THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING MARCH 22ND, 1902.)

VOL. I. TORONTO, MARCH 27, 1902 NO. 11.

MEREDITH, J. MARCH 12TH, 1902.

TRIAL.

McLELLAN v. HOOEY.

Assessment and Taxes — Sale for Taxes — Description of Land— Sufficiency of — Possession — Adverse after-acquired Rights of Entry—R. S. O. ch. 224, sec. 211.

Action by plaintiff, claiming under a registered paper title, to recover possession of certain lots of land in the town of Trenton, and to set aside a tax deed made to defendant, and for other relief. The plaintiff derived his registered title after the sale for taxes to defendant. The lots were advertised for sale on 23rd September, 1896, for arrears of taxes for the years 1892-3-4, and the sale was adjourned to 7th October, 1896, at which time the corporation purchased, and in May, 1899, assigned the certificates to defendant, who went into possession of the lots, which had hitherto been vacant, and made improvements to the value of $650.

A. Abbott, for plaintiff.

W. C. Mikel, for defendant. The fact that there are only two lots, 7 and 8, discloses only a latent ambiguity, and evidence may be given to shew that the lots sold were the lots bought by the defendant and in his possession. The tax sale is valid under 57 Vict. ch. 85 and 61 Vict. ch. 56. Moreover, the assignment of mortgage under which plaintiff claims is dated 17th September, 1900, and the conveyance to him is dated 1st August, 1900, both after the entry into possession of defendant; and therefore under sec. 211 of the Assessment Act defendant must succeed.

F. Britton Osler appeared for town of Trenton, though not parties.

MEREDITH, J.—The lands were generally described as lots 5, 6, 7, and 8 on the east side of McLellan avenue, in the town of Trenton. There happen to be two other lots on the east side of McLellan avenue also numbered 7 and 8, and it was urged that as to those two lots, at all events, there was such uncertainty as to avoid the sale; that the

lots in question ought to have been described as in the Irvine survey, the other lots 7 and 8 being in what is called the Jubilee survey. There was no other lot 5 or 6 on the east side of the avenue, and throughout the proceedings the four lots in question were grouped together with an adjoining lot, 4, fronting upon another street; and the only testimony given upon the question of identity was that of plaintiff's witness, the town engineer, who said, in effect, that the grouping of the lots removed any doubt as to their identity, any ambiguity or uncertainty as to lots 7 and 8; and, besides this, in some of the proceedings the lots were otherwise distinguished so as to remove any excuse for doubt, real or assumed, as to their identity.

Apart from all this, no one concerned has been misled . . . and the taxes have been properly imposed, and the proper person had notice of assessment and intention to sell. . . . The plaintiff obtained his title while the defendant was in occupation under his tax title, and it was contended for defendant that, by reason of sec. 211 of the Assessment Act, the plaintiff could not succeed, but the same question probably arises here as that already dealt with, for if the assessment and sale proceedings be void for uncertainty as to the lands, it can hardly be said to be a case "where lands are sold for arrears of taxes." And so too probably as to the defence, based upon 61 Vict. ch. 56 (O.) But I find that the proceedings were not invalid by reason of the description of the lands, and that it was sufficient in this case for the purposes of the taxation, and sale in question: see Hyatt v. Mills, 19 A. R. 329; Assessment Act, secs. 13 (1) (c), (4), columns 8 and 9, secs. 29, 34, 51, and schedule D., sec. 74, sub-sec. 2, and secs. 152-5, 162, 173, 177, 193, 203, 207, and 212.

Action dismissed with costs.

A. Abbott, Trenton, solicitor for plaintiff.

W. C. Mikel, Belleville, solicitor for defendant.

BRITTON, J. MARCH 17TH, 1902.

TRIAL.

TORONTO JUNCTION PUBLIC SCHOOL BOARD v. COUNTY OF YORK.

Public Schools—Model School—Support of—Contribution by County—School in a Separated Town Territorially within County.

Action brought for a declaration that defendants are liable under the provisions of the Public Schools Act to

contribute towards the support of the South York County Model School, situated at the town of Toronto Junction.

W.E. Raney, for plaintiffs.

C. C. Robinson, for defendants.

BRITTON, J.—The plaintiffs are entitled to the declaration as prayed. Toronto Junction is territorially within the limits of the county of York, but it is a separate town, within the provisions of the Municipal Act, and as a municipality is not under the jurisdiction of the county council. Is Toronto Junction part of the county of York, within the meaning of secs. 83 and 84 of 1 Ewd. VII. ch. 39, for educational purposes? That is to say, for the purpose of compelling the county of York to contribute to the maintenance of its model school, set apart by the board of examiners as one of the model schools of the county. The county board of examiners is a board appointed by the municipal council of the county. That board must have as one of its members the inspector of any town (within the county) separated from the county. That board has jurisdiction within the county as to the subjects (limited in number) with which it can deal. The board can set apart at least one public school in the county as a model school for the training of teachers. Such a school could be established by the board in a town (within the county), although separated municipally from the county. If the board could do this now, it follows that this model school in Toronto Junction, properly set apart as a county model school, continues such, notwithstanding the separation of the town municipally from the rest of the county. The word "county," in the Act, sometimes must be applied territorially and sometimes municipally. In this case the model school is a county school, although in the separated town. Judgment for plaintiffs with High Court costs.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for plaintiffs.

C. C. Robinson, Toronto, solicitor for defendants.

LOUNT, J. MARCH 18TH, 1902.

CHAMBERS.

RE ANDERSON.

Will—Direction to Pay Debts out of Estate—Specific Devise of Personalty—Residuary Devise of Money and Securities for Money—Debts Payable out of Money.

Originating notice, heard at London, by executors of John Anderson, deceased, for a direction as to the fund

out of which the testator's debts, amounting to $1,143, are to be paid.

M. P. McDonagh, London, for executors and for Ellen Needham.

R. G. Fisher, London, for Margaret Ardel.

F. P. Betts, London, for J. H. Needham, an infant.

LOUNT, J.—The estate is valued at $27,000. The personal property, household furniture, goods, chattels, and effects, excepting money and securities for money, are of the value of $1,200. The money amounts to $5,880, and securities for money are of the value of $3,050. By clause 1 of the will, provision is made by the testator for the payment of his just debts, funeral and testamentary expenses, by his executors, out of the estate, as soon as convenient after his decease. Other clauses contained devises of his real estate in different parcels to his grandson, John Hamilton Needham, the infant, to Margaret Ardel and Ellen Needham, his daughters. By clause 6 of his will, he gave and bequeathed all his "personal property, household furniture, goods, chattels, and effects to my grandson, John Hamilton Needham, excepting the money and securities for money of which I die possessed," and by clause 7 he directed that "the money and securities for money of which I die possessed be divided" among his daughters and grandson in certain proportions. I think that the debts must be paid out of the money and securities for money bequeathed in clause 7. The money in hand is the proper fund to which resort should be had for the payment of debts, and in this case there is sufficient for the purpose. Clause 7 is a residuary clause, but clause 6 is of a specific legacy, and not to be resorted to for the payment of debts as long as there are sufficient funds for that purpose under clause 7.

Order accordingly. Costs of all parties out of fund mentioned in clause 7.

MEREDITH, J. MARCH 19TH, 1902.

CHAMBERS.

NESBIT v. GALNA.

Security for Costs—Residence of Plaintiff out of Ontario—Return—Ordinary Residence—Rules 1198 (b), 1199.

An appeal by the plaintiff from an order of the local Master at Sarnia dismissing an application by the plaintiff to set aside a præcipe order for security for costs.

The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in

the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on præcipe, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario.

D. L. McCarthy, for plaintiff.

J. D. Falconbridge, for defendants.

MEREDITH, J.—The order was rightly made, not only under Rule 1199, but also because plaintiff actually resided out of Ontario at the time. After his marriage, his residence was at his wife's home, in Michigan. As to the question whether, if the plaintiff now really resides in Ontario and intends to reside therein, that circumstance is sufficient to relieve him from the order: at law it ordinarily would not, especially if security had been given: Badnall v. Haylay, 4 M. & W. 535; Westenberg v. Mortimore, L. R. 10 C. P. 438; Hatley v. Merchants' Despatch Co., 12 A. R. 640: but in equity it would: O'Conner v. Sierra Nevada Co., 24 Beav. 435; Mathews v. Chichester, 30 Beav. 135; Harvey v. Smith, 1 Ch. Chamb. 392. No case, however, seems to lay down any clear and positive rule upon the subject. . . .

The plaintiff being a British subject, always a resident of Ontario until his second marriage about six years ago, and even during that time frequently sojourning and doing business in Ontario, and security not having been given, but a præcipe order only obtained, I should feel authorized in relieving him from that order, if quite satisfied that he is now actually, and intends to continue, a resident of Ontario: see Place v. Campbell, 6 D. & L. 113. . . But, upon the evidence, I look upon the wife's home in Michigan as really the place of residence of herself and the plaintiff, and likely so to remain: see Marsh v. Beard, 1 Ch. Chamb. 390; Watson v. Yorston, 1 U. C. L. J. N. S. 97.

The local Master has found that the plaintiff's ordinary place of residence is at his wife's home, and that his residence in Ontario, boarding at an hotel, though for months past, is merely a temporary residence. I have not disagreed with him in that finding; the burden of proof was upon the

plaintiff. Rule 1198 (*b*) therefore applies, and the case is one in which an order for security for costs ought to be made, and nothing would be gained by setting aside the præcipe order and making another order to the same effect.

Appeal dismissed: costs in cause to defendants.

Hanna & McCarthy, Sarnia, solicitors for plaintiff.

W. L. Haight, Parry Sound, solicitor for defendant.

LOUNT, J. MARCH 20TH, 1902.

CHAMBERS.

RE FITZSIMMONS.

Will—Death without Issue—Executory Devise—Power of Sale—Executors—Executors of Executor—Rule of Construction.

Originating notice under Rule 938 by executors of R. Ferguson, deceased, the last surviving executor of R. Fitzsimmons, deceased. R. Fitzsimmons died in 1845, leaving surviving, his wife Elizabeth, and one child Mary Ann. The will provided as follows:—"Firstly, I give and bequeath my real estate . . . containing 50 acres to the sole and proper use of my wife Elizabeth and my child Mary Ann in the following manner and on these express conditions, viz.:—My said wife is to have, possess, and enjoy all my said real estate, subject to the payment of all my just and lawful debts, for the support of herself and my child as long as she remain my widow, and in the event of her marrying after my decease, it is my will that all my real estate aforesaid should to all intents and purposes become the sole property of my said child Mary Ann and her heirs after her, and in case of the above event my will is that the place might be leased by my executors, and the proceeds solely appropriated to the support of my said child, and in the event of my said child Mary Ann dying without issue, it is my will and desire that my said real estate should be sold, and the proceeds equally divided between the children of my brother James, and also between the children of my sister Margaret, that is, to be equally divided between the children of my said brother and sister respectively. I hereby appoint Robert Ferguson and Keiran Kelly to be my sole executors to carry the above into effect." The widow remained unmarried, and died in 1897. The daughter died unmarried in 1900.

W. Davidson, for petitioners.

J. Hales, for executors of Mary Ann Fitzsimmons.

W. I. Dick, Milton, for Robert Murphy, representing a class.

LOUNT, J.—"A will should be construed by reading it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer to be extracted from the whole instrument should follow from so reading it:" per Lord Wensleydale in Abbott v. Mitchell, 7 H. L. Cas. 877. "It is not the duty of a court of justice to search for a testator's meaning otherwise than by fairly interpreting the words he has used:" per Lord Cranworth in the same case. See also Crawford v. Broddy, 26 S. C. R. at p. 353. Adopting this rule of construction, and reading the will in the ordinary and grammatical sense, it appears to me that Elizabeth Fitzsimmons, the widow of the testator, took an estate for life, subject to being cut down to an estate terminable on her marrying again, and subject to the express conditions of the payment of his debts, and to the support of his child Mary Ann, and as long as she remained his widow, but if she married again, her estate would absolutely cease; otherwise an estate for life, if she remained unmarried. His child Mary Ann, by the words "I give and bequeath my real estate to the sole and proper use of my child Mary Ann," took an estate in fee simple, subject to an executory devise over in the event of her dying without issue, by the words, "in the event of my child dying without issue it is my will that my real estate should be sold and the proceeds equally divided between the children of my brother and sister." I think these words import a failure of issue restricted to the time of the death of the first devisee: Ex p. Davis, 2 Sim. N. S. 114; Coltsman v. Coltsman, L. R. 3 H. L. 121; Gray v. Rochford, 2 S. C. R. 431; Jarman on Wills, 5th ed., 1332. The rule is well established of restrictive construction for cases in which the devise is to A. in fee, and if he dies without issue, then at his death, over. . . . I think, also, it must be held that the intention of the testator was that, whether the estate reached Mary Ann through one channel or the other, he intended and willed that if she died without issue, then there should be the executory gift over, the lands should be sold and the proceeds go to the children of his brother and sister as mentioned in the will. By giving to the will this construction full meaning is attached to all of it, with the result that the manifest intention of the testator is effectuated without repugnance or inconsistency. This being so, the executors of the deceased surviving executor of this testator have power to sell and distribute the proceeds among the children of his brother and sister. The will does not clothe the executors directly with authority to sell, but directs a sale, and his executors are "to be his sole executors to carry the

above into effect." This would be sufficient authority for the executors if either were alive; what either of them, if living, could do, the executor of the survivor can do: Williams on Executors, 9th ed., 204. See also Re Stephenson, Kinnee v. Malloy, 24 O. R. 395.

Declare, therefore, that Mary Ann took an estate in fee simple subject to an executory devise over if she died without issue, whereby the executors of Robert Fitzsimmons were empowered to sell and distribute the proceeds among the children of the testator's brother and sister, and that the executors of the surviving executor have power to sell. Costs of all parties out of the estate

G. E. McCraney, Milton, solicitor for petitioners.

W. I. Dick, Milton, solicitor for R. Murphy.

Mills, Raney, Anderson, & Hales, Toronto, solicitors for executors of Mary Ann Fitzsimmons.

MEREDITH, J. MARCH 21ST, 1902.

CHAMBERS.

HENRY v. WARD.

Arrest—Intent to Quit Ontario with Intent to Defraud—Foreigner.

Motion by defendant for his discharge from custody under an order for his arrest made upon the plaintiffs' application by the Judge of the County Court of Essex. The defendant was never a resident of Ontario, but was a citizen of the United States of America, and a resident of and a large property owner in the State of Michigan.

J. H. Moss, for defendant.

J. M. Clark, K.C., for plaintiffs.

MEREDITH, J.—If the truth and the whole truth had been told upon the ex parte application for the order, it could not rightly have been made: see Cozens v. Richer, Dra. 167; Fryer v. Hislop, 1 Ex. 437; Bowers v. Flower, 3 P. R. 62. The defendant must now be discharged from custody, because he was not at the time the order was obtained about to quit Ontario at all, and because, upon the whole evidence brought out upon this motion, the defendant did not then intend to defraud his creditors generally or the plaintiffs in particular, by quitting Ontario.

Order made for discharge of defendant with costs.

Fleming, Wigle, & Rodd, Windsor, solicitors for defendant.

J. W. Hanna, Windsor, solicitor for plaintiffs.

WINCHESTER, Master. MARCH 6TH, 1902.
ROBERTSON, J. MARCH 19TH, 1902.

CHAMBERS.

REX EX REL. ROBERTS v. PONSFORD.

Quo Warranto—Notice of Motion for Tuesday 24th February, by Mistake for Tuesday 25th February, Valid—Amendment.

This was an application for an order to unseat the respondents, who had been elected aldermen of the city of St. Thomas.

On the 6th February, 1902, the relator, upon filing his affidavit and the affidavits of two others, etc., obtained a fiat to serve the notice of motion—upon his filing a sufficient recognizance as provided by the Municipal Act, R. S. O. 1897 ch. 223, sec. 220—for an order setting aside and declaring invalid and void the election or pretended election held on the 6th February, 1902, at the city of St. Thomas, under which election the respondents—eleven in all—had unjustly usurped the office of alderman in and for the city of St. Thomas.

Before serving the notice of motion, the relator's solicitor filled in the date upon which it was returnable as "Tuesday the 24th day of February, A.D. 1902." This notice of motion was served upon the respondents on the 15th February, 1902, and shortly thereafter it was discovered that a mistake had been made in describing the date as "Tuesday the 24th day of February," instead of "Tuesday the 25th day of February;" and on the 18th February a notice entitled in this matter and reading as follows:—"Take notice, that by a clerical error in the notice of motion served on you herein, it is stated that a motion will be made before the said Master in Chambers at Osgoode Hall in the city of Toronto, at eleven o'clock in the forenoon, on Tuesday the 24th day of February, 1902, instead of Tuesday the 25th day of February, 1902; and you are hereby notified that the day on which the said motion will be made is Tuesday the 25th day of February, A.D. 1902:"—was served upon a number of the respondents by the relator; and the remainder were served with same on the 20th, 21st, and 22nd days of February. This notice was signed by the relator John West Roberts, by his solicitor.

J. H. Moss, for the relator.

E. E. A. DuVernet, for the respondents.

THE MASTER IN CHAMBERS, after referring to Batten v. Harrison, 3 Bos. & Pull. 1, and Eldon v. Haig, 1 Chit. 11, held the notice valid for 25th February, and continued as follows:—

It was further argued by counsel for the respondents that there was no provision in the statute giving any

authority to amend the notice of motion or enlarging the time.

R. S. O. 1897 ch. 223, sec. 220 (4), seems to me, however, to give all the power that is given under the Consolidated Rules of Practice under the Judicature Act to the proceedings under that Act.

It says: "Where the proceedings are taken before a Judge of the High Court or before the Master in Chambers . . . the same shall be entitled and conducted in the High Court of Justice in the same manner as other proceedings in Chambers." . . .

From 1888 to 1897, the provisions of this statute—secs. 220 (1) and (2) to 236, inclusive—formed a portion of the Consolidated Rules of Practice under the Judicature Act, but they were in 1897 consolidated in the Municipal Act with the addition of 220 (4) and one or two other subsections, thus indicating that the practice in High Court matters was intended to be still made applicable to such applications.

Even before the sections relating to controverted municipal elections had been consolidated in the Rules of Practice, it was held that the Rules of Practice appplied.

There are a number of cases shewing this.

In Reg. ex rel. Linton v. Jackson, 2 Ch. Ch. 18, and in Reg. ex rel. McManus v. Ferguson, 2 C. L. J. N. S. 19, it was held that proceedings in these *quo warranto* matters were not to be held irregular and void which do not interfere with the just trial of the matter on the merits. See also Reg. ex rel. Grant v. Coleman, 7 A. R. 619, at p. 625.

I would also refer to cases of irregularity in giving notice of trial where the statute required a certain notice to be given, but where the irregularity was not allowed as sufficient to set aside the notice: see Holmested & Langton, 704.

I hold, therefore, that the notice of motion given herein, under the circumstances set forth, is good and sufficient notice for Tuesday the 25th February, 1902, and that the sureties can have no ground of objection because of the proceedings not being properly prosecuted.

The order for examination of witnesses will issue—to be spoken to as to the examiner.

An appeal by the respondents from this order was argued by the same counsel in Chambers before

ROBERTSON, J. who held that the notice for the 25th February was good for the reasons given by the Master.

McEvoy & Perrin, London, solicitors for the relator.

McLean & Cameron, St. Thomas, solicitors for the respondents.