land" within the meaning of the Execution Act. In addition to "land" proper, sec. 32 (1) makes exigible under a *fi. fa.* lands "Any estate, right, title or interest in land which under section 8 of the Act respecting the transfer of real property may be conveyed or assigned by any person or over which he has any disposing power which he may, without the assent of any other person exercise for his own benefit . . ." The section 8 referred to i.e., that of R. S. O. 1897 ch. 119, reads: "A contingent an executory and a future interest and a possibility coupled with an interest in land . . . also a right of entry . . . may be disposed of by deed . ." A mere tenant at will has none of these.

It is argued however that the position of a holder of a certificate of location is different from that of a mere tenant-at-will and that his interest is exigible.

In *Reilly* v. *Doucette*, 19 O. W. R. 51, 2 O. W. N. 1053, the matter came up for decision, and while the report does not contain any reference to this point, I am informed by my learned brother that he held that a *fi. fa.* could not attach to this kind of property. To give effect to the argument of the appellant it would be necessary to reverse this judgment. I do not think that should be done.

In my view the appeal can be disposed of on the short ground that no transfer by the sheriff could be effective (sec. 73) as he could not be "the recorded holder of the claim." Not being able to transfer effectively he could not sell and as we have said he cannot seize what he cannot sell.

But there are other and valid reasons for this view.

Is this a chattel interest exigible under a *fi. fa.* goods? The argument is that sec. 65 makes the mining claim free from liability to impeachment or forfeiture except as expressly provided by the Act; and that consequently there is a term not liable to be put an end to by the Crown.

But the forfeiture is such a forfeiture as is contemplated by secs. 84, 85, 86, 190, 191, by reason of loss of status of licensee, or doing or leaving undone something. If the provisions of sec. 65 are inconsistent with those of sec. 68, they must give way, the later section speaking "the last intention of the makers": *Atty.-Gen.* v. *Chelsea W. Co.* (1728), Fitzg. 195; *Wood* v. *Riley* (1867), L. R. 3 C. P. 27; Maxwell on

Statutes, 3rd ed. 215, and "*leges posteriores priores contrarias abrogant*": (1614), 11 Co. R. 626; *Garnett* v. *Bradley* (1878), 3 A. C. 944 at p. 965.

There is however in my mind no inconsistency—no necessary repugnancy. The intention of the Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent and consequently makes the certificate holder a tenant-at-will. So long as the Crown does not exercise its paramount power, the certificate holder is not liable to have his position attacked. So, too, while he has the right to work the mine, this right is subject to the same limitation —and I see nothing in this inconsistent with a tenancy-at-will any more than the right to crop a farm held on the same tenancy. No doubt the minerals got out become the personal property of the exploiter, and so subject to a *fi. fa.* goods, but the same cannot be said of a right to get such minerals which right may be terminated at any moment by the lord paramount.

Nor is there any necessary inconsistency in the right given to transfer an interest to another—that at the very most would make the transferee, but a tenant-at-will in lieu of the original licensee—this is not such a transfer as is covered by the R. S. O. (1897), ch. 119, sec. 8.

It is argued however that this is an instance of profits *a prendre*; and it is argued that a *fi. fa.* lands will attach. For this is cited *McLeod* v. *Lawson* (1906), 8 O. W. R. 213 at p. 220, where it is said that the highest Lawson's right could be put at was a profit *a prendre*. There certain persons had a mining lease which by the statute was to be for a term of ten years R. S. O. 1897, ch. 36, sec. 35, and from one of them Lawson received the privilege of entering upon the location and mining ore and mineral and removing the same from the date of the agreement up to 31st August, 1905. See 7 O. W. R. at p. 521, 8 O. W. R. at p. 221. It is then urged that a profit *a prendre* is decided to be exigible by *Can. Rw. Acc. Co.* v. *Williams* (1910), 21 O. L. R. 472, a case of an oil lease like that in question in *McIntosh* v. *Leckie* (1906), 13 O. L. R. 54. But in that case there were leases for a certain fixed time, and it was on such leases that the decision of the C.J.C.P. was given. That is no authority for saying that a profit *a prendre* (so to speak) at the will of the Crown is likewise exigible.

A strong argument for the conclusion I have arrived at is the recent Statute, 2 Geo. V., sec. 7, which provides that a certified copy of a writ of execution may be filed with the Recorder and the Recorder shall enter a note of the execution "And from and after but not before such entry, the execution shall bind all the right and interest of the execution debtor in the claim, and after such entry the sheriff shall have power to sell and realize upon such right and interest in the same way as goods and chattels may be sold . . ." In this statute there is to be noted (1) it is by the entry and not before that the execution binds the debtor's interest—it has no power or effect in itself. Before this statute no entry could be made. (2) After the entry the sheriff may sell in the same way as goods and chattels not other goods and chattels.

A third point is not without interest; the sale by the sheriff may be to one who is not a licensee which cannot be done by the debtor himself. Section 35 of the Mining Act.

I am of opinion that the appeals should be dismissed with costs.

I should add that while all the many cases referred to by counsel in their very careful and exhaustive arguments (and in memo. subsequently sent in) are not cited in this judgment, I have read them all and many more.

HON. SIR GLENHOLME FALCONBRIDGE, C.J., K.B., and HON. MR. JUSTICE BRITTON, agreed in the result.

DIVISIONAL COURT.

AUGUST 27TH, 1912.

PEARSON v. ADAMS.

3 O. W. N. 1660; O. L. R. .

Covenant — Building Restrictions — Construction of — "Detached Dwelling House"—Erection of Apartment House—Judicature Act, s. 81—Authority of Previous Decision—Covenant—What Constitutes—Subsequent Purchaser—Status to Sue.

Action for injunction restraining defendants from erecting an apartment house upon certain lands on Maynard avenue, Toronto, in alleged breach of covenant, the lands being granted "to be used only as a site for a detached brick or stone dwelling house," but there being no express covenant to the same effect in the deed. Plaintiff had purchased other lands in the same street from the same grantor subject to similar restrictions, and had obtained from the grantor's legal representatives an assignment of the right to enforce the covenant.

MIDDLETON, J. (22 O. W. R. 71; 3 O. W. N. 1205), dismissed action with costs.

Robertson v. *Defoe*, 20 O. W. R. 712, followed with reluctance.

DIVISIONAL COURT (Britton, J., dissenting), allowed appeal from judgment of Middleton, J., and granted injunction as prayed, both with costs.

Robertson v. *Defoe*, *supra*, distinguished.

Per RIDDELL, J.:—"The provision in question is a covenant, not a condition subsequent or a mere nullity."

Review of authorities.

Per RIDDELL, J.:—"Plaintiff, as a subsequent purchaser, has a status to sue."

Rogers v. *Hosegood*, [1900] 2 Ch. 388; *Forby* v. *Barker*, [1903] 2 Ch. at p. 551, followed.

An appeal by the plaintiff from a decision of HON. MR. JUSTICE MIDDLETON, 22 O. W. R. 71; 3 O. W. N. 1205.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE RIDDELL.

J. H. Cooke, for the plaintiff, appellant.

J. M. Godfrey, for the defendant, respondent.

HON. MR. JUSTICE RIDDELL:—The plaintiff, an architect, purchased one of the few vacant lots on Maynard avenue —he knew there were building restrictions as to the class of building to be erected upon that street and knew by personal inspection that the houses on the street were private dwelling houses, and worth between $7,000 and $10,000 each. He himself built a house costing him about $14,000, which he

would not have done had he not believed that there were building restrictions sufficient to prevent the erection of such a building as is proposed by the defendant.

In 1888 Miss Maynard and Mrs. Atkinson, the executrices and devisees of the previous owner of the land, who had laid out Maynard avenue, sold lot (No. 32) on this avenue to one Williamson through whom the defendant claims the husband of Mrs. Atkinson joining as grantor. The deed (which is numbered 4033 reads "All and singular" (describing the land) "to be used only as a site for a detached brick or stone dwelling-house to cost at least two thousand dollars to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots. To have and to hold, etc." After the usual covenants, the following covenant by the purchaser is found:—

"And the said party of the second part hereby for himself his heirs, executors, administrators, and assigns covenants, promises, and agreed to and with the said parties of the first part their heirs and assigns, that he the said party of the second part, his heirs and assigns or any person or persons claiming or deriving title or interest in the lands hereby conveyed or any part thereof through, under or in trust for him, shall not nor will at any time or times hereafter erect or maintain or suffer or allow to be erected or maintained upon said land or any part thereof, any building for manufacturing purposes, nor carry on or permit to be carried on on said lands or any part thereof, any dangerous or noisy or offensive trade or business, which would be a nuisance in the neighbourhood."

Miss Maynard swears that it was always her father's intention that Maynard avenue should be built up with a uniformly fine class of private, detached, dwelling houses, and she had endeavoured to sell and convey the lands still unsold at his death in such a way as to carry out his wishes—and it was with a view that there should be erected on lot 32 a private, detached, dwelling house, which would be in keeping with the houses on the other and adjoining lots that the condition already recited was put in the deed.

The defendant is proposing to erect an apartment house, a six-suite apartment house, upon lot 32. The plaintiff having taken an assignment from Miss Maynard of "all and any right as grantor in the said conveyance (i.e., that to Williamson), to enforce the conditions imposed under the said conveyance," brings his action "for an injunction restraining

the defendant from erecting an apartment house on lot number 32, plan 454 . . . and thereby violating the conditions and restrictions contained in deed . . . number 4033."

A motion for an interim injunction was by consent turned into a motion for judgment by Mr. Justice Middleton, and he dismissed the action with costs.

The plaintiff now appeals.

My learned brother thought that he was bound on the authority of *Robertson* v. *Defoe* (1912), 25 O. L. R. 286; 20 O. W. R. 712, to hold that an apartment house such as the defendant intended to build is a "detached dwelling house."

With much respect, I do not think so; but think that the learned Judge was notwithstanding *Robertson* v. *Defoe,* to follow his own opinion—and hold as he would have held in the absence of authority which he considered binding upon him "that an apartment house such as the defendant contemplated erecting could not be described as a detached dwelling house. In *Robertson* v. *Defoe,* there was a covenant that every residence erected on the land should be a detached house—the question (or one of the questions) was, was the erection of a "three-suite dwelling house" a breach of this covenant? The learned Chief Justice Common Pleas held that it was not—but that is quite a different thing from saying that all apartment houses are "detached dwelling houses." "In order to ascertain the scope and effect of . . . covenants . . . regard must be had to the object which they were designed to accomplish: *Ex p. Breull, In re Bowie* (1880), 16 Ch. D. 484, and the language to be read in 'an ordinary or popular, and not in a legal and technical sense,' per Collins, L.J., *Rogers* v. *Hosegood* [1900] 2 Ch. 388, 409." *Robertson* v. *Defoe,* at p. 288—that is what James L.J., in *Hext* v. *Hill,* L. R. 7 Ch. 699, at p, 719 calls the "vernacular."

In the particular case the Chief Justice Common Pleas held that a certain apartment house was a detached house, and we are not called upon to consider whether his conclusion was what we should have arrived at. The learned Chief Justice does not, as I read the case lay down any rule of law at all—if it be considered that the decision is such as to cover the present case, with much respect, I should be unable to follow it. Within fairly wide limits the question is not one of law at all, but of fact.

Without at all saying that in some contracts, even in some statutes, under certain circumstances or at certain parts of

the English-speaking world an apartment house such as is contemplated might be called 'a detached dwelling house,' I think it plain it cannot be so called in Toronto, and in this contract. No one using language here in its ordinary and popular vernacular sense would call an apartment house "a detached dwelling house."

It is to my mind of none effect to say that a family if large enough might occupy the whole building—that might be said of the King Edward Hotel—or to say that there is just the one front door, etc., that might be said of the Alexandra or the St. George Mansions. No one would, I think, call this apartment house even a dwelling house, except one who desired to build one where only a dwelling house should be—or his architect or someone making an affidavit for him. And neither defendant, architect nor neighbour ventures to call the proposed building "a detached dwelling house."

The next question is—is the provision in question a covenant? It is either a condition or a covenant—it is not simply a mere nullity.

I do not know of any case in which the law is more clearly, concisely, and accurately laid down than *Rawson* v. *Inhab. School District* (1863), 89 Mass. (7 Allen) 125. Bigelow, C.J., delivering the judgment of the Court, says p. 127 "a deed will not be construed to create an estate on condition unless language is used which according to the rules of law *ex proprio vigore* imports a condition, or the intent of the grantor to make a conditional sale is otherwise clearly and unequivocally indicated. Conditions subsequent are not favoured in law. It it be doubtful whether a clause in a deed be a covenant or a condition, Courts of law will always incline against the latter construction . . . Co. Litt. 205b., 219b.; 4 Kent Coram (6th ed.), 129, 132: *Shep. Touch.* 133; *Merrifield* v. *Cobleigh*, 4 Cush. 178, 184. . . . The usual and proper technical words by which such an estate is granted by deed are 'provided,' 'so as.' or 'on condition.' Lord Coke says 'words of condition are *sub conditione, ita quod*, proviso.' *Mary Portington's Case*, 10 Co. 42a. Co. Litt. 203, a. b. . . . In grants from the Crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose or with a particular intention . . . But this rule is applicable only to those grants or gifts which are purely voluntary and where there is no other consideration moving the

grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a *feoffment* in fee, *ea intentione, ad effectum, ad propositum,* and the like, the estate is not conditional, but absolute, notwithstanding. Co. Litt. 204a, Shep. Touch. 123, Dyer, 138b. . . . Ordinarily the . . . non-fulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate . . . We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used where such purpose will not enure specially to the benefit of the grantor and his assigns . . . If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object is that they may if properly expressed create a confidence or trust or amount to a covenant or agreement on the part of the grantee . . . conditions subsequent are not to be favoured or raised by inference or implication."

Duke of Norfolk's Case (*Hil. Term* 3 & 4 Ph. & M.), 2 Dyer 138b. "It seems *ea inentione* do not make a condition but a confidence and trust . . ." per Saunders and Stamford Justices of B.R., p. 139 (a).

"No particular form of words is necessary to create a covenant. It is sufficient if from the construction of the whole deed it appears that the party meant to bind himself." Elphinstone, p. 409, Rule 151: "Wherever the intent of the parties can be collected out of a deed for doing or not doing a thing, covenant will lie," per Nottingham, C. *Hill* v. *Carr,* 1 Ca. Ch. 294; 2 Mod. 86; 3 Swans. 638. Lindley, J., points out in *Brooks* v. *Drysdale* (1877), 3 C. P. D. 52, at p. 60, a covenant may be "in the form of a condition, a proviso or a stipulation," and Parke B., says in *G. N. R.* v. *Harrison* (1852), 12 C. B., at p. 609: "No particular form of words is necessary to form a covenant; but wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument."

To my mind, there can be no doubt taking the deed as it stands, the words employed enable the Court to collect,

that the vendee was engaging, not to put up any building, but "a detached dwelling house;" and if that is so, although the words are more like a condition, there is a covenant.

Nor does the well-known rule *expressio unius est exclusio alterius,* or as it is otherwise stated *expressum facit cessare tacitum* prevent this from operating as a covenant.

This maxim "is not of universal application. It depends upon the intention of the parties, as it can be discovered upon the face of the instrument or upon the transaction." *Saunders* v. *Evans* (1861), 8 H. L. Ca. 721, at p. 729, per Lord Campbell. "The maxim, '*Expressio unius exclusio alterius,*' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits." *Colquhoun* v. *Brooks* (1887), 19 Q. B. D. 400, at p. 406, per Wills, J.: "I agree with what is said below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master, to follow in the construction of statutes and documents.

The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied leads to inconsistency or injustice," S. C. in appeal, I. R. 21 Q. B. D. 52, at p. 65, per Lopes, L.J.

Finally, the maxim has never been applied to a case in which a covenant would have been held to have been created by the words which it is desired to exclude the effect of and their covenants in the usual and regular form have been superadded. A covenant in the form of a condition is just as much *expressum* as one in the regular form of a covenant; and the whole of a deed must be given effect to wherever possible.

That the plaintiff who bought from the owners after the deed under which the defendant claims, can take advantage of this covenant is decided by *Rogers* v. *Hosegood,* [1900] 2 Ch. 388; *Formby* v. *Barker,* [1903] 2 Ch., at p. 551, and cases cited. This is not indeed contested, and I do not pursue the subject.

I am of opinion the judgment below should be reversed with costs of motion and appeal.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

HON. MR. JUSTICE BRITTON (*dissenting*):—The action was brought for an injunction restraining the defendant from erecting an apartment house on lot No. 22 on the east side of Maynard avenue, in Toronto. It is contended that such erection there, is in violation of a condition and restriction contained in a deed of this property from the executrices and devisees under the last will and testament of the Reverend Geo. Maynard in his lifetime, of the township of York, deceased, to John Wm. Williamson. The plaintiff claims title under Williamson. The deed to Williamson was made on the 18th day of April, 1888, and after the grant to Williamson his heirs and assigns forever of the land therein described—being the land now owned by the defendant, the words added now invoked by the plaintiff as applicable to the present case, are these—"to be used only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars; to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots." The express covenants of the grantee in that conveyance, are against the erection or maintenance on the land of any building for manufacturing, and against carrying on, or permitting to be carried on, on any part of the land, any dangerous or noisy or offensive trade or business which would be a nuisance in the neighbourhood. The defendant proposes to build an apartment house. He calls it a dwelling house, and in a sense it will be, if erected, a dwelling house. He desires to rent it to, or for six families—and the house will be fitted up to accommodate six tenants, and it will be a dwelling house for those tenants. The architectural design of the proposed house—its location, the material in its construction are all unobjectionable. The objection is simply that it is to be an apartment house—and the Court is asked, upon reading the conveyance—and taking into consideration that the street was intended to be what is commonly known as a residential street, to say that this house is not "a detached dwelling house," within the meaning of the conveyance, and the understanding of the parties, when in April, 1888, the conveyance was made. In 1888, there were very few—comparatively—apartment houses in Toronto. Since then the number has increased—and they increased in size and improved in finish and convenience. It is quite true that even with the best architectural design, they are objected to in certain localities—and when objection is because of location out of

line with other buildings on the street—or because of finish such objection may be well founded. That is not this case. This is the simple objection that an apartment house is not a detached dwelling-house. I am of opinion that an apartment house may be fairly called a dwelling house—and in this case a detached dwelling house. It appears to me that an apartment house as an objectionable house was not within the contemplation of either of the parties to the deed in question. No definition of dwelling house was given by either of the parties—as to location it was to be detached, and same distance from street; as houses on adjacent lots. It was to cost not less than $2,000. Nothing said as to maximum of size or cost. It was to be of fair architectural appearance. We are now asked to limit its size and its capacity to accommodate dwellers therein. That would be making a new conveyance—with more restriction than the grantee agreed to and more than grantors asked. "The presumption is in favour of freedom."

The case of *Campbell et al.* v. *Bainbridge*, 2 Scots L. T. R. (1911), 373, seems to me expressly in point. In that case the prohibition was of "houses or buildings of any kind other than villas or dwelling houses with offices and such enclosing walls as my said disponee may think proper to build," and it was held that the building of tenements was not prohibited. The Lord President (p. 375 said: "A tenement of dwelling houses is just a dwelling house. It is a dwelling house with more or less accommodation in it—I cannot think that, in ordinary parlance a set of flats could not be called a dwelling house—they are dwelling houses."

Having come to the conclusion as above—it is not necessary that I should discuss the other branch of the case—namely, that there was no covenant on the part of the grantee affecting the matter in question.

In my opinion the appeal should be dismissed with costs.

DIVISIONAL COURT.

AUGUST 20TH, 1912.

TRAVIS v. COATES.

3 O. W. N. 1651.

Principal and Agent—Agent's Commission on Sale of Lands—Purchaser found by Agent—Abandonment of Purchase—Subsequent Purchase through Another Agent—Causa Causans of Sale.

Action by real estate broker against owner for commission on sale of defendant's house. The house had been placed in plaintiff's hands for sale, and in September, 1911, he procured one Jerou to enter into a verbal agreement for the purchase of the property. When the time came to close the proposed sale, Jerou, for no sufficient reason, refused to complete and plaintiff notified defendant that the sale was off. Nothing further transpired until December, 1911, when Jerou purchased defendant's property for the price formerly agreed upon, but through another agent than plaintiff, to which latter agent defendant paid the usual commission. All the evidence tended to shew that Jerou had definitely abandoned, in September, 1911, all intention of purchasing.

DENTON, Co.J., gave judgment for plaintiff with costs.

DIVISIONAL COURT, *held*, that plaintiff's actions were not the *causa causans* of the sale and that, therefore, he could not recover.

Toplin v. *Barrett*, 6 T. L. R. 30, followed.

Imrie v. *Wilson*, 21 O. W. R. 964; 3 O. W. N. 1145, and other cases referred to.

Judgment of Denton, Co.J., reversed, and action dismissed, both with costs.

An appeal from a judgment (May 2nd, 1912), of HIS HONOUR JUDGE DENTON, in favour of the plaintiff in an action tried by him (April 30th), without a jury in the County Court of the county of York, brought to recover a commission on the sale of land.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE KELLY.

C. A. Moss, for the defendant, appellant.

T. N. Phelan, for the plaintiff, respondent.

HON. MR. JUSTICE RIDDELL:—The facts are not complicated, but the result of the judgment if it is to stand, would be that for the owner of real estate, as soon as he wished to sell it, the proverbial inevitable evils have become a trial and "there is nothing sure but death, taxes, and agents' fees."

I set out the facts as I understand them giving references where I add to or vary the findings of the learned trial Judge.

The defendant owned a house known as No. 116 Curzon street, in Toronto, which was heavily encumbered. Mr. Ponton a real estate agent was acting for the mortgagee, and foreclosure was imminent. The defendant then put the property into Ponton's hands as sole agent, for sale: Ponton seems to have made some attempt to sell, but did not succeed.

The plaintiff is a real estate agent, and some time in August, 1911, got into communication with one J. J. Jerou, a prospective purchaser on behalf of his wife. The plaintiff went to the defendant and asked her if she would sell her house, and if so, upon what terms, as he had a purchaser in view. The defendant then authorized the plaintiff to obtain a purchaser at the usual terms as to commission. The price first asked was $5,000. Jerou at first offered $4,200, and finally the parties came together and the defendant agreed to sell and Jerou to buy at $4,600, on terms of $3,000 cash and the balance on mortgage. Jerou was in a rented house and had to move, and one of the conditions of the sale by defendant was that he should get possession by the 15th September, 1911. Jerou signed nothing, and could not, therefore, be compelled to carry out the contract.

Jerou took the matter of getting possession into his own hands; he was attending to the matter of obtaining possession himself, and he told his solicitor that if he could not get possession by the 19th September he would not take the property. Jerou went to the property, and it was arranged that he should get possession on the 19th, and at the cost of considerable inconvenience, everything was out of the house and the property ready for him by that day (Vernon Coates' evidence). But Jerou did not take possession, he made some complaint about the title, which was absolutely groundless as appears by his own solicitor's evidence. He suggested taking the house for a month as tenant, and if he thought it was fit he would take and buy the house. The defendant saw the plaintiff about the matter, as did her son, to the son he said, "there is a flaw in the sale," to the defendant, "well the sale is off for some flaw in the title."

The solicitor for Jerou was waiting to be put in funds by Jerou and was in a position to close the sale if he had received the funds. He had been instructed not to carry out the transaction unless possession was given by the 19th September. On being called upon by the vendor's solicitor on the 19th to close the sale he replied that he had no funds and the next day Jerou telephoned him not to carry it out, not to close, he was not going on with

the deal. The defendant did not let the house to Jerou; but thinking, and justifiably thinking that the deal was off, she went again to Mr. Ponton and reappointed him, instructed him to try and sell it again as he puts it.

About December 27th Mrs. Jerou apparently without the knowledge of her husband came into Ponton's office and made inquiry about the property—she said she had seen it —and it was arranged that Ponton's representative Dunlop should call and see Mr. Jerou in the evening. He did so: and negotiations commenced Dunlop asking a rather high price. The Jerous then said they had been offered the property for $4,600: and Dunlop agreed to submit that figure— he saw the defendant, the terms were accepted and a contract signed—without much if any delay. The sale was carried out on practically the same terms as had been arranged through the plaintiff.

The plaintiff had September 27th rendered his bill to the defendant for $115, and her solicitors had the next day written an answer "You are no doubt aware that Mr. Jerou declined to purchase" and no reply was made by the plaintiff.

After the sale in December the defendant paid Ponton a commission for the sale: 15th February, 1912, the plaintiff issued his writ: the trial Judge has given him judgment for $115 and costs, and the defendant now appeals.

The trial Judge finds that Jerou never abandoned his intention to buy—that may be so; I doubt it but certainly he gave his solicitor to understand that the sale was off, the plaintiff gave the defendant to understand that the sale was off. No intimation was given to anyone by Jerou that the sale was not off—and if he had still the intention to buy he carried that around in his head without making any external or visible manifestation of its existence, and "*de non apparentibus et de non existentibus eadem est ratio.*" The plaintiff cannot set up that the sale was not off, that Jerou had not refused to purchase, he told the defendant that the sale was off and the defendant acted accordingly.

It cannot in any event I think be considered that the intention if any which Jerou had in reference to this property was to buy on the basis of the arrangement made through the plaintiff, but to enter into new negotiations and buy if he could make satisfactory terms.

It is to my mind in every respect as though he had no intention in the matter: but had simply refused to carry out his purchase.

So far as the facts before December go there can be no doubt that the plaintiff could not recover: But it is claimed that the subsequent sale through Ponton to the same purchaser entitled the plaintiff to his commission. It may be at once admitted that the sale to Jerou would probably not have been effected had it not been for the plaintiff's retainer by the defendant and his efforts. No doubt the plaintiff's services were a *causa sine qua non* (to use the time honoured terminology); but that is not enough—the services must be a *causa causans*.

In *Imrie* v. *Wilson* (1912), 21 O. W. R. 964; 3 O. W. N. 1145, the defendant agreed to pay the plaintiff a commission if he sold certain property: the plaintiff introduced K. to the owner as a purchaser: K. was unable to purchase, but agreed with the defendant that he should try to sell for him as an agent and did so. Mr. Justice Clute held that the plaintiff could not succeed and this was sustained by the Divisional Court (June 11th, 1912), "No doubt" says my learned brother "the introduction by Stinson (one of the plaintiffs) of K. to Nelson was the cause without which the sale would not have been effected: but was it the *causa causans*, or was there a new and distinct act which intervened which really brought about the sale; . . It required a new act to procure a purchaser: in short the plaintiffs' acts were not the effective cause of the sale which actually took place. The most that can be said is that the introduction was merely a *causa sine qua non*."

Not wholly unlike and really the converse of that case is *Barnett* v. *Isaacson* (1888), 4 T. L. R. 645—the plaintiff was to introduce to the defendant a purchaser of the business—he introduced one C. an accountant to find a purchaser. C. did not find a purchaser but bought on his own account. The plaintiff sued but was held not entitled to recover.

The test is "was the relation of buyer and seller really brought about by the act however trifling of the agent?" if so "he is entitled to his commission although the actual sale has not been brought about by him." *Green* v. *Bartlett* (1863), 14 C. B. N. S. 681. And accordingly in *Sleere* v. *Smith* (1885), 2 T. L. R. 131, where an agent took one H. to the owner and introduced him, although H. did not then make any offer but took a house in the same street, still when H. ultimately did buy from the owner, the agent was held by Field, J., entitled to his commission. That right is not lost even by the discharge of the agent, and with-

drawal of the lands from his hands before the sale, if his acts before this were the efficient cause of the sale.

Wilkinson v. *Martin* (1837), 8 C. & P. 1, and see per Lord Coleridge, C.J., in *Lumley* v. *Nicholson* (1885), 2 T. L. R. 118 at p. 119.

But if notwithstanding an original introduction by the agent his act is not the real and efficient cause of the sale, he cannot recover. In *Gillow* v. *Aberdare* (1892), 9 T. L. R. 12, the agent was to let a house or sell the ground lease. He did procure a lessee in one T. for same, but T. refused to deal with him for the ground lease and dealt with another agent. It was held by Hawkins, J., 8 T. L. R. 676, that he could not recover and this was sustained by the Court of Appeal. Lord Esher, M.P., said, 9 T. L. R. 12: 'The sale . . . had not been brought about by the introduction of the plaintiffs with whom . . T. . . had refused to have any dealings but had been the result of independent action on his part in going to another firm of house agents . . .' In this case T. had said to the plaintiffs in language not unlike that of Jerou that if he liked it he might buy it.

A case more like the present is *Taplin* v. *Barrett* (1889), 6 T. L. R. 30. The defendant employed the plaintiffs a firm of house agents to sell a house on commission. The plaintiffs introduced S. as a possible buyer, but he made certain stipulations and did not complete the purchase. Then the defendant put the property in the hands of a firm of auctioneers who put it up for sale by auction and S. bought at the auction sale. The Co. Court Judge held that the plaintiffs could not recover and the Divisional Court sustained that view saying per Wills, J., "that it was doubtful whether but for the auction S. would have bought at all" and holding that the only right of action the plaintiffs had was for revocation of authority.

Mathew, J., points out that the contention of the plaintiffs would render the defendant liable for two commissions, one to the plaintiffs and the other to the auctioneers.

Nothing turned in that case on the fact that the agents employed after the failure of S. to complete his purchase were auctioneers—and I am unable to distinguish the two cases.

The proposed sale to Jerou fell through, the owner of the property put the property into the hands of another agent, the previous agent did nothing more and the new agents effected a sale. The "intention" of Jerou to buy

the property some day if it suited him—if that intention did in fact exist—probably shared his mind with the "intention" to buy any other property if it suited him—and were it even less vague than it is, is no more effective than the expressed intention of T. in the case of *Gillow* v. *Aberdare*. Nor is the fact that in the present case the purchaser went herself to the new agent of any more significance than that T. went to the new agent in that case, *Wilkinson* v. *Alston* (1879), 41 L. T. 394; 48 L. J. Q. B. 733, has been said to lay down a different principle, and it was much relied upon in the argument in the Divisional Court on the appeal in *Imrie* v. *Wilson*. But I do not think that can be successfully contended. In that case the plaintiff agreed that if the defendant should introduce a person who would become the purchaser of a ship of the defendants, he should receive a commission. In February he introduced one T. (who had been recommended to buy the ship by one W.) and the plaintiff and defendant agreed if T. did buy, the commission should be divided between the plaintiff and W. No sale was effected, the negotiation with T. went off. In March W. mentioned the ship to one Wise to the knowledge of the defendant and wrote the plaintiff to see Wise. Nothing was done by the plaintiffs. In May Wise acting as broker wrote direct to the defendant and introduced a principal Learoyd for whom he was agent, and who became purchaser. Plaintiff thereupon claimed his commission. Lush, J., thought that Wise was agent for the defendant, and that he would undoubtedly be entitled to commission from the defendant—and that "Wilkinson's information to Wise must be taken to have been only the *causa causans* (a plain misprint for *causa sine qua non*), and that is not enough"—also that "it cannot be said . . under these circumstances that Wilkinson by his agent procured Learoyd to become the buyer. The chain of continuity was broken." He accordingly dismissed the action. If the view of Lush, J., that Wise was the agent of the vendor, had been correct, this case would much resemble *Imrie* v. *Wilson*, already referred to, but it was held by the Court of Appeal that this view was not sound.

The Court of Appeal held that the position of Wise was agent for the buyer not agent for the vendor, that it was quite the same as though Wise were buying for himself. (Indeed Bramwell, J., thought Wise was buying for himself) that consequently there was no breach of continuity, Wise having been introduced by the plaintiff and W., and

that a sale resulted from this introduction. The appeal was allowed.

I can find nothing in the case when the facts are examined at all adverse to the view I take in the present case.

I think the appeal should be allowed and the action dismissed both with costs.

HON. SIR WM. MEREDITH, C.J.C.P. and HON. MR. JUSTICE KELLY, agreed.

DIVISIONAL COURT.

AUGUST 20TH, 1912.

RENAUD v. THIBERT.

3 O. W. N. 1649; O. L. R. .

Division Courts—Increased Jurisdiction under 10 Edw. VII., c. 32, s. 62—Ascertainment of Amount—Proof of Documents, etc.

DIVISIONAL COURT *held*, that s. 62 of Division Courts Act, 10 Edw. VII., c. 32, providing that an amount is not to be deemed to be ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of the document and proof of the signature to it, has reference to the proof of defendant's liability and not of plaintiff's title, and, therefore, where a plaintiff found it necessary to give extrinsic evidence to prove that an assignment by him of a mortgage was by way of security only though absolute in form, this circumstance did not oust the jurisdiction of the Division Court.

An appeal from a judgment of the Junior Judge of the County Court of the county of Essex in favour of the plaintiff for $260, in a Division Court action, upon a covenant in a mortgage made by defendant to plaintiff.

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

J. H. Rodd, for the defendant, appellant.

F. D. Davis, for the plaintiff, respondent.

HON. MR. JUSTICE TEETZEL:—The mortgage had been assigned by the plaintiff to one Meloche, by an assignment absolute in form, but which, as the learned Judge found, was not intended to be absolute but a collateral security only for an advance by Meloche, who was made a defendant in the action.

At the trial plaintiff produced a document purporting to be a reassignment of the mortgage from Meloche to

the plaintiff, but failed to prove that it was executed by Meloche or under his authority.

The only question upon which judgment was reserved at the argument was whether the learned Judge had jurisdiction to try the action under section 62 of The Division Courts Act, 10 Edw. VII., ch. 32.

Jurisdiction of the Division Court was first extended to claims for $200 by 43 Vict., ch. 8, sec. 2, and the extended jurisdiction was made to embrace "All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

This provision was amended by 56 Vict. ch. 15, sec. 2, by making a provision that interest accumulated upon any such claim should not be included in determining the question of jurisdiction, but that the same might be recovered in addition to the claim, notwithstanding that the interest and the amount of the claim so ascertained together exceed two hundred dollars.

There were many conflicting decisions as to the principle of construction of the word "ascertained" in the Act conferring the extended jurisdiction, and the leading ones are reviewed in *Kreutziger* v. *Brox* (1900), 32 O. R. 418, where the learned Chancellor, in delivering the judgment of the Divisional Court, lays down the following as the proper construction to be applied:

"The amount of the claim is ascertained by the signature of the defendant if it is thereby made certain, i.e., if upon proof of the signature the liability is established. If other and extrinsic evidence is required, such as to shew completion of the contract—in the case of a signed building contract to pay so much for a house—the stipulated price is not ascertained by the mere evidence of contract. The jurisdiction of the Division Court is extended to cases where the balance claimed on such an ascertained amount does not exceed $200, but it was not intended in such cases to throw open in the lower forum disputed matters as to the proper completion of the contract—the due fulfilment of all conditions and the like."

By 4 Edw. VII. ch. 12, sec. 1, the Act was amended by adding the following section:

"72a. The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the

defendant or of the person whom, as executor or administrator, the defendant represents within the meaning of clause (d) of sub-section 1 of section 72, when in order to establish the claim of the plaintiff or the amount which he is entitled to recover it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The effect of this section is, apparently to declare the law to be as laid down in *Kreutziger* v. *Brox*, but it clearly, I think, was not intended to narrow the jurisdiction already conferred.

In section 62 of the Revised Division Courts Act, supra, the language of the amendment of 1904 is altered by omitting the words "in order to establish the claim of the plaintiff or the amount which he is entitled to recover" and it now reads:

"An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

The presence in the statute of 1904 of the words omitted in 1910 led to the suggestion in the argument of *Slater* v. *Laboree* (1905), 9 O. L. R. 545, that the presence of those words was intended to limit the jurisdiction of the Division Court in a case of that kind; but in that case, which was an action upon a promissory note, it was held that where the production of the note and the protest and the proof of the signature would *prima facie* entitle the plaintiff to recover, the case is brought within the jurisdiction of the Division Court, and at p. 547, the judgment proceeds:

"It is not for us to determine whether upon proof of the endorsement without more the plaintiff would be entitled to recover. If the plaintiff is not entitled to recover without more, then if it should become necessary for the learned Judge to enter upon further enquiry and to take evidence for the purpose of shewing some ground for making the defendant liable, then in all probability his jurisdiction would be ousted and he would be bound to stop the further trial of the action; but upon the first question whether upon the face of the instrument the defendant is liable, that is for the Division Court, and not for us," and further on: "The order must be framed so as to make it clear that we are not directing a trial if extrinsic evidence is necessary in order to make the defendant liable."

Now in this case it is plain that upon the production of the mortgage signed by the defendant and the time for payment thereunder having passed, the defendant is *prima facie* liable to the owner of the mortgage, and it would not be necessary for the plaintiff to give other or extrinsic evidence beyond the production of the mortgage and the proof of the defendant's signature in order that the amount of such liability might be said to be "ascertained."

The question in this case is, does the fact that in order to establish the plaintiff's right to sue in his own name on the covenant he must establish by evidence other than documentary that the assignment was only by way of collateral security oust the jurisdiction of the Division Court? I am of opinion that it does not.

It seems to me that in making the provision as to proof, it is the ascertainment of the defendant's liability under a document and the amount of such liability that the legislature had in view, and not the matter of plaintiff's interest in or right to the document by which the same are ascertained.

In every action upon a document if the plaintiff does not appear on the face of it as the person entitled he must establish his title by other evidence which may not always be documentary. The holder of a note in an action against the payee as endorser would have to prove by oral evidence the facts of presentment and dishonour in the absence of a notarial certificate of those facts. A surviving member of a partnership suing in his own name upon a note or other written agreement for payment of money would have to prove the death of the other members of the firm to shew his title by operation of law.

Besides these instances and cases like the one now being considered, it may often happen that a plaintiff cannot establish his title to the document sued on by documentary evidence only. To hold that he cannot for that reason avail himself of the increased jurisdiction of the Division Court notwithstanding that he is able to ascertain and establish the defendant's liability, and the amount thereof under the document by its production and proof of his signature would be to make the statute a dead letter in many cases.

Once the production of the document and proof of its execution establish the liability of the defendant to the owner thereof and ascertain the amount of such liability without the necessity of other and extrinsic evidence to

establish either, I think there is nothing in the statute or in any of the cases decided upon it which suggests that evidence to establish plaintiff's title would be "other and extrinsic evidence" in contemplation of the statute. The appeal should be dismissed with costs.

KELLY, J.:—The question for determination in this appeal is whether, under the circumstances, there was jurisdiction, under section 62 of The Division Courts Act, 10 Edw. VII., ch. 32, to try the action in the Division Court.

By that section jurisdiction is given to Division Courts in an action for the recovery of a debt or money demand, where the amount claimed exclusive of interest . . does not exceed $200, and the amount claimed is:

(i) Ascertained by the signature of the defendant, or of the person whom as executor or administrator he represents, or

(ii) The balance of an amount not exceeding $200 which is so ascertained, etc.

The section also declares that an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of the document and proof of the signature to it.

This, in my view, has reference to cases where the document being produced and the signature proven, something further is necessary to shew the liability of the defendant thereunder—such for instance as proving the fulfilment of a condition on which the document was to take effect—and does not apply to evidence necessary to establish the plaintiff's status with reference to the document.

If the document be produced, and if the signature of the defendant or of the person whom as executor or administrator he represents be proven, and if there be no further evidence necessary to shew the completion of the transaction, so far as the person signing it is concerned, then there is an ascertainment within the meaning and intention of section 62.

Giving this interpretation to that section, I am of opinion that the appellant cannot succeed, and that the appeal should therefore be dismissed with costs.

HON. SIR WM. MEREDITH, C.J.C.P.:—I agree in the conclusion to which my learned brothers have come.

HON. MR. JUSTICE BRITTON. AUGUST 23RD, 1912.

GALBRAITH v. McDOUGALL.

McDOUGALL v. GALBRAITH.

3 O. W. N. 1655.

Partnership—Dealing in Land—Agreement—Advances—Division of Profits—Expenses.

Action for a declaration that plaintiff was entitled to one-quarter of the profits arising from the sales of parts of lot 12, 2nd concession of the township of Whitney, and to an undivided quarter interest in the part not sold, and for an account under a certain partnership agreement between plaintiff and defendant and cross-action by defendant consolidated by order of the Master-in-Chambers for payment by plaintiff of one-half the cost of surveying, developing, marketing and selling the said lands.

BRITTON, J., gave declarations asked for by plaintiff, with a reference to the Local Master at Cornwall to take accounts.

Costs of both actions down to and including trial to plaintiff.

Costs of reference and further directions reserved.

Consolidated action tried at Cornwall without a jury.

G. I. Gogo, for Galbraith.

F. E. Hodgins, K.C., and T. E. Godson, K.C., for McDougall.

HON. MR. JUSTICE BRITTON:—The first of these actions is for a declaration, that the plaintiff, Galbraith, is entitled to one quarter of the profits arising from the sale of any part of Lot No. 12 in the second concession of the township of Whitney in the District of Sudbury, and to an undivided quarter of the part of said lot, not sold; and for an account, on the basis of a partnership between the plaintiff and defendant as to this land, in which partnership the plaintiff claims to be entitled to one-fourth and the defendant three-quarters of the net profits, arising out of such partnership.

In the second action, McDougall, the plaintiff therein, claims that Galbraith can only be entitled to anything out of the proceeds of sales of town-site lots, part of said lot 12, upon payment to him, McDougall, of one-half of all the expenses of surveying, developing, marketing and selling said lots—McDougall also asked to have a caution, registered by Galbraith, released.

By an order of the Master in Chambers made on the second day of May, 1912, these actions were consolidated. The following are the facts. McDougall was the owner of said lot 12 in the second concession of Whitney, containing 160 acres. This lot was known as, and called, the McDougall Veteran claim. On the 11th February, 1911, the parties to this action made an agreement in writing, by which

McDougall purported to transfer to Galbraith, one-fourth interest in said 160 acres. This transfer was to cover all surface, mineral, and other rights in the property. Galbraith was to provide funds for surveying and laying out the property into town lots, and other incidental expenses, preparatory to offering the lots for sale. These expenses were to be equally shared by each when property disposed of, or when a sufficient sum would be realized.

This agreement was subject only to this, that the Temiskaming and Northern Ontario Railway Commission would locate a station upon some part of the said 160 acres. In due course the station was located as expected. The parties then apparently thought it necessary to have a more formal agreement. It was not suggested by either party to this litigation or by anyone that there was need for further negotiation—or that any new terms would be introduced. It was simply that an agreement should be drawn up by a lawyer. On the 28th March, 1911, the more formal agreement was prepared by a solicitor and executed by the parties. The agreement recites the facts—there McDougall agreed to advance from time to time as might be necessary, or to become liable for one-half of all the expenses incurred through the expedient (sic) laying out of the said lots or any part thereof into a town-site the survey, filing a plan and advertisement of the same—and of the costs and expenses of clearing, grading, and laying out the streets of timber from the same lot and all other necessary and expedient expenses or outlays in connection with the development of the said town site, and the exploration of all mineral rights thereon.

Galbraith was to devote a reasonable amount of his time and attention to the affairs of the said town site and to assist in the laying out and improvement of the same, and the sale thereof.

In consideration of this, McDougall was to give to Galbraith an undivided one-fourth share or interest in the proceeds, arising from the sale of the said town site, in lots, or otherwise the timber and mining rights thereon and in all profits or benefits arising therefrom in any respect whatever.

Then it was provided that proper books of account should be kept of the receipts and expenditures in connection with the said townsite, and an audit of the same shall be made at the expiration of every six months or oftener; a division of the profits was to be made every

six months, until the whole of the interests of the parties are disposed of.

According to the agreement it was the duty of McDougall to devote his time and attention to the requirement of the said town-site, and act in conjunction with Galbraith, etc.

This venture seemed to prosper and it ripened fast. McDougall did most of the work and made by far the greater part of all necessary expenditure. Money seems to have come in from sales of property so that for that reason or some other, Galbraith was not called upon to furnish money in terms of the agreement; when he was called upon, it was only because of the interpretation McDougall placed upon the agreement, viz., that Galbraith was to pay as a certain sum one-half of the total expenses for one-fourth of the gross proceeds of sales of the townsite property. I interpret these agreements as, virtually, one agreement and as particularly set out in the writing dated the 28th March, 1911, and the agreement is to all intents and purposes a partnership agreement.

The defendant, McDougall, was the owner of this property which promised to become and which actually became very valuable, as townsite property. He approached the plaintiff, and made the offer of a quarter interest in it, if plaintiff would agree to finance the undertaking, that is to say—if plaintiff would agree to advance and pay from time to time, as might become necessary, or if the plaintiff would become liable for one-half of all expenses. When the advances were being made, and money was being expended for purposes mentioned, the plaintiff was not asked to furnish money. Unquestionably he was liable. If advances were obtained from outside parties, the plaintiff was liable with defendant to such parties. If defendant furnished the money, the plaintiff is liable to the defendant for one-half upon the settlement between plaintiff and defendant. The clauses in the agreement by which McDougall agrees to give Galbraith not only the one-quarter interest in the proceeds arising from the sale of the townsites, but in all profits or benefits arising therefrom in any respect whatever, and that the division of profits, if any, should be made every six months seem to me conclusive in Galbraith's favour as to the interpretation of the contract. If the plaintiff was to get an undivided quarter interest in the land, it necessarily follows, in the absence of any agreement to the contrary, that he would be entitled to one-quarter of the profits.

Books of account were to be kept to ascertain what profits were made. I think the plaintiff's contention as to how the profits are to be arrived at is correct. According to defendant's contention it might so happen that although defendant would make a large amount of money, in the transaction, the plaintiff would be a loser. For example suppose gross proceeds of sales to be $10,000:

Plaintiff's one-quarter would be $2,500
Defendant's expenses 5,000

If plaintiff was obliged to pay one-half of these his one-quarter would be absorbed. That might go on from time to time and plaintiff get nothing. That could not have been the intention of the parties. No such result was contemplated—and the agreement will not bear that construction.

The argument of counsel for defendant is that if the agreement was that Galbraith should pay $6,000, and be entitled to one-quarter interest in the proceeds, no question could arise, as he would be liable for the $6,000 as the purchase price of his interest, irrespective of what that interest amounted to. That is quite true, but the agreement did not end where counsel leaves it. If the agreement ended with payment—it would make no difference whether payment was of a definite sum—say $6,000, or a sum to be ascertained as half of the expenses McDougall should incur in doing something.

The first agreement, the one of 11th February, 1911, was not as I have already stated, merely for the transfer to Galbraith of one-fourth the lot in question "with its surface, mineral and other rights," but it is a conditional agreement—the condition being that "the Temiskaming and Northern Ontario Rw. Commission, locating their station on said lot." This shews that a speculation was being entered upon. Then the agreement goes on to say that Galbraith should provide the funds for surveying, etc., etc., preparatory to offering said property for sale. These expenses to be equally shared by each, when the property is disposed of, or when a sufficient sum is realized. The plain meaning of that is that if by a sale of lots a sufficient sum is realized to pay expenses, expenses are to be paid out of the money so realized. Then coming to the more full and complete agreement of the 28th March, 1911, the recitals are full and consistent with what plaintiff contends was his real position in this transaction.

Galbraith agreed to advance, or become liable for one-half of all expenses incurred, etc., as above stated. The venture became a joint one—perhaps through the gener-

osity of defendant—but it is too late now to make a new agreement.

I do not appreciate to the extent urged, the expert evidence of accountant offered to prove the necessity under the agreement in question, of setting aside some of the money to establish a capital account.

I find that there was and is a partnership between the plaintiff and defendant in reference to the land mentioned, and the dealings with it, and there will be a declaration to that effect.

The plaintiff will be entitled to one-fourth of the profits arising from the sale of such part or parts of said land as have been sold, or arising in any way whatever out of the dealings by the defendant with said lands since the making of the agrement, and further that the plaintiff is entitled to an undivided one-fourth of the unsold part of said land. As to most of the items it was stated at the time, that there would be no dispute—once the principle is determined as to the mode of taking the account—so there will not be a necessity for much, if any, oral evidence—and the reference may well be to the Local Master at Cornwall.

There was not in my opinion, any necessity for the second action. All the questions raised therein could well be disposed of in the first action.

As this second action has been consolidated with the first, and so cannot now be further proceeded with as an independent action, and as the defendant McDougall must bring forward whatever he has by way of account or set-off or counterclaim, I do not formally dismiss the second action, and if any formal disposition of it, other than above, be necessary—that can be made after the report, and on further directions. There will be judgment for the plaintiff directing a reference to the Local Master at Cornwall—to take the accounts and report. The judgment will be with costs to the plaintiff, Galbraith, against McDougall in both actions down to and including trial. Costs of reference and further directions reserved.

The appointment of a Receiver was asked for. That is not necessary at present. The plaintiff may at his own risk, as to costs, if he deems it necessary, apply later on. The accounts will be taken as partnership accounts, and not only the items brought forward by the plaintiff, Galbraith, but also those asked for by the defendant McDougall in his second action, and those brought forward and claimed by him in the reference.

Thirty days' stay.