

And where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration, in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it ;

Held, that the award was bad and must be set aside.

Upon the motion an affidavit tendered in reply was rejected because it contained only matter which supported the case made out by the original affidavits and depositions filed, and an affidavit in rejoinder was also rejected.

Moss, Q.C., for the applicants.

W. R. Meredith, Q.C., contra.

Chancery Division.

BOYD, C.]

[Oct. 14.

WORDS AND WORDS.

Will—Construction—Investment—Joint Stock Company—Income.

J. G. Worts by his will authorized his trustees "to invest in such securities as they should think proper, with power to retain any investments existing at his death as long as they shall see fit." He also authorized them to continue his firm business, in which he was engaged, for one year after his death if they saw fit.

A few months after the testator's death his said firm business was converted into a joint stock company, the assets of the testator being valued and put in as so much stock.

Held, that technically this was a breach of trust, and the use of the money of the estate in the business not a proper investment under the will.

Investment is not a proper term as to money in trade ; "securities" meaning such securities as bind lands or something to be answerable for it.

The joint stock company business was prosecuted for seven years, when the interest of the testator's estate was bought out at a large advance by the surviving partner.

Held, that under the circumstances of this case, which did not raise the question between

tenants for life and remaindermen the profits derived from the above use of the capital of the estate were, properly considered, income, and to be applied accordingly by the trustees of the will.

Moss, Q.C. and *T. P. Galt* for the plaintiffs.

Robinson, Q.C., *Lash*, Q.C., *McCarthy*, Q.C., *Hoskin*, Q.C., *A. R. Creelman*, and *W. Macdonald* for various defendants.

Div'l Ct.]

[Oct. 19.

ANDERSON *et al.* v. THE SAUGEEN MUTUAL FIRE INSURANCE CO. OF MOUNT FOREST.

Insurance and insurance companies — Time within which proofs of loss to be made and action commenced—Mortgage clause—Default of mortgagor—Subrogation—Premium note—R.S.O., c. 167, s. 131.

W. insured his mill with the defendants for \$1,000. At the time of the insurance the mill was mortgaged to P. The defendants gave a policy payable on its face to the extent of \$500 to P. as mortgagee or as his interest should appear. A mortgage clause was on a separate slip attached to the policy. The fire took place October 10th, 1887, and proofs of loss were made by W. September 28th, 1888, and by P. for himself September 20th, 1888, and action commenced October 8th, 1888. In an action by W. and the executors of P. against the Company,

Held (affirming BOYD, C.), that the mortgagee was not bound as "the assured" under statutory condition 12 to make proofs of loss, and that the person assured is the person to make them under conditions 12 & 13.

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss within which an action could be brought under condition 22, was a neglect, from the consequences of which the mortgagee was relieved by the mortgage clause, and that as far as he was concerned the action was not brought too soon.

Held, also, that the words "shall claim" that as to the mortgagor no liability exists" in the mortgage clause, mean "and as to the mortgagor no liability exists," and that as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the