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COURT OF APPEAL.

JULY 13TH, 1911.

*MANUFACTURERS' LUMBER CO. v. PIGEON.

Receiver—Equitable Execution—Fund not Presently Payable—Contract.

An appeal by the plaintiffs from the order of a Divisional Court, 22 O.L.R. 378, ante 341, reversing the order of MIDDLETON, J., 22 O.L.R. 36, ante 79, by which a receiver was appointed, by way of equitable execution of the plaintiffs' judgment, to reach a fund in the hands of the Corporation of the City of Stratford.

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

R. T. Harding, for the plaintiffs.

R. S. Robertson, for the defendant.

The judgment of the Court was delivered by MACLAREN, J.A.:—. . . . The defendant had entered into a contract with the Corporation of the City of Stratford to pave a certain street and maintain it for 10 years. On the completion of the paving, he was to be paid 90 per cent. of the contract price, and the remaining 10 per cent. was to be retained by the corporation until the expiration of the 10 years, with the right to pay out of the same for any repairs not made by the defendant, interest being allowed him meantime on the balance in the hands of the corporation. The contract provides that at the end of the 10 years a "final certificate for the balance due (if any) shall be issued and paid to the contractor."

The whole question is, whether the said 10 per cent. is such a sum as is subject to equitable execution, and whether a receiver

*To be reported in the Ontario Law Reports.

should be appointed. No case precisely in point was cited to us, and I have not been able to find any. It cannot be said that the authorities in cases more or less analogous are consistent with each other or that they can all be reconciled. Upon the whole, the weight of authority appears to be decidedly in favour of the view taken by the Divisional Court, that this is not a proper case for the appointment of a receiver. The contract for the paving and maintenance is a single contract, and the money is only divided or apportioned for the purpose of payment. It is significant, also, that the final certificate is not to issue until the expiration of the 10 years, and then only for the amount (if any) then found to be due. It is not at all certain that any part of the 10 per cent. retained by the corporation will ever be due or payable to the defendant, in which case the action of the Court in appointing a receiver would be wholly barren and fruitless.

Of the cases that have been referred to, I think that of In re Johnson, [1898] 2 I.R. 551, bears the closest analogy in its facts to the present; and in that case an Irish Divisional Court held that it was not a proper case for the application of the principle of equitable execution.

I am of opinion that the appeal should be dismissed.

JULY 13TH, 1911.

MOOREHOUSE v. PERRY.

Money Lent—Conflict of Testimony—Credibility of Parties—Finding of Fact—Appeal—Chattel Mortgage—Illegal Transaction—Pleading.

Appeal by the defendant from the judgment of RIDDELL, J., ante 92, in favour of the plaintiff in an action for money lent, and dismissing the defendant's counterclaim.

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

I. F. Hellmuth, K.C., for the defendant.

D. Inglis Grant, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—

. . . The dealings between the parties . . . were evidently not conducted along business lines, with the usual result that in

the end they became exceedingly complicated. The unravelling of the complication, in the light of the evidence of the parties, involved serious questions of credibility, which were all determined in the plaintiff's favour. It would, therefore, be quite unusual to interfere with the conclusions of the learned trial Judge upon the facts, unless we could see some reasonably clear error or omission.

A defence not pleaded, and not entitled to much favour if it had been, is attempted to be set up in this Court, based upon certain facts found by Riddell, J., concerning certain chattel mortgages upon the goods of the defendant which were taken by the plaintiff for the purpose, as he practically admits, of protecting the property from the creditors of the defendant. These transactions were not creditable to the plaintiff any more than to the defendant, but, if the defendant desired to get the benefit of the defence, she should have pleaded it. She has, as the result of unusual kindness, and indeed generosity, on the part of the plaintiff, in his attempts to assist her in her business, now in her possession a large sum of money which she should in honour pay him. To such a condition met by such a defence, the forcible language of James, L.J., in Hargle v. Kaye, L.R. 7 Ch. 469, at p. 473, seems applicable: "If a defendant means to say that he claims to hold property given to him for an immoral purpose in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it."

But the defence, even if pleaded, would, if I understand the facts, have been no defence. The claim in respect to which the plaintiff now has judgment is made up of items of loans and advances quite apart from these chattel mortgages, which, of course, he could not and does not seek to enforce.

I would dismiss the appeal with costs.

JULY 13TH, 1911.

*RE HENDERSON ROLLER BEARINGS LIMITED.

Assignments and Preferences—Assignment for Benefit of Creditors—Goods Seized by Sheriff—Interpleader—Claim of Assignee—Rights of Interpleading Creditors—Priority—Assignments and Preferences Act, sec. 14—Creditors' Relief Act, 9 Edw. VII. ch. 48, sec. 6, sub-sec. 4—Status of Assignee.

*To be reported in the Ontario Law Reports.

An appeal prosecuted by one Robert J. Henderson, in the name of N. L. Martin, the assignee for the benefit of creditors of the estate of the Henderson Roller Bearings Limited, from an order of a Divisional Court, 22 O.L.R. 306, ante 273, affirming an order of CLUTE, J., 22 O.L.R. 306, ante 162, on an appeal to him from an order of the Master in Chambers.

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

A. H. F. Lefroy, K.C., for the appellant.

Grayson Smith, for the execution creditors Fowler and Eckardt.

J. G. O'Donoghue, for the Queen City Foundry Co.

R. J. Maclennan, for the Sheriff of Toronto.

MOSS, C.J.O.:—The sole question is, whether, in the circumstances of the case, the assignment made by the Henderson Roller Bearings Limited to Martin takes precedence over the claims of the creditors by whom and for whose benefit the interpleader contest was successfully prosecuted as against J. L. Atkinson's claim.

I am prepared to affirm the judgment of the Divisional Court, upon the special facts of this case.

The goods which were in the custody of the Sheriff at the date when the assignment by the Henderson Roller Bearings Limited to Martin, under the Assignments and Preferences Act, took effect, were not then the property of the company, but of Atkinson. They had, indeed, been declared not to be his property as against the execution creditors. That is to say, that, to the extent to which it might be necessary to deal with them for the satisfaction of the execution creditors' claims, the transfer of them to Atkinson was void. But, subject to these claims, they still remained his property. And, while they were in that position, they were dealt with by the Court in a manner which prevented him from disposing of them otherwise than subject to the claims of the execution creditors.

The order of the Master in Chambers, read in the light of the judgment pronounced by Latchford, J., upon the trial of the interpleader issue, was not an order or judgment against the company or its goods, but an order or judgment against Atkinson and his goods.

They did not pass by the assignment to Martin. It may be that, as indicated by the learned Chancellor in the Divisional Court, a potential right to vacate the original transfer to Atkin-

son passed to Martin. But he did not assert that right, if he possessed it. On the contrary, he afterwards accepted from Atkinson a transfer on the basis of the sale to him having been a valid sale, but subsequently cancelled by mutual arrangement.

How can he now be heard to assert any higher right to the property than Atkinson could? He is not in a position, as it appears to me, to invoke the provisions of sec. 14 of the Assignments and Preferences Act. But, if he could, I am of opinion, as at present advised, that it would not avail him, because the judgment under which the goods are now held is not a judgment against the assignors or their goods, but a judgment against Atkinson and his goods.

In my judgment, the appeal should be dismissed.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred; MAGEE, J.A., stating reasons in writing.

MEREDITH, J.A., dissented, for reasons stated in writing.

HIGH COURT OF JUSTICE.

SUTHERLAND, J. JULY 8TH, 1911.

LECKIE v. MARSHALL.

Contract—Sale of Mining Properties—Purchase-price Payable by Instalments—Judgment—Payment of Instalment into Court—Reference—Appeals—Subsequent Instalments—Direction for Payment into Court.

Application "for an order granting leave to the plaintiffs to rescind the contract in the pleadings mentioned for default in payment of the instalments due the 6th November, 1909, 6th May, 1910, and 6th November, 1910, or for an order granting leave to the plaintiffs to rescind the said contract unless the instalments of purchase-money in arrear be paid within a time to be fixed by" the Court, or for such further or other order as to the Court may seem meet.

J. Bicknell, K.C., and Glyn Osler, for the plaintiffs.

G. Bell, K.C., for the defendants Grey's Siding Development Limited.

W. N. Ferguson, K.C., for the defendant Marshall.

SUTHERLAND, J.:—The application is made with reference to a written agreement dated the 6th May, 1908, concerning the sale of certain mining properties in the Sudbury district, for the sum of $250,000.

The agreement provided for the payment in cash of the sum of $12,500, which was duly paid. Further payments were to be made under its terms as follows: 6th May, 1909, $37,500; 6th November, 1909, $50,000; 6th May, 1910, $50,000; 6th November, 1910, $50,000; 6th May, 1911, $50,000.

On the 21st August, 1909, the plaintiffs commenced this action, and asked for a declaration that the option given by the plaintiff Leckie to the defendant Marshall by the said agreement had expired, that the defendants were no longer entitled to the benefits of the said agreement, etc.

The action was tried before the late Mr. Justice MacMahon, and judgment delivered by him on the 26th November, 1909. This judgment (see 1 O.W.N. 222) declares that the contract in question is a valid and subsisting contract and that the defendants are entitled to have it specifically performed by the plaintiffs and carried into execution in case the plaintiffs can make a good title to the properties therein described. The judgment also directs that it be referred to the Master in Ordinary to inquire and state whether a good title can be made by the plaintiffs to the said properties, and, if so, to take an account of the purchase-money, etc.

Clause 5 of the said judgment is as follows: "And this Court doth further order and adjudge that the defendants William Marshall and Grey's Siding Development Limited do pay into Court to the credit of this action on or before the 5th day of January, 1910, to abide the further order of this Court, the instalment of $37,500 in the said counterclaim mentioned and any interest earned thereon since the 5th day of July, 1909, up to the date of such payment into Court."

From that judgment the plaintiffs appealed, first to the Court of Appeal for Ontario (see 1 O.W.N. 899), and later to the Privy Council.

In the order of His Majesty in his Privy Council dated the 25th May, 1911, this provision is found: "And their Lordships do further report that liberty ought to be reserved to the appellants to apply to the said Court of Appeal with reference to the payment of the purchase-money due under the said agreement."

In pursuance of the leave thus given, an application was made to the Court of Appeal for Ontario, and by its order dated the 5th July, 1911, it was ordered "that the matter referred to in

the said order of His Majesty be and the same is hereby referred to the High Court of Justice to be dealt with as by the said order directed or intended."

The defendants have taken out an appointment under the said judgment of MacMahon, J., to proceed with the reference as to title, and such reference is pending.

The defendants were, under the terms of the contract, let into possession of the property referred to in the agreement, and are still in possession. The plaintiffs, under its terms and in pursuance of a letter to the defendants the Royal Trust Company, dated the 8th May, 1908, and signed by the plaintiff Leckie and the defendant Marshall, delivered the agreement in question to that company, together with certain title deeds then belonging to the plaintiff Leckie, and which are now still in the possession of the said trust company or else filed in Court.

It is intimated that the defendants have now commenced an action in the Courts of the Province of Quebec, and are seeking to escape therein liability under the contract. It is also intimated that they are now willing to give up possession of the mining properties in question.

It seems to me that, the trial Judge having directed that the instalment of $37,500 be paid into Court to the credit of this action to abide the further order of the Court, and the order of His Majesty in his Privy Council having reserved the right to the appellants to make this application, it is now proper for me to direct that the further instalments of principal, which in the meantime have become payable under the agreement, be also paid into Court, with interest earned thereon since their respective dates of payment up to the date of such payment into Court and to abide in the same way the further order of the Court.

I accordingly order and direct that the defendants William Marshall and Grey's Siding Development Limited do on or before the 6th day of August, 1911, pay into Court to the credit of this cause the instalments due under the said agreement on the 6th November, 1909, 6th May, 1910, and 6th November, 1910, to abide the further order of this Court.

I direct that the costs of this application be costs in the cause.

BRITTON, J. JULY 8TH, 1911.

McMILLAN v. ATTORNEY-GENERAL FOR ONTARIO.

Limitation of Actions—Real Property Limitation Act—Title by Possession—Acts of Ownership—Burden of Proof—Evidence.

Action for a declaration that the plaintiff was the owner of that part of the west half of lot 31 in the 3rd concession of the township of Roxborough, in the county of Stormont, which lies north of the highway—called "the forced road"—crossing the said lot, containing about 45 acres.

D. B. Maclennan, K.C., and C. H. Cline, for the plaintiff.
R. A. Pringle, K.C., for the defendant.

BRITTON, J.:—Donald McMcMillan, the grandfather of the plaintiff, was in his lifetime the owner, and died in possession of, all of the west half of the said lot, except about 27 acres of the southern part, owned by one Andrew Kinnear.

Donald by his will devised all that part of the west half which he owned, lying south of the highway mentioned, to his older son John, and all that part lying north of the highway, to his son Archibald. The family residence was on John's part, south of the road, and John and Archibald continued to reside there with their mother after Donald's death, which occurred in February or March, 1856. By Donald's will, his widow was given control of the real estate until John and Archibald became of age, and then she was to be maintained on the farm by these two sons. There was no evidence of the exact date of the birth of either John or Archibald, but the inference is warranted, and I find, that both were of age on the date in 1873 when Archibald left the farm. Archibald was in possession of his part from the time of his becoming of age until he left, and he was then obliged, with his brother John, to maintain his mother. The mother died in July, 1885. It appeared in evidence that 1885 was the first year that the whole farm was assessed to John, and the defendant's evidence established that then 38½ acres of the northern part were assessed as wood or bush land.

In 1885 the deceased George McMillan was living with John. He was a good worker, but John was master, and George simply resided with John and worked as one of the family. In 1895 John was apparently getting feeble, and on the 26th

April of that year he made a conveyance to George of all of the west half owned by Donald—and not even excepting that part of it which had been taken by a railway company and was used as part of the line. This conveyance was subject to and the land was charged with the maintenance of John during his life and his burial after death. John afterwards made a will in which he assumes to charge the land already conveyed to George with the maintenance of Lydia McMillan or to give to Lydia a room in the house upon that property. Nothing turns upon this. The will is dated 1890—that is manifestly a mistake in omitting properly to fill in the year.

John died in April, 1905.

George seems faithfully to have maintained his uncle John—and he, George, died in June, 1910.

Archibald never returned to the property, but on the 22nd January, 1908, he made a conveyance of the land in question to his son Donald McMillan, the plaintiff in this action.

Archibald McMillan died on the 25th February, 1908.

The conveyance from Archibald to the plaintiff was not seriously contested. I find that the plaintiff has a good paper title.

As to possession. This is not a case where either the deceased John or George entered upon the land under any colour or pretence of right. It was not, I think, ever the intention of John to claim, as against his brother Archibald, title by possession. The only doubt cast upon that is the conveyance by John to George of what they both knew to be Archibald's by paper title. That may be explained by its being the mistake of the conveyancer. John could not read or write. The conveyance included the part taken by the railway company for their right of way; and yet John never set up any claim to that. It may be—and I think that is what happened—that John intended to convey what was unquestionably his. It would have been satisfactory to have had, if it were possible, some evidence of how the conveyance was obtained and from whom, if one was ever obtained, to a railway company of what is now used as part of the line of the Canadian Pacific Railway. It is admitted that the railway company own the part they use. It was accepted at the trial that the railway company took possession of what they required of this land in 1885. Archibald was then the registered owner. I will assume that the railway company obtained title from Archibald—and that John raised no question about Archibald's right to sell. There is no evidence of anything being said or done by John that he desired to terminate or that he would ter-

minate his relation to the land—according to whatever understanding he had with Archibald. Christie Cummings, sister of John and Archibald, was about 22 years of age when Archibald left. Archibald said to John, "Keep the house, pay the taxes, and take care of mother."

If Mrs. Cummings is strictly accurate, there was nothing said about Archibald's land other than what would be implied from the request to John to pay the taxes. I find that John regarded himself as a caretaker for Archibald; he, John, was not placed in possession of any part of Archibald's land, and he did not go into possession so as to be in actual, visible, exclusive, and continuous possession or occupation. That he, and George for him, tapped trees to make sugar in some of the spring-times—that some of the trees were cut from the slash—was proved—but nothing more than recurrent acts of trespass. John's statements, before he executed the conveyance to George, are evidence, not against his title, if he had acquired title, but to shew how he regarded himself in reference to the land.

He had a letter written informing Archibald of the railway construction, and asking him to come home to look after this business. He always spoke of this parcel as Archibald's land. On more than one occasion he sent Archibald money. It seems clear that he did not send it as rent—or for use and occupation. It is consistent with a theory that, Archibald owning land adjoining land of John, John would be willing to send money as to which there would be a subsequent reckoning.

I am not able to find possession in John of any particular part, so as to bar the right of Archibald to that part—much less to carry with it the possession of the whole parcel; and so I am of opinion that Heyland v. Scott, 19 C.P. 165, cannot be invoked in the defendant's favour. Even if there has been possession of any part of the land between the forced road and the railway, for a sufficient time to bar the plaintiff's title, such possession would not carry with it the land north of the railway. The part north of the railway is not, even yet, wholly enclosed—the fence to the north not extending all the way across the west half of the lot. Before 1895 trees were tapped and a small amount of timber cut, but only such acts were committed as to be fairly called acts of trespass. Fire went over the north part in 1908, and some timber has been taken off since. That, of course, does not affect questions now up for determination.

There was not in this case any claim by John under colour of right or title. He knew and stated that the land belonged to Archibald. As to him I am of opinion that the conveyance made

to George should make no difference in the standing of the parties. Certainly not as to John. If he knew that he was attempting to convey what belonged to Archibald, it was wrong, and, as the evidence discloses that George knew of Archibald's claim, he is not, in my opinion, in any better position than John. After the conveyance to George, George assuming ownership—particularly of the more valuable part where the house is—he began to encroach more and more upon Archibald's part.

The difficult thing now, upon the evidence, is to say how much, if any, and what particular part of Archibald's land north of the highway and south of the railway, has been since the 26th April, 1895, and before the commencement of this action, in the exclusive visible possession of George.

Now there are five small fields—20½ acres in all— four fields of 4½ acres each cleared and fenced in, and one field of 2½ acres under cultivation. These improvements, such as can be particularly pointed out as made for the use of George in his possession, have been, or may have been, made within the last ten years prior to George's death. In my opinion, the defendant has not satisfied the onus of establishing that George had the possession required by law for the whole statutory period so as to bar the plaintiff's title.

See Ryan v. Ryan, 5 S.C.R. 487; Doe dem. Perry v. Henderson, 3 U.C.R. 486; Heward v. Donoghue, 19 S.C.R. 341; Wood v. Le Blanc, 34 S.C.R. 627.

Judgment will be for the plaintiff for the land and for possession and with costs.

There may be a declaration that the land in question was not owned by George McMillan at the time of his death.

SUTHERLAND, J., IN CHAMBERS. JULY 11TH, 1911.

RE HOLLIS.

Infants—Past Maintenance—Claim of Relative upon Estate of Infants—Discretion.

Application by Emma Preston for an order authorising payment to her out of the estate of certain infants of a sum for their past maintenance.

F. E. Hodgins, K.C., for the applicant.
F. W. Harcourt, K.C., for the infants.

SUTHERLAND, J.:—One Mary Jane Wheeler Hollis died on or about the 14th February, 1896, leaving her surviving her husband, John Hollis, and the following children, John Ernest Hollis, Frank Milburn Hollis, William Gordon Hollis, and Edna Jeanette Hollis. The husband died on or about the 17th August, 1899.

The applicant, Emma Preston, formerly Emma Hollis, is the aunt of the said children, and was appointed administratrix of the estate of Mary Jane Wheeler Hollis on the 18th March, 1903. After the death of her brother, John Hollis, she supported, maintained, clothed, and educated the children aforesaid, all of whom were infants. She and they resided at No. 13 Glenhill avenue, in the city of Toronto, which was the property of the deceased Mary Jane Wheeler Hollis, and is now the only asset of her estate.

The applicant states that she has expended in the maintenance of the infant children nearly $3,000, and expended upon them in other ways moneys which would bring her total claim up to in the neighbourhood of $3,500. There is a mortgage upon the property in question on which there is a balance of about $560, and the property is stated by the applicant to be worth $2,500, leaving its net value at a little over $1,900. She asks that this property be given to her in settlement of her claim for past maintenance, and is content to take it for that purpose.

Two children who have come of age in the meantime have signified their consent in writing to the application being granted. Since the application was launched, another infant has come of age and is said to be also willing. The only remaining infant, who will be of age in the course of a couple of years, has also signified his consent to the application being allowed.

I am referred in support of the application to the following authorities: Brazil v. Brazil, 11 Gr. 253; In re Dougall, 14 Gr. 609; Stewart v. Glasgow, 15 Gr. 653; Wylie v. McKay, 20 Gr. 425; Crane v. Craig, 11 P.R. 236.

In the present case the applicant asks that the house property, which is the only asset of the estate, shall be transferred to her. I think, however, in my discretion I should not make the order asked in these circumstances. See Re Blair, 14 P.R. 240.

The application will be dismissed. No order as to costs.

SUTHERLAND, J. JULY 12TH, 1911.

MID-WEST AGENCY v. MUNRO.

Vendor and Purchaser—Contract for Sale of Land—Formation of Contract—Letters—Misrepresentation as to Situation of Land—Avoidance of Contract.

Action by the vendors for specific performance of an alleged agreement for the sale and purchase of land.

J. F. Orde, K.C., and N. G. Larmonth, for the plaintiffs.
G. F. Henderson, K.C., and J. G. Gibson, for the defendant.

SUTHERLAND, J.:—The Mid-West Agency is a real estate partnership firm, consisting of Leon Benoit, residing at Winnipeg, Manitoba, and Henry Vaurs, at Melville, Saskatchewan, at which latter place the firm carried on business. The defendant is a carriage-maker, residing at Alexandria, Ontario, whose business takes him from time to time to the Canadian west, where he had made and desired to make investments in real estate.

On the 30th July, 1910, being in Melville, which is a divisional point on the line of the Grand Trunk Pacific Railway Company, he called at the plaintiffs' office; after a preliminary discussion with Vaurs about lots and "acreage," they took together a walk around the town. In the course of this the defendant says that the plaintiff Vaurs pointed to some land lying to the north-west of the town, adjoining the settled portion thereof, which sloped upwards from near the settled portion. Later in the same day he drove the defendant out to the property.

It appears that a portion of the south-east quarter of lot 31 in question herein slopes from south to north in a rising manner to about the middle line between the north and south halves of the said lot, while the south-west quarter slopes downward as it recedes northerly from the town. Upon the evidence, it is clear that while that part of the south-east quarter lying immediately north of the land of the Grand Trunk Pacific Railway Company would be desirable for subdivision into lots for building purposes, the south-west quarter would be much less so. What the defendant wanted and was the subject of discussion between him and Vaurs, was acreage suitable for such subdivision.

On their return from the drive, a further discussion ensued, which, the plaintiff Vaurs says, ended in the defendant making the following offer, viz., to purchase from the plaintiffs all that

portion of the west half of section 31 in township 22 and range 6, west of the second meridian in the said province, lying immediately north of the main line of the Grand Trunk Pacific Railway, within the town limits of Melville, . . . and containing 160 acres more or less, for the price or sum of $130 per acre, $10,000 to be paid in cash and the balance in one year, with interest, in the meantime, at 6 per cent.

The defendant denies that he made an offer of $130 an acre at all, and says that his first and only offer was $135 an acre. Vaurs further says that, on the plaintiff making the offer of $130 an acre, he declined to accept it, but said he would submit the matter to his partner at Winnipeg, and thereupon sent a telegram, which was put in, and is to the following effect: "Have purchaser one hundred sixty acres in section thirty-one offers $130 acre wire immediately lowest price and state if he can expect you Monday morning." To this a reply was received the same evening as follows: "Try get firm offer in writing on northwest 160 acres price stated with largest cash deposit possible short terms large cash payment and will decide Tuesday, am going up Monday afternoon." This answer when received by Vaurs was not shewn, apparently, to the defendant. He intimated to him, however, that his offer was not accepted, and endeavoured to induce him to remain at Melville until Tuesday.

Vaurs further states that, after the receipt of the telegram from his partner, Benoit, he induced the defendant to make an offer of $135 an acre, and that he himself accepted that offer conditionally on his partner agreeing, and that the understanding arrived at between him and the defendant was that the plaintiffs would communicate later with the defendant as to his offer. The defendant, on the other hand, says that, when his offer of $135 an acre was declined, he stated to Vaurs that he would not wait in Melville until Tuesday, and that all negotiations were off. He also says that Vaurs desired him to call on Benoit at Winnipeg on his way back and wished him to look at a lot in that city. The defendant did not call on Benoit or look at the lot. However, while in Winnipeg, and before returning to Ontario, he made certain investments in real estate in the west.

On the 4th August, 1910, the plaintiff Benoit wrote a letter, dated at Melville and directed to the defendant at Alexandria.

. . .

[The letter was in part as follows: ". . . My partner submitted to me your offer of $135 per acre for the 160 acres lying immediately north of the G.T.P. main line in the west half of

sec. 31 within the town limits of Melville, on terms of $10,000 cash and the balance in one year at 6% with privilege of paying off at any time. After consulting my associates, we have decided to accept your offer. . . . As to these 160 acres, may say some very serious parties in London and Manchester are figuring on the purchase of same at £30, which, deducting commission to agent, is a trifle more than price offered by you. . . . As I am leaving on a trip next week, kindly wire us at our expense, without fail, on receipt of this letter, stating how you want the deal conducted, so I may get the deal fixed up before leaving. . . . Awaiting your telegram, we remain," etc.]

To this letter the defendant replied on the 15th August, as follows: ". . . I arrived home from the west a few days ago, and found your letter of Aug. 4th on my desk, and see by it that you decided to accept the offer that I made your partner when there. I regret, however, to say that I am not in the same position now that I was then. I was quite anxious to secure the 160 acres mentioned when there, but since going to Winnipeg I invested so heavily that I am not in a position to do anything further, which I regret very much. Thanking you for your offer, I remain."

The plaintiffs say that these two letters constitute the contract on which they rely and of which they seek specific performance as against the defendant.

The plaintiffs a little later had their solicitors in Winnipeg prepare and forward an agreement to the defendant. The defendant says that, after he had written his letter to the plaintiffs dated the 15th August, he was approached by F. T. Costello and Thomas Gormeley, a solicitor and real estate agent respectively, at Alexandria, with a proposal to take an interest in some Montreal real estate, but declined. He thereupon suggested to these men that the plaintiffs had the property in question herein and which might still be open for purchase. As a result of this, a telegram was sent to the plaintiffs signed by the defendant on the 26th August, 1910, as follows: "Wire you still open accept my offer one thirty-five." To which the plaintiffs replied on the next day as follows: "Your telegram twenty-sixth received. We confirm our letter fourth in which we accepted your offer of one hundred and thirty-five dollars per acre. Shall send agreement beginning of next week and draw for ten thousand."

On the 29th August following Costello and Gormeley went up to Melville, saw Vaurs, and were also driven out to the property.

The plaintiff Vaurs and the defendant tell very different

stories as to what occurred when Vaurs drove the latter out to see the property on the 30th July. The plaintiff Vaurs and Costello and Gormeley also disagreed in their evidence in material respects. . . .

I was more favourably struck with the evidence of the defendant than that of the plaintiffs, and accept his story with reference to what occurred during his drive with Vaurs. . . .

In each case it seems plain that, while commencing at the southerly limit of the land in question, at a point at or near the line between the east and west halves of lot 31, he drove in a north-easterly direction, instead of following the line between the east and west halves, and that this was done intentionally and for the purpose of endeavouring to indicate that what he was discussing with the parties and seeking to sell included the rising ground.

Costello and Gormeley apparently pressed him before they left, and learned that it was actually the ground which was sloping away that he claimed to own. On their return to Alexandria, the defendant was led to make a second trip to Melville and a further investigation of the facts on the ground. He was then convinced that he had been deceived by Vaurs, as I think he was.

So far as the letter of the plaintiffs to the defendant of the 4th August, 1910, and his reply of the 15th August, 1910, are concerned, I would be inclined to think, apart from the other evidence, that they would, on their face, constitute a contract. While the plaintiffs' letter of the 4th August contained statements, outside those actually relating to the contract, which I think were inaccurate and misleading and were made with the intention of inducing, if possible, the defendant to write a letter in reply committing himself to the purchase, it nevertheless sets out in definite and explicit terms what is said therein to be an offer which the defendant had previously made to the plaintiffs.

The defendant says in his letter of the 15th August that he sees that the plaintiffs have "decided to accept the offer that" he had "made" to one of the partners when at Melville. If the defendant had denied that he had made any such offer, or if he had stated in the letter that any offer made by him had been withdrawn, the case would have been different. "Where the letters deny that a contract ever existed, it would seem impossible to treat them as the evidence or an admission of a contract; but where the letters repudiate on the ground of matter subsequent, as, for example, of damage done to goods bought, there a statement of the terms of the contract in the letters may satisfy

the statute:'' Fry on Specific Performance, 5th ed., p. 281; Wood v. Midgley, 5 De G. M. & G. 41, 46.

In this case the defendant in his letter does not repudiate the plaintiffs' statement that he had made the offer in question, nor that its full and clear terms as set out in the plaintiffs' letter are in any way inaccurate, nor does he state that he has withdrawn it. He admits that he made the offer which the plaintiffs were accepting by the letter of the 4th August. After doing so, however, he seeks in his letter to excuse himself from completing it, not on the ground that he has not made it or has withdrawn it before its acceptance, but that in the meantime he was not ''in the same position'' as he was at the time he made the offer, but ''since going to Winnipeg'' had ''invested so heavily'' that he was not now in a position to do anything further. I would be inclined to think that such a letter, when written and signed in reply to the letter of the plaintiffs, would, under ordinary circumstances, bind the defendant. It is true that at the end of the letter of the 15th August he uses this language, ''Thanking you for your offer,'' as though he were treating the matter then rather as an offer from the plaintiffs, which he could accept, than a letter written by him in reply to one in which the plaintiffs were stating that they accepted the offer previously made by him.

I believe the defendant's story that on the 30th July he had declared his offer and the negotiations off, but, in that view, his letter of the 15th August was certainly a careless and badly expressed letter if he intended it, as I have no doubt he did, to be a repudiation of the offer made by him rather than an acquiescence therein.

His conduct later, also, was careless in connection with sending the telegram already referred to. This telegram was, of course, more in the nature of an inquiry than anything else, and is in that sense more consistent with the view that he thought the previous negotiations were at an end. The plaintiffs, of course, contend that the telegram was sent and the visit of Costello and Gormeley made at the instance of the defendant, and with the view to disentangle him, if possible, from the effects of his carelessly written letter. While the telegram, immediately followed up by the visit of Costello and Gormeley to the west, would almost lend colour to that contention, these two men and the defendant all deny such to have been the fact. I credit their testimony.

But, whether the letter in question would constitute a contract between the parties or not, this case, I think, should be decided from another point of view. It seems to me clear that the

defendant never negotiated with the plaintiffs at all for the purchase of 160 acres of the west half of lot 31, but that, from the beginning, what was pointed out to the defendant by Vaurs, when they were together in the settled portion of Melville, before driving out to the property and while on the property, as the rising ground, and which forms part not of the west half, but of the east half of lot 31, was what he intended to deal with, and that alone.

Upon the whole evidence, I have no doubt, as I have already indicated, that Vaurs did point this out to the defendant and did later on shew it to him. I cannot hold, therefore, upon the evidence, that the defendant ever negotiated at all for the purchase of any part of the west half of lot 31. The plaintiffs insist that it was a part of that half of the lot that they were seeking to sell to him.

I find as a fact, then, that Vaurs knowingly and intentionally pointed out and shewed to the defendant the high land with a view to deceive him, and that the vendors were aware when they wrote the letter of the 4th August, 1910, that the defendant had been deceived as to the location of the land mentioned therein, and, if he replied to that letter, would do so in the belief that he was referring to land other than what was mentioned therein.

The plaintiffs seek specific performance of an alleged contract. The defendant has convinced me by his evidence that the allegations in paragraph 5 of his statement of defence, namely, "the plaintiffs misrepresented the location of the said land, and through such misrepresentation the defendant was led to believe and did believe that the land offered for sale was land more advantageously situated and closer to the business centre of the town of Melville than is the land described in the plaintiffs' statement of claim," are true. I think they constitute a good answer to the plaintiffs' action.

The defendant should not be forced to take a property from the plaintiffs which they knew he did not negotiate for or intend to buy: Dart on Vendor and Purchaser, 7th ed., p. 1050; Leake on Contracts, 5th ed., p. 212; Smith v. Hughes, L.R. 6 Q.B. 597; Paget v. Marshall, 28 Ch. D. 205.

The action will be dismissed with costs.

TEETZEL, J. JULY 12TH, 1911.

McDONALD v. LONDON GUARANTEE AND ACCIDENT CO.

Guaranty—Fidelity Bond—Dishonesty of Servant—Embezzlement of Money—Untrue Statement of Employer in Declaration Forming Basis of Contract — Materiality — Cheques Signed in Blank Given to Servant—Avoidance of Contract.

Action upon a guarantee agreement, under which the defendants, for the consideration or premium of $40, and upon the terms and conditions therein mentioned, agreed, during one year from the date thereof, and during any year thereafter in respect of which the company should accept the said premium and renew the said agreement, to make good and reimburse to the plaintiff, to the extent of $10,000, such pecuniary loss as he might sustain by reason of embezzlement or theft of money on the part of one Douglas B. Findlay, who was then and had been for seven months a bookkeeper in the plaintiff's employment.

The agreement extended from the 1st May, 1906, to the 1st May, 1907, and was renewed for another year.

The plaintiff alleged that Findlay, during the two years, embezzzled from him various sums, aggregating much more than $10,000.

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

J. B. Clarke, K.C., H. H. Dewart, K.C., and C. Swabey, for the defendants.

TEETZEL, J.:—It was agreed at the trial that specific proof of embezzlement should be limited to a few items, and that, if I were satisfied that the plaintiff had suffered loss through embezzlement by Findlay, and if I determined that the defendants were liable under the agreement, there should be a reference to ascertain the amount up to $10,000.

The evidence offered satisfies me that Findlay embezzzled $1,000 on the 21st March, 1907, and $240.75 on the 16th September, 1907, so that, if the defendants are liable for anything under the agreement, there should be a reference to the Master in Ordinary.

The agreement recites that the employer (the plaintiff) has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of

the employee Findlay, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has consented that such declaration and each and every statement therein referred to or contained shall form the basis of the contract, this stipulation to be limited to such statements as are material to the contract.

Among other statements in the plaintiff's declaration above recited are those contained in the following questions and answers:—

"11. If applicant is required to deposit in bank, state name of bank and in what names account will be kept? A. Yes, Dominion Bank, Toronto Junction. D. McDonald.

"Will he be empowered to draw cheques on these accounts? A. No.

"Will these cheques be invariably countersigned after they are drawn? A. No.

"Who will so countersign? A. Mr. McDonald and Ethel, his daughter, who has power of attorney, are the only two who can sign cheques or indorse.

"Will you require cheques drawn by applicant to be accompanied by vouchers or warrants authorising payment before they can be honoured at bank? A. Cannot sign my name."

In their statement of defence the defendants plead the above and other statements, and allege that they were material to the making and to the renewal of the said agreement, and that they were untrue, inasmuch as cheques signed in blank by the plaintiff were frequently left with the said Findlay, whereby the said agreement became void and is not binding upon the defendants.

I find, upon the evidence, that it was the practice of the plaintiff, in the conduct of his business, both before and after the making of the agreement, to sign cheques in blank and frequently to leave as many as four or five of such blank cheques in the hands of Findlay, with authority to fill in such amounts as he might deem necessary, and to obtain the cash therefor from the bank for the purposes of the plaintiff's business.

In his evidence, the plaintiff swore that, before the agreement sued on was completed, he told Mr. Alexander, the defendant's manager, that it would be necessary for him to leave blank cheques with Findlay from time to time, and that Mr. Alexander consented to this being done or made no objection to it.

This conversation is denied by Mr. Alexander, and I unreservedly accept his evidence upon this matter rather than that of the plaintiff.

I also find that this practice of the plaintiff was a circumstance that was material to the risk assumed by the defendants, and that it was in substantial conflict with the statement of the plaintiff that Findlay would not be empowered to draw cheques on the bank account or to sign the plaintiff's name thereto. In other words, while it was literally true that Findlay was not to draw cheques or sign the plaintiff's name, the representation was substantially false, because, if he was to be furnished with cheques already signed in blank by the plaintiff, there was no safeguard against his filling them in for any amount he might choose, and was, therefore, so far as respects the risk assumed by the defendants, equivalent to his having the power to draw the moneys on his own signature. The embezzlement of the $1,000 item on the 21st March, 1907, was, I have no doubt, upon the evidence, effected by his filling in one of these blank cheques for that amount to his own order.

The statement that Findlay would not be empowered to draw cheques or to sign the plaintiff's name being clearly material to the contract, and being substantially untrue, I think the case is governed by Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 8 O.L.R. 117, 9 O.L.R. 569, 11 O.L.R. 330, and that the plaintiff cannot recover; and I do not, therefore, deem it necessary to express an opinion upon several other defences raised by the defendants.

Action dismissed with costs.

CORRECTION.

In the note of Griffith v. Grand Trunk R.W. Co., ante pp. 1059 et seq., the text should be corrected as follows:—

Page 1060, 2nd line from top, for "some distance north of Kenilworth avenue" substitute "some distance north of Kenilworth avenue crossing."

Page 1061, 7th line from top, for "quietly" substitute "quickly."

Page 1061, 13th line from bottom, for "dinner" substitute "dinner-pail."