CARTWRIGHT, MASTER. NOVEMBER 12TH, 1907.

CHAMBERS.

HARCOURT v. BURNS.

Executor—Renunciation of Probate — Previous Intermeddling—Action on Promissory Note Signed by Defendant as Executor—Personal Liability—Leave to Enter Conditional Appearance.

Motion by defendant to set aside the writ of summons and service thereof, or for leave to enter a conditional appearance.

W. H. Blake, K.C., for defendant.

W. H. Price, for plaintiffs.

THE MASTER:—The defendant is sued as executor of the will of his brother. He moves, "personally and not as executor," before appearance. . . .

One J. W. Burns died on 12th November, 1906, having made a will, of which the defendant was made sole executor. He never took out letters probate, though it was stated that he had made application therefor, and on 27th February, 1907, he executed a formal renunciation, which seems to have been filed in the Surrogate Court some time afterwards. Thereupon, at the request of the widow, letters of administration with the will annexed were granted to the Toronto General Trust Corporation. Before all this was done, the defendant on 18th December, 1906, gave a promissory note to the plaintiff for $2,000, which he signed as executor of J. W. Burns. This on 21st January, 1907, was renewed in like form, and the renewal is the note sued on herein. . . .

It was argued for the plaintiffs that, as the defendant had intermeddled, he could not be afterwards allowed to renounce: Jackson v. Whitehead, 3 Phillim. 579; and that a slight act of intermeddling with the assets will preclude an executor from afterwards renouncing: per Sugden, L.C., in Cummins v. Cummins, 3 Jo. & Lat. at p. 91. Counsel for the plaintiffs also referred to Williams on Executors, 10th Eng. ed., p. 199, to the same effect and as shewing that a renunciation is not effective until recorded and filed, as until then it may be withdrawn. Wentworth on Executors