UNREPORTED PRACTICE CASES*

AFFIDAVIT OF DOCUMENTS—SUFFICIENCY OF AFFIDAVIT—FURTHER & BETTER AFFIDAVIT—DESCRIPTION OF DOCUMENTS

A party may be compelled to give a further and better affidavit of documents. A defendant was ordered to give further and better particular documents which had been in his possession when he alleged he had sold the business and was left without all relevant documents "He must search his records and memory" and list and identify in the best detail he can now develop those documents which must have been at one time in his possession or power.

Documents for which privilege is claimed should be listed by category, indicating the date and to or from whom they passed. (*Continental Jewellery Co.* v. *Makowchuk,* S.C.A., J.D.E., January 22, 1969; The Master, L. D. Hyndman, Q.C.)

PLEADINGS—STRIKING OUT—NO CAUSE OF ACTION

In Alberta a pleading will be struck out as not disclosing a cause of action only when it is clear "at least beyond a reasonable doubt" that there is no cause of action. That appears to be the effect of the omission of the word "reasonable" in what is now rule 129(1) (a). That appears to be the result of *Racine* v. *C.N.R.* [1923] 1 W.W.R. 961, *Demers* v. *Desrosier* [1928] 2 W.W.R. 61, *Desjardine* v. *Callison* [1928] 1 W.W.R. 145, aff'd at 687.

Having regard to the comparatively stringent decisions elsewhere it appears that an almost unanswerable case must be made to strike out. (*Kannata-Kihei Resort Ltd.* v. *Schune et al,* S.C.A., J.D.E., 55680, 15 Oct. 1968; The Master, L. D. Hyndman, Q.C.)

SERVICE EX JURIS—BREACH WITHIN JURISDICTION

Plaintiff claimed return of a deposit made on a charter agreement on the grounds that Defendant charterer had repudiated the charter agreement when it advised it could not secure permission to land in London. It was an agreement for a charter from Edmonton to London and provided that the agreement was to be interpreted in accordance with the laws of Manitoba.

The Plaintiff had earlier sought leave to serve ex juris but an earlier order had been set aside by the Appellate Division on the grounds that the affidavit had been sworn before the action was commenced.

The Master held that rule 30(g) was almost identical to English Order 11, Rule 1 and English authorities authoritative. There must be a good arguable case of a breach of contract within the jurisdiction: *Vitkovice Horni* v. *Korner* [1951] 2 All E.R. 334. The affidavit did not state there was a breach committed within Alberta.

In addition the order is discretionary and the Court may refuse to give leave when a proceeding is not in substance within the rule, although

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it might be within the letter: *Kroch* v. *Russel* [1937] 1 All E.R. 725 at 728. (*London Society of Edmonton, Alberta* v. *Transair Limited,* S.C.A.,J.D.E., 55216, March 10, 1969; L. D. Hyndman Q.C., Master).

MORTGAGE—FORECLOSURE—RE-OPENING ON TERMS—STAYS

A mortgagee foreclosed a second mortgage, ultimately obtaining title, and finally obtaining a writ of possession against the former owners.

An application was made to re-open the foreclosure, on terms, *viz.* the payment of arrears and costs (in a total of $2,000.00), the assurance of monthly payments to retire the mortgage within its terms, and the making of substantial payment on the first mortgage which was also under foreclosure.

The property was taken to have a value of $24,000.00 and the mortgages totalled $20,000.00, indicating that the mortgagee could sell it for the return of his investment and $4,000.00. The interest rate on the second mortgage was 12% and the Master observed that "A mortgage investment is intended to secure and recover the principal advanced plus interest, not an investment intended to realize a capital gain."

The applicant advanced the proposition that sections 19 & 32(e) of the Judicature Act founded his motion, while the mortgagee argued that section 19 applied only up to the time judgment was recovered or relief could be obtained. The Master was prepared to distinguish the Ontario cases of *Adams* v. *Wilson* [1948] O.W.N. 753, and *Ontario Loan & Debenture* v. *Gray* [1942] OW.N. 363 but decided the matter without determination of this argument.

Citing Coote on Mortgages, 9th ed. 1083-1087; Falconbridge on Mortgages 3rd ed., 450-452; *Mackie* v. *Standard Trusts* [1922] 1 W.W.R. 566, *Thornhill* v. *Manning* (1951) 61 E.R. 174, *Campbell* v. *Holy Land* (1877) 7 Ch. D. 16 at 171, *Williams* v. *Box* (1911) 44 S.C.R. 1, *Colonial Investments* v. *McManus* [1918] 1 W.W.R. 561, and *Dovercourt* v. *Dunvegan* (1920) 47 O.L.R. 105, the court held that "not only may the foreclosure be reopened and thereby the mortgagor become entitled to redeem but that he can be given time within which to do so. The terms are in the discretion of the court dependent upon circumstances."

The Court directed payment of $2,000.00 within two weeks and $45.00 monthly, together with the amount necessary to put the mortgage in good standing in six months.

The mortgagee was entitled to costs although the applicants had been successful and was to retain the title pending the compliance with the terms.

At the same time the court dealt with an application by the owners to stay the proceedings on the first mortgage which action was then at the stage that the mortgagee was at liberty to readvertise the property for the third time.

The owners proposed paying $1,000.00 to the mortgagee, $500.00 semi-annually on arrears and to resume monthly payments.

The Court cited *Idington* v. *Trusts and Guarantee* [1917] 2 W.W.R. 154, in considering the principle by which the court should be guided in enlarging the time: "Two of the things that it should be satisfied of in making such an order are the sufficiency of the security and the

probability of the mortgagor being able to pay off the mortgage if the enlarged time is granted".

The owners had been granted indulgences in the past, including time to pay and the rejection of prior tenders but applying the authorities they were granted further time generally on the terms requested which would result in arrears and costs (which together totalled approximately $3,000.00) being retired within a year. The mortgagee was entitled to the cost of the application, although the applicants were successful.

G. F. Investments Ltd. v. *Branton*, S.C.A., J.D.E. No. 51404; *Standard Life* v. *Branton*, S.C.A., J.D.E. No. 50189; The Master, L. D. Hyndman, Q.C., July 3, 1969.