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APPELLATE DIVISION.

JUNE 11TH, 1913.

RE EMPIRE ACCIDENT AND SURETY CO.

FAILL'S CASE.

Company—Winding-up—Shareholder—Liability as Contributory—Evidence—Onus—Dominion Incorporation — Provisions of Companies Clauses Act—Proxies—Pledgor and Pledgee—Credit for Dividends.

Appeal by Alexander Faill from the order of MEREDITH, C.J.C.P., ante 926.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

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

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

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

HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. JUNE 9TH, 1913.

KELLY v. McKENZIE.

Jury Notice—Motion to Strike out—Judge in Chambers—Discretion—Con. Rule 1322—Proper Case for Trial without a Jury—Nature of Remedy—Equitable Relief.

Motion by the plaintiff to strike out the defendant's jury notice.

W. Proudfoot, K.C., for the plaintiff.
H. S. White, for the defendant.

LENNOX, J.:—This is an action in which the remedy sought by the plaintiff could have been obtained only in the Court of Chancery prior to the Judicature Act. The defence, in effect, is simply a denial of the plaintiff's right to any part, or at all events the whole, of the relief claimed. The defendant claims to have the issues tried by a jury, and the plaintiff moves to have the jury notice struck out. The propriety of leaving the determination of this question for the trial Judge in an action of a common law character has been declared on many occaisons, and the cases are collected and reviewed by the Chancellor in Stavert v. McNaught (1909), 18 O.L.R. 370. In Montgomery v. Ryan (1906), 13 O.L.R. 297, the Chief Justice of the Common Pleas based his order striking out the jury notice upon the double ground that it was a case that "plainly ought to be tried without a jury"—one of investigation of accounts—and a case to be tried in Toronto where non-jury sittings are practically continuous throughout the year; and, delivering the judgment of a Divisional Court in Bryans v. Moffat (1907), 15 O.L.R. 220, at p. 223, the same learned Chief Justice said: "Speaking for myself, I think, the rule of practice laid down in Montgomery v. Ryan, 13 O.L.R. 297, might well be extended to any case, whether in town or country, where the case is one that, in the opinion of the Judge before whom the motion to strike out the jury notice comes, would be tried without a jury." It was held that the Chancellor exercised a proper discretion in striking out the jury notice.

On the issues that case is not distinguishable from this action. I think then that the order should go.

This is not a common law action, like Stavert v. McNaught, but is clearly governed by Bryans v. Moffatt, being a case which, in my opinion, ought to be tried without a jury. I do not know that it can be said with absolute certainty that "no Judge would try the issues with a jury;" but the judgment in Clisdell v. Lovell (1907), 15 O.L.R. 379, was pronounced before the promulgation of Rule 1322. I agree in the decision of Mr. Justice Riddell in Bissett v. Knights of the Maccabees, 3 O.W.N. 1280, as to the meaning and effect of the Rule. Whilst it enlarges the powers of a Judge in Chambers, it prevents embarrassment, by vesting the ultimate decision in the trial Judge. I direct that the action be tried without a jury.

Costs will be costs in the cause.

LENNOX, J. JUNE 9TH, 1913.

DAHL v. ST. PIERRE.

Vendor and Purchaser—Contract for Sale of Land—Default of Purchaser — Time of Essence — Waiver—Recognition of Contract as Subsisting—Necessity for Notice before Terminating Contract—Default of Vendor—Specific Performance —Ascertainment of Amount Due.

Action for specific performance of a contract for the sale of land by the defendant to the plaintiff.

M. K. Cowan, K.C., for the plaintiff.
F. D. Davis, for the defendant.

LENNOX, J.:—The plaintiff is entitled to specific performance of the agreement sued on. Time is, in terms, made of the essence of the contract, but this is not open to the defendant as a defence. After the default now complained of, the defendant continued to negotiate with the plaintiff, and recognised the continued existence and validity of the contract. Having once done this, he cannot afterwards hold the plaintiff to the original stipulation as to time: Webb v. Hughes, L.R. 10 Eq. 281. Once the time is allowed to pass, the rights of the parties are governed by the general principles of the Court: Upperton v. Nicholson, L.R. 6 Ch. 436. And the defendant could not, in

these circumstances, terminate the contract abruptly, as he attempted to do by the letters of the 20th and 27th January, 1913—he must give a notice fixing a date within which the contract is to be completed, and that date must afford the other party a reasonable time: Malins, V.-C., in Webb v. Hughes, L.R. 10 Eq. at pp. 286, 287; McMurray v. Spicer, L.R. 5 Eq. 527.

There are other reasons. A person who is himself in default cannot avail himself of this stipulation as against the other party: Foster v. Anderson, 15 O.L.R. 362, 16 O.L.R. 565. I am quite satisfied that it was understood that the plaintiff's share of the rent was to be applied upon the October payment, and that this and the state of the mortgage account against the property was the cause of the delay. On the other hand, the moving cause of the defendant's sudden energy was the same as that which caused the dog to grab at the shadow in the stream, the desire to grasp what was not his—the increased value of the property subsequent to the sale. The result is a loss in both instances.

The total contract-price is $3,500. The plaintiff is entitled to be credited for payments on the contract with the following sums . . . amounting to $941, leaving a balance of consideration, exclusive of interest, amounting to $2,559.

It was contemplated that the plaintiff would make payments by the 15th October, 1912, amounting to $1,075. After giving the credits above, he has fallen short of this by the sum of $134; the balance of the $3,500, namely, $2,425, was to be paid when the defendant cleared the property of the mortgage to the Huron and Erie Loan and Savings Company.

But the amount required to release the land covered by agreement, on the 1st May, 1912, was $3,177.67, and had increased by the 15th October, so that, at the time of the alleged default, counting only the cash payments of $775, the plaintiff had paid more than he was safe in paying, and more than he could be reasonably called upon to pay until the mortgage was reduced. The plaintiff must pay this $134 shortage, with interest upon it from the 15th October, 1912, as soon as the defendant reduces the mortgage-charge upon the land to the sum of $2,425, and he should not be called upon to pay it until this is done. . . .

There will be the usual judgment for specific performance, with the costs of the action to the plaintiff, and a reference to the Master at Sandwich to adjust the account and interest, and settle the conveyance in case the parties cannot agree.

MIDDLETON, J. JUNE 10TH, 1913.

*BOYD v. RICHARDS.

Vendor and Purchaser—Contract for Sale of Land—Default in Payment of Instalments of Purchase-money—Stipulation that Time of Essence and for Cancellation on Default—Relief from Forfeiture—Compensation by Payment of Purchase-money and Interest—Laches—Special Circumstances—Costs.

Action for specific performance of an agreement for the sale of land by the defendant Richards to the plaintiff Tucker.

The agreement was dated the 16th March, 1909. The purchase-money was payable in instalments; and there was a clause in the agreement providing that the stipulations as to title, time, and payments should be of the essence of the contract; and, upon default, that the vendor might treat the contract as cancelled and all payments as forfeited.

The agreement was assigned by the plaintiff Tucker to the plaintiff Boyd, in May, 1909; and the land was sold by the defendant Richards, subject to the contract with Tucker, to the defendant Parsons.

On the 24th November, 1910, the defendant Parsons gave notice to the plaintiffs' solicitors that the agreement was cancelled for default in payment of instalments. The plaintiffs then tendered the balance due, with interest. The tender was refused, and this action was brought.

The action was tried before MIDDLETON, J., without a jury, at Toronto, on the 5th June, 1913.

R. B. Henderson, for the plaintiffs.

M. H. Ludwig, K.C., for the defendants.

MIDDLETON, J., after setting out the facts, referred to In re Dagenham (Thames) Dock Co., L.R. 8 Ch. 1022; Labelle v. O'Connor, 15 O.L.R. 519; and Halsbury's Laws of England, vol. 13, p. 151; and proceeded:—

While one Court, in Labelle v. O'Connor and a series of cases following it, has refused to accept the statement of Lord Justice Mellish in the Dagenham case, the Privy Council in Kilmer v. British Columbia Orchard Lands Co., [1913] A.C.

*To be reported in the Ontario Law Reports.

319, accept it without question and apply it to determine a case in which the contract is substantially the same as that in question here. . . .

The case dealt with by the Privy Council is reported in the Court below, 17 B.C.R. 230. A perusal of the judgments there reported makes it plain that the views presented in Labelle v. O'Connor were fully considered, and that the Privy Council determined that specific performance, and not merely the return of purchase-money, follows on the relief from forfeiture.

As I understand the effect of these cases, it is my duty to relieve from the default, if compensation can be made by payment of the purchase-money and interest. This has been tendered. I do not think that there has been such laches or delay as to disentitle the plaintiff to the relief sought.

If it is necessary to find special circumstances entitling the plaintiff to the consideration of the Court (and I do not think it is), such circumstances exist here. The land was being purchased, it is said, by an agent acting on behalf of trustees for a railway company. There never was any intention to abandon the project. Non-payment is clearly the result of some oversight or error. The moment a notice was sent purporting to cancel the contract, the money and interest were tendered. No notices were, during the year of default, sent to the trustees or to the solicitors, who were known to the vendor to have the matter in hand. Everything points to the view that the vendor wished for default, and somewhat studiously avoided communication with the purchasers lest they should seek to remedy it.

In view of the undoubted default and of the state of the law upon which the vendors relied when the action was brought, the judgment for specific performance may well be without costs.

MIDDLETON, J. JUNE 10TH, 1913.

KNIBB v. McCONVEY.

Vendor and Purchaser—Contract for Sale of Land—Action by Purchaser for Specific Performance—Default of Purchaser in Payment of Price—Tender of Conveyance by Vendor—Failure of Vendor to Comply with Terms of Agreement—Cancellation of Contract—Relief from—Costs.

Action for specific performance of an agreement for the sale of land by the defendant to the plaintiff.

E. F. B. Johnston, K.C., for the plaintiff.
J. M. Ferguson, for the defendant.

MIDDLETON, J.:—By agreement dated the 25th February, 1913, the defendant agreed to sell the lands in question to the plaintiff. At this time the title was vested in the Title and Trust Company; the defendant having a contract with them under which he was entitled to call for a conveyance upon payment of his purchase-money.

By the agreement, the price, $6,300, was to be paid as follows: $200 on the execution of the agreement, and the balance on the completion of the sale, which was to be on the 10th March, 1913.

Time is said to be of the essence of the agreement, but there is no forfeiture clause. The agreement provides that the deed is to be given at the expense of the vendor.

The $200 was paid; the title was searched and found satisfactory; and the purchaser had every intention of completing his contract. On Saturday the 8th March, no draft deed having yet been prepared or submitted by the vendor, the vendor wrote a letter to the purchaser's solicitors, which reached them on the morning of the 10th March. After referring to the contract and to the provision that time was of its essence, he proceeds: "I, therefore, give you notice that on the 10th day of March, 1913, I will tender the executed deeds for this parcel of land at your offices in the Canada Life Building, King street, Toronto. Therefore, if this sale is not closed on the 10th day of March, 1913, I will cancel this sale."

The purchaser's solicitors communicated with their client and with the vendor, and an appointment was made for 2.30

p.m. to close the matter. Neither the vendor nor the purchaser kept this appointment. The solicitor had not been placed in funds. At 3.30, or a little later, the vendor went to the office, dramatically produced deeds from the Title and Trust Company to the purchaser, and demanded the money and an undertaking from the solicitors that the purchaser would execute the conveyance. The purchaser not being there, the solicitors stated that they would try to reach him by telephone, and asked the vendor to call later. The endeavours of the solicitors to find the purchaser were unsuccessful. At 4.30, the vendor returned; again he produced the deeds; and, the money not being forthcoming, said that he called the transaction off.

On each occasion, the purchaser was accompanied by a clerk from the Title and Trust Company, whose instructions did not permit him to part with the conveyances unless the money was paid and the deed signed by the purchaser, or an undertaking received from the solicitor that it would be so signed. The vendor had given his own cheque to the Title and Trust Company, but it was worthless until the purchase-price was deposited to meet it. The next day the balance of the purchase-money was tendered and refused. This action followed on the 13th March.

Foster v. Anderson, 15 O.L.R. 362, shews that, where the deed is to be given at the expense of the vendor, it is the duty of the vendor to prepare the deed. In this case, the vendor, not having submitted a draft deed, and not having complied with the request made to him in the letter of the 10th March, to hand the deed to the purchaser's solicitors for execution by the purchaser, "this being necessary because of certain covenants in the nature of building restrictions," was himself in default. Apart from this, the deed tendered was not in compliance with the contract. It would, no doubt, operate as a good conveyance; but the purchaser was entitled to have the vendor's own covenants, and was only bound to covenant with the vendor and not with the Title and Trust Company. The difference between the deed tendered and the deed to which the purchaser was entitled may or may not be material; but, before the purchaser can be regarded as in default, the vendor must be himself blameless with respect to matters concerning which the onus is upon him.

In Boyd v. Richards, ante 1415, I have discussed the effect of the recent decision in Kilmer v. British Columbia Orchard Lands

Co., [1913] A.C. 319, and need not here repeat what is there said. If necessary, I would in this case relieve from forfeiture.

I should mention the fact that copies of two letters were produced and marked, upon the assumption that they would be proved to have been sent. No such proof was given; and I think that these letters, if sent, did not relate to this transaction, but to a transaction in respect of lands on Rutland avenue.

Judgment will, therefore, go for specific performance. The costs should be deducted from the purchase-money.

MIDDLETON, J., IN CHAMBERS. JUNE 11TH, 1913.

WIDELL CO. & JOHNSON v. FOLEY BROS.

Partnership—Action in Name of, after Dissolution—Absence of Authority of one Partner to Sue in Partnership Name—Objection by Partner—Addition of Objecting Party as Defendant

Appeal by the plaintiff Frank W. Johnson from the order of the Master in Chambers, ante 1338.

G. S. Hodgson, for the appellant.
R. McKay, K.C., for the defendants.

MIDDLETON, J.:—It is conceded that the Widell Co. and Frank W. Johnson carried on business together in partnership, so far at least as the transaction in question is concerned, under the firm name of "Widell Co. & Frank W. Johnson."

It is clear law that a partner may sue in the name of his firm; but, if his co-partner objects, the partner suing may be ordered to give the objecting co-partner security against the costs of the action. See Halsbury's Laws of England, vol. 22, p. 41; also Seal & Edgelow v. Kingston, [1908] 2 K.B. 579.

Widell & Co., the objecting co-partner in this case, is out of the jurisdiction, and has notified the defendants that it is not a party to this litigation; and, fearing to attorn in any way to this jurisdiction, it declines to make the motion necessary for protection.

The true solution of the situation is that indicated in In re Mathews, [1905] 2 Ch. 460. The name of Widell Co. should be eliminated from the style of cause, and it should be added as a party defendant. Leave should now be given to

serve it out of the jurisdiction and to make all appropriate amendments.

The term imposed in In re Mathews that security should be given for the costs of the defendants cannot properly be imposed here. The foundation for it in that case was the fact that the dissenting plaintiff had become liable for costs by assenting to be a plaintiff in the first instance.

The costs before the Master and of this appeal should be to the defendants in the cause.

MIDDLETON, J. JUNE 11TH, 1913.

PHILLIPS v. MONTEITH.

Vendor and Purchaser—Sale of Land Free from Incumbrances—Unpaid Taxes—Dispute as to whether a Charge on Land—Purchaser not Bound to Pay Purchase-price while Dispute Unsettled—Action for Purchase-price—Summary Disposition—Indemnity or Payment into Court—Costs.

Motion by the plaintiff for judgment on affidavits, the parties consenting that their substantive rights and the question of costs should be thus dealt with.

Featherston Aylesworth, for the plaintiff.
T. H. Peine, for the defendants.

MIDDLETON, J.:—Monteith Brothers, the defendants, purchased certain lands from the plaintiff for $4,000. A declaration was made by the plaintiff, at the time of the closing of the transaction, that there were no taxes or incumbrances upon the land. Upon the strength of this, a cheque was given for the full balance of the purchase-price.

The defendants stopped payment of the cheque, because they learned, as they say, that $47 arrears of taxes existed against the property. The bank was, however, authorised to pay the cheque if the $47 to meet these taxes was retained. Phillips refused to assent to this, saying that he had searched in the Sheriff's office and ascertained that there were no arrears of taxes against the land.

It appears that a son of Phillips had been in possession of the lands, and was primarily liable for the payment of these

taxes. When the roll was placed in the collector's hands, the collector threatened to distrain. The younger Phillips then persuaded the collector to make a false return shewing that the taxes had been paid—promising ultimately to pay the amount to the collector. This payment has never been made; and the township corporation now contend that the false return made by the collector, certifying to a payment which has never in fact been made, does not operate to discharge the land. Phillips senior contends that this land is exonerated, and that the township corporation must look to the collector and his sureties or to the son.

This action is now brought upon the cheque for $3,900. The defendants are ready to carry out the sale and pay the whole price if they are allowed either to deduct the amount in question or if they receive security.

I do not think that Phillips can call upon them to accept the risk of the township corporation being sustained in their contentions. It may be that the certificate which has been issued will serve to protect Phillips from any claim; but this is his concern, and he is quite wrong in seeking to shift to the purchaser the onus of resisting the township corporation.

The proper solution of the matter is to allow the whole price to be paid to Phillips upon his giving the defendants an indemnity; or a sufficient sum adequately to protect them should be deducted from the purchase-money and be retained in Court pending the final adjustment of the dispute.

As, in my view, Phillips has been wrong throughout, the defendants should be allowed to deduct their costs from the purchase-price.

I do not understand that there is any question of interest upon the purchase-money. If there is, I may be spoken to with reference to it.

MIDDLETON, J. JUNE 11TH, 1913.

KLING v. LYNG.

Vendor and Purchaser—Contract for Sale of Land—Mistake—Evidence—Reformation—Priority between Mortgages—Relief Granted upon Terms—Payment of Costs and Overdue Instalments of Principal and Interest—Specific Performance.

Action for reformation of an agreement for the sale of land and for specific performance.

W. Proudfoot, K.C., for the plaintiff.
R. R. Waddell, for the defendant.

MIDDLETON, J.:—Mary Lyng was the owner of lot 27 on Mansfield avenue, Toronto, subject to a certain mortgage for $750, erroneously assumed, at the time of the sale to be referred to, to be for $700. Her husband made an agreement, in his own name, with Gustav Kling and his brother, for the sale of the house for $2,675. This agreement was in writing, but is not produced.

Kling, realising that the agreement with the husband was not satisfactory, asked Mrs. Lyng to execute a formal contract, and took her to his solicitor, Mr. Melville Grant, for the purpose of having this drawn. Mr. Grant prepared the document produced, dated the 12th March, 1912, by which Mrs. Lyng agreed to sell this property for $2,675, payable $100 as a deposit, $700 by the assumption of the first mortgage, $1,000 by a second mortgage, the balance in cash on the closing.

Mr. Kling and his solicitor, Mr. Grant, now both depose that this was not the bargain, but that the true bargain was, that the second mortgage should be subject, not to the $700 mortgage existing against the property, but to a mortgage for $1,500 which Kling was to place upon the property in substitution for the $700 mortgage, which would fall due in a comparatively short time. Mr. Grant says that he knew and understood this, but did not put it in the written document because he was acting for both parties, and he intended to provide for this in the conveyancing. A more unsatisfactory statement it would be hard to conceive.

The transaction was in due course carried out, and Mrs. Lyng received her mortgage, which contained a clause at the end: "The mortgagor to have the privilege of raising a first mortgage for

any amount up to $1,500 in priority to this mortgage; said mortgagee will consent thereto and execute any necessary documents to permit of such priority, and will consent to renewal or replacement of such mortgage whenever necessary, at the cost, however, of the said mortgagor."

This mortgage was executed by the mortgagor only, and Mrs. Lyng was not asked to sign it. The evidence that she knew of the insertion of any such clause is most unsatisfactory. It is said to have been read to the mortgagor, and it is said that she was present and could have heard if she had tried. No explanation was given to her at the time the transaction was closed; it being assumed that she knew.

Mrs. Lyng states that she left the transaction entirely in the hands of her husband. He is now dead. She has no recollection of the details of the transaction, and probably never understood it at all, but merely signed, at the request of her husband, documents which he may or may not have understood.

Kling placed a first mortgage upon the property, and then brought this action to have the agreement reformed and for specific performance. He has since sold the property, so that the transaction cannot be rescinded.

There being no contradiction of the solicitor's statement, there is nothing to lead me to believe that he is not stating the facts; and I do not see how I can disregard his evidence. Accepting it, I think that the contract must be reformed; although in adopting this course I fear that I may be doing the defendant injustice. Had the husband been alive, and had he contradicted the plaintiff and his solicitor, I would not have given effect to their evidence; and it may be a serious misfortune to the defendant that her husband, manifestly a most material witness on her behalf, is not now here to give his evidence. Yet, weighing this, and realising that the husband was alive when the defence of the action was undertaken, I cannot bring myself to disregard the evidence given.

The mistake in the preparation of the agreement is the fault of the plaintiff and his solicitor, and I think I am warranted, upon the cases, in giving relief only upon the term that, as a condition precedent, the plaintiff pay, not only the costs of the action, but all the instalments of principal and interest which have fallen due under the mortgage.

LATCHFORD, J. JUNE 11TH, 1913.

SIMONS v. MULHALL.

Landlord and Tenant—Lease of Hotel—Covenants of Lessee—Breach—Delay in Giving up Possession at End of Term—Damages—Loss of Business—Profits of Bar—Refusal to Transfer Bar License—Conversion of Chattels—Fixtures—Intention—Trade Fixtures.

Action by the assignee of a landlord against the tenant of an hotel property for damages for breaches of covenants contained in the lease. Counterclaim for the conversion of certain articles in the hotel, alleged by the plaintiff to be fixtures.

E. G. Porter, K.C., and A. A. McDonald, for the plaintiff.
F. M. Field, K.C., for the defendant.

LATCHFORD, J.:—As I intimated upon the argument, the notice which the defendant gave, after the expiration of his term, was not effective to renew the lease. Accordingly, the plaintiff, as purchaser of the reversion and as assignee from the lessor of the lease made by the defendant, became entitled, at the end of the term, to possession of the leased premises and to the benefit of all covenants made by the lessee, including a right to the transfer of the hotel license "without any expense or charge, upon demand."

Mulhall appears to have acted in good faith, though erroneously, in thinking himself entitled to the additional term of two years. By his refusal to give up possession until removed on the 9th July, under an order made pursuant to the Overholding Tenants Act, he caused substantial damage to the plaintiff. The profits which the plaintiff thus lost are, I think, greatly exaggerated in his evidence. He places the net earnings of the dining-room and bed-rooms at $10 a day. The bar receipts averaged about $40 daily from the 30th July to the 14th August, and of this fifty per cent. is sworn to be profit. The stables brought in $1 additional. The defendant says that the receipts from the dining-room, bed-rooms, and stables were about $4 a day, and that the bar produced an average of $30. I am disposed to discount not a little the estimate of the plaintiff as to the net earnings of the hotel at the time of the contest for possession. It is exceedingly difficult, upon the evi-

dence, to say, with any degree of accuracy, what profit the plaintiff lost between the 24th June and the 9th July; but, from the best consideration I have been able to give to the point, I estimate his loss at $10 a day. This loss continued after he obtained possession, owing to the refusal of the defendant to sign a transfer of the liquor license or permit. The transfer was, however, signed on the 25th July. For any subsequent delay I do not regard the defendant as answerable, nor do I think that he should be held liable for the expense the plaintiff was at in interviewing the License Commissioners, employing counsel, or enlisting the services of persons assumed to have influence with the Commissioners and others. Between the 24th June and the 25th July there were twenty-six days on which the bar—from which the profits were, I think, wholly derived—might have been open had the defendant conformed to his covenants. The plaintiff's loss at the rate stated is $260; and for this he is to have judgment, with costs on the County Court scale.

The counterclaim of the defendant is for the conversion by the plaintiff of certain fixtures. At the trial, this claim became restricted to the following articles, which the plaintiff claimed as part of the freehold, and refused to deliver to the defendant: a large mirror, a beer cabinet, a beer-pump and a porter-pump, and a bar cabinet.

Quite clearly the defendant is entitled to damages for the conversion of the mirror, which rests upon a mantel, and is suspended from the wall by a wire, and may be removed as readily as a picture hung in the same way.

When the defendant leased the premises from Golding, the plaintiff's predecessor in title, the bar fixtures mentioned were sold to him with the furniture and other movables for $3,500. The lease contained a provision that Mulhall might remove fixtures. As between Mulhall and Golding, the cabinets and pumps were, in fact as well as in the common intention of the landlord and tenant, trade fixtures, which the tenant had the right to remove at the end of the term or within a reasonable time afterward—if such removal could be effected without material damage to the freehold. Whether the articles in question are affixed by screws and bolts, as the defendant contends, or, in the case of the bar cabinet, by nails, as asserted by the plaintiff—though he is not supported in this by his expert witness—they cannot, in circumstances establishing beyond question that they were intended by lessor and lessee to continue

chattels, be regarded as part of the freehold—at least as between tenant and landlord. The defendant has amply satisfied the onus which the law casts upon him.

The plaintiff is not, in my opinion, in any higher position than that which Golding would occupy had he not sold the hotel. Simons purchased the property subject to the lease, and with knowledge of the right possessed by the defendant to remove the fixtures which he had bought from Golding. He wrongfully withheld these chattels when they were claimed from him by the defendant. The mirror I find to be worth $10; the bar cabinet, $250; the beer cabinet and pumps, $40. There are some other articles of trifling value which were not demanded. These, I understand, the plaintiff is willing to deliver to the defendant. There will be judgment upon the counterclaim for $300 and costs.

Reference to Argles v. McMath (1895), 26 O.R. 224; Slack v. Eaton (1902), 4 O.L.R. 335, and In re Chesterfield's Estates, [1911] 1 Ch. 237.

BRITTON, J. JUNE 11TH, 1913.

TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.

Insurance—Fidelity Bond Guaranteeing Honesty of Tax Collector of Municipality—Embezzlement of Money — Conditions of Bond — Alleged Breaches — Written Statement of Mayor of Municipality—Expiry of First Bond—Execution of New one without Fresh Application or Statement—Inclusion in New Bond—Renewal of Original Bond—Answers of Mayor to Questions in Statement—Substantial Truth—Onus—Duties of Collector—Municipal Act, 1903, *sec.* 295—*Absence of Fraud or Wilful Misstatement — Additional Duties of Collector.*

Action to recover $5,000 upon a fidelity bond executed by the defendants, dated the 30th May, 1905, by which the defendants agreed, subject to certain conditions and stipulations in the bond, to make good and reimburse to the plaintiffs all and any pecuniary loss sustained by the plaintiffs, of money, securities, or other personal property in the possession of one John

Mattson, Chief of Police and Tax Collector of the plaintiffs, by any act of fraud or dishonesty on his part in the discharge of his duties in these two capacities.

The action was tried before Britton, J., without a jury, at Ottawa.

W. M. Douglas, K.C., and J. E. Thompson, for the plaintiffs,

G. H. Watson, K.C., and T. F. Slattery, for the defendants.

BRITTON, J.:—The bond contains a great many conditions, and the breach of these is put forward by the defendants in their statement of defence as relieving them from any liability under their bond.

On or about the 19th May, 1904, Mattson made an application in writing to the defendants for a bond as an officer of the plaintiff corporation. The then Mayor of Arnprior, at the request of the defendants, sent to them a statement dated the 10th June, 1904, agreeing to be bound by the statements and answers to questions therein, and agreed that the answers to the questions submitted in that statement were to be taken as conditions precedent and as the basis of the bond applied for or any renewal or continuation thereof or any other bond substituted in place thereof.

A bond was issued by the defendants in favour of the plaintiffs dated the 16th June, 1904, for $5,000.

On the 30th May, 1905, a new bond for the same amount was made by the defendants in favour of the plaintiffs; and the defendants contend that all the statements which were the foundation of the first bond continued as the foundation and basis of the bond last-mentioned. There was no application in writing, by either Mattson or the plaintiffs, for the new bond; no representations of any kind by them. If any were made by Mattson, they were made without the knowledge and consent of the plaintiffs. No continuation notice was sent by the defendants to the plaintiffs at or about the time of expiry of the first bond.

The liability on the last bond—the one sued upon—was from the 10th June, 1905, to the 10th June, 1906, subject to continuance or renewal. It was continued by certificate on the 28th May, 1906, to the 10th June, 1907, and by certificate of the 11th July, 1907, to the 1st June, 1908. (This was a mere clerical error, "1st" instead of "10th.") It was further continued on the 10th June, 1908, to the 10th June, 1909, and by certificate of the 4th June, 1909, to the 10th June, 1910, and by certificate of the 14th June, 1910, to the 10th June, 1911.

During the currency of the bond and between the 10th June, 1910, and the 10th June, 1911, suspicion was directed towards Mattson that he was not acting honestly as Collector. A special audit was ordered, and investigation followed, with the result that Mattson was found to have fraudulently appropriated to his own use money of the plaintiffs. He embezzled in 1908 and 1909 . . . $11,246.55. . . .

The plaintiffs deny the right of the defendants to set up as any defence in this action the written statement mentioned. It was made for the purpose of getting a bond in 1904. It served its purpose. The bond was issued. There was liability under it for a year. At the end of the year liability was not continued, but was terminated by the defendants.

On the 30th May, 1905, the defendants, upon being paid the premium for another year, executed and issued the new bond above-mentioned. This bond, by continuation certificates, was kept in force until the 10th June, 1911.

In each year after 1905, except one, the defendants made inquiry of the plaintiffs and received a satisfactory report of Mattson's conduct.

With a good deal of hesitation, I come to the conclusion that the written statement of the 10th June, 1904, upon which the bond of the 16th June, 1904, was issued, can be invoked as part of the contract represented by the bond of the 30th May, 1905. . . .

The statement itself contains the following: "It is agreed that the above answers are to be taken as conditions precedent and as the basis of the above bond applied for, or any renewal or continuation of the same that may be issued by the United States Fidelity and Guaranty Company to the undersigned, upon the person above-named."

My conclusion is, that the present bond is a renewal of the original insurance. There is much to be said against that view. The bond itself, in express terms, makes the new bond a new contract. . . .

It was argued that the statement was only part and parcel of the contract, which expired in one year, and which was not renewed within the meaning of the contract; as to which "renewal" or "continuation" has a definite meaning; but it expired; and as to the new bond the company did not ask for a new statement or report of any kind.

It is somewhat anomalous that the company can allow the bond to expire, and keep a statement on foot as the basis of a

new bond. I come to the conclusion that the defendants can do this only because of the want of care on the plaintiffs' part in not making inquiry as to the written statement mentioned in the bond.

The plaintiffs are not bound by any alleged warranty of the truth of the statement. The plaintiffs did not execute the bond; the employee did.

Such a statement as the defendants invoke might be true when made and untrue at the expiration of the first year, so that a new statement in the same words could not be given. The defendants are getting the benefit of the falsity of a statement, if it was false, made in 1904, by making that statement do the double duty of being the foundation of a bond in that year and of another one in substitution in 1905, without the plaintiffs asking for such substituted bond. . . .

[Reference to Youldon v. London Guarantee and Accident Co., 3 O.W.N. 832, 26 O.L.R. 75, 4 O.W.N. 782; Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co., 33 S.C.R. 94.]

I am of opinion that the old statement for the former bond can be read into the new contract and as the foundation of the bond sued upon.

Counsel for the plaintiffs submitted that, under R.S.O. 1897 ch. 203, sec. 144, sub-sec. 2, the defendants could not rely upon the falsity of any statement in the writing mentioned; as the bond did not, in providing for the voiding of it, limit the untrue statements to those that are material to the risk.

In so far as the defendants rely upon any misstatement in the application, that objection is supported by Village of London West v. London Guarantee and Accident Co., 26 O.R. 520; but the main reliance of the defendants is upon the misstatements in the writing itself, not the application. This is set out in the body of the bond. Having regard to Jordon v. Provincial Provident Institution, 28 S.C.R. 554, and to Venner v. Sun Life Insurance Co., 17 S.C.R. 394, I do not decide nor do I give effect to the plaintiffs' contention in this action upon that point.

In the case of McDonald v. London Guarantee and Accident Co., 2 O.W.N. 1455, the recited statement in writing delivered by the employer expressly stipulated that the statements therein were to be limited to such statements as were material.

The case of Hay v. Employers' Liability Assurance Corporation, 6 O.W.R. 459, decides, upon the authority of Venner v. Sun Life Insurance Co., 17 S.C.R. 394, and Jordan v. Provincial Provident Institution, 28 S.C.R. 554, that, as the question of materiality in the answers contained in the statement in writing, is for the Judge or jury, it is unnecessary to set out in the policy in full the misstatements relied upon or to allege their materiality. I am bound by this.

Also see Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 11 O.L.R. 330.

The defendants apparently rely most strongly upon the statement of the Mayor in the writing referred to, as it appears in the answers to questions 11 and 12 on that paper: "Q. 11. To whom and how frequently will he account for the handling of funds and securities? A. He accounts to Treasurer daily, or when he has collected funds."

The answer was merely a statement of the Collector's duty. That was true until the Collector failed to do his duty, and appropriated money he ought to have paid to the Treasurer. It was to prevent loss in case the Collector failed to do his duty that the guaranty bond was secured.

"Q. What means will you use to (a) ascertain whether his accounts are correct? (b) How frequently will they be examined? A. (a) Auditors examine rolls and his vouchers from Treasurer yearly. (b) Yearly."

I am of opinion that these answers do not mean more, and that they were not intended to mean more, than that the Municipal Act requires a yearly audit, and that there would be such an audit; the Act would be complied with.

Section 295 of the Consolidated Municipal Act, 1903, provides for the appointment of a collector or collectors; and subsec. 3 of that section provides that the council may prescribe regulations for governing them in the performance of their duty. There is no regulation governing them prescribed by statute, and the matter is left to the fair and reasonable discretion of the council.

The plaintiffs' council, on the 4th October, 1893, passed a by-law requiring all municipal taxes to be paid on or before the 14th December in each year. This by-law was amended, in a manner not material in this action, by a by-law dated the 6th October, 1899.

Under the by-law of 1893, five per cent. had to be added to these unpaid taxes. To have that done, and to enable the

Treasurer to make the return required of him, the Collector was obliged to make a return to the Treasurer of all persons who had paid taxes on or before the 14th December, and at tthe same time he was required to pay to the Treasurer the amount of taxes so paid.

Section 292 provides that the Treasurer shall, after the 14th December and on or before the 20th December, prepare and transmit to the Clerk of the municipality a list of all persons who have not paid their taxes on or before the 14th December. This necessitates the examination of the Collector's roll for each year, down to the 14th December; and apparently no statutory duty is put upon the Treasurer to examine the Collector's rolls other than to that date.

Section 299 provides for the appointment of two auditors by the council of each municipality. Section 304 defines the duties the council of each municipality.

Section 304 defines the duties of these auditors. . . .

The Treasurer of the Village of Arnprior was a salaried officer, who also gave security to the plaintiffs, by a bond of these defendants, for the due performance of the duties of his office. Section 290 prescribes the duties of the Treasurer, and sec. 291 states what books the Treasurer is to keep . . . He should enter the date of payment of any tax money to him by the Collector.

After the roll gets back to the Collector, with the percentage added for collection, there is no statutory provision for any inspection of it.

Mattson saw his opportunity, and began to appropriate the money received by him from the taxes unpaid on the 15th December, 1908, and unpaid on the roll on the 15th December, 1909.

In interpreting the answer of the Mayor, it should be remembered that the plaintiffs are a municipal corporation. Their work is done as prescribed by statute, as to which the defendants know as much as the plaintiffs. They are presumed to know the law. The answers were given in perfect good faith.

I am unable to find upon the evidence that there was no fraud or concealment of any kind, nor was there any wilful misstatement on the part of the Mayor, Treasurer, or Clerk, or any officer of the plaintiff corporation, in obtaining the bond in question. I am of opinion that the answers of the Mayor—the statements in writing—are true in the way the Mayor understood the questions and in the way he wished the defendants

to understand them, and in the way the defendants did understand them.

It is alleged by the defendants that Mattson was in debt to the plaintiffs in June, 1904, and that the plaintiffs were aware of it, or should have been aware of it, and that Mattson was in debt to the plaintiff corporation every year during the continuation of the bond, and that the plaintiff corporation had knowledge of that condition of affairs.

There is no proof of any such indebtedness for the year 1907 or any year prior to that; and the plaintiff corporation had no knowledge of any such indebtedness, if any existed, in or prior to the year 1907.

I find against the defendants upon the eleventh, twelfth, and thirteenth paragraphs of the statement of defence. These have reference to the notice by the plaintiffs to the defendants of Mattson's default; and to the want of compliance by the plaintiffs with the conditions as to proof of loss. These conditions were reasonably complied with.

The defendants say that the statement made in the application by Mattson for the issue of the bond, and the answer to the questions of the defendants by the plaintiffs therein, and the statements by the plaintiffs to the defendants mentioned before, were all untrue. I am of opinion that many of the statements were immaterial, and that all of them were substantially true. . . .

The defendants say that the placing of additional duties upon the Collector voids the bond. The alleged additional duties were the collection of license fees and water rates and fines, and acting as sanitary inspector.

There is no evidence of Mattson's collection of any fine or license fee, nor of his being authorised by the plaintiffs to make such collections. If he did, he acted without authority from the plaintiffs, at the instance of the person liable.

"Sanitary Inspector" is not a distinct office. It was something fairly within the duty of Mattson as Chief of Police, to look after on his rounds.

There is no evidence that he acted as collector of water rates; and, if he did so act, there was no shortage in his water account. Although Mattson was called, he said nothing about making up shortages, if any, on water rates by payment out of tax money.

"Q. 7 (a). If the duties embrace the custody of cash, state largest amount likely to be in his custody at any one time.

(b) And the average amount of daily handlings. A. (a) $2,000; (b) $100 to $500.

It was stated by Mattson that on occasions when the heaviest taxes were paid, and paid by cheque, there was as much at one times as $8,000—including cheques—in his hands. Even if Mattson did have $8,000 in cash and cheques in his possession at one time, it was an exceptional thing—a thing not in the ordinary course likely to occur. The Mayor was only speaking of what was likely. Mattson stated in his signed application of the 19th May, 1904—which the defendants put in as evidence—that the total amount handled by him during the year would be $18,000 or $19,000, and the largest amount apt to be under his control at any time would be $1,000. Taking the largest amount for the whole year at $19,000, and allowing say a hundred days for collection, the average would be only $190 a day; much less than the maximum amount mentioned in the statement of the Mayor.

I find that the answers to question 7 are substantially true.

It was not shewn that the answers to questions 13, 14, 15, and 16 were not true. The onus was upon the defendants to shew the falsity if the answers were false.

No evidence was given to shew that there was any default or indebtedness prior to that of 1909.

I find that the defendants were duly notified in writing of Mattson's default, and that the defendants were furnished with proofs of their loss.

I further find that the defendants requested that Mattson be prosecuted for his theft or embezzlement, and that . . . he was prosecuted and found guilty.

There will be judgment for the plaintiffs for $5,000 with interest thereon from the 20th June, 1911, at five per cent. per annum, with costs.

MEREDITH, C.J.C.P. JUNE 12TH, 1913.

RE EDGERLEY AND HOTRUM.

Will—Construction—Devise to two Daughters—Provision in Event of one Dying without Issue—"Surviving Daughter or her Heirs"—"Or" Read as "and"—Vendor and Purchaser—Title to Land—Forcing Doubtful Title on Unwilling Purchaser.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title was not a valid one, and that the vendor had shewn a good title.

Shirley Denison, K.C., for the vendor.
D. L. McCarthy, K.C., for the purchaser.

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

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

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

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

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

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

But the second clause of the will unquestionably modified the effect of the first. Under it, in the case of the death of either of the devisees without leaving issue, her share is to go to her

survivor, or her heirs; putting it in the exact words of the will; "I direct and it is my will that in case any of my said daughters should die without leaving lawful issue the share of the person so dying shall go to the surviving daughter or her heirs."

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

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

LENNOX, J. JUNE 14TH, 1913.

RE PATERSON.

Will—Construction—Interest in Business Carried on by Partnership—Valuation—Direction that Amount at which Interest Valued "Remain in Business" for Named Period—Appreciation at End of Period—Rights of Devisees and Legatees.

Application by the widow of James L. Paterson, deceased, for an order, under Con. Rule 938, determining questions arising in the administration of the estate as to the proper construction of the will of the deceased.

G. H. Shaver, for the applicant.

A. F. Lobb, K.C., for the executors and for Robert Paterson (one of the executors) individually.

F. W. Harcourt, K.C., Official Guardian, for the infant daughter of the testator.

LENNOX, J.:—Mr. Lobb, in appearing for Robert Paterson, states that matters subsequently arising may affect the ultimate division of the property, so far at all events as the widow is concerned, and he waives no rights lying outside of the question of the proper construction of the will, as to this client.

The following clauses occur in the will in question:—

I give devise and bequeath to my said executors and trustees all my property upon trust: (1) to pay my just debts; (2) to determine the value of my interest in the business carried on at . . . Toronto by Paterson Brothers and allow the amount to remain in said business for five years, interest to be paid thereon at per cent. per annum, half-yearly: (3) to divide all my property in equal shares between my wife Bertha Davidson Paterson and my daughter Jessie P. Davidson.

The surviving partner, the said Robert Paterson, is one of the executors and trustees, and a testamentary guardian of the infant beneficiary. It is not contended, as I understand it, that anything has taken place since the death of the testator to affect the rights of the infant. Certain real estate which belonged to the partnership has appreciated in value since the valuation was made, at the death of the testator.

I am asked whether the widow and daughter, the legatees and devisees, are entitled to share in this rise in value. Subject to anything the widow, a person sui juris, may have done to debar herself, they certainly are. The testator did not mean by clause 2 that his trustees were to sell out to the surviving partner when they determined the value, and there was no obligation on the surviving partner to accept the valuation, or carry on the business, or pay interest. The testator merely meant that the surviving partner should have the right, if he desired it, to have the use of the testator's share of the assets for five years, at a rental, and this rental was to be measured by interest upon a valuation to be made. Practically speaking, there is no reason that this valuation should not be treated as final so far as the stock in trade, and perhaps the other chattel property, is concerned. As to the real estate, the infant

daughter is clearly entitled to one-fourth share of what it is worth or what it can be sold for now (at the end of the five years); and, subject to any contract or estoppel which Robert Paterson may be allowed to set up against his *cestui que trust*, the widow is entitled to an equal share.

Costs of all parties out of the estate.

ST CLAIR v. STAIR—MASTER IN CHAMBERS—JUNE 9.

Discovery—Affidavit on Production—Claim of Privilege for Certain Reports—Necessity for Identification—Documents Obtained for Information of Solicitor—"Solely."]—Motion by the plaintiff for a better affidavit on production from the defendants the "Jack Canuck" Company. For the facts of this case, see ante 645. The affidavit attacked claimed privilege for "a quantity of reports fastened together, numbered 1 to 77 inclusive, initialled by this defendant." These were said to be privileged as "being reports and communications obtained for the information of solicitors and counsel and for the purpose of obtaining advice thereon with a view to litigation between the plaintiff and the said defendants." It was objected: (1) that the dates of these reports and the names of the authors should be given; and (2) that the claim of privilege was defective, because it did not state that these reports were obtained solely for the purposes of the pending action. The cases relied on in support of the motion were Swaisland v. Grand Trunk R.W. Co., 3 O.W.N. 960, on both branches, and Jones v. Great Central R.W. Co., [1910] A.C. 4, on the second. The Master said that in cases such as Collins v. London General Omnibus Co. (1893), 68 L.T.R. 831, no doubt, the word "solely" was necessary, in view of the previous judgment in the similar case of Cook v. North Metropolitan R.W. Co., 6 Times L.R. 22. But this qualification was not of universal application, though it might be as well to use it in every case as a matter of precaution and for greater security. As at present advised, the Master did not deem it necessary to express any opinion on this point, because the motion seemed entitled to prevail on the first ground. The affidavit should comply with what was said in the Swaisland case, 3 O.W.N. at p. 962: "Moreover, it is essential that the documents should be so clearly identified that, if it turns out that the affidavit on production is untrue, there will be

no difficulty in securing a conviction for perjury." It would seem necessary, therefore, to give the date of each report and the name of the person making it; for, "where the name is a material fact, it must be disclosed, and it is no answer that in giving the information the party may disclose the names of his witnesses:" Bray's Digest of Discovery (1904), p. 39, citing Marriott v. Chamberlain, 17 Q.B.D. 154. So, too, Odgers on Pleading, 5th ed., p. 179, citing in addition (with other cases) Milbank v. Milbank, [1900] 1 Ch. 376. A further and better affidavit must, therefore, be made, within a week, as above directed. In this the claim of privilege could also be amended by adding "solely," if the deponent thought it wise to do so, and could so declare, in view of what might appear when the reports were dated. The affidavit on production of the Holland Detective Bureau, made a defendant in this action, mentioned: "Reports made at various times between the 20th November and the 27th December, 1912, by the Bureau to James R. Rogers." These were probably the reports mentioned in the affidavit made by Mr. Rogers, as an officer of the defendant company. This action was begun only on the 27th December, 1912, though the libel action was begun earlier. The plaintiff was entitled to the costs of this motion in any event. W. E. Raney, K.C., for the plaintiff. A. R. Hassard, for the defendant company.

RUNDLE v. TRUSTS AND GUARANTEE CO.—MASTER IN CHAMBERS —JUNE 10.

Discovery—Production of Documents—Better Affidavit—Identification of Documents—Issue as to Release—Account—Relevancy of Documents.]—This action was brought to set aside a release given by the plaintiff, C. A. Rundle, to the defendants, as administrators of his mother's estate, and to reopen the accounts, which on the 22nd December, 1909, were passed in the Surrogate Court, in his absence, on the strength of a letter which he was induced to sign after it had been prepared by the defendants. In this he was made to say that he had carefully examined the accounts, and was quite satisfied with them, and did not desire the defendants to produce vouchers on the audit. The plaintiff objected to the affidavit on production made by an officer of the defendants, and moved for a further and better

affidavit, on the ground, first, that the mention of the documents in the second part of the first schedule was too vague and indefinite, and in no way complied with the principle affirmed in Swaisland v. Grand Trunk R.W. Co., 3 O.W.N. 960, at p. 962. In the affidavit these documents were said to be: "statements, estate vouchers, receipts for pass-books, cheques, submitted to C. A. Rundle through the Waterbury National Bank, when release executed by him; letters, vouchers, books, documents referring to and connected with the administration of the estate of Lily Rundle." The Master said that this was clearly insufficient, as it did not identify the documents in any way. As set out in paragraph 5 of the affidavit on production, the refusal to produce these documents was based on the fact that they all related to the administration of the estate of the plaintiff's mother and of his own, and that the defendants had passed their accounts before the Surrogate Court, and secured their discharge as administrators, and had duly accounted to the plaintiff for the balance found to be in the hands of the defendants by the orders of the Surrogate Court, and had received from him the full release set out in the pleadings. The Master said that this was substantially an assertion that these documents were not relevant to the issue to be tried, and were to be produced only after the plaintiff had established his right to have the release set aside, and to be allowed to attack the orders of the Surrogate Court, assuming that he could do so in this action. In cases such as Adams v. Fisher, 3 M. & C. 526, where the plaintiff has to establish his right to an account, only what is relevant to that issue will be ordered to be produced. See, too, Sheppard Publishing Co. v. Harkins, 8 O.L.R. 632. But, where the existence of a fiduciary relationship is admitted, and "where it does not clearly appear that the documents mentioned are immaterial to the question to be decided at the trial, production will be ordered:" Bray on Discovery, p. 32. So far as appeared in the present case, no examination of the accounts had been made by the cestui que trust or any one on his behalf. Two reasons for full discovery at once given by Bray, p. 28, might be found applicable to the present action. By the 7th paragraph of the statement of claim the plaintiff alleged negligence of the defendants in respect of the personal belongings and household goods of the deceased: as to this issue, production would certainly be relevant, as well as to the negligence and improvidence in management of the estate al-

leged in paragraphs 10 and 12 especially. A further affidavit should be filed in accordance with the above. Costs of the motion to be costs to the plaintiff in the cause. W. E. Raney, K.C., for the plaintiff. Casey Wood, for the defendants.

FINLAYSON v. O'BRIEN—BRITTON, J.—JUNE 10.

Contract—Sub-contract for Railway Construction Work—Payment—Terms of Contract—Inclusion of Terms of Principal Contract—Partnership—Authority of Partner—Acquiescence—Withholding of Percentage of Price—Premature Action—Costs.] Action for money alleged to be due to the plaintiff upon a contract between the plaintiff and the defendants for work on the construction of the National Transcontinental Railway. In the year 1908, the defendants had a contract with the Transcontinental Railway Commission for the construction of a large section of the railway east of Superior Junction; and the plaintiff entered into a sub-contract with the defendants for the doing of a part of the work. The amount sued for was $18,216.44 with interest from the 1st August, 1911. There was no contract in writing between the plaintiff and defendants. A written contract, dated the 1st October, 1908, purporting to be between the defendants and Finlayson and Barry, was signed by Barry as the plaintiff's partner; and the defendants said that this contract was, in its terms, the contract verbally made with them by the plaintiff; and was finally accepted by the plaintiff; and, even if not, was binding upon him, having been signed by his partner. BRITTON, J., upon conflicting evidence, concludes that the real contract between the plaintiff and defendants was, except as to prices and some minor matters not in dispute, the same as the contract between the defendants and the Transcontinental Railway Commission; that the contract signed by Barry was binding on the plaintiff; apart from acquiescence, that contract was practically, and in all respects material in this action, the same as the verbal contract entered into; by the terms of that contract, the plaintiff was bound by the terms of the contract between the defendants and the Commission; and, by the latter, the time for payment of the amount claimed in this action, the ten per cent. drawback of the sum payable to the plaintiff for his work, had not arrived when this action was begun. Action dismissed as premature, but without prejudice to any future

action, if necessary, upon the defendants being paid or settled with by the Commission, or upon new or other facts and circumstances. Dismissal of action to be without costs. J. A. Ritchie, for the plaintiff. J. H. Moss, K.C., and J. Lorn McDougall, for the defendants.

BERLIN LION BREWERY CO. v. LAWLESS—MASTER IN CHAMBERS—JUNE 11.

Summary Judgment—Rule 603—*Action for Balance Due on Promissory Notes—Suggested Defence—Unconditional Leave to Defend.*]—On the 15th November, 1912, the defendants gave the plaintiffs a mortgage on lands in the city of Ottawa for $6,000, payable two years after date. At the same time they gave two promissory notes for $3,000 each, payable three months after date. The real indebtedness had not at that time been ascertained. These notes had admittedly not been paid. The plaintiffs sued upon the notes, and moved for summary judgment, under Rule 603, for an alleged balance of not quite $5,000. The defendant J. A. Lawless made an affidavit that, when he and his wife, the co-defendant, gave the mortgage and notes, it was agreed that the notes were given at the plaintiffs' request so that they could be used with the bank; but that they were only for the plaintiffs' accommodation, and were to be renewed during the currency of the mortgage. It did not appear whether these notes were given at or after the execution of the mortgage. The defendant J. A. Lawless was not cross-examined on his affidavit. The president of the plaintiff company was cross-examined on his affidavit in support of the motion. He refused to admit the defendants' contention that the mortgage was the real security. He said, however, that he went to Ottawa, where the defendants were apparently residing at the time, and threatened action. He went to Ottawa specially for the purpose of getting "the matter straightened out." When the defendant suggested a mortgage, the president said that it was "quite satisfactory," and that "we took the notes and made use of them." The Master said that, in view of these admissions and the affidavit of the defendant J. A. Lawless, the motion could not succeed. The doctrine of merger might apply—as the defendants were joint mortgagors, and the notes apparently were several only; the case might be ruled by Wegg

Prosser v. Evans, [1895] 1 Q.B. 108. See Broom's Common Law, 10th ed. (Odgers), p. 669, and cases there cited. However this might be decided, it seemed clear that this was not a case for summary judgment. Motion dismissed; costs in the cause. See Smyth v. Bandel, 4 O.W.N. 425, 498. The second decision was affirmed on appeal on the 20th December, 1912, by Middleton, J. W. H. Gregory, for the plaintiffs. H. J. Macdonald, for the defendants.

SMYTH v. MCCLELLAN—BRITTON, J.—JUNE 12.

Conversion of Chattels—Damages—Lien.]—Action for the recovery of a saw-mill and machinery and appurtenances belonging to the plaintiff, which the defendants took and retained possession of, against the will of the plaintiff, during negotiations for a sale to the defendants at the price of $1,400. The learned Judge finds that the defendants had no authority for taking posesssion. Judgment for the plaintiff for $1,400 and interest from the 18th December, 1911, and a declaration that the existing lien upon the property is valid until payment in full, and that the plaintiff is entitled to the property until the judgment is fully satisfied. The money in Court is to be paid out to the plaintiff in part satisfaction of the judgment. The defendants to pay the plaintiff's costs on the High Court scale. R. McKay, K.C., for the plaintiff. J. W. Mahon, for the defendants.