SUPREME COURT.

Tuesday, September 5.

ADJOURNED FULL COURT.

Before their Honours the Chief Justice (Sir S. W. Griffith), Mr. Justice Cooper, and Mr. Justice Real.

Hendle and Another v. Qualtrough and Another.

Mr. Stumm, with him Mr. Fewings (instructed by Messrs. Atthow and M'Gregor), for the appellants; Mr. E. M. Lilley (instructed by Messrs. Roberts and Roberts) for the respondents.

This was an appeal from the judgment of his Honour Mr. Justice Chubb in an action brought by William James Hendle, Lucy Hendle, and Wm. John Heirdsfield against Walter H. Qualtrough and Elizabeth Qualtrough. The action was tried at the Civil Sittings of the Supreme Court in June last. The plaintiffs then sought to enforce against the defendants (1) an alleged resulting trust in land in their favour. (2) An express trust of land in their favour, and also a parol declaration of trust in their favour of the sum of £350 each. The jury found against the plaintiffs on the first and second claims, and against W. J. Heirdsfield on the third. With regard to Lucy Hendle they found that on or about December, 1890, the defendants had declared themselves to be trustees for her of a sum of £350 and of certain lands; that the defendants paid her £25 of that sum, and expended the remaining £325 in the purchase for her of a piece of land which had been settled by defendants in trust for her for life with the remainder to her children in fee, and with ultimate remainder in fee to defendants; and that the £25 and the land so purchased and settled were not a gift from defendants. On those findings his Honour considered that the evidence showed there was a trust, not for a sum of money simply, but for a sum of money to be laid out by the donor in land for the benefit of the donee, or, in other words, a trust in land of the value of £350. His Honour held that there was not the requisite evidence to establish a trust of that nature, and gave judgment for the defendants, with costs. The plaintiffs now appealed from that decision, and declared that in the evidence they were entitled to judgment, and in the alternative they asked for a new trial.

After argument,

The Chief Justice, in delivering judgment, said the plaintiffs were two children of William Heirdsfield, who died in 1890. His wife was the sister of Mrs. Qualtrough. In 1886 Heirdsfield made an application to bring a piece of land in Fortitude Valley under the provisions of the Real Property Act, and requested that the title should issue in the name of Qualtrough, his wife's sister's husband. The plaintiffs alleged that this was a transfer without consideration, and consequently there was a resulting trust in favour of Heirdsfield—that was to say, that Qualtrough acquired the land as trustee for Heirdsfield. The jury negatived that. They were of opinion, and they found as a fact, that Qualtrough gave £80 for the land, and it appeared that that was about the value of that land at the time, and the contribution to the Insurance Fund was paid on the basis that the land was worth £80. Application was now made for a new trial on the ground that the finding was against the evidence. There was, however, direct evidence that at the time that price was agreed upon as the consideration to be paid for the land. Whether that would have been enough to have gone to the jury to establish a resulting trust might be doubted. It was sufficient for them (their Honours) to say that there was ample evidence on which they could have found, if they believed it, that there was no resulting trust. There was some evidence perhaps to show that the trust was not for Heirdsfield at all, but for Heirdsfield's children, but there was ample evidence of no resulting trust in favour of Heirdsfield. Heirdsfield died intestate. Qualtrough on his death devised all his property to his wife and son. This property was sold, and the defendants, with the consent, apparently, of the members of the family who were interested under Qualtrough's will, divided the proceeds, or a great portion of it, amongst the children of Heirdsfield. Lucy Hendle made an alternative claim as to £350, which would be her share as one of the children of Heirdsfield, but the defendants constituted themselves as trustees of that sum for her. As a matter of fact, they bought her a property, or conveyed a property to trustees for her, which was valued at £325, and they gave her £25 in cash. She alleged that this £325 was hers, and that they had constituted themselves trustees for her, and she was entitled to have that money now, or its value, absolutely for herself, the conveyance of the land not having been for her exclusive benefit. It appeared to him (the Chief Justice) that there was no evidence of any intention on the part of Mrs. Qualtrough to declare herself a trustee for Lucy Hendle. The learned Judge was of opinion that the words used by her, and deposed to by Mrs. Hendle, indicated the creation of a trust in land, which, under the Statute of Frauds, required to be in writing. He (the Chief Justice) could not see any evidence of a declaration by Mrs. Qualtrough that she was a trustee at all, so that on that point it appeared to him that there was no evidence for the plaintiff to go to the jury. The defendant asked for a nonsuit, but the plaintiff objected. If there was no evidence for the plaintiff, the Judge should have directed judgment for the defendants. He had entered judgment for the defendants, and it appeared that his judgment was the correct one. The appeal, therefore, would be dismissed with costs.

Mr. Justice Cooper and Mr. Justice Real concurred.

Q.N. Bank, Limited, v. Queensland Trustees Limited.

Mr. E. M. Lilley, with him Mr. Shand

Limited.

Mr. E. M. Lilley, with him Mr. Shand (instructed by Messrs. Flower and Hart), for the plaintiffs; the Attorney-General (Hon. A. Rutledge, Q.C.), with him Mr. Stumm (instructed by Messrs. Thynne and Macartney), for the defendants.

This was an action between the Q.N. Bank, Limited, and the Queensland Trustees Limited, with respect to a guarantee given by the late Mr. W. H. Baynes to secure advances to the Graziers' Butchering and Meat Export Company. The Queensland Trustees were sued as executors of the will of the deceased gentleman. The amount for which the bank claimed they were liable was £16,316 3s. 8d. The action was called on before his Honour the Chief Justice on the 15th August, when an application was made on behalf of the plaintiff to amend the pleadings in certain respects, and on behalf of the defendants for an adjournment on account of the absence of witnesses. The case for the plaintiffs was that on 9th October, 1896, the Graziers' Butchering Company then being in difficulties, Mr. Baynes gave a guarantee for further advances to them to the amount of £15,000. On the same date as the guarantee was given, a letter was sent to Mr. Baynes by the late Mr. D. G. Stuart, then secretary at the head office of the bank. This document was to the following effect:—"With reference to your interview with our general manager and myself this morning, I have to confirm the results as follows: In consideration of your having guaranteed repayment of advances made to the Graziers' Butchering Company up to the amount of £15,000 sterling, the bank agrees (1) to allow the debt standing at old account—namely, £28,087 17s.—to remain at that figure for twelve months from date, if so required; (2) that the limit of overdraft at No. 2 account shall be £50,000; (3) the rate of interest on both accounts shall be 6 per cent per annum; (4) that, provided no act of insolvency is committed by the firm, and the business continues to be carried on, the bank agrees to refrain from calling up any portion of the abovenamed advances during twelve months from this date; (5) that Mr. William Baynes may, at any time on the permanent reduction of the indebtedness of the firm by not less than £5000 below the above arranged limits, obtain a release from his liability under the guarantee for a like sum." The two documents formed the basis of the present action. The chief defence was that the guarantee was rendered void by the plaintiff company advancing beyond the limit fixed by the letter. Certain questions of law arising on the construction of the two documents, the Chief Justice, after adjourning the hearing, made an order for these questions to be argued before the Full Court, before the trial of any questions of fact, if any, arose. These questions were —(1) Whether, assuming that the two documents of the 9th October, 1896, together constituted the contract of guarantee between the plaintiffs and the late W. H. Baynes, it is a defence to this action to show that the plaintiffs allowed the overdraft of the Graziers' Butchering Company at the No. 2 account to exceed £50,000? (2) Whether oral evidence is admissible to show the sense in which the words "limit of overdraft" in the letter were used and understood by the parties thereto? and (3) Whether, assuming that the documents together constituted the contract of guarantee between the plaintiffs and the late W. H. Baynes, it is competent for the plaintiffs to claim to have the letter rectified on the ground of mutual mistake by striking out part thereof, or by substituting other words for certain words contained therein, and to recover upon the contract as so rectified?

Mr. Lilley said the plaintiffs had applied to amend their pleadings in order to raise the defence that if the letter bore the construction put upon it by the defendants it was a mistake, and was not the contract made between the parties. They asked to be allowed to plead mutual mistake, and obtain a rectification of the instruments of the guarantee.

Mr. Justice Real: How can you have a mistake in a guarantee unless you allege fraud? You may guarantee as much as you like, but if you do not put it into writing you are not bound by it.

Mr. Lilley said the guarantee was in the ordinary banking form, but a letter was written at the same time, and the court were asked to assume that the two documents formed the guarantee. There was, however, an impression in the letter which was never intended to be in the contract. The question was whether that document could be rectified, and the plaintiffs still sue upon the contract. As to the first question, he contended there was an ordinary rule for the construction of contracts, which was that you must interpret a contract in such a way as to give effect to every word of it.

The Chief Justice: If you can. Sometimes you cannot, and then the question is, Which words are to go?

Mr. Lilley contended that the words, "and further agree that you may advance any amount beyond such sum of £15,000 to the principal, and that this guarantee shall always be a continuing and standing guarantee for the balance," were quite inconsistent with the limitation in the second document that the amount of the account should not exceed £50,000.

Mr. Justice Real: What will be the result if it is?

Mr. Lilley said the result would be that the printed document, which was the contract between the parties, must stand. He contended that the limitation was never intended to be put in the letter. What was intended was that the guarantor should be liable for £15,000 whether the account went above £50,000 or not; and if the accounts were reduced by £15,000, the guarantee was to be released. He had not been able to find any satisfactory cases on the subject, but he had some. One of them was Lawrence v. Walmsley (31 L.J.C.P., p. 143).

At this stage the court adjourned until 10.30 o'clock on the following morning.