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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 10TH, 1919.

MASSON v. SHAW.

Vendor and Purchaser—Agreement for Sale of Land—Assignment of another Agreement—Exchange—Misrepresentation as to Value of Security—Fraud—Finding of Trial Judge—Right to Rescind—Inability to Make Restitution in Integrum—Estoppel—Judgment and Final Order of Foreclosure in Foreign Action—Bar to Present Action—Delay to Allow of Proceedings to Set aside Judgment and Order—Leave to Apply.

Appeal by the plaintiff from the judgment of LATCHFORD, J., 15 O.W.N. 438.

The appeal was heard by MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and MIDDLETON, J.

M. L. Gordon, for the appellant.

H. J. Scott, K.C., for the defendant, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought to enforce the specific performance of an agreement entered into between the parties on the 8th May, 1913, by which the appellant agreed with the respondent to assign to him the money due by one Easton to the appellant in respect of the purchase by Easton of lots 5 and 6, block A3, plan A 955, Saskatoon, and to pay to the respondent, as was alleged in the statement of claim, $6,200, in consideration of a release of the money due by the appellant to the respondent under an agreement between one Blain and the appellant for the sale by the latter of lot 18, block 176, plan 3, Saskatoon, which had been assigned to the respondent, and a transfer to him of that lot.

After setting out the facts, the learned Chief Justice said that it was clear, upon the correspondence, that, subject to what should

be said as to the fraud that the trial Judge had found and to the effect of the proceedings in the Supreme Court of Saskatchewan, a binding agreement was entered into between the parties that, upon payment by the appellant to the respondent of $6,000 and the appellant assigning to the respondent the Easton agreement and covenanting to make the payments that were to be made on it if Easton made default, the appellant should be released from his liability on the Blain agreement and that lot 18 should be transferred to the appellant.

The trial Judge found that a fraud was committed by the appellant in representing that the sale had been made to Easton on the 30th April, 1913, when in fact it had been made on the previous 30th November. In that finding the learned Chief Justice agreed, and he also agreed that it was a material misrepresentation entitling the respondent to rescind. McCallum (an agent of the respondent) was, no doubt, cognizant of and indeed a party to the fraud, but that fact did not help the appellant: Cameron v. Hutchinson (1869), 16 Gr. 526.

The respondent had no knowledge of the true nature of the transaction between the appellant and Easton until it was divulged by the appellant in giving his testimony at the trial.

The defence of fraud, the fraud being then unknown to the respondent, was not set up in the statement of defence, and no amendment and no application for leave to amend was made at the trial.

It was argued for the appellant that the respondent was not in a position to rescind; that to entitle him to rescind he must offer to return the money he had received under the terms of the agreement and to reconvey the Easton lots and agreement to the appellant; that he had offered to do neither of these things, but insisted on the right to retain the money paid and apply it on the overdue instalment on the Blain agreement; and that he could not reconvey the Easton lots, because they had been sold for taxes.

The inability of the respondent to restore to the appellant the lots which were transferred to him, and his insistence on retaining the money that was paid to him under the provisions of the agreement, are a fatal barrier against his right to rescind. It is too late to rescind if, either from his own act or from misfortune, it is impossible for him to make restitution in integrum.

The Saskatchewan judgment was pronounced in an action in which the respondent is plaintiff and the appellant and Blain are defendants, and by it the appellant was ordered to pay into Court on or before the 27th July, 1916, $20,748.79, the amount found to have been due on the 10th October, 1914, for principal and interest on the Blain agreement, with interest from that date, and

$2,405.98, the amount paid by the respondent for taxes on lot 18, with interest from the 26th November, 1915, and the costs of the action, and it was adjudged that, in default of payment, the agreement be rescinded, and that all moneys paid under it to the respondent be forfeited, and the appellant stand foreclosed of all interest in the agreement or the assignment of it to him. Default having been made, a final order was obtained on the 22nd November, 1916, foreclosing the defendants. That order was pleaded as an estoppel in bar of this action; and, as long as the judgment and order stand, they are a complete answer to the appellant's claim to be released from the obligations of the Blain agreement and to have lot 18 transferred to him.

If proceedings have been taken to set aside the judgment and order, as was stated at the hearing of this appeal, and have resulted adversely to the appellant, his appeal should be dismissed with costs; but, if they have not yet been taken, or, having been taken, are still pending, the appeal should be retained for six months, and if, at the end of that period, the judgment and order have not been set aside, the appeal should stand dismissed with costs, but liberty should be reserved to the appellant, if occasion arises, to apply for an extension of the six months.

MACLAREN and MAGEE, JJ.A., agreed with the Chief Justice.

MIDDLETON, J., dissented, giving reasons in writing. He was of opinion that, although there could not be rescission, there ought to be a recovery, for the damage resulting from the fraud, of the amount of the debt, less the actual value of the security transferred; and, as, on the evidence, the security was worthless, the full amount of the debt should be awarded as damages.

Order as stated by the Chief Justice.

HIGH COURT DIVISION.

KELLY, J. JULY 9TH, 1919

RE RICHER.

Will—Construction—Devise and Bequest to Widow—Use of Estate for Lifetime—Devise and Bequest to Children of what "will Remain Unspent"—Absolute Interest of Widow—Uncertainty of Interest of Children—Trust—Evidence.

Motion by the widow of Honore Richer, deceased, for an order determining a question as to the true interpretation of the will of the deceased.

The motion was heard in the Weekly Court, Ottawa.

E. R. E. Chevrier, for the widow.

Henri St. Jacques, for the administrators with the will annexed of the estate of the testator and for the testator's children.

KELLY, J., in a written judgment, said that what was to be determined was whether the testator's widow took, under the will, an absolute interest in his estate or only a life-interest. The testator gave, devised, and bequeathed to his wife "the free use of all my estate both real and personal for her lifetime."

Had this been the only reference to the interest given her, doubt would not have arisen; but this provision in her favour was immediately followed by this other: "After my said wife's decease the balance of my said estate that will remain unspent, if any, I give, devise, and bequeath to my four children, to be divided among them in equal shares."

The testator evidently contemplated his wife "using" and "spending" the estate at her discretion and without restriction as to amount or the purposes for which she was empowered to use or apply it. Reading the two provisions together, the true construction seemed to be that, given this unqualified right to use and spend the estate, the interest she then acquired was not a mere life-interest or a life-interest with power of appointment over the corpus, but an unrestricted and absolute interest. What the four children would, on their mother's death, take, was, in view of the above disposition in her favour, too uncertain to create an enforceable trust in their favour.

The learned Judge said that there were many reported decisions on the construction of wills, in language nearly but not altogether similar to that employed here; but he could find none binding him to an opinion different from that expressed.

On the argument an affidavit of the person who, on the testator's instructions, drew his will, was offered in evidence to shew what was his intention. That evidence was not admissible and was not accepted. The question was not what the testator intended, but what his intention, expressed in and to be derived from the will itself, was.

Order accordingly; costs of the motion out of the estate.

MASTEN, J. JULY 9TH, 1919.

*ADAMS v. KEERS.

Mortgage—Foreclosure—Execution Creditor of one of three Owners of Equity of Redemption—Subsequent Incumbrancer—Payment of Mortgagee's Claim and Redemption of Mortgage—Consolidation of Securities—Rights of Owners of Equity—Separate Rights according to Shares or Interests—Marshalling Securities—Appeal from Master's Report.

Appeal by the Toronto Railway Company, made a defendant in the Master's office, from the report of the Master in Ordinary in an action for foreclosure.

The appeal was heard in the Weekly Court, Toronto.
H. A. Harrison, for the appellant company.
J. W. Payne, for the defendants Keers and Ferguson.
J. R. Roaf, for the defendant Gray.

MASTEN, J., in a written judgment, said that the appellant company was an execution creditor of the defendant Keers; its claim had been allowed in the Master's office, and it had, as a subsequent incumbrancer, redeemed by paying what was due upon the plaintiff's mortgage. The defendants Keers, Ferguson, and Gray (the respondents) were owners (presumably as tenants in common, but in what proportions did not adequately appear) of the equity of redemption. The interest of each of the respondents was subject to the plaintiff's mortgage. The interest of Keers was, but the interests of Ferguson and Gray were not, subject to the execution of the appellant company.

The appellant company contended that the Master should have apportioned the amount of the plaintiff's mortgage according to the respective interests of the three respondents, and should have found the amount that each of them should pay to redeem the plaintiff, having regard to their respective interests, and should have fixed a date for payment by each of them. In the alternative, the appellant company claimed the benefit of the doctrine of marshalling securities or of consolidation.

The respondent Ferguson contended that redemption by any one of the owners of the equity put an end to the foreclosure action and forced the appellant company to launch some other proceeding to enforce its rights. The learned Judge did not agree with this. He was of opinion that all remedies possible should be granted in the one action: Judicature Act, sec. 16 (*h*).

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

The appellant company possessed the status of an incumbrancer, with all the rights incident to that status: Federal Life Assurance Co. of Canada v. Stinson (1906), 13 O.L.R. 127; Scott v. Swanson (1907), 39 Can. S.C.R. 229; Cahnac v. Durie (1863), 9 Gr. 485.

When the appellant company redeemed the plaintiff, it became, as against the respondent Keers, the mortgagor, entitled to a judgment of foreclosure, unless redeemed by payment of the full amount due on both its securities: Gilmour v. Cameron (1857), 6 Gr. 290, 299, 302.

Neither marshalling, in the strict sense, nor consolidation as against Ferguson or Gray, could properly be directed in this case.

But the appellant company was entitled to have the respective interests of Keers, Ferguson, and Gray ascertained, and the moneys due under the first mortgage apportioned so that each of them should be entitled to redeem his undivided interest on payment of the proper amount: Flint v. Howard, [1893] 2 Ch. 54.

The report should be set aside and the matter referred back to the Master in order that he may inquire and report the respective proportions in which the equity of redemption is held by Keers, Ferguson, and Gray, and in order that he may apportion the amount due on the first mortgage for principal, interest, and costs, among the three, in proportion to their respective interests, and directing that Ferguson may redeem his interest by payment of his proportion of the principal, interest, and costs due to the appellant company on the first mortgage, and that in default of redemption Ferguson may be foreclosed; and that Keers shall be entitled to redeem his interest on payment of his proportion of the first mortgage, plus the amount due the appellant company, for judgment debt, interest, and costs, according to its claim as proved.

The learned Judge said that he was unable, from lack of data, to give directions regarding Gray's rights. This point might be mentioned to the Judge if the parties differed.

Leave to apply in this action should be reserved, so that, when the proceedings for foreclosure and redemption should be concluded, partition or sale might be had in this same action between the several persons who will then hold the lands, clear of incumbrances, as tenants in common.

The appellant company should have its costs of the appeal against the respondents.

LOGIE, J. JULY 9TH, 1919.

MAIZE v. McFARLANE.

Partnership—Fraud and Misrepresentation Inducing Plaintiff to Enter into—Rescission of Partnership Agreement—Repayment of Sum Paid by Plaintiff—Lien on Assets of Partnership—Payments Made to Creditors of Partnership—Subrogation—Indemnity—Reference—Costs.

Action for rescission of a partnership agreement and for repayment of moneys put in by the plaintiff, and for a declaration that the plaintiff was entitled to a lien, etc.

The action was tried without a jury at Goderich.

Charles Garrow, for the plaintiff.

William Proudfoot, K.C., and J. L. Killoran, for the defendant.

LOGIE, J., in a written judgment, said that he had no difficulty in arriving at the conclusion that the plaintiff was entitled to the relief claimed.

The defendant fraudulently represented to the plaintiff that the trade-debts of the business carried on by the defendant, which were to be assumed by the new partnership, amounted to $2,782.60. In fact they exceeded this amount by nearly $1,500.

This representation was of a fact, it was untrue, the untruth was material; the representation was relied on by the plaintiff and induced him to go into partnership with the defendant. The defendant knew that the representation was untrue. At the very date of the negotiations with the plaintiff to enter into partnership with him, the defendant was being threatened by creditors whose accounts he omitted from the list given to the plaintiff.

If there is a fraudulent misrepresentation as to any part of that which induces a party to enter into a contract, such party may repudiate the contract.

Moreover, the utmost good faith is due from every member of a partnership towards every other member, and his obligation to perfect fairness and good faith is not confined to persons who actually are partners but extends to persons negotiating for a partnership—and between whom no partnership as yet exists: Lindley on Partnership, 7th ed., p. 342; Glaeser v. Klemmer (1914), 7 O.W.N. 14.

The plaintiff repudiated the contract as soon as he became aware of the fraud practised on him.

There should be judgment for the plaintiff for: (1) rescission of the partnership agreement; (2) repayment by the defendant

of the sum of $2,935 paid in by the plaintiff and interest thereon from the 5th April, 1918; (3) a lien for these amounts on the surplus assets after discharge of the bona fide partnership liabilities; (4) subrogation to the rights of the partnership creditors in respect of the payments made by the plaintiff to them; (5) indemnification by the defendant of the plaintiff against the partnership debts and liabilities.

There should be a reference to the Master at Goderich to find the amount of the bona fide partnership debts and liabilities, with leave to appoint a receiver, if the plaintiff so desires, to wind up the affairs of the partnership.

The counterclaim should be dismissed with costs.

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

LOGIE, J. JULY 9TH, 1919.

MAIZE v. GUNDRY.

Partnership — Liability of Firm for Debt of Partner — Fraud — Evidence — Novation — Assignment by one Partner in Firm's Name for Benefit of Creditors — Invalidity — Assignments and Preferences Act, sec. 12 — Estoppel — Damages — Winding-up of Partnership — Costs — Injunction.

Action by W. T. Maize against Thomas Gundry, claiming to be the assignee for the benefit of creditors of the estate and effects of the firm of McFarlane & Maize, and against Thomas G. Allen and James C. McFarlane, for a declaration that the defendant Allen was not a creditor of the firm of McFarlane & Maize and not entitled to rank as such on the assets of the firm; for a declaration that an assignment made by the defendant McFarlane, in the name of the firm, to the defendant Gundry, was void and inoperative, and to have the same and all proceedings thereunder set aside; for an injunction restraining the defendants from dealing further with the assets of the firm; and for other relief.

The action was tried (with the action of Maize v. McFarlane, ante), without a jury, at Goderich.

Charles Garrow, for the plaintiff.

William Proudfoot, K.C., and J. L. Killoran, for the defendants.

LOGIE, J., in a written judgment, said that the defendants Allen and McFarlane carried on business in partnership as general merchants, at the village of Dungannon, from June, 1915, till

August, 1915, when the partnership was dissolved by consent. By the agreement of dissolution, the partners each assumed certain liabilities of the firm, and McFarlane gave Allen a note for $5,100 representing Allen's share in the business, and agreed to furnish or sell to Allen at cost any goods in his line that might be required of him, for a minimum term of three years or as long as any balance on the note remained unpaid.

McFarlane continued the business and furnished certain goods to Allen, but paid nothing in cash on the note till after the partnership between the plaintiff and McFarlane had been formed. The business did not succeed in McFarlane's hands.

Allen was consulted by the plaintiff, while the latter was still an infant, about a loan in anticipation of a sum which he expected from his father's estate when he should become of age, and Allen suggested that the plaintiff should go into business with McFarlane. The plaintiff, who relied on Allen's judgment, agreed to this, and arrangements were made, under which the plaintiff at once went into the business. A partnership agreement was entered into. Allen's claim of $5,100 was mentioned in the course of the negotiations as a claim against McFarlane; the plaintiff did not agree to assume it as a debt of the new firm. On the 2nd April, 1918, the plaintiff came of age; on the 4th or 5th he got a cheque for $2,500, which he endorsed and put into the firm's cash-box. McFarlane on the 6th took this cheque and deposited it in a bank, and out of the proceeds paid Allen $1,300 on account of his note.

The business went on badly; McFarlane was in fact insolvent when he took the cheque on the 6th April; and on the 30th September McFarlane, assuming to act for the firm, executed a deed of assignment to Gundry, who sold the assets to Allen for 60 cents on the dollar, realising $4,036.19. Allen went into possession and carried on the business.

The plaintiff was wholly overreached and defrauded by McFarlane.

The learned Judge reviewed the evidence, which was to some extent conflicting: he accepted the evidence of the plaintiff and discredited both McFarlane and Allen.

The findings were: that Allen was not a creditor of the firm, nor entitled to rank as such against the assets of the new firm; that no novation took place constituting Allen a creditor of the new firm—to that the plaintiff's consent was lacking; that Allen was a creditor of McFarlane alone, and payments on account in cash or goods were made on McFarlane's account solely; and that the assignment to Gundry was invalid and void: Cameron v. Stevenson (1862), 12 U.C.C.P. 389.

Section 12 of the Assignments and Preferences Act, R.S.O. 1914 ch. 134, had no application.

The evidence disclosed nothing done by the plaintiff which would estop him from attacking the assignment to Gundry.

The assignment being void, the sale to Allen fell with it, and Gundry had no right to the proceeds.

The moneys in the hands of Gundry should be paid into Court, there to remain subject to the repayment of $1,300 with interest from the 6th April, 1918, to the firm of McFarlane & Maize; that sum to be available, first, in or towards payment of the just claims of the bona fide creditors of the firm, excluding the claim of Allen on the note, and, secondly, in or towards satisfaction of the lien of the plaintiff established in Maize v. McFarlane, ante.

The plaintiff is entitled to damages against Allen in respect of Allen's carrying on the business of the firm since the purchase, and such damages are to form a portion of the assets of the firm available for their creditors; the balance of the money paid into Court is to be retained to meet the claims of creditors, to the extent of the damages found; and the plaintiff is to be allowed to amend his statement of claim accordingly.

Reference to the Master at Goderich to fix the amount of the damages, and wind up the partnership, and appoint a receiver if desired.

Damages were not sought against Gundry; but, as he proceeded with the assignment, he should be liable with the other defendants for the plaintiff's costs.

There should be an injunction restraining the defendants and each of them from dealing with the assets of the firm.

The plaintiff's costs should be payable by all the defendants.

SUTHERLAND, J. JULY 11TH, 1919.

RE RUSSELL AND TORONTO SUBURBAN R.W. CO.

Railway—Expropriation—Taking Part of Farm—Compensation—Value of Land Taken—Damages for Severance and Injurious Affection of Land not Taken—Award of Arbitrators—Appeal—Reasons for Award Prepared after Award Made—Benefit to Land by Railway—Evidence to Sustain Award—Refusal to Interfere.

An appeal by the railway company from the award of arbitrators appointed to determine the compensation to be paid to William Russell for a part of his farm taken for the company's railway and the loss and damage caused to the remainder of the farm by the severance, injurious affection, etc.

The arbitrators (by a majority award) awarded $814 for the land taken and $2,686 for loss and damage, making in all $3,500, with interest from the 4th November, 1912, and the costs of the arbitration.

During the course of the arbitration, William Russell died, and the proceedings were continued in the name of his widow as administratrix of his estate.

The appeal was heard in the Weekly Court, Toronto.

R. B. Henderson, for the railway company.

R. S. Robertson, for the administratrix.

SUTHERLAND, J., in a written judgment, said, after stating the facts, that the evidence as to the value of the farm before the severance was conflicting. The arbitrators had proceeded upon the proper principle—they had endeavoured to ascertain the value of the property before and after taking and fixed the compensation at the difference: Re Ontario and Quebec R.W. Co. and Taylor (1884), 6 O.R. 338; James v. Ontario and Quebec R.W. Co. (1886-8), 12 O.R. 624, 15 A.R. 1; Re Hannah and Campbellford Lake Ontario and Western R.W. Co. (1915), 34 O.L.R. 615.

When the appeal first came on for hearing, counsel for the company suggested that, no reasons for their award having been given by the majority arbitrators, the learned Judge should deal with the case as one of original jurisdiction: James Bay R.W. Co. v. Armstrong, [1909] A.C. 624. But reasons were afterwards given by the two arbitrators and placed before the Judge, and so this suggestion was not pressed.

In the award itself the two arbitrators merely indicated the factors of damage which comprised the total sum allowed in the reduction of the value of the land, or the difference before and after the severance. In the circumstances, it would have been better had their reasons been given at the time they made their award: James Bay R.W. Co. v. Armstrong, [1909] A.C. at p. 631; Lake Erie and Northern R.W. Co. v. Schooley (1916), 53 Can. S.C.R. 416, 423; Clarkson (Lloyd) v. Campbellford Lake Ontario and Western R.W. Co. (1916), 21 Can. Ry. Cas. 330, at p. 332, note.

On the whole, the learned Judge came to the conclusion that it was impossible to say that the majority arbitrators proceeded on any wrong principle, or that there was not substantial evidence before them which, if effect was given to it, would warrant the compensation and damages allowed. The arbitrators' findings of fact must be treated with consideration and given effect to,

even should the Judge, sitting in appeal, and viewing the case as an arbitrator, be of opinion that a smaller sum would be sufficient for compensation and damages: Toronto Suburban R.W. Co. v. Everson (1917), 54 Can. S.C.R. 395, 415.

That case might also be referred to on the question of allowance for benefit, by reason of the railway, to the land not taken.

Appeal dismissed with costs.

SUTHERLAND, J. JULY 11TH, 1919.

UNDERHILL COAL CO. v. GRAND TRUNK R.W. CO AND PUDDY BROTHERS LIMITED.

Railway—Carriage of Goods—Cars Containing Goods Placed on Private Siding of Consignee—Rules of Railway Company—Finding that Delivery Made—Action by Vendor against Railway Company and Consignee for Price of Goods—Denial of Consignee that Goods Received—Finding of Receipt and Acceptance—Statute of Frauds—Costs.

Action to recover from the defendants, or one of them, $901.49 and interest for two car-loads of coal sold by the plaintiffs to the defendants Puddy Brothers Limited.

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

John Jennings, for the plaintiffs.

D. L. McCarthy, K.C., for the defendant railway company.

A. G. Slaght, for the other defendant.

SUTHERLAND, J., in a written judgment, said that on the 3rd March, 1917, the plaintiffs sold to the defendant Puddy Brothers Limited one car-load of coal, shipped in the railway company's car P.R.R. 407064, and on the 8th March another car-load, shipped in car P.R.R. 413399.

The railway company's answer to the action was that it had placed the two cars on the private siding of the other defendant, and that the cars while on the siding were emptied and then removed.

The defendant Puddy Brothers Limited said that it had never received the coal.

The learned Judge said that, while the officers of the Puddy company seemed to be honest in their belief that they had never received the coal, they must have been mistaken. His finding was that they did receive the coal.

The defendant railway company sought to escape liability by force of rule 13 of the rule-book governing its right and liability as to the delivery of cars—"The delivery of cars to private tracks shall be considered to have been made when such cars have been properly placed on the tracks designated, or when they would have been so placed but for some condition for which the shipper or consignee is responsible."

The railway company had proved that the cars were properly placed on the private tracks of the Puddy company. The railway company had thus discharged all its duty in so far as the shippers and consignee were concerned; and the action, as against the railway company, should be dismissed.

The proper legal presumption was that the coal delivered was of the kinds and quantities ordered.

The orders were given by telephone. The Puddy company relied on the Statute of Frauds, R.S.O. 1914 ch. 102, sec. 12, contending that there was no memorandum in writing signed by them and no acceptance or receipt of the goods. The learned Judge found, however, that there was an acceptance and receipt.

The plaintiffs should have judgment against the Puddy company for the amount claimed, with interest and costs.

The plaintiffs were justified in suing both defendants. The action should be dismissed with costs as against the railway company, and the plaintiffs should be allowed to add such costs to their claim against the Puddy company and to recover the amount thereof from that company.

WATT v. HITCHCOCK—FALCONBRIDGE, C.J.K.B.—JULY 8.

Contract—Architects—Remuneration for Services.]—Action by architects to recover $1,150 as remuneration for services rendered to the defendants. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the contract between the parties was set out in the affidavit of the defendant Hitchcock, filed by way of defence. The contract was prepared by the plaintiffs. The learned Chief Justice agreed with the contention of counsel for the defendants, and was unable to read into the contract any stipulation for the charges now sought to be made by the plaintiffs. The action should be dismissed with costs. The defendants might take out the money paid into Court and apply it pro tanto on their costs. G. S. Gibbons and J. C. Elliott, for the plaintiffs. T. G. Meredith, K.C., for the defendants.

RIVERDALE LAND AND IMPROVEMENT CO. v. CHAPPUS—SUTHERLAND, J.—JULY 11.

Trial—Amendment Made at Sittings for Trial—Question of Law Raised—Postponement of Trial.]—This case being on the list for trial at the Sandwich non-jury sittings, a motion was made at the sittings, before SUTHERLAND, J., on behalf of the plaintiffs, to postpone the trial. An application was also made, on behalf of the defendant, to amend his defence by adding at the end of para. 3 the words, "not having obtained a license in mortmain to hold lands in Ontario." The application to amend was granted. The action arose out of an agreement in writing for the sale of land made by the defendant to Edward J. Condon, and assigned by him to the plaintiffs, a company incorporated in the State of Michigan. On the defence being amended as mentioned, counsel for the defendant argued that the plaintiffs plainly had no status to commence or continue the action. It was agreed that authorities should be put in, and if the learned Judge came to the conclusion that this contention was so clearly right as to enable him to dispose of the case, he should do so. The learned Judge, in a written judgment, said that he had come to the conclusion that, the amount involved being considerable, and the point not free from doubt, he should not, in the circumstances, express an opinion upon it, but let the case go to trial in the ordinary way. This was the fair course to be taken in so far as the plaintiffs were concerned, the amendment having been made at the trial. The case would, therefore, stand for trial until the next non-jury sittings at Sandwich, and the costs of the application to postpone and to amend would be disposed of by the trial Judge. F. C. Kerby, for the plaintiffs. F. D. Davis, for the defendant.