

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div

an adoption of the action of the clerk, and was equivalent to personal service, if such were required by the statute.

It was contended that the Revising Officer was an appointee of the Dominion Government, and that his sittings were sittings of a court of record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him.

Held, that the Dominion Parliament had by the Electoral Franchise Act interfered with civil rights in this Province, and made no provision for a court to superintend the conduct of the officials; and, following *Valin v. Langlois*, 3 S. C. R. 1, that until such a court is created, the Provincial courts, by virtue of their inherent jurisdiction, have a right to superintend the discharge of their duties by any inferior officer or tribunal.

Held, also, that the Revising Officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to F. should have been given, which were not findings of fact, and such mistakes or errors are not such decisions to prevent the granting of the writ of mandamus. If he had found, as a matter of fact, that notice was not given to D., there might have been some difficulty in interfering with his conclusion.

The *Centre Wellington* case, 44 U. C. R. 132, referred to and distinguished.

Aylesworth, for the motion.

Osler, Q.C., and *O'Neill*, contra.

Divisional Court.]

[September 22.]

MERCHANTS' BANK OF CANADA V.

MCKAY ET AL.

Mortgage—Security for indebtedness—Sureties—Change of original securities—Release of sureties.

K. & Co. were customers of the plaintiff's, and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for the payment of all bills, notes and papers upon which K. & Co. were then

liable, together with all substitutions and alterations thereof, and all indebtedness in respect of the same, being a continuing security, notwithstanding any change in the membership of the firm. The bank did business with K. & Co. in two different ways—one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes; and another by discounting K. & Co.'s own notes, and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers.

At the time the mortgage was given, all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitution nearly all the notes held at the date of the mortgage had been replaced by K. & Co. (in renewals and substitutions) by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage the mortgagors claimed they, as sureties, were discharged by the bank's action.

Held, that the bank parted with genuine and received falsified securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability, so far as they were prejudiced by the conduct of the bank. *Prima facie*, the bank is liable to the extent of the face value of the securities surrendered, but they can reduce that by evidence as they may be advised.

Rae, for the plaintiffs.

Moss, Q.C., and *Stewart*, for the defendants.