THE
ONTARIO WEEKLY REPORTER

VOL. 22 TORONTO, AUGUST 15, 1912. NO. 12

HON. MR. JUSTICE BRITTON. JULY 2ND, 1912.

CORNWALL SINGLE COURT.

RE JOHNSON.

3 O. W. N. 1571.

Will—Construction—"Survivor"—Period of Ascertainment—Death of Testator.

BRITTON, J., *held*, that where a testator devised his property to his mother, M. J., and to his sister, C. F., "or the survivor of them," the date of survivorship was the death of the testator, and both beneficiaries having survived him, took as tenants-in-common.

Motion by Eliza Blackwood, executrix of the will of the late Margaret J. Johnson, the mother of John Roger Johnson, and one of the devisees named in his will.

John Roger Johnson made his will on the 1st September, 1904—in the words following:—

(1) "I will and direct my executrices hereinafter named to pay my just debts and funeral and testamentary expenses out of my personal estate.

(2) I will and devise all of my real and personal estate to my mother Margaret J. Johnson and to my sister Catharine Lillian Froom, or the survivor of them.

(3) I hereby appoint my mother Margaret J. Johnson, and my sister Catharine Lillian Froom executrices of this my will, and I hereby revoke all other wills by me heretofore made."

The testator died on 9th May, 1905. Both his mother Margaret and his sister Catharine survived him, but the mother, Margaret, died on 22nd November, 1911.

George A. Stiles, for Eliza Blackwood.

R. A. Pringle, K.C., for Catharine Lillian Warner, formerly Catharine Lillian Froom.

HON. MR. JUSTICE BRITTON:—The contest here is between the sisters Eliza Blackwood and Catharine Lillian Warner—formerly Catharine Lillian Froom, as to the true meaning of the 2nd clause of said will. It is contended on behalf of the applicant Eliza Blackwood that survivorship mentioned had reference to the testator—and as both the mother and sister survived the testator—they took as tenants in common. The rule as laid down in Theobald on Wills, 4th ed., p. 554, seems correct as deducible from the authorities.

"Survivorship is to be referred to the period of division. If there is no previous interest given in the legacy, then the period of division is the death of the testator—and the survivors at his death will take the whole legacy. But, if a previous life estate be given, then, the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy.

The same rule applies to realty as to personalty."

See cases cited by Theobald.

Here no life estate was given. It was a direct gift to the two—the mother and sister or the survivor. They both survived the testator—they both took it all, as tenants in common. Some of the cases cited on the argument and relied upon for Mrs. Warner are outside of this rule. In *Peebles* v. *Kyle*, 4 Grant 334. there was a devise to wife of testator for life, with remainder to A. B. and C. or survivors or survivor of them. Survivorship there meant survivors at the death of the tenant for life—and not of the testator.

In *Smith* v. *Coleman*, 22 Grant 506, there was a devise to the wife for life.

There will be a declaration that the survivorship mentioned in the will of John Roger Johnson was referable to the death of the testator, and upon the testator's death, Margaret J. Johnson, and Catharine Lillian Froom took as tenants in common.

There will be no order as to costs.

HON. MR. JUSTICE SUTHERLAND. JULY 4TH, 1912.

SUNDY v. DOMINION NATURAL GAS CO. LTD.

3 O. W. N. 1575.

Contract—Construction—Supply of Natural Gas—Breach—Continuing Breach—Damages—Costs.

Action by plaintiffs for an order compelling defendants to supply them with gas for use in their private dwellings for domestic purposes, free, and for damages for breach of their contract to do so. Plaintiffs, who were the original owners of certain gas wells situate at Attercliffe Station, Ont., had sold their interests to certain predecessors in title of defendants, taking from them an agreement to supply them with gas free, "for ordinary purposes for use in their private dwellings at or adjacent to Attercliffe Station." Defendants and their predecessors in title had supplied plaintiffs with gas, free, down to April, 1911, but ceased at this date, claiming, that as the operation of the Attercliffe Station gas field was no longer profitable or possible, from a commercial standpoint, any obligation to plaintiffs was at an end.

SUTHERLAND, J., *held*, that, "when a party, by his own contract, creates a duty or charge upon himself he is bound to make it good, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract," and that, therefore, the commercial failure of the gas wells did not absolve defendants from their obligation to plaintiffs.

Clifford v. *Watts*, 40 L. J. C. P. 36; L. R. 5 C. P. 586, and other cases referred to.

Judgment for plaintiffs for $60 and High Court costs, same to be without prejudice to plaintiffs' right to bring other actions in future for future damages.

An action for an injunction and damages in respect of an alleged breach of an agreement.

J. A. Murphy and R. S. Coulter, for the plaintiffs.

J. Harley, K.C., and A. M. Harley, for the defendants.

HON. MR. JUSTICE SUTHERLAND:—In or about the year 1896 natural gas was discovered in the county of Haldimand at or near Attercliffe station. The plaintiffs, Sundy, Strome, Kenny and one Harold Eagle, were then residing at or near said station. They or one of them drilled a well and some time after, when there was talk of others piping the gas from that field to the city of Brantford, a second well was put down to insure, as far as practicable, to them and those to whom they might see fit to sell gas, a continued supply. The plaintiffs obtained a supply of gas for themselves at their respective dwellings, and also sold some to others.

A company was incorporated by them with a capital stock of $2,000, under the name of the Attercliffe Station

Natural Gas Company Limited. Each of said named persons became a shareholder therein, and the company commenced to do business and was apparently succeeding and paying dividends.

On the 25th March, 1902, a written agreement was entered into between the company and H. Cockshutt and W. J. Aikens by which a new company was to be formed to take over the holdings of the original company. Under this agreement the said named plaintiffs and Eagle were to and did take stock in the new company in the proportions of their holdings in the old company. It was also agreed that they should have "in addition gas for their private dwellings free for ordinary purposes." The new company was incorporated under the name of the Imperial Natural Gas Limited. A supplemental agreement, dated 16th December, 1902, was made between the original company and the individual shareholders thereof and such new company. This agreement contained a clause referring to the shareholders of the original company, including the said named plaintiffs and Eagle, by which they became "entitled to receive" from the new company "gas for ordinary purposes for use in their private dwellings at and adjacent to Attercliffe station in accordance with the agreement recited in the premises," which agreement alleged to have been recited in the premises was no doubt the agreement of March 22nd, 1902.

The Imperial Company proceeded to extend its operations in the Attercliffe gas field, and in doing so drilled 9 new wells. They also continued to supply the plaintiffs with free natural gas at their dwellings. There had been a company known as the Dunnville Natural Gas Company operating near the town of Dunnville several miles distant from Attercliffe station and supplying gas for the use of the inhabitants of that town. These two companies, the Imperial and the Dunnville company, were merged into a new company called the Peoples' Natural Gas Company, in which the plaintiffs again took stock in exchange for their stock in the Imperial Company, and they say in evidence that they were to continue to have free gas as before. It was apparently understood at the time of this amalgamation that gas was to be piped from the Attercliffe field to Dunville and a pipe line was thereafter put down for that purpose and gas was piped there.

In the year 1905 the Peoples Company is said to have been "absorbed" by the defendant company the Dominion Natural Gas Company Limited, and in connection with this arrangement a written contract was on the 2nd February, 1905, entered into between the Dominion Natural Gas Company Limited, of the first part, and Eagle, Strome, Sundy, Reilly and Kenny of the second part, which is in part as follows:—

"Whereas the parties of the second part hereby agree to sell, sign, convey and transfer their stock now held in the Peoples Natural Gas Company for par value of same to be paid forthwith by W. J. Aikens; Now this agreement witnesseth and it is hereby agreed by and between the parties hereto as follows: The parties of the second part shall be entitled to receive from the parties of the first part gas free for use in their private dwellings at and adjacent to Attercliffe station, in accordance with the agreement entered into with the Imperial Natural Gas Company on the 16th day of December, 1902. It is understood that this agreement is to extend to the successors and assigns of the parties of the first part."

The plaintiff Strome obtained from the company a contract bearing the same date by which the company agreed to supply to him and his heirs a certain amount of free gas along any of its pipe lines in case he removed from Attercliffe station. This is not of importance in this action as he is still living at or near Attercliffe station.

Each of said named plaintiffs and Eagle was paid in cash under said agreement the par value of their stock amounting to $444.

Sometime after said last mentioned agreement Harold Eagle died, and the plaintiff Rosinia Eagle is said to be his heir-at-law. It was agreed by counsel at the trial that she was not properly a party to the action, and her name was struck from the record. The defendant company continued to supply the plaintiffs Sundy, Strome, and Kenny with natural gas free of charge down to April, 1911, when they discontinued doing so, and took up the pipe line between Attercliffe station and Dunnville.

There is some disagreement between the parties as to whether after discontinuing the supply to the plaintiffs in April, 1911, the defendant company did or did not first offer to sell to them certain wells in which there was still some gas available, apparently, for purely local purposes

before selling them to other persons. By that time some of the wells had been abandoned as useless, and the others they then sold for sums representing approximately the cost of the casings therein.

The position of the defendant company in this action is that when the plaintiffs sold out to them in February, 1905, it was in the contemplation of all parties that the gas was being or would be piped from the Attercliffe field to Dunnville, where there was a considerable population to be supplied, and that the result would inevitably be to cause the Attercliffe field to be sooner exhausted than it otherwise would. They say that the pressure in the wells in the Attercliffe field having run down to a point where it was not commercially feasible to continue to pipe from those wells, they were justified in discontinuing operations therein, and in declining further to supply the plaintiffs with gas free at their dwellings.

Since April, 1911, the plaintiffs have been obliged to secure their supply of gas from the purchasers of these wells, and have so obtained it, and apparently it has cost them in the neighbourhood of $50 to $60 a year.

In this action the plaintiffs assert that on the 25th April, 1911, the defendants in violation of said agreement of 2nd February, 1905, shut off and refused to supply them further with free gas, and still refuse to supply them therewith. They ask in consequence "an order restraining the defendants from the continuance of the said breach" and damages therefor.

It appears that while the main pipe line from Attercliffe station to Dunnville has been taken up, the defendant company is still drawing gas from wells in the Attercliffe field, which they still own, and piping it by another line along the Dilks road to Dunnville. Defendants say that these wells are not wells which were owned by the plaintiffs or the Imperial Company, but wells put down by the Dunnville Company before the merger. These wells are about a mile east of the Attercliffe station, and there was a line from the Dilks road to Attercliffe station formerly, which is said to have been taken up after the main pipe line from Attercliffe station to Dunnville was taken up.

The plaintiffs contend that as the contract to supply them with free gas is an unconditional one the defendant company must continue to supply them or else pay damages consequent upon their failure. The defendants, on the other hand,

contend that so long as the company could do so on a commercial basis, and without loss to themselves, they had lived up to the contract, and that the moment they could not do so the contract was at an end.

The effect of the contract entered into on the 16th December, 1902, between the plaintiffs and the defendant company is, I think as follows: That the company would supply to the plaintiffs gas free for use in their private dwellings so long as they lived at and adjacent to Attercliffe station, and gas was obtainable in the Attercliffe station field sufficient for that purpose. It is clear that when the defendants refused to further supply the plaintiffs, there was still gas in that field from wells owned by the defendants, sufficient to supply the plaintiffs for use in their private dwellings. It is clear that there is still gas in that field which the defendants are at the present piping to Dunnville by way of the Dilks road. It is said that the pressure in the wells in that field, still owned by the defendants, fluctuates and at times it might be difficult to pipe any gas from these wells to Attercliffe station. It appears that at other times it would be quite practicable. It is plain also that if the defendant company had not parted with the wells which they owned, they would have been in a position ever since they cut off the supply from the plaintiffs to supply them as the present owners of those wells are now doing. The defendant company might have qualified their contract with the plaintiffs by the introduction of a clause such as that they were only to continue to supply so long as gas continued to be found in the Attercliffe station field in paying quantities, or so long as they could supply the same without loss to themselves. They did not do so. It has been laid down that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract." *Clifford* v. *Watts* (1870), 40 L. J. C. P. 36; Law Reports 5 C. P. 586. Reference to Leake on Contracts, 6th Canadian ed., 495; *Wallbridge v. Gaujot,* 14 A. R. 460 (affirmed 15 S. C. R. 650); *Ridgeway* v. *Sneyd,* 1854 Kay. 632; *Gowan* v. *Christie,* L. R. 2 Sc. Ap. 273: "At common law the mere fact of 'unworkability to profit' affords no ground for redusing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes."

The plaintiffs ask, and I think, are entitled to receive from the defendants damages for the breach of the agreement for failing to supply to them, gas free. Approximately, it has cost them about $60 since the date when the defendants refused to further supply them with gas. I think each of the three plaintiffs Sundy, Strome, and Kenny, must, therefore, have judgment for the sum of $60 down to the date of trial. I find that the covenant to supply free gas to the plaintiffs is still an existing and binding one upon the defendants. In case, therefore, they continue to refuse to supply the plaintiffs, the disposition I am making of this case will not in any way prejudice the rights of the plaintiffs in any future action. I think it is a case in which High Court costs should be granted to the plaintiffs, and I make an order accordingly. It is, of course, impossible to say exactly how long the Attercliffe station gas field will continue to supply gas for commercial purposes, or even for local purposes. Aitkens, a gas expert who testified at the trial on behalf of the plaintiffs, says that the gas under present conditions and consumption would probably last 8 to 10 years for commercial purposes, and will possibly be completely abandoned for such purposes in 12 years. It may be that the parties would prefer that I fix a lump sum to be payable by the defendants to the plaintiffs for a release of any further liability under the contract in question. If so, the matter can be further mentioned.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JULY 4TH, 1912.

TRIED AT SANDWICH.

CLARK v. WIGLE.

3 O. W. N. 1583.

Contract — Interlineation — Effect of — Sale of Shares—Option or Completed Agreement—Evidence—Onus—Corroboration.

Action by vendor for specific performance of a written agreement to sell certain mining stock, signed by both parties. Defendant claimed that the words "*Wigle agrees to take said stock*" had been inserted in the agreement after he had signed the same, and produced a copy of the agreement in his own writing not containing these words. Plaintiff, in reply, alleged that the words were inserted in his copy of the agreement at the time of making the same, with defendant's consent, and that defendant had insisted they did not need to be inserted in his copy, as he was bound to take the stock in any case. Without these words, the agreement constituted no more than an option on the stock given defendant.

FALCONBRIDGE, C.J.K.B., in view of conflicting testimony, dismissed action, but without costs.

The plaintiff claimed specific performance of the following contract:—

"Ohio City, Cal., July 14th, 1911.

This agreement made in duplicate this 14th day July, 1911, between T. Clark, of Kingsville, Ont., and Darius Wigle of same place. I hereby agree to sell two thousand shares of Sandy Hook to Darius Wigle, Mining Stock, *Wigle agrees to take said stock,* which mine is located on the Ohio Creek, Gunso County, Cal., at seventy-five cents per share, the same to be transferred three months from this date without interest, the parties hereto set their hand and seal in the presence of

Norman Peterson,
Witness.

(Sgd.) Thos. Clark,
(Sgd.) Darius Wigle."

At the trial plaintiff's counsel put in a few questions from the cross-examination of the defendant admitting his signature to the document, and closed his case. The defendant, being called on his own behalf, testified that the writing was drawn up by the plaintiff in a tent at the mine in California, in presence of one Norman Peterson. He swore that the writing was not in the same condition as when he signed it; that the italicized words "*Wigle agree to take said stock,*" had been inserted since he signed it, and he produced the paper which he said was written and signed at the same time. It was also in plaintiff's writing, but did not contain these words. This he said was the real agreement "as near as possible;" that he never heard of the alteration until last winter, about February, or perhaps just before the issue of the writ (11th of January, 1912).

Norman Peterson was called by the defendant, having heard the evidence of both plaintiff and defendant. He said that defendant said something about, if everything went as he calculated, he would take it, i.e., the stock, or be able to take it. He said he paid very little attention to what was going on. He could not say if the writing was in the same condition, or whether the two writings were just alike. And on cross-examination he said, "he thought it was a sale in the tent, the way they talked."

Plaintiff was then called in reply. He said defendant dictated this agreement, and he, plaintiff, wrote it out. That he, plaintiff, said it ought to have those words in it. That

he, plaintiff, reached over for the other copy to interline them, and defendant said "it is no matter; this binds you to give it, and that binds me to take it;" and that defendant consented to have the italicized words inserted. That was done there at the same time, and it was signed after the interlineation. He said the word "option" was never mentioned, and there was no condition about the matter, nor any words uttered by defendant to the effect that if matters turned out as he calculated, he would take the stock. This latter statement defendant had sworn to.

E. S. Wigle, K.C., for the plaintiff.

H. Clay and W. A. Smith, for the defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The burthen is undoubtedly on the plaintiff to shew that the document which he propounds, differing as it does, from the document produced by defendant (both being in plaintiff's own handwriting), represents the true agreement.

Unless I found that one or other of the parties, from his demeanour or otherwise, was manifestly lying, it is plain that without the evidence of Peterson, plaintiff could not succeed. Now Peterson's evidence is partly corroborative of plaintiff's story, and equally corroborative of defendant's. Therefore, it goes for nothing. I do not overlook the argument based on the expression "without interest," as being inapplicable to the case of a mere option, but I do not think it is sufficient to turn the scale.

Therefore, on the application of the rule regarding the burthen of proof the plaintiff fails.

It may be that plainiff's explanation is true, and if so, it is very unfortunate for him that he did not insist on having the interlineation made in both documents. He looked like a man of ordinary business capacity, and ought not to have allowed himself to be induced to neglect this reasonable precaution.

Entertaining, therefore, the doubt which I have expressed as to the correctness of this decision—(I do not mean the legal correctness as to which I have no doubt), in dismissing the action, I make no order as to costs.

Action dismissed without costs.

HON. MR. JUSTICE SUTHERLAND. JULY 4TH, 1912.

DUBE v. MANN.

3 O. W. N. 1580.

Contract—Sale and Purchase of Mining Claims—Completed Agreement—Fraud and Misrepresentation—Failure to Establish—Royalty—Covenant to Pay—Ore not Found in Paying Quantities—Payment of Lump Sum in Lieu of Royalties.

Action by plaintiffs for instalments of royalty payable by defendant under an agreement in writing dated April 8th, 1908. Plaintiffs, who were the owners of certain mining claims, had given defendant several options upon them, by agreements, prior in date to that sued on, under which mining experts and engineers, employed by defendant, had inspected the properties in question.

Finally, after considerable negotiation, the agreement sued on was arrived at between the parties, which provided for the sale of the said properties to defendant for $35,000 and a royalty. The provision as to a royalty was, in part, as follows: "The royalty . . . shall commence immediately upon the expiration of two years from the date hereof, and shall be at the rate of 15 cents for each long ton (2,240 lbs.), of ore removed from the said locations, the amount to be removed from the locations in each year to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not and such royalty shall be payable on the 8th day of April in each year. Provided, however, that the purchaser shall have the right at any time to purchase such royalty from the vendors for the sum of $25,000 cash." . . . Defendant paid the $35,000 provided for by the agreement and the properties were assigned to him by the plaintiff, but when the first instalment of royalty fell due he refused to pay the same, claiming that thorough investigation had shewn that there were not 65,000 tons of ore commercially procurable upon the whole property. He also counterclaimed in this action for rescission of the agreement and the return of the moneys paid by him on the ground of fraud and misrepresentation.

SUTHERLAND, J., *held*, that there was no evidence of fraud or misrepresentation and the defendant having entered into an unequivocal agreement to pay royalties on a tonnage of 65,000 tons per annum was bound thereby whether so much ore was to be found or not.

Palmer v. *Wallbridge*, 15 S. C. R. 650, and other cases referred to.

Judgment for plaintiff for $34,750 with interest and costs.

See also *Sundy* v. *Dominion Natural Gas Co.*, 22 O. W. R. 743; 3 O. W. N. 1575, and cases therein referred to.

Action to recover $9,750 the first instalment of a royalty, under an agreement in writing, dated 8th April, 1908.

McKay, K.C., for the plaintiffs.

L. G. McCarthy, K.C., for the defendant.

HON. MR. JUSTICE SUTHERLAND:—In this action the plaintiffs seek a judgment against the defendant for the first

instalment of a royalty of $9,750, claimed to be due under an agreement in writing, dated the 8th April, 1908.

The plaintiffs were mining prospectors, and in the year 1906, had become the discoverers of certain mining rights or claims in the vicinity of Burwash lake in the Temagami Forest Reserve in the province of Ontario, and had purchased the rights of certain other discoverers in other claims.

On the 6th October, 1906, an agreement or option was entered into between them and the defendant in which the plaintiffs were called vendors and the defendant purchaser, by which it was provided that for the sum of $50,000, $2,000 of which was to be payable on or before the 1st December, 1906, and the balance on or before the 6th July, 1907, the vendors offered to sell to the purchaser their rights in certain of said mining claims, the offer to remain open for acceptance until default was made in the payment of any instalment of purchase-money; and on default to immediately become null and void. It provided that the purchaser should have access to the property for the purpose of searching, prospecting, and exploring for minerals and to examine the lands and develop the mines thereon and to remove therefrom sufficient ore for testing in a laboratory or smelter.

The purchaser employed one Harris, a man of practical mining experience, to examine the lots included in the option, and on the 29th October, 1906, received a report from him. Thereupon the defendant paid the $2,000 and proceeded to spend considerable money in prospecting and examining as authorized. He continued to employ Harris during the year 1907, and up to the early part of 1908, and he was in charge of the prospecting operations. He received a further report from him on the 21st February, 1907, and other reports during that year up to the 31st December.

On the 28th June, 1907, a further agreement was entered into between the parties referring to the previous agreement or option and providing that the offer of sale contained therein should remain open for acceptance, and the time for payment of the balance of $48,000 be extended until the 6th October, 1907, and the defendant therein bound himself to perform or cause to be performed on each of the claims the work and other conditions necessary to preserve the title of the plaintiffs thereto until the expiration of the extended period. The defendant continued to expend money on the properties in prospecting and exploration.

On the 2nd October, 1907, a further agreement or option covering the same mining claims and certain other mining properties or claims was entered into between the parties varying the terms of the two former agreements as follows: The price of the mining claims was increased to $100,000, $2,000 of which was acknowledged as having been paid, and the balance was to be payable in ten instalments in varying sums, and at varying dates between October 6th, 1907, and July 6th, 1909. This agreement also provided that on October 6th, 1908, the purchaser should be entitled to exercise one of several options therein set out.

On February 7th, 1908, the plaintiffs, through their solicitors, wrote a letter, from which I quote as follows: "You say in your letter that you cannot complete the purchase of their properties at the price named in the option, but that if the Dube Bros. will consider giving you an option for a lesser amount you will again try to complete the purchase and build a railway to the mines. Now, although the Messrs. Dube feel that the price named in the former option was not a bit too great for the properties, still if you will not take it that settles it. They would like, however, to learn from you at what price and upon what terms of payment you would be willing to take a new option on the said properties? It is possible that a deal might still be made between you, and they feel that after you have spent so much money developing the property that they would prefer giving you the opportunity of purchasing in preference to any other person if there would not be too great a difference in the price offered."

On February 13th, the defendant replied as follows: "I would suggest that the Dube Bros. make me an offer of what they will take for the property on a year's option, or cash transaction. As I have stated before, I have seen a lot of the iron ore people, but they do not care to take up a concentrating proposition at the present time. I am very much disappointed that I did not get rich commercial ore in any large quantities, but it may be possible to locate some rich lenzes in another summer's work. I would consider the question of working there this summer, provided a reasonable option, at a very much reduced price. Probably the better way would be for the Dube Bros. to come down and see me."

Plaintiffs' solicitors wrote again on February 15th, as follows: "They also say that they do not wish to give an

option on the property, as they would prefer to sell out and out. You state in your letter that any arrangement would have to be at a very much reduced price, but you do not state how much reduction would suit you. The price that was put in the option which you formerly held was $100,000, for all the properties mentioned therein if you took them all. Now the Dube Bros. if they sell at all wish to sell all the properties which were mentioned in that option. They say that they do not know exactly what price to put on such properties in a cash deal, but wish to know how that following proposition would suit you, namely, that you should buy all their right, title, and interest in the said properties for the sum of $37,500 cash, and also a royalty on the output of say 15 cents for each ton of ore raised from the properties, weighed at the mine's mouth. Of course, if this proposition should be accepted it would be necessary in the agreement concerning the royalty, that you should bind yourself to raise a certain limited number of tons per year. It might be added, however, in the agreement, that if you wish at any furture time to get rid of this royalty you might buy out their claims to the same for a further payment of say $25,000 cash."

On or about the 14th April, 1908, Joseph Dube had an interview with the defendant in Toronto. At this interview the defendant says that after some discussion, an agreement was arrived at "about rebonding the property," as he put it. He says that a part of the arrangement was that a royalty of 15 cents a ton on 65,000 tons a year was to be paid, provided he discovered ore lenzes of commercial ore, and that the royalty was dependent upon ore in commercial quantities being found. On that day apparently he sent to the plaintiffs a written memorandum of his understanding of the matter in the following terms: "With respect to the iron locations at Burwash lake, specified in the agreement made between us, dated October 2nd, 1907, I will be glad to sign an option for the purchase of these locations, including the following terms, total price $35,000 payable as follows: $20,000 down on the signing of papers, balance of $15,000 in two payments of $7,500, payable in six months and one year respectively from the date of the option. Royalty: For the first two years from the date of the option no royalty shall be payable. After that period, I am to pay you royalty of 15 cents per long ton of ore removed from the locations. I am to take out of the locations an aggregate

of 65,000 tons per annum, but reserve the right to purchase the royalty at $25,000 cash at any time. Please have the necessary papers prepared and sent to me for execution."

Thereupon solicitors for the plaintiffs prepared and sent to the defendant a draft agreement reciting, among other things, that the vendors had agreed to sell to the purchaser upon the terms and conditions therein set forth, all their right, title and interest in each of the mining claims, proceeding to say that in consideration of the premises and one dollar paid by each of the parties to the other they agreed as follows: The vendors agreed to sell to the purchaser and the latter to purchase from them all their right, title, and interest in the mining claims for the consideration of the royalty hereinafter described, and the payment in addition of $35,000 to be payable as set out. It is also provided that:—

"3. The royalty hereinbefore mentioned shall commence immediately upon the expiration of two years from the day of the date hereof, and shall be at the rate of 15 cents for each long ton (2,240 lbs.) of ore removed from the said locations, the amount to be removed from the locations in each year to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum, at least, whether that amount shall be actually removed or not, and such royalty shall be payable annually on the 8th day of April in each year. Provided, however, that the purchaser shall have the right at any time to purchase such royalty from the vendors for the sum of $25,000 cash, and upon payment to the vendors of the said sum of $25,000 cash the vendors shall assign such royalty to the purchaser, but such purchase and assignment shall not include any royalty, the payment of which is overdue by the terms of this agreement before the date of such purchase.

4. Upon payment in full of the $35,000 purchase-money, above mentioned, within the time hereinbefore stipulated for the payment thereof, the vendors shall execute or cause to be executed transfers of each of the above described unpatented mining claims to the purchaser from the owners thereof as the same may appear in the records of the office of the Bureau of Mines, such transfers to be to the purchaser or his nominees, and the purchaser shall as a contemporaneous act with such transfers give security to the vendors

upon the said mining claim for the payment of the royalty hereinbefore described.

5. The vendors shall not require to do any further work on the said claims or be at any further expense with respect thereto, but the purchaser shall enter into possession of the said claims forthwith upon the executon of these presents, and shall until the payment in full of the said sum of $35,000 perform the necessary work and do all other necessary things and make all payments necessary to preserve the title to the said claims at present held by the vendors and the other discoverers.

6. Time shall be strictly of the essence of this agreement, and upon default being made in the performance of the work and other conditions in the immediately preceding paragraph hereof mentioned, or in the payment of the said sum of $35,000 or any part thereof, this whole agreement shall become null and void at the option of the vendors, and the purchaser shall actually forfeit all work done and all moneys paid before the date of such default and shall abandon the possession of, and all claims to, the said mining claims without being entitled to any recompense therefor.

7. The purchaser covenants with the vendors that he will well and truly pay or cause to be paid to the vendors the said sum of $35,000 at the times and in the manner above set forth and also the said royalty at the said rate annually on the 8th day of April in each year after the expiration of two years from the date hereof as above stipulated."

The defendant submitted said draft agreement to his solicitors, who suggested two amendments thereto as follows: Between the words "year" and "provided" in said paragraph 3 he inserted the following: "Provided, however, that shipments in excess of 65,000 tons in any year shall to the extent of such excess be credited in reduction of shortages in any subsequent year or years," and striking out from paragraph 4, all the words after "nominees" and inserting in place thereof the following, "and to contain a reservation in favour of the vendors herein named of the royalty above specified unless the purchaser has previously exercised his option to acquire such royalty for $25,000."

The solicitors for the defendant engrossed an agreement in duplicate with said variations; the defendant executed same and thereupon the same was forwarded to the plaintiffs' solicitors accompanied by a draft for the $20,000 in

cash and two notes of $7,500 each to represent the balance of the cash payment. The agreement as altered was accepted by the plaintiffs and also executed by them, and is the agreement in question herein.

Under the former agreements or options the vendors had been assisting Harris, the representative of the defendant, in his operations and work upon the property.

The defendant having thus paid the cash payment of $20,000, went into possession and continued to investigate, explore and mine. Later on at their maturity on the 8th October, 1908, and 8th April, 1909, he paid the said two notes. Having thus paid all the cash consideration, he on or about the 12th April, 1909, obtained from the plaintiffs written transfers of their right, title, and interest in and to the respective mining properties subject to the royalty as already mentioned. He was then owner subject to the payment of the royalty.

The first instalment of royalty under the agreement of $9,750 being 15 cents on 65,000 tons, came due, as the plaintiffs allege, on the 8th April, 1911, and was not paid by the defendant. On the 29th May, 1911, this action was commenced by writ of summons.

In the course of the litigation an order was made by Clute, J., as follows:—

"Upon the application of the plaintiffs on the 23rd of November, 1911, to postpone the trial of this action.

Upon the application of the defendant on the 12th day of January, 1912, for an order changing the place of trial of this action from the town of Sudbury to the city of Toronto, and directing that the case be set down without further notice of trial for the non-jury sittings commencing at the city of Toronto on the 15th day of January, 1912, and for such further and other order as to this Honourable Court may seem meet:

Upon reading the affidavit of Leighton Goldie McCarthy, filed, and the exhibits therein referred to and the affidavit of James Arthur Mulligan, filed, and the exhibits therein referred to, and the pleadings and proceedings in the action:

And it appearing that if the trial of this action be postponed until the next sittings of this Honourable Court, to be held at the town of Sudbury, a further sum of $9,750 will, if the plaintiffs' contention is upheld, accrue due under

the agreement between the parties, dated the 8th day of April, 1908, and set forth in the statement of claim herein, before this action could be tried, and it further appearing that the defendant could under the terms of the said agreement at any time prior to the 8th day of April, 1912, relieve himself from any and all liability thereunder, exclusive of interest charged by the payment of $34,750, counsel for the plaintiffs and defendant consenting thereto.

1. It is ordered that the trial of this action be and the same is hereby postponed until the next sittings of this Honourable Court, to be held at the town of Sudbury.

2. And it is further ordered that the application of the defendant for an order changing the place of trial herein from the town of Sudbury to the city of Toronto, be, and the same is hereby dismissed.

3. And it is further ordered that upon the defendant on or before the 8th day of April, 1912, depositing in Court the sum of $34,750, with interest at 5% on $9,750, from April 8th, 1911, to date of payment into Court, or filing a bond to the satisfaction of the Registrar of this Court at Toronto in the penal sum of $50,000, securing the payment of the said sum of $34,750 with interest as aforesaid, to said date, and further interest equal to what would accrue if the money were paid into Court, the limit of the liability of the defendant under the terms of the said agreement of the 8th day of April, 1908, if any there be, is hereby fixed, exclusive of interest charged, at $34,750.

4. And this Court doth further order that if the said sum of $34,750 with interest as aforesaid, has been paid into Court under the terms of this order it shall upon the termination of this litigation be paid out, wth accrued interest thereon, to the successful party or parties, and thereupon all parties shall be discharged and released from all the terms and conditions of the said agreement of the 8th day of April, 1908.

5. And this Court doth further order that if a bond has been filed under the terms of this order the same shall upon the termination of this litigation be delivered to the successful party or parties.

6. And this Court doth further order that the costs of these applications be costs in the cause."

Under the terms of the said order the defendant paid into Court the said sum of $34,750 and interest.

At the trial the plaintiffs put in the agreement and read from the examination for discovery of the defendant to shew that he had signed the contract; paid the $35,000 thereunder; obtained transfers of the properties covered by the agreement and had, under the agreement and in pursuance thereof, gone on the property and done work. I quote further from the examination:—

"57. Q. Under that agreement, Sir Donald, in pursuance of that, you went on the property and did work? A. Yes.

58. Q. Treated it as your own, as you were entitled to? A. Yes, under the agreement we had, the right to go on.

59. Q. And you did go on, and treated the property as your own? A. Yes."

The defendant had had the property examined in November last by two mining experts, who said that they went upon the property to see if there was any iron ore that could be "commercially worked," and could find nothing that could be worked at a profit; they could find no merchantable ore; that everywhere they went there were evidences of drilling, small quantities of iron ore; that 65,000 tons of ore could not be taken out in a year. One of these experts, Ferrier, said that he had observed ore which was in considerable part of iron; that these were isolated occurrences on most of the claims and largely loose and non-continuous. He gave as a definition that ore was "a mineral substance of such quality and in such quantity that it might be exploited at a profit," and stated that its essential feature was that the mineral might be extracted at a profit. He said that non-payable ore is a contradiction in terms. The other expert, Barlow, also said that he had gone over the properties with Ferrier, and found no iron ore of commercial quality in commercial quantities. At one spot there would be a few thousand tons of ore, say 4,000 or 5,000. He also agreed that it was not possible to take out 65,000 tons in any one year. He said that he and Ferrier were engaged in their inspection the greater part of two days; that there were 26 locations covering about 1,000 acres. While he would not say that he put his foot on 100 acres out of the 1,000, he expressed the opinion that owing to the character of the formation the two days' time occupied in the inspection was sufficient to enable them to report.

The evidence of the experts was taken subject to the objection of the plaintiffs, that the case had to be disposed of on the written terms of the contract and that no evidence was properly admissible as to whether 65,000 tons could or could not be taken out of the property in any one year.

The evidence of Harris was also put in on behalf of the defendant to shew the efforts made by the latter to find and develop the ore. He says that he left early in 1908; that he made an honest endeavour, and did his best to find iron ore; that he employed from 15 to 35 men at various times in the work, including the plaintiffs, who were on the pay-roll, but that he was unable to find any merchantable iron ore. He says that in addition to his written reports he verbally reported to the defendant. He says that by the time he finished, in February, 1908, they had worked all over the property and had made a magnetic survey over every 50 paces or so. He also explained that certain estimates made in his reports as to what percentage would be yielded from ore from which samples had been taken did not come up to his expectations. He expressed the opinion that at no place could 10,000 tons of ore be taken out. He said that if he estimated all kinds of iron formation down to 30 per cent. a good deal more than 10,000 tons could be got out, but this would be regardless of cost, that the percentage would not be high enough to make it merchantable ore.

The defendant said that in his interview with the plaintiff Joseph Dube, in Toronto, before the contract in question was signed, Dube had stated that in his opinion the properties in question were as valuable as the Moose Mountain property, which the defendant says was a very valuable mining property. He said that what he understood, he contracted to do was to try and find real commercial ore, in which case he was to mine it and remove it to a furnace. If found on the property it would be necessary to build a railway to remove it to a furnace. I quote further from defendant's evidence:—

"Q. Did you discuss with him that subject as to the advisability of taking it out or anything of that kind? A. Yes, I discussed it with him if it was found it was understood that I was to pay him fifteen cents a ton on 65,000 tons a year, if we could find commercial ore there . . .

Q. Then it is clear from the correspondence, without troubling you with the details, Sir Donald, that at the time you were making this agreement you had been, shall we say

disappointed in the reports you had received from the property down to that time? A. Yes.

Q. And that this agreement was made in hopes? A. Hopes we would find rich ore.

Q. Hopes you would find rich ore? A. Yes.

Q. And it was upon that hope, with the chance of the hopes being realized that the agreement was being entered into? A. Yes, and the statements made to me.

Q. You have told me all the statements that were made to you as here? A. Yes.

Q. And any other statements there were you heard Mr. Harris say here, reports from him from time to time, reports of what his work had shewed and the results of it, and I suppose you agree with what he said that you knew of them at the time? A. Well, he said he was of the opinion that we might find rich lenzes or ore, commercial ore.

Q. That was the way he put it and it was upon that hope or chance, whichever way you put it that you were taking the further chance on it? A. Yes."

The evidence of G. Ruel, the solicitor for the defendant to whom the agreement in question was submitted, and who made the changes already mentioned, taken to plaintiffs' objection, was as follows:—

"I said Sir Donald, there is a reservation made that you have to take out 65,000 tons of ore per annum, and I said, 'Are you going to be able to get that out.' And Sir Donald said: "If we do not get it out we do not have to remove it. That settles it,' or words to that effect. I said: 'If that is the agreement it is all right.'

Q. What then was the next thing you agreed with reference to royalty? A. As to royalty?

Q. Now what was it you were to pay? What, how and when were you to pay him? A. I was to pay him when I found the ore and mined it.

Q. Whether you removed it or not? A. And if it was not there, I did not owe him anything."

The defendant also put in as part of his case the following extracts from the examination for discovery of the plaintiff, Joseph Dube:—

"86 Q. Now Mr. Dube, do you now say that there is any quantity of merchantable iron ore on these locations in question? A. It is pretty hard to tell that, for me.

87 Q. Did you believe when you made the agreement of April, 1908, that there were 65,000 tons of merchantable

iron ore on the locations in question? A. I was not an expert.

88 Q. Did you know it or did you not? A. I could not tell anything about it. . . .

91 Q. How was it that 65,000 long tons of iron ore were referred to in the third paragraph of the agreement? A. That is what he agreed to take out.

92 Q. That is what you asked him to agree to take out? A. Yes. . . .

97 Q. How and when and where was this iron ore to be weighed as you understood it? A. I suppose that where it was suitable to Mann himself.

98 Q. Where must it be—how are you going to weigh tons of iron ore? A. I guess there was no mention of that at all, on the agreement.

99 Q. Where was it going to weighed? A. I do not know anything about it.

100 Q. Never discussed that? A. Not that I know of.

101 Q. Either with Mulligan & Meldrum or Mr. Mann? A. It might be weighed on the property, that is where it should be I guess.

102 Q. Are you sure that you did not stipulate that it should be weighed at the mouth of the mine. A. It might be there too—that is the proper place. . . .

115 Q. Are you prepared to deny it, if I tell you for a fact that no quantity of merchantable ore has been found? A. No.

116 Q. You know Sir Donald Mann has spent considerable sums of money in endeavouring to locate ore on the locations? A. He did.

121 Q. You have no dissatisfaction to express at all events? A. It was their own doing. . . .

130 Q. But it is to be only, as I understand, when it has been moved off the locations? A. It was not. By the covenant it was whether the ore was removed or not.

131 Q. But the ore was to be first mined? A. I do not know. I guess it had to be first mined before it could be removed.

132 Q. And you understood it was to be mined before it could be removed? A. Yes.

133 Q. And you also know that if it is not there, it cannot be mined? A. That is to be proved.

134 Q. If it is not there it cannot be mined? A. That has to be proved. . . .

152 Q. Was it discussed with an expectation that that 65,000 long tons was going to be taken off? A. Yes.

153 Q. You both thought it was going to be taken off? A. Yes.

154 Q. And he was to have two years to work the mines before any royalty was to be paid? A. Yes.

155 Q. Then you expected that in two years he would have mines in operation which would be producing 65,000 long tons of iron ore per year? A. Yes

156 Q. And it was with that expectation that this agreement was made? A. Yes.

157 Q. And you talked about it in that way? A. It was on the agreement.

158 Q. And you talked about it in that way? A. I guess we did.

159 Q. And you expected to get $9,750 whether any ore was found there at all? In view of that talk? A. That was the agreement.

160 Q. Did you expect it? A. I do not know about that.

161 Q. Do you think for one minute that Sir Donald Mann intended to agree to pay you that whether ore was found there or not? A. I do not know his intention.

162 Q. You did not expect to get it if they did not find the ore? A. I do not know.

164 Q. Now was not this the intention—that Sir Donald Mann was to pay you $35,000 cash for the properties, and was to pay 15 cents a ton, long tons, on any ore that was mined and weighed at the mouth of the mine, whether removed from the locations or not? A. Yes.

165 Q. So that in your talks with Sir Donald Mann it was clearly understood that the ore was to be mined and weighed at the mouth of the mine before a royalty was to attach? A. No sir.

166 Q. Was it in the intention in your mind that you were to get $9,750 whether they found any ore or not there? A. That was the agreement.

167 Q. It was in your intention when you were making the agreement that you were to get that whether it was found or not? A. They were supposed to get it.

168 Q. That is, they were supposed to get the ore—you assumed they were going to find the ore? A. That was their intention."

Dube at the trial stated that it was a purchase and sale and not an option that was discussed between him and Mann and which discussion was followed by the agreement in question. He says that Mann wanted to buy at a low figure, less than the former one. He also says that there was nothing said about the royalty only being paid in case he mined and removed that quantity but that the agreement was that the defendant was to pay whether he removed the ore or not; that there was nothing said to the effect that the defendant was not to pay a royalty unless he found 65,000 tons. While he says that he does not remember speaking of the Moose Mountain property to the defendant, he also says that it was his opinion that the properties in question were nearly as good as the Moose Mountain property at that time.

In his statement of defence the defendant avers that he was induced to execute the contract in question by the fraud and misrepresentation of the plaintiffs and that the plaintiffs or one of them fraudulently represented to him, knowing the same to be untrue, that there were upon the mining claims in question large quantities of merchantable iron ore and that the said claims were capable of producing at least 65,000 tons, long tons, of such merchantable iron ore per annum, whereas the claims had not thereon nor were capable of producing iron ore in any merchantable quantities whatever.

No evidence was adduced at the trial from which I could find that any fraudulent representations were made to the defendant by the plaintiffs. The fact of the matter was that the defendant was in just as good a position through his agent, Harris, and the knowledge he had obtained from him as the plaintiffs about the character of the properties in question and their possibilities.

The defendant also alleges "that the basis of the agreement and particularly paragraph 3 thereof was that it was possible to work, raise and remove from the mining claims in question not less than 65,000 long tons of merchantable iron ore per annum and that the true intent and meaning of the parties, which was set up or intended to be set up in the agreement was, that a royalty of 15 cents should be paid on every long ton worked, raised and removed" from the mining claims, "provided that an average quantity of not less than 65,000 of such long tons should be removed from the said mining claims or locations every year, or the

said royalty should be payable on that quantity when weighed at the mine's mouth, whether that quantity should be actually removed from the said claims or locations or not."

He also further says: "that notwithstanding the expenditure of upwards of $75,000 the employment of competent mining experts and the use of the most improved methods of mining and the best machinery, no merchantable iron ore whatever can be discovered upon the said mining claims, and that it is impossible to remove 65,000 long tons or any commercial quantity whatever of merchantable ore."

He further claims that the "plaintiffs are not entitled to recover a royalty upon ore that does not and never did exist and which therefore cannot be removed."

He further "submits that there has been entire failure of consideration for the alleged agreement and the payments made by him to the plaintiffs in connection therewith."

By way of counterclaim he asks that the agreement shall be declared null and void and of no force or effect and for repayment of the sum of $35,000 paid by him to the plaintiffs and an order declaring that the true intent and meaning of the parties to the agreement was as set out in paragraph 4 of the statement of defence, and that if the Court should deem necessary it should order the agreement to be rectified so as to make it embody the real intention of the parties.

In view of the fact that in place of providing for a small down payment as is usual in the case of an option and as had been the case in the agreements in the form of options which had previously been entered into between the parties, the contract in question provided for a cash payment of $20,000 and the payment of the two remaining cash instalments within one year and that the purchaser assumed to go into possession and continued in possession until after all the purchase money was paid and thereupon received from the vendors written documents transferring all their right, title and interest in the respective unpatented mining claims in question, and in view of the form of the agreement itself which provided that the vendors were to sell and the purchaser to purchase all the right, title and interest of the vendors in each of the mining claims, I have come to the conclusion that the document must be considered and treated as a sale and purchase and not as a mere option.

On the purchaser obtaining the documents transferring the title of the vendors to him he became and was the owner of the claims subject to the payment of the royalty as men-

tioned in the agreement in question and which was also referred to in the documents of transfer as follows: "the royalty hereinbefore referred to as being hereby expressly reserved and excepted from this transfer is the royalty agreed upon in the agreement dated the 8th day of April, A.D. 1908," etc. . . . "and which royalty is to be paid on 65,000 such tons per annum at least from the said group and on more if more be removed, but the royalty is subject to be purchased by the owners of the properties at any time as to payments not overdue at the time of such purchase, for the sum of $25,000 cash."

The covenant on the part of the defendant is a definite and certain one, viz., that "the amount to be removed from the locations in each year" is "to be not less than 65,000 of such long tons and the said royalty 15 cents per long ton shall be paid on 65,000 long tons per annum at least whether that amount shall be actually removed or not, and such royalty shall be paid annually on the 8th day of April in each year."

The purchaser also provided for his own protection by the alteration made by his own solicitor in the contract as originally drafted, that "shipments in excess of 65,000 tons in any year shall, to the extent of such excess, be credited in reduction of shortages in any subsequent year or years."

There is another term of the contract also which was for his special protection and advantage, which is as follows: "Provided, also, that the purchaser shall have the right at any time to purchase such royalty from the vendors for the sum of $25,000 cash." He took upon himself, under the terms of the contract, "the burden of quantity and failure."

I think the case of *Palmer* v. *Wallbridge* (1888), 15 S. C. R. 650, has much application. It was there held "that the lease contained an absolute covenant by the lessee to pay the rent in any event and not having terminated the lease under the above proviso he was not relieved from such payment in consequence of ore not being found in paying quantities. Here, too, there is an absolute covenant to take out a named quantity of ore and pay a definite amount of royalty thereon. Here, too, there is a clause permitting the purchaser to put an end to the royalty by payment of a lump sum in lieu thereof. Reference also to *Phillips* v. *Jones* (1839), 9 Simons 519; *Marquis of Bute* v. *Thompson* (1844), 14 M. & W. 487; *Mellers* v. *Duke of Devonshire* (1852), 16

Beaven 252; *Lord Clifford* v. *Watts* (1870), L. R. 5 C. P. 577; *Gowan* v. *Christie* (1873), L. R. 2 C. A. 273; *Battle* v. *Willox* (1908), 40 S. C. R. 198, and Leake on Contracts, 6th Canadian edition, 1912, p. 490.

The plaintiff will, therefore, have judgment for the sum of $34,750 with interest paid into Court under the order of Clute, J., as aforesaid, together with subsequent interest, and all parties to be otherwise discharged and released from the terms and conditions of the agreement in question. The plaintiffs will also have their costs of suit.

HON. MR. JUSTICE TEETZEL. JULY 8TH, 1912.

HOLDEN v. RYAN.

3 O. W. N. 1585.

Covenant—Building Restrictions—Breach—Semi-detached Building—Width of Land—"Appurtenant"—"Front" of Building—"Main hall"—Distance from Centre of Street.

Action for injunction restraining defendant from erecting a building on his lands alleged to be in violation of a certain building scheme in accordance with which the lands were laid out by the original owner subject to certain building restrictions running with the land. The land in question was 40 feet in width on Palmerston avenue, Toronto, with a frontage on Harbord street, and defendant proposed erecting thereon an apartment house with a vertical dividing wall extending the whole height of the building with 7 or 8 apartments on each side and no communication between them. He also proposed to make the entrance to all the apartments save one from Harbord street. Plaintiff claimed that the proposed building infringed two of the building covenants to which the land was subject, in that it constituted two semi-detached buildings on a lot less than 50 feet and moreover fronted on Harbord street and not Palmerston avenue as required by the covenants.

TEETZEL, J., *held* that the proposed building constituted two houses and not one as contended by defendant.

Park Estates Ltd. v. *Jacobs*, [1903] 2 Ch. D. 522, followed.

That the proposed building fronted on Harbord street and not Palmerston avenue.

Judgment for plaintiff with costs.

Action for an injunction to restrain defendant from erecting a building upon his land which was alleged by plaintiff to be in violation of a certain building scheme in accordance with which the lands were laid out by the original owner subject to certain building restrictions running with the land.

The restrictions in question, for violation of which defendant was charged, were numbers 3 and 5 of the scheme

covered by the covenants in the conveyances and endorsed thereon:—

3. "Every building erected upon any such lot shall be either detached or semi-detached. Every such detached building (except stables and outbuildings) shall have appurtenant to it land having a frontage on Palmerston avenue of at least thirty-three feet; and every such pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet.

5. "Any building (except stables and outbuildings) erected upon any such lot which has a frontage upon some other street as well as upon Palmerston avenue shall have its front on Palmerston avenue."

The defendant's lot had a frontage of only 40 feet on Palmerston avenue and Harbord street adjoins to the south. The defendant's plans were for the erection of a building to be used as an apartment house or houses, and having obtained the permit from the city architect was proceeding at the commencement of this action with the erection thereof.

As to the first alleged violation, the plaintiff charged that the proposed building was in fact a pair of semi-detached buildings and not a detached building, and that the total width of land appurtenant thereto being only 40 feet restriction number 3 was thereby violated.

In the proposed building there was a vertical division wall running north and south extending the whole height of the building dividing it into two equal divisions, and in each division there were some seven or eight separate apartments. There was no door or other opening in this division wall, so that there was no means of access between the easterly and westerly halves of the building; each half had its independent entrance facing upon Harbord street.

Tried at Toronto without a jury.

W. A. McMaster, for the plaintiff.

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

HON. MR. JUSTICE TEETZEL:—I think upon this question the case is governed by *Ilford Park Estates Limited* v. *Jacobs*, [1903] 2 Ch. D. 522, in which it was held that a building structurally divided into two tenements on different floors with no internal communication, common staircase or common front door, constitutes two houses within the

meaning of a covenant not to erect more than one house on the site. I therefore hold that the proposed building is in fact a pair of semi-detached buildings, and to permit the same to be erected would be in violation of the restriction which provides that every "pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet."

Although the word "appurtenant" if strictly construed, as urged by Mr. Thurston, would not be the strict legal expression to use, I think it is plain that the parties meant, and that instead of giving the word "appurtenant" as used a strict legal meaning, its ordinary popular meaning must be given to it, and in so doing I find that the defendant if permitted to erect the building in question would be violating restriction number 3.

Then as to the other condition, I have no hesitation in finding upon a consideration of the plan and the weight of evidence at the trial, that the proposed building does not have its front on Palmerston avenue, as required by the fifth restriction, but has its front upon Harbord street.

While it is true there is an entrance to one of the apartments from Palmerston avenue, there is no connection between that apartment and any of the others in the building. The main entrance for all the other apartments in the easterly half of the building is on Harbord street, as is also the main entrance for all the apartments in the westerly half of the building.

While it is true that the portion of the building facing Palmerston avenue may be described as the front end, it is not the substantial or predominating front of the building, which as already stated, having regard to the plan and to the weight of evidence at the trial is on Harbord street and is therefore in violation of building restriction number 5.

Among other ingenious and ably maintained defences urged by Mr. Thurston, much attention was paid to a defence alleging that the plaintiff himself had violated one of the restrictions of the scheme and therefore cannot be heard to complain of violations by the defendant. I do not stop to discuss the law upon this matter if there had been a violation by the plaintiff, but find as a fact that the violation charged by the defendant against the plaintiff was not established.

The claim is that the main wall of the plaintiff's building has been erected nearer than fifty-five feet to the centre

line of Palmerston avenue, in violation of restriction number 1.

In my opinion it was well established by the plaintiff that the main wall of his building is not built in violation of that condition. I think the main wall of the plaintiff's building is the wall which supports the superstructure and roof of his house, and not the wall in front of the bay-windows.

Judgment therefore will be declaring that a building as proposed by the defendant would be in violation of conditions 3 and 5 of the building restrictions in question, and that the defendant must be restrained from proceeding with the erection of the building unless and until he alters his plan and complies with those restrictions.

Defendant must pay the costs of action.

HON. MR. JUSTICE SUTHERLAND. JULY 9TH, 1912.

HILTY LUMBER CO v. THESSALON LUMBER CO. AND TRADERS BANK OF CANADA.

3 O. W. N. 1593.

Timber — Contract of Sale — Representation or Guaranty — Oral Testimony — Admissibility — Fraud and Misrepresentation — Contemporaneous or Prior Oral Agreement — Discount on Price —Demurrage — Evidence.

Action for declaration that a certain contract for the sale of certain lumber by defendant company to plaintiffs was made on the express representation that certain of the lumber known as the Mississauga cut would run at least 5,000,000 feet of No. 3 lumber and that it was a further term of the agreement that plaintiffs should be allowed a discount of 2 per cent. on the purchase and for damages for breach of the said representation and term. The agreement which was entered into after considerable negotiation and after a casual inspection of the lumber on the runs by the president of the plaintiffs a shrewd business man, contained no reference to either of the above terms and defendants denied that they had been referred to in the making of the contract. Instead of running 5,000,000 feet the Mississauga cut ran 3,235,000 feet and for the shortage plaintiff claimed $7,060 damages.

SUTHERLAND, J., *held*, that no false representation, no prior nor contemporaneous oral agreement constitutng a condition upon which the performance of the written agreement was to depend, or that the allowance of a discount was to have been one of the terms thereof had been proven.

Semble, that evidence as to oral guarantee or representation should not have been admitted.

Lindley v. *Lacey*, 17 C. B. 578; *Lasalle* v. *Gifford*, 1901, 2 K. B. 215, and *Lloyd* v. *Sturgeon Falls Pulp Co.*, 85 L. T. R. 162, referred to.

Action dismissed with costs.

M. McFadden, K.C., and J. E. McEwen, for the plaintiffs.

J. L. O'Flynn, for the defendant lumber company.

P. T. Rowland, for the defendant The Traders Bank.

HON. MR. JUSTICE SUTHERLAND:—This action arises out of a written contract dated the 15th March, 1910.

The plaintiff alleges that it was induced to make said contract by certain verbal representations made to their president one Forster, by one Bishop, the general manager of the defendant lumber company, on the truth and accuracy of which it relied, and to the effect that the defendant lumber company would undertake to deliver all of the saw-logs owned by it at the time of the contract then cut in the woods, on skids or in the streams on the bank of the Little Thessalon and Mississauga rivers at their mill and manufacture same into lumber upon specifications to be furnished by the plaintiff, and that the Mississauga run would cut into at least 5,000,000 feet of grade No. 3 and better.

In the written contract itself the bargain between the parties appears in the following form "the party of the first part does hereby sell to the party of the second part all of the white pine No. 3 and better lumber, to be cut from the saw-logs now cut and owned by it in the woods, on skids or in the streams and on the banks of the streams on the Little Thessalon and Mississauga rivers in the district of Algoma, province of Ontario."

The bargain was discussed and arranged between said Forster, and said Bishop. The former was apparently apprised by one Woodey, a lumber inspector, that the defendant lumber company had the logs in question and communicated with the latter and was asked to come to Thessalon to look them over. He and Bishop met at Thessalon and drove from there to Nesterville, some miles distant. They went around on the different skidways and looked over the logs consuming a couple of days in the operation. Forster says that while he had opportunity to see all the logs he does not think he did. He states that the object of his trip was to "size up the logs and see if they would produce the kind of timber he wanted and not to estimate the amount." He says, as a general thing, buyers would have to take the seller's representation as to quantity, and that Bishop represented that the defendant company would have about 16,000,000 feet of white pine timber No. 3 and better for

sale, about 11,000,000 from the Little Thessalon river of smaller size and less valuable, and 5,000,000 from the Mississauga river of a good class of logs, and which would make up into good lumber.

He says that he stated to Bishop that he could not make a contract unless he could be assured that there would be 5,000,000 feet of the Mississauga logs, and that it was necessary for him to have an approximate estimate of the better class so as to enable him to make an offer of a stated amount per thousand for the combined cut. He says that the whole contract, so far as he was concerned, hinged on that.

No contract was arranged between the parties at this time. Between this interview and the next, which occurred five or six days afterwards, Forster says that he was able to ascertain that he could sell the 5,000,000 of the Mississauga cut at an advanced price. He did not intend to use this better class in his business, but the lower grade cut from the Little Thessalon river. The Thessalon lot he did not consider was worth the general price which he was prepared to offer and did offer and which was accepted, and the Mississauga was to be better and enable him to have a profit on it so as to reduce the whole to a reasonable average price.

At the second interview between the same parties in the office of the plaintiff company, at Milwaukee, they went over the matter again. Forster states that at this interview his partner, Charles Miller, the treasurer of the plaintiff company, was present, and that Bishop again stated that there would be 5,000,000 from the Mississauga river, and indeed went farther and said you will get 5,500,000 from that river, and the other one will overrun also. Forster says that he repeated to Bishop that it was only on that stipulation that he would enter into a contract. Charles Miller says that he was present at this interview and that Forster stated to Bishop that the plaintiffs must get 5,000,000 Mississauga cut to bring the price down to where they could come out all right, and that the understanding between them was that the plaintiffs were to get 5,000,000 from the Mississauga river and 11,000,000 from the Little Thessalon. He says that no estimate was given by Bishop of how much more than 5,000,000 would be cut on the Mississauga river.

A bargain was arranged at this interview and Bishop was to subsequently draw the contract which he did.

On the 15th March, 1910, Bishop went from Chicago to Milwaukee with the contract for execution by the parties.

A further interview then occurred in the plaintiff's office. Forster states that Bishop again represented that the Mississauga cut would go even 5,500,000 of the "good long Mississauga stuff." He says this was repeated several times in the conversation between them before the contract was executed.

Charles Miller, who was present when the contract was signed does not remember that the amount of timber to be cut was discussed at this time. Bishop says that at no time did he say that the Mississauga cut would be 5,000,000 or 5,500,000. He says that he did make the statement that the entire cut on the Mississauga river, including culls, would run about 5,000,000, he thought. He says that at the time he had the Government scale in his hands which enabled him to estimate that there would be approximately 3,500,000 or thereabouts of No. 3 and better. He says the Government scalers scale only logs that will cut into merchantable lumber. He says that the matter is to some extent a guess and one can only make a general estimate.

Under these circumstances Forster and Charles Miller read over the contract as prepared by Bishop on the 15th March, 1910, and at Forster's suggestion some slight clerical changes were made in the contract as typewritten, by the insertion of the following words at the end of clause 5 "any No. 4 found in the same price $12 per M. ft.," and by inserting the year "1910" in connection with the date of the promissory notes set out also in that paragraph, and the change of the word "sixty" to "ninety" days in the same paragraph. There was also a substantial change made in paragraph 12 by the addition thereto of the following: "In event should the United States Government impose an *ad valorem* or further duty on lumber from Canada into the United States then this contract is null and void."

The contract was thereupon executed in the name of the defendant lumber company by Bishop, as vice-president and in the name of the plaintiff company by Forster, its president.

Paragraph 5 of the contract reads as follows:—

5. "In full consideration for the No. 3 and better lumber, and for insuring same as herein provided, second part agrees to pay to the first party therefor $24 per thousand feet, board measure, for the lumber of the grade of No. 3

and better, ten feet long and upwards, as follows: any No. 4 found in same, price $12 per M. feet.

"Sixty-eight thousand dollars ($68,000) on or before April 13th, 1910, either in cash or second party's promissory notes due as follows:—

June 15th, 1910	$10,000
July 15th, 1910	10,000
August 15th, 1910	10,000
September, 15th, 1910	10,000
October 15th, 1910	10,000
November 15th, 1910	10,000
December 15th, 1910	8,000

and the balance of the purchase price above specified on the 15th of the following month, after the lumber is sawed and piled on the dock on an estimate to be made between a representative of the party of the first part, and the party of the second part, and agreed upon, either by cash less 2 per cent. discount or their 90-day paper.

"Said party agrees to ship from the docks where same is piled the product of the said logs above specified lumber, within ninety (90 days from the date of the 15th of the month following which the lumber was manufactured."

Notwithstanding that under that paragraph it was in contemplation that $68,000 were to be paid on or before April 15th, 1910, either in cash or by his company's promissory notes as therein set out. Forster says he directed the bookkeeper and assistant-secretary of his company to immediately prepare the seven notes mentioned and when this was done and they were brought to him, having looked them over, he said to Bishop "But where is our discount; we should have a discount of 2 per cent. off each note." He says that to this proposition Bishop replied that the plaintiff company could deduct the $200 or 2 per cent. from each note on the payments due on the 15th June each month, being the 95 per cent. of the cut for the month on which the $10,000 would be paid each month. Forster says that he proposed that a new contract should be made providing for this, but that Bishop said that that was not necessary; he had spent a good many days preparing the contract and that the plaintiff company could simply deduct the discount each month. Bishop denies that he ever agreed to any such arrangement. He also denies that there was any talk about the matter at all on the day that the contract was signed. He also denies that the notes were made or received by them

on that day. He says that after the signing of the contract, before payments could be arranged or made definitely, it was necessary for him to apprise the defendant bank of the contract and get some kind of a consent from them. It appears and is admitted all round that at the date of the contract the bank had a lien under the provisions of the Bank Act upon the saw-logs intended to be covered by the contract and that such lien is still in existence. Bishop says that after the contract was signed, he wrote a letter dated April 6th, 1910, to Mr. Strathy of the defendant bank, enclosing a copy of the contract and directing his attention to paragraph 8 thereof, and asking him to send a release upon the logs so that there would be nothing to interfere with the making of the payments according to the contract. This letter was produced. A reply to it was received dated April 12th, in the following terms: "I am in receipt of memorandum of agreement made between your company and the M. Hilty Lumber Company, of the city of Milwaukee. I note that under this contract you are to receive $68,000 in cash or promissory notes from that company on the 15th instant. This bank hereby agrees to release its lien on the logs to the M. Hilty Lumber Company as its interests may appear."

Bishop says that it was only after receiving this that he went to Milwaukee and that upon shewing the correspondence to Forster the notes were made out on or about the 15th April, 1910. He says that at the interview about the question of discount, which occurred on that date, all he said was that it seemed to him a reasonable proposal and if matters went smoothly under the contract he would endeavour to get his company to acquiesce in the proposed 2 per cent. discount.

Albert Miller was called and stated that he was present at a talk between Forster and Bishop at the time that the notes were issued. He thinks it was about the 15th March, 1910. He cannot say whether it was on the same day that the contract was signed or not. He corroborates Forster in his statement about his proposal that there should be a new contract drawn and that Bishop said there was no need of that, the contract could stand and the 2 per cent. could be deducted. He says he thinks the notes were dated ahead.

Upon this evidence the plaintiffs ask me to find first, that there was a definite representation on the part of Bishop that there would be a cut of 5,000,000 feet at least

on the Mississauga river of the kind of timber contracted for, and, second, an agreement that under the contract the 2 per cent. discount referred to should be allowed. It seems almost incredible that a shrewd, capable business man, as Forster appears to be, should have put his name to a written contract to bind his company and omitted to insert therein these two material factors. He says that the question of the guarantee of the 5,000,000 cut was discussed before the signing of the contract. It could have been made certain by the insertion of a dozen words, but he did not insert them. According to his version of the matter, the question of the discount apparently came up after the contract was signed; but even then a few words in writing could have been inserted in the contract to have made what he says was the agreement clear and intelligible and the contract re-acknowledged. Yet this was not done.

Subsequently the first monthly payment under the contract was made without any deduction of the 2 per cent. discount. The plaintiffs say this was by oversight.

On June 15th, 1910, the plaintiffs wrote the defendant lumber company as follows: "We beg to advise you that we are charging your account with $200, being the 2 per cent discount on the $10,000 note which we paid to-day. This confirms the conversation Mr. Forster and the writer had with your Mr. Harry Bishop when in our office to-day. Thanking you to kindly give us credit for this amount, we remain." In reply to which the defendant lumber company wrote to the plaintiffs on the 23rd June, as follows:—

"Replying to your letter of June 15th in regard to the 2 per cent. discount on the $10,000 note. The writer stated to you that he believed that you were justly entitled to the 2 per cent. but that your contract did not call for same, and that at the end of the season, if everything went along right and smoothly between us, that he would use his best endeavours to have this discount allowed, but did not agree to allow it at the present time."

On July 22nd, the defendant lumber company also wrote the plaintiffs and I quote an extract from the letter:—

"We are in receipt of your note dated July 15th, for $51,671.63, which has been placed to your credit. We note that you have deducted 2% discount on $20,000 cash paid. Your contract does not provide for this and at present we cannot see our way clear to allow it. You will please send

by return mail your paper for $400, dated July 15th at ninety days."

The plaintiff company kept deducting the 2 per cent., and the defendant lumber company simply credited on account the amounts which they from time to time received, and matters so far as the 2 per cent. was concerned thus continued until a rupture occurred.

The plaintiffs say that towards the end of September, 1910, they learned through one Boyer that the Mississauga logs of the quality in question were finished, and they wrote Bishop as follows:—

"According to your estimate there is 3,235,500 ft. Inspection shews 5.6/10%, which would leave about 3,155 M. ft. of No. 3 and better, Mississauga stock. The difference between this and 5 millions promised, is something that must be adjusted between you and us, and we, therefore, kindly request you to stop over on your next trip to Chicago, or when you go up to the mill. We simply want this matter thoroughly understood before going ahead."

And again on October 1st, they wrote:—

"I am informed by Mr. Boyer that the Thessalon logs, now being sawed, are not as good as what has been going through the mill. It seems that the good logs don't seem to be coming down. This makes it a bad deal for us, especially since we have been getting the poorest logs so far. The good Thessalon logs seem to hang up, and the amount of Mississaugee logs that you told me were to put in, never went into the river. This certainly is not right. Now, Harry, I want to see you soon, so hope you will call on me whenever you come down or go up."

It appears that Bishop and Forster had been acquaintances for some years and this accounts for the familiar way in which Forester writes to him.

On October 5th, 1910, Bishop wrote to the plaintiff company as follows:—

"Replying to both of your letters, the next time I am in Chicago, which will be about the 15th of the month, I will call you up on the phone and make arrangements to meet you either at your office or in Chicago."

On November 3rd the plaintiff company wrote Bishop again as follows:—

"We have your statement for lumber sawn up to Nov. 1st, which shews that you have now cut 11,087 M. ft. of Thessalon timber, and 3,235 M. ft. of Mississaugee. We

have all we bargained for of the Thessalon stock, but are short 1,765 M. ft. of the Mississaugee. You know that the trade was based on 5 million Mississaugee and 11 million Thessalon, and only if we could sell the 5 million Mississaugee at $28.00 we would buy the stock. It is up to you now to come to us and tell us how to send you paper for this invoice. There is $7,060 to be accounted for in the Mississaugee stock. . . . Now, Harry, you know all you promised to do in this, regarding the Mississaugee logs. You know that you told me and Wodding that you would dray haul the logs so that we were sure of getting the 5 million. It all hinges on these 5 million of logs, and this must be made up now before more of our paper is sent to Nesterville, or we will send you our paper less the 7,060 we are short on Mississaugee."

Apparently the defendant lumber company made no other reply by letter to these letters of the plaintiff company. Bishop says, I think that meantime he saw Forster personally and denied that any such representation or stipulation had been made, and that in any event, he did not think Forster was making the claim seriously. The payments went on, the plaintiffs deducting $7,060. This amount is made up by figuring $4 per thousand on 1,765 M. alleged shortage.

During the month of July, 1911, the defendants were claiming a balance due them, and insisting upon payment, and stating that unless payment according to their statements furnished were made they would discontinue delivering lumber under the contract. Plaintiffs were insisting that they had made their payments according to the contract and their understanding of it.

At last on plaintiffs sending one of their boats to receive the lumber, the defendant lumber company, as intimated in their correspondence with the plaintiffs, declined to supply timber to load it, and the boat was delayed for some little time. One of the claims of the plaintiffs in this action is a sum of $300 for demurrage in connection with this. It appears, however, that all they paid in the way of demurrage was $150. They agreed that if they were able to collect $300 from the defendant lumber company, they would make up the difference to $300 to the owners of the boat.

It also appears that there is still about 900,000 feet of the Thessalon lumber in the possession of the defendant lumber company.

It was agreed at the trial that all payments have been made for lumber delivered, and that the contract has been fully performed up to say the 17th August, 1911, except that plaintiffs have deducted the $7,060 for the shortage and $1,360 for the discounts. The defendant company is willing to deliver the balance of the 1910 cut, approximately 900,000 feet, on payment of these deductions, together with the 5 per cent., as the boats shall be loaded hereafter with said balance pursuant to the contract. The plaintiffs are willing to accept this lumber, provided they are only charged the 5 per cent., for whatsoever the said balance is, or in case it overruns on said 900,000 and the overrun. The $7,060 was admitted by the plaintiff to be stated damages for breach of the contract as to the shortage in connection with the 5,000,000. Forster also admitted that he understood that the bank had a lien at the time of the contract and that it has continued down in force, and is now an existing lien, subject to plaintiffs' rights under the letter produced by the defendants from the bank, and shewn to them.

The lumber inspector, William E. Woodey, was called on behalf of the plaintiffs, and corroborated Forster in his statement, that when he and Bishop were up at Thessalon and Nesterville, Bishop represented that there would be 5,000,000 or 5,500,000 cut on the Mississauga river. He says on the strength of this he wrote to parties for the plaintiffs for the purpose of placing the 5,000,000 of Mississauga cut. A contract was produced from the plaintiffs' custody and filed by the defendants, which shews a sale on the 27th April, 1910, by the plaintiff company to E. B. Foss & Co., of "all of the white pine No. 3 and better lumber, ten feet and longer, to be cut by the Thessalon Lumber Company from saw-logs cut in the township of Gould in the winter of 1909 and 1910, now in the Mississauga river in the district of Algoma, province of Ontario, estimated to be about 5,000,000 feet."

Forster says that he added the words "estimated to be about 5,000,000 feet," at the request of the purchaser, he having intimated to him that the cut would run about that amount.

The plaintiffs in this action do not ask in so many words for a rectification of the agreement in question. They have deducted $7,060 on the assumption that the agreement was entered into on the representation that the Mississauga run would run into at least 5,000,000 feet of grade No. 3 and

better, and, therefore, seek to treat the contract as though it did contain a clause guaranteeing that, and so have retained the said sum for damages as on a breach thereof.

I am not at all clear that it was open to the plaintiffs to shew by oral testimony that any such representation or guarantee on the part of Bishop, prior to or at the time of making the contract had been made. This is not the case of a collateral agreement about something not referred to in the document. *Lindley* v. *Lacey*, 1870, 17 C. B. 578; *LaSalle* v. *Gilford*, L. R. 1901, 2 K. B. D. 215; and *Lloyd* v. *Sturgeon Falls Pulp Co.*, 1901, 85 L. T. R. 162.

In paragraph 1, of the document the quantity of saw-logs is dealt with, viz., "all of the white pine No. 3 and better lumber to be cut from the saw-logs now cut and owned by it in the woods, on skids, or in the streams, and on the banks of the streams on the Little Thessalon and Mississauga rivers in the district of Algoma, province of Ontario.

What the plaintiffs contend for would be in effect that they should be permitted to give evidence that there was an agreement with reference to the quantity which is expressly dealt with in the contract, guaranteeing that it, in the case of one of the rivers, be at least 5,000,000 feet. Nor is there any ambiguity about clause 1, which might afford an opportunity to introduce evidence to clear it up.

In clause 8 of the agreement the parties have expressly provided that unless the defendant lumber company obtained a release to the plaintiffs, as their interests might appear from the defendant bank's lien upon the lumber, the contract should not become operative and binding, and in clause 12, it is provided that, should the United States Government impose a certain kind of duty on lumber from Canada, the contract should become null and void.

One can scarcely, under these circumstances, credit that there should be another most important element of the contract, and on which it hinged, omitted in the manner stated by the president of the plaintiff company.

Bishop says that he wanted to sell the cut on each river independently of the other, but that Forster insisted on both. The contract was not rushed into in a hurried way by Forster, but was the result of several interviews and negotiations lasting sometime.

I am unable to find that there was any representation by Bishop that the Mississauga cut would run at least

5,000,000 feet. Forster had some personal knowledge in the matter obtained by a personal inspection of the territory and the logs. He had opportunities to make fuller and more definite inspection, and he had the opportunity to have inserted a clause in the contract protecting his company. When he came to deal with the Foss people he himself inserted a clause stating it was an estimated amount.

I think everything before the day on which the contract was signed was merely preliminary, and that the parties were dealing with the lumber on the basis of estimates as to what each river might yield in the way of cut.

I am unable to find that there was any false or fraudulent misrepresentation made by Bishop.

I am unable to find that there was any prior or contemporaneous oral agreement constituting a condition upon which performance of the written agreement was to depend.

I am also unable to find that Bishop ever agreed that the 2 per cent. discount should be allowed. Here again there is conflict of testimony, Forster and one of the millers saying there was no such an agreement, and the plaintiffs asserting it in their correspondence, Bishop, on the contrary, contradicting them and his letters at the time stating his position to be the same then as it was at the trial, viz., that while he recognized a certain fairness in the proposal that such a discount should be conceded, he had never agreed on behalf of the defendant lumber company to concede it, but had left it an open question, promising that if matters went agreeably under the contract he would endeavour to induce the defendant lumber company to allow it.

In view of my findings as to these two questions, and in view of the contention of the defendant lumber company at the time that they refused to load the plaintiff's boat, that the defendants were not under the contract paying as they were required, I think the plaintiffs' claim also as to the $300 must fail.

The plaintiffs' action will, therefore, be dismissed as against the defendant lumber company. It also fails as against the defendant bank.

The bank under the terms of their letter simply agreed to release its lien as the plaintiff company should from time to time, by paying for the lumber according to the terms of the contract, make its interest appear.

The defendant lumber company will, therefore, have judgment for the two sums of $7,060 and $1,360 with in-

terest, from the date when the former was first payable, and on the monthly sums making up the latter, from the respective dates at which they should have been paid.

As to the balance of the lumber still in the possession of the defendants and available under the contract, the plaintiffs are to be at liberty to apply to the defendant lumber company and to obtain the same from it, but under the circumstances and to avoid further difficulty and possible litigation they must first pay said $7,060 and $1,360 and interest, and also pay for said balance of lumber in full as loaded on the boat.

The defendant lumber company and the defendant bank will each have its costs against the plaintiff company.

HON. MR. JUSTICE SUTHERLAND. JULY 9TH, 1912.

McLEAN v. DOWNEY.

3 O. W. N. 1592.

Negligence—Injury to Scow—Damages.

Action for damages suffered by foundering of plaintiffs' scow while at dock of defendants' and under their custody and control through their alleged negligence. Defendants denied responsibility for the safe-keeping of the scow, and that they had been negligent.

SUTHERLAND, J., *held*, defendants guilty of negligence and gave judgment for plaintiffs for $1,211.80 damages with costs.

Action to recover damages for injury to plaintiffs' sand-scow, owing to defendants' alleged negligence.

J. E. Irving, for the plaintiffs.

J. L. O'Flynn, for the defendants.

HON. MR. JUSTICE SUTHERLAND:—In the month of October, 1911, the plaintiffs were owners of a sand scow, and had a verbal contract with defendants to deliver sand at the latter's dock in the St. Mary's river, at the town of Sault Ste. Marie. The scow had originally cost about $4,000, and was then about seven years old.

On the deck of the scow was a box about 78 feet long by 20 feet wide and 4 feet in depth, into which the sand was deposited when loading. There were holes along the sides and bottom of the box, through which the water from the wet sand escaped and ran off the deck. At both bow and stern there were two hatches rising about seven or eight inches above the deck, and fitted with loose covers. Along the entire box

ran benches or horses placed there when the scow was being loaded with sand. In the centre of the box on each side there was a door.

The course of unloading appears to have been as follows: When the scow was brought to the dock three timbers were placed from her to the shore across which planks were laid. The benches or horses were first dug out and laid aside, and the holes thus made in the sand filled up. Then the sand was dug away from the door in the side of the box next to the dock and that door taken away. The sand was then removed from the scow by means of scrapers drawn by horses.

It appears that in connection with previous unloadings sand had tumbled off at the sides of the gang-way and gradually formed a bar alongside of the dock, thus making it more difficult to get close to it. The plaintiffs say that the contract between them and the defendants was that they were to bring in the scow to the dock, tie her up and notify the defendants. It thereupon became the duty of the defendants, they say, to unload the sand promptly and with due care, and they were to have a day or two for that purpose. They say that from the time they brought the scow in and notified the defendants, she was to be in charge of the latter until the unloading was complete. The plaintiffs were not in the habit of leaving any one on her to watch her, and did not do so on the occasion in question.

The defendants deny that the scow was to be in their charge or that they were to be responsible for her.

The boat was docked by the plaintiffs at about two or three o'clock in the afternoon on the 5th October, 1911, securely fastened by ropes, and the defendants notified. The defendants did nothing towards the unloading that day. The next morning it was raining, and it continued to rain until along in the afternoon. It seems to have cleared up about two or three o'clock and thereupon the defendants began to prepare to unload. They put down the gangway, dug out the horses and the door, and also dug a trench in the sand along the west side of the box, almost the full length of the box, throwing the sand towards or beyond the centre of the box. They also pulled the boat by means of the lines, with which she had been tied to the dock by the plaintiffs, closer in to the shore.

These operations seem, upon the evidence to have had the effect of causing the boat to list to one side, lower at the south-east corner. The dock ran out into the river from

the shore in a southerly direction, and the boat was lying at its east side.

The men employed, and who included one of the defendants' sons, discontinued operations at about 6 o'clock and left the boat until the morning. On the next day the defendant and one of his men went down to the wharf and found that the south-east corner of the boat had gone farther down in the water, and that she was apparently taking in water through the south-east hatch. In the course of an hour or so more she was taking water very fast and ultimately sank. It appears that the dock had been constructed in part by rock taken out of the channed of the river, being deposited, and that when the scow settled upon the bottom, she lay on these with the result that holes were broken into the bottom. She was also very much twisted, and the result of this, according to the evidence, was that her bolts and timbers were badly damaged.

The plaintiffs allege that it was negligence on the part of the defendants to shift the sand from the east side to the west side and pull the boat up farther, thus causing her to go farther down into the water at the south-east corner, with the result that during the night water from the swells of passing boats gradually made its way into the hatches and caused her to settle. The defendants say that their operation on the occasion in question were conducted in exactly the same way as theretofore, and all done with the knowledge and acquiescence of the plaintiffs.

The defendants in their pleadings say that when the boat was brought into the dock, she was in a damaged condition and was not seaworthy, and they allege that what caused her to sink was her taking in water through open seams on the deck, a break in a plank in the deck, and a hole in one end of the boat, which was caused by coming in contact with the rudder of another boat.

Upon the whole evidence, I am satisfied and find that the boat was in a sound and seaworthy condition when she was taken into the dock on the occasion in question, loaded with sand. I find upon the evidence that there were no seams in the deck which were leaking or through which the water which caused the boat to sink could have run. I find that the whole in the plank on the deck had been repaired before she was loaded on the occasion in question, as had also been the hole in the end of the boat. It also appeared from the evidence that this latter hole was in the end of the

boat which had been drawn up closer to the shore and was out of the water.

Upon the evidence, I think, there is no doubt that the theory advanced by the plaintiffs is the correct one, and that the water ran into the boat through the hatch at the south-east corner, owing to the fact that the sand had been shifted to the east side of the boat and the shore end of the boat drawn closer into the shore, with the result that the south-east corner of the boat was lowered. The south end was heavier than the other end in any event, because the sand pump and the engine were both at that end.

It was negligence on the part of the defendants to leave the boat unwatched and unattended as they did over night after having dealt with her as they had and caused her to list and lower at the southerly end. Even in the morning, when the defendant first saw the boat, it is not at all clear that something might not then have been done to have preserved her from sinking. I think it is clear upon the evidence that the defendant at first clearly recognized his negligence and liability, and on more than one occasion promised to pay, at all events, a bill for the repair of the boat.

I am of opinion also that it was the arrangement between the parties that after the boat was brought in and tied up to the dock the defendants should assume the charge and care of her. I think it was through their negligence that she sank.

It was found necessary to take her to a dry-dock at the Sault Ste. Marie in the United States to repair her, and the bill of the dry-dock company was $485.15. In addition to this, the duty on the repairs at that amount when she was brought back to the Canadian side was $121.25.

The plaintiffs also make a claim for $105.40 for the use of their tug, while engaged in pumping the scow out, taking her over to the Michigan Sault, bringing her back, etc. They also claim a sum of $500 or $600 for permanent injury to the scow.

They also make a claim for damages for loss of the use of the scow while undergoing repair, and seek to shew that they had contracts on which they would have made a substantial sum by using the scow during the intervening period.

I am inclined to think that in any event their damages, if allowed in this connection, would be limited to what they

could have earned in connection with the sand business which they were carrying on to the knowledge of the defendants. It is not clear that they could not have done some of the work as it was. Under all the circumstances I am not disposed to allow anything on this account.

I think the plaintiffs, however, are entitled to judgment for the respective sums of $485.15, $121.25, $105.40, and also for the sum of $500 for permanent injury to the scow, amounting in all to $1,211.80, with interest on all said sums from the date of the writ and their costs of suit.

HON. MR. JUSTICE SUTHERLAND. JULY 9TH, 1912.

GROCERS WHOLESALE CO. LTD. v. BOSTOCK.

3 O. W. N. 1588.

Solicitor—Lien for Costs—Judgment—Settlement or Compromise without Providing for Costs—Absence of Collusion or Improper Conduct—Jurisdiction—Costs of Petition.

Petition by plaintiffs, a firm of solicitors, for a declaration that they were entitled to a lien on a judgment and that the Canadian Canning Co. be directed to pay their costs of the action in which the judgment was obtained. Petitioners had acted for defendant Bostock in the action of *Grocers' Wholesale Co.* v. *Bostock*, 17 O. W. R. 128, and after the judgment was pronounced the defendant company had come to a settlement with Bostock which petitioners alleged had had the effect of collusively depriving them of their costs incurred as solicitor for Bostock in the said action.

SUTHERLAND, J., *held*, collusion and improper conduct had not been proven though the surrounding circumstances were suspicious. *Reynolds* v. *Reynolds*, 26 T. L. R. 104, referred to.

Petition dismissed but without costs.

This was a petition by the plaintiffs, a firm of solicitors, in which they asked for a declaration that they were entitled to a lien on a judgment, and that the Canadian Canning Company Limited, be directed to pay the amount of their costs in connection with the action in which said judgment was obtained.

M. Lockhart Gordon, for the petitioner.

H. E. Rose, K.C., for The Canadian Canning Co.

HON. MR. JUSTICE SUTHERLAND:—The action was commenced about July, 1908, by the Grocers Wholesale Company

Limited, against John L. Bostock and the Canadian Canning Company.

On or about the 22nd September, 1909, the action was discontinued by the plaintiffs as against the Canadian Canning Company Limited.

A third party notice was served by the defendant Bostock, claiming relief against the Canadian Canning Company Limited. The action proceeded to trial and judgment was given therein on the 20th October, 1910, in favour of the plaintiffs against the defendant Bostock, with a reference to ascertain the amount of damages and judgment also that the Canadian Canning Company indemnify said Bostock as therein set out.

Upon the present application, counsel for the Canadian Canning Company Limited took exception to the jurisdiction to entertain the petition herein.

In view of the finding of the trial Judge when disposing of the action, I am inclined to think it is not open now to the company to object to the jurisdiction.

The judgment of *Grocers Wholesale Company* v. *Bostock,* is reported in 17 O. W. R. 128, and at p. 141, the trial Judge says as follows: "The fact that the third parties here plead in their statement of defence to the jurisdiction does not help them. Their election was made on entering their appearance, and that appearance standing they cannot take a new position."

However, upon the merits of this application, with some hesitation, I have come to the conclusion that the prayer of petition cannot be granted.

The notice of lien on which the petitioners mainly rely is contained in a letter dated the 20th September, 1909, directed by the petitioners to the solicitors in Vancouver from whom they had originally received instructions to appear for the defendant, Bostock. I quote from this letter. "Up to date we have not been paid any fees by Mr. Bostock and we would not care, under the circumstances, to incur any further costs unless our bill up to the present is paid and we are assured that the balance will be paid."

In a letter dated the following day they also say: "We wish that you would in the meantime take up the question of our costs with Mr. Bostock and write us as to whom we are to look for payment of our costs."

The Vancouver solicitors apparently took the matter up with Mr. Bostock who on the 28th September, 1909, wrote directly to the petitioners, and I quote from the letter: "I went into the question of your account with Mr. Russell and although I contend that the Canadian Canning Company should pay this, yet your good selves had nothing at all to do with any action between the Canadian Canning Company and myself with regard to the account, and I accordingly enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account."

This correspondence was, of course, long before the recovery of the judgment. No subsequent notice of any claim for lien as to costs appears to have been given either to the solicitors in Vancouver or to the Canadian Canning Company Limited. In fact, no specific notice to the latter appears to have been given at any time.

Subsequent to the judgment on the 24th January, 1911, and while the reference to ascertain the damages was pending, the defendant Bostock made a settlement with the Canadian Canning Company Limited in so far as their liability in connection with the said action was concerned. This document states as follows: "The undersigned John J. Bostock hereby receipts to the Canadian Canning Company all liability from or by reason of the express warranty given, mentioned in this case, and upon which the said judgment is founded, and from the said judgment and every clause therein contained: the intention of this receipt being to stay any further proceedings as between the said John J. Bostock and the Canadian Canning Company, with a view to saving costs, and to release the Canadian Canning Company from all further or other liability in respect of the costs of action between the said John J. Bostock and the Canadian Canning Company, and to ensure that, if any costs are or have been incurred against the Canadian Canning Company in this suit in favour of either the plaintiff or the defendant, the said John J. Bostock shall assume the same and indemnify the Canadian Canning Company therefrom.

An affidavit is filed by the Vancouver solicitor in answer to the petition in which it is stated, among other things, as follows: 9. "On receipt of letters dated 20th and 21st of September, 1909, we again took up the question of costs with Mr. Bostock and he again assured us that all costs had been

paid, and that he would call the attention of petitioners to the fact that we were not to be troubled further about his costs, which he evidently did as appears from his letter to the petitioners dated September 28th, 1909, when he tells them 'your good selves have nothing at all to do with any action as between the Canadian Canning Company, Limited, and myself with regard to the account, and I accordingly enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account.'"

10. "From this date on and until long after the judgment between the Canadian Canning Company, Limited, and Bostock, had been settled in full as per memorandum of settlement, dated 24th January, 1911, we heard nothing further from the petitioners with regard to their costs."

It appears that originally the Vancouver solicitors had not only instructed the petitioners to act for Bostock in the said action, but had also instructed solicitors at Hamilton to act for the Canadian Canning Company, the Vancouver solicitors apparently acting originally as principals for both defendants and the defendants apparently being at first disposed to act together to a certain extent in their defence.

In the same affidavit in paragrph 14, the Vancouver solicitor says as follows:—

14. "In January, 1911, the defendant Bostock came to me, knowing that I was no longer connected with the Canadian Canning Company, Limited, as manager or solicitor, and asked me if the claim as between himself and Canadian Canning Company, Limited, could not be arranged. I asked him then how he stood in the east, and he told me that he had arranged everything. I was particular to ask him how he stood with his own solicitors and he told me he had paid them some $490" . . . "I then suggested that he should see Mr. Fleming, the manager of the Canadian Canning Company, Limited, and they came together and made the settlement, dated 24th January, 1911. I was asked to draw this settlement up merely for the reason that I was more or less conversant with the facts of the case. It is for this same reason that when this present petition was presented I was asked to instruct agents in Ontario."

16. "I say that from the time the plaintiffs discontinued their action against the Canadian Canning Company,

Limited, and the defendant Bostock elected to proceed with his third party notice against the Canadian Canning Company, Limited, the petitioners have not acted as solicitors for the Canadian Canning Company, Limited, nor as agents of my firm, but have been acting under direct instructions from the defendant Bostock, and his Vancouver solicitors.

20. " . . . I say positively that there was no collusion in any sense, direct or indirect, between Bostock and the Canadian Canning Company, Limited, or our firm or any member of the firm, having in view depriving petitioners firm of their proper charges for services rendered, or any part thereof."

It is said that at the time Bostock made the settlement for $1,100 with the Canadian Canning Company, he was in insolvent circumstances and in ill-health and had left the country, and that the canning company compromised with him under these circumstances, their indebtedness in connection with the remedy over which he had against them at a much smaller sum than Bostock was reasonably entitled to claim.

While the circumstances may and do look somewhat suspicious, I am unable to find particularly, in face of the affidavit of the solicitor in Vancouver, that there was any collusion or improper conduct on the part of the canning company to deprive the petitioners of their costs. See *Reynolds* v. *Reynolds*, 26 T. L. R. 104.

The prayer of the petition will, therefore, be refused. I do not think, however, on the whole that it is a case for costs and I make no order as to same.

HON. MR. JUSTICE SUTHERLAND. JULY 11TH, 1912.

HOME BUILDING & SAVINGS ASSOCIATION v. PRINGLE.

3 O. W. N. 1595.

Mortgage—Subsequent Incumbrances—Judgment for Redemption or Sale—Final Order of Sale—Motion to Open up Master's Report —Assignees of Equity of Redemption—Parties.

Application by two defendants in a mortgage action to open up a report on the grounds that (1) the mortgagee did not file a complete abstract of the lands shewing all subsequent incumbrances, and (2) that the said mortgagee had sold and released certain of the mortgaged lands from the mortgage sued on.

SUTHERLAND, J., *held*, that a plaintiff in a mortgage action need not make all subsequent incumbrancers parties, his failure so to do being at his own risk.

That a mortgagee cannot be forced to marshal his securities but can take his debt out of that portion of his security which first becomes available.

Application refused with costs.

An application at the instance of two defendants in a mortgage action to open up a report dated 6th November, 1911, on the following grounds:—

1. That the mortgagee failed to file a complete abstract of all lands covered by the mortgage;

2. That in consequence thereof the applicants were not informed as to all the subsequent incumbrancers and other parties interested in the properties subsequent to the mortgages in question.

3. That the solicitor for the plaintiffs at the time of making the Master's report concealed the fact that the plaintiffs had sold some of the properties and received a large amount of money therefor, and had been in possession of certain portions of the lands and that no credits were given for the moneys so received or anything allowed for use and occupation of said lands.

On this motion counsel for the applicants conceded that no doubt the solicitors for the plaintiffs thought the abstract was an abstract of all the properties in the mortgage, but that the plaintiff company knew better; and

4. That since the date of the judgment and the making of the report, the plaintiffs have sold without the consent of the Court certain lands and premises and discharged the same from the mortgage in question, which properties so sold are of greater value than the remaining properties.

The mortgages in question were two, viz., (1) dated March 1st, 1885, from Peter Valley to the Hamilton Provident & Loan Society to secure repayment of $1,900 and interest at 7 per cent. as therein provided, and (2) a mortgage from the same to the same dated 1st February, 1886, to secure repayment of $150 and interest at 7 per cent as therein provided and these mortgages covered several parcels of land.

By indenture dated 2nd January, 1908, the said society assigned the said mortgages to the plaintiffs for a named consideration of $824.75, said to be the amount then owing.

The writ in this action was issued on the 10th March, 1908. In the statement of claim filed on the 4th December, 1909, the plaintiffs claimed that there was then due under and by virtue of the said mortgages for principal money, interest, insurance premiums and other expenses, the sum of $631 and stated that there had not been any occcupation of the mortgaged premises or any part thereof.

Originally some thirty defendants were made parties as the original mortgagor had in the meantime sold his equity of redemption in parts of the lands to various persons and the applicants herein Victoria McKillican and David A. Smith were two of said defendants.

In their statement of defence these defendants asserted that the mortgages became due and payable respectively on the 1st March, 1886, and 1st February, 1887, and the then holders thereof were entitled to enforce the same if they had so desired. They asserted that they had been in actual and undisturbed possession of the portions of the lands and premises in question owned and occupied by them since the beginning of March, 1887, and had acquired a title as against the plaintiffs. They also asserted that the Hamilton Provident & Loan Society had received sufficient to satisfy and discharge the full amount due upon the mortgages and that there was nothing due and owing thereon to the plaintiffs.

A motion for judgment was made and judgment granted on the 25th February, 1911, which reads in part as follows:

"Upon motion for judgment made this day unto this Court by counsel for the plaintiffs in the presence of counsel for the defendants David A. Smith and Victoria McKillican and for the defendant Elizabeth Lizette, no one appearing for the defendants Robert A. Pringle, Alexander Munroe, John Lalonde, Maxime L. Lizette, Alexander Villeneuve,

Calixte Villeneuve, Adelard Branchaud and Catherine McBain, as to whom the pleadings have been noted as closed, and this action having been discontinued as against the other defendants:" and by said judgment it was declared that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for redemption or sale, and that for these purposes the cause should be referred to the Master of the Supreme Court at Ottawa. And it was further ordered that the defendants hereinbefore specifically named and including the applicants herein should forthwith deliver to the plaintiffs, or to whom they might appoint, possession of the lands and premises in question in the cause, or such part thereof as might be in their possession.

The said judgment was signed on the 30th June, 1911.

The plaintiffs brought into the Master's office certificates of the registrar and sheriff and notice "T." was issued.

Certain admissions were made in writing in so far as the applicants are concerned and lengthy written arguments put in before the Master, and some of the matters urged before me upon this motion were set out therein.

The Master thereupon made his report dated 6th November, 1911, and in paragraph 1 it states: "and it appearing to me by the respective certificates of the sheriff and registrar of the county of Stormont that no party or parties, other than the said plaintiff hath or have any lien, charge or encumbrance upon the lands and premises embraced in the mortgage securities of the said plaintiff in the writ of summons in this action mentioned, against which the said plaintiff is desirous of proceeding to enforce its remedies under the said mortgage securities.'

"2. And it subsequently appearing to me that the proper warrant giving the defendants: David A. Smith, Victoria McKillican, Elizabeth Lizette, Robert A. Pringle, Alexander Munro, John Lalonde, Maxime L. Lizette, Alexander Villeneuve, Calixte Villeneuve, Adelard Branchaud and Catherine McBain notice of this proceeding had been duly served upon them, this action having been discontinued before judgment against all the other defendants, I proceeded to hear and determine the matters referred to me by the said judgment, and thereupon I was attended by the respective solicitors for the plaintiff and the defendants Victoria McKillican and David A. Smith, no one attending on behalf of the other defendants, though duly notified as aforesaid.

"3. And I find that at the date of this, my report, there is due to the said plaintiff, for principal money, interest and costs, and that there will accrue to it for subsequent interest upon its said mortgage securities up to the day hereinafter appointed for payment, the sums following:

Balance of principal money due on the two mortgages in the statement of claim mentioned	$460 00
Interest on $460 from October 9th, 1911, to date of this report	2 11
Six months' subsequent interest on $460 from 6th November, 1911, to 6th May, 1912...	13 80
Costs taxed and revised at	343 91
Total due plaintiff, 6th November, 1911 ...	$819 82

"4. And I appoint the said sum of $819.82 to be paid by the said defendants into the Canadian Bank of Commerce at Ottawa, to the joint credit of the said plaintiff and the accountant of the Supreme Court of Judicature for Ontario, between the hours of ten o'clock in the forenoon and one o'clock in the afternoon of the said 6th day of May next."

C. H. Cline, for the motion.

F. A. Magee, for the plaintiffs, contra.

HON. MR. JUSTICE SUTHERLAND:—The certificate of the registrar referred to in the report was, of course, the abstract filed pursuant to Rule 745. It was the duty of the Master under Rule 744 to enquire as to encumbrances and the duty of the plaintiffs to bring into the Master's office the certificates of the registrar and sheriff setting forth all the encumbrances. It was of course in the interest of the plaintiff to take care that all persons having any claim as subsequent encumbrances were made parties, as unless this were so, difficulty might be caused later in case of a subsequent sale. That is a risk the plaintiff takes in case he fails to do so

Written reasons were given by the Master for his conclusions. I quote from these:—

"Mr. Cline contends:—

"First. That the original defendants who purchased subsequent to the plaintiffs' mortgages and as against whom the plaintiff discontinued, should be made parties in the Master's office on taking the account.

"I do not think the plaintiff can be forced to do this, especially in view of the fact that the judgment recites the discontinuance. Under the practice, subsequent purchasers should be made parties to the writ, as was done in this case, if the plaintiff desires to enforce his remedies as against them.

"It is his own lookout if he does not choose to proceed against them.

"Any subsequent encumbrancer, however, has the right to redeem the plaintiff, and then to proceed on his own account. *Rutherford* v *Rutherford*, 17 P. R. 228.

"Second. That by discharging part of the lands covered by the mortgage, makes the mortgagee liable for the value of the lands discharged. That is, that the doctrine of marshalling of securities applies.

"I do not think this doctrine applies to a case like this. By discharging part of the lands, the plaintiff is the one that takes the chances by reducing his security.

"The Court will not interfere with the first mortgagee's right to take his debt out of that part of his security which first comes available (upon the ground that other funds are available) Coote Can. Ed. 698. . . .

"Fifth. Mr. Cline contends that I can issue a certificate of my findings from which to take an appeal, if necessary, instead of taking the account and making a report.

"It would appear that this can be done. See *Sievewright* v. *Leys*, 1 Ont. 375 and note p. 873 H. & L.

"I think it would be a convenient way of settling the questions, if it is in order."

The said report was duly filed on the 6th November, 1911.

No appeal was taken therefrom and the redemption period having run, the plaintiff made an application on the 25th May, 1912, supported by an affidavit of its manager in the usual form for a final order of sale. It was granted—I quote from this order as follows:—

"1. Upon the application of the plaintiffs and upon hearing read the affidavit of Clifton Ashton Douglas, the certificate of the bank manager at Ottawa and the affidavit of Frederick Arthur Magee filed herein;

"2. It is ordered that the lands and premises in the pleadings mentioned or a competent part thereof be sold in pursuance of and in the manner directed by the judgment in

this action with the approbation of the Master of this Court at Ottawa."

An appointment was taken out in pursuance of said order to settle an advertisement and the Master was proceeding to do so when on the 4th June, 1912, this motion was launched.

An application was first made to the Master himself who considering that he was *functus officio* declined to entertain it.

Under the facts hereinbefore set out I do not think a case has been made out to open up the report.

In the affidavit of the manager of the plaintiff company filed on obtaining the final order for sale he states that no part of the money found due by the report has been paid and that the plaintiff association has not been in possession of the lands or any part thereof.

In a further affidavit filed in answer to the plaintiff's material herein he cleared up in the main the material allegations contained therein. I think the case of *Rutherford* v. *Rutherford*, et al., referred to in the Master's reasons has application to this motion. The applicants were assignees of the original mortgagor of the lands in which they are interested and have had ample opportunity during the progress of the reference to look after their interests.

The solicitor for the applicants, in one of his affidavits filed on the application, states that in the presence of the Master he asked the solicitor for the plaintiffs if he would, upon being given the amount found due by the report with subsequent costs to date, assign to the applicants the mortgage including the properties which his clients had sold as set out in his (the applicants' solicitor's first affidavit) to which he replied that he would not do so and would only be willing to assign the mortgage as to the properties which were undischarged at the time. No doubt this latter offer is still open to the applicants.

I think the motion must be dismissed with costs.