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BRITTON, J. NOVEMBER 7TH, 1903.

WEEKLY COURT.

RE PAKENHAM PORK PACKING CO.

Company—Winding-up—Action for Calls before Winding-up Order—Counterclaim for Rescission of Application for Shares—Application for Leave to Proceed—Jurisdiction of Referee in Winding-up Proceedings.

Appeal by William Gorrell from order of J. A. McAndrew, an official referee, before whom a reference for the winding-up of the company was pending, refusing an application by the appellant for an order directing that a certain action brought by the company (before the winding-up order) against the appellant and the appellant's counterclaim therein against the company be proceeded with notwithstanding the winding-up order.

George Bell, for the appellant.

S. B. Woods, for the liquidator.

BRITTON, J.—The action was for the unpaid calls upon 14 shares of preference stock and 7 shares of common stock. The counterclaim asked that Gorrell's application for the stock be cancelled and rescinded, on the ground of misrepresentations and of false and fraudulent statements in the prospectus, etc., on which statements Gorrell said he relied.

Issue was joined on the 29th April, 1903. On the 16th June, 1903, the winding up order was made. On the 26th September Gorrell applied to the referee for leave to proceed in the action, pursuant to sec. 16 of the Winding-up Act, R. S. C. ch. 129.

This leave was refused on the ground that an appointment had been taken out to settle the list of contributories, and that all the defences raised by Gorrell could be dealt with upon the application to place him upon the list of contributories, with a right of appeal as wide as an appeal in an action that had been tried.

If that is the case, the action ought not to be allowed to proceed. There are in all about 16 actions, and if all are allowed to proceed a great delay may ensue and very large expense will be incurred. . .

This case is, after all, simply whether Gorrell is or is not a contributory. . . .

The referee is, in my opinion, right in thinking that he has complete jurisdiction. The dictum which would on first impression seem to be against that view is that of the Chief Justice in Re Hess Manufacturing Co., 23 S. C. R. 665. He said: "Relief by way of rescission is beyond the jurisdiction of the Master in a winding-up proceeding under the Dominion statute." I think the learned Chief Justice did not intend to go as far as to say that the Master had not jurisdiction to declare rescission to the extent of removing a name from the list of contributories, or, in other words, to give effect to a defence, if proved, of fraud in procuring the signature of a person to a subscription for shares. The Master has no authority to grant substantive relief such as might be claimed by counterclaim, or to rescind in the case of a sale by a promoter, or to give the consequential relief which in some cases recission would involve.

The appellant, having resisted the claim for calls, and having put in his defence and counterclaim before the winding-up order, is not too late to insist upon the same defence now, if he can establish it: see Whiteley's case, [1900] 1 Ch. 365.

In view of what is said in the Hess case, I add that if the appellant shall not be able, by reason only of want of jurisdiction of the official referee, to avail himself of as full defence before said official referee as in the action, the present application and my decision thereon shall not stand in the way of, nor prejudice the appellant in, a future application.

Appeal dismissed. Costs reserved until after determination of question of appellant's liability.

BOYD, C. NOVEMBER 9TH, 1903.

CHAMBERS.

RE OLIVER AND BAY OF QUINTE R. W. CO.

Costs—Railway—Expropriation of Land—Abandonment.

Motion by landowner and mortgagee for an order for taxation and payment of costs of proceedings for expropriation, which, the applicants alleged, were abandoned by the company.

A. H. Marsh, K.C., for applicants.

W. E. Middleton, for company.

BOYD, C., held, applying and following Widder v. Buffalo and Lake Huron R. W. Co., 24 U. C. R. 234, that the word "desist" in C. S. C. ch. 66, sec. 11, sub-sec. 6, has the same meaning as "abandon" in 51 Vict. ch. 29, sec. 158, i.e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference, if the company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, which involves the company in paying costs to the landowner.

Order made referring the costs for taxation to a taxing officer. Costs of application to be paid by company.

BOYD, C. NOVEMBER 9TH, 1903.

CHAMBERS.

TAYLOR v. TAYLOR.

Writ of Summons—Substituted Service—Motion by Person Served to Set aside—Status of Applicant—Solicitor—Communication with Defendant—Notice—Inference—Costs.

Appeal by a solicitor who was served by substitution for defendant with the writ of summons, from order of Master in Chambers (ante 921) dismissing the appellant's application to set aside the order for substitutional service and the service upon the appellant, upon the ground that appellant had no status to apply.

W. J. Elliott, for appellant.

H. D. Gamble, for plaintiff.

BOYD, C.—In this case the solicitor might have contented himself with sending back the copy of writ served and calling

attention to the fact that he was not acting for or in communication with the defendant, as was done in Watt v. Barnett, 3 Q. B. D. 184; or he might have moved as an officer of the Court to advise the Court that an error had been committed in ordering service upon him as the defendant's solicitor, as was done in The Pomerania, 4 P. D. 195. And, even if not an officer of the Court, I think it is competent for a person served as agent of defendant to move the Court to set aside the service if he is not an agent: Doremus v. Kennedy, 2 Gr. 657.

But here the motion is by the solicitor acting for the defendant; he swears that he applies on the defendant's behalf, and the motion is made "on behalf of the above defendant." He, as solicitor acting for the defendant, has no locus standi because that implies that he is in communication with the defendant and has the right, or has been instructed, to represent him. Instead of applying as amicus curiæ, he applies as agent of the defendant. The Court will not set aside substitutional service if it appears, or can fairly be inferred, that the defendant has notice of what was going on. Such notice is here to be inferred from the form of the application and of the affidavits, as well as from the fact that a person called Taylor was making some inquiries about this motion during its pendency.

Altogether I think it best to affirm the Master's conclusion not to disturb the order for substitutional service, and let the plaintiff proceed at his own risk.

No costs of application or appeal to either party.

BOYD, C. NOVEMBER 9TH, 1903.

CHAMBERS.

RE OGLE.

Infant — Custody — Rights of Father — Agreement with Uncle—Costs.

Motion by Abraham Stirling, the uncle of Goldie Florence Ogle, an infant of eight years, on the return of a habeas corpus and on petition, for an order as to the custody of the infant, who was handed over when a year old to the applicant by the father under a written agreement. The father afterwards took possession of the child.

D. L. McCarthy, for applicant.

J. J. Warren, for the father.

BOYD, C., held that the articles of agreement as to the custody of the child being put an end to by mutual agreement and delivered up on 17th September, 1903, it was not necessary to deal with the rights of the applicant. The infant has come to the hands of her father, who is willing and able to keep her in a suitable manner, and his right is superior to that of the uncle, whose guardianship has been determined. It is impossible, on the conflicting affidavits, to draw any conclusion as to the welfare of the child. There is not enough evidence to induce any interference, and no such case is suggested as would warrant incurring further expense by a reference to the Master. Having regard to the fact that the child has been left in the hands of the uncle since 11th November, 1897, and has been maintained at his charge without contribution from the father, there should be no costs. Application dismissed without costs.

BOYD, C. NOVEMBER 9TH, 1903.

CHAMBERS.

BASTEDO v. SIMMONS.

Costs—Scale of—Jurisdiction of County Courts—Amount Liquidated or Ascertained.

Appeal by plaintiffs from ruling of one of the taxing officers that plaintiffs were entitled only to costs on the County Court scale and defendants to a set-off of costs. Action for the price of a number of furs sold to defendants. Judgment was given by the trial Judge (MEREDITH, C.J.) for plaintiffs for $286 (2 O. W. R. 866). The question was whether the amount was ascertained by the act of the parties.

R. McKay, for plaintiffs.

S. B. Woods, for defendants.

BOYD, C.—The cases appear to be in confusion as to the construction and meaning of the words "liquidated or ascertained" in the County Courts Act, R. S. O. ch. 55, sec. 23 (2), and none the less confusing when the cases on the meaning of the like word "ascertained" in the Division Courts Act, R. S. O. ch. 60, sec. 72 (d), are brought into contrast.

The taxing officer, having proceeded upon the exposition of the law as given in Ostrom v. Benjamin, 21 A. R. 467, should not be disturbed in his ruling.

It may be that the Chief Justice will consider the question of granting a certificate to prevent set-off of costs, if applied to.

TEETZEL, J. NOVEMBER 9TH, 1903.

WEEKLY COURT.

NELSON v. NELSON.

Costs—Mortgage Action—Redemption—Costs of Appeal in Former Action—Attempt to Add to Claim—Dismissal without Costs—Effect of.

Appeal by defendant Isabella Gibson from a part of the report of the Master at Stratford allowing plaintiff $464.11, being the costs incurred by him in opposing an appeal to the Supreme Court of Canada. The action was for foreclosure of a mortgage, and defendant was entitled to redeem. The appeal to the Supreme Court was by defendant from judgment of Court of Appeal dismissing action by her against plaintiff to redeem the mortgage in question, and also from the judgment of the Court of Appeal reversing an order of ROSE, J., staying proceedings in this action. The Supreme Court dismissed the appeal without costs.

J. P. Mabee, K.C., for appellant.

J. Idington, K.C., for plaintiff.

TEETZEL, J.— . . . The general rule is, that, besides the costs of the suit in which the mortgagee's rights are immediately adjusted as between himself and the owner of the equity, he has also a right to be allowed out of the mortgaged property all costs and expenses reasonably and properly incurred in ascertaining, asserting, or defending his rights, or in recovering the mortgage debt: Fishers Law of Mortgages, 5th ed., p. 894 et seq.; Seton on Decrees, 6th ed., p. 1953, and cases there cited. . . . In dismissing the appeal to the Supreme Court the Chief Justice said: "Both the appellant and respondent appear to us to have been during the whole course of their dealings in the matter in dispute unreasonably endeavouring to multiply the proceedings and prolong the litigation." . . . In my opinion, the effect of the judgment was not only to deprive plaintiff of the personal remedy for these costs, but of the right to add them to his mortgage debt against defendant.

Appeal allowed with costs and report amended accordingly.

BOYD, C. NOVEMBER 9TH, 1903.

WEEKLY COURT.

CHITTICK v. LOWERY.

Vendor and Purchaser—Acquisition of Equity of Redemption by Execution Creditor Purchasing at Sale under Execution—Sale of Equity to Mortgagor—Release of all Claims—Effect of—Short Forms Act—Unsatisfied Judgment against Mortgagor—Execution Subsequently Placed in Sheriff's Hands—Subsisting Incumbrance.

Appeal by one Stovel, made a party in the Master's office, from a report of the local Master at Barrie disallowing the claim of plaintiff as a subsequent incumbrancer by virtue of an assignment of a judgment and execution. Under an execution in the case of Hawthorn v. Lowery, the sheriff sold the equity of redemption of Lowery in mortgaged lands on 14th August, 1896, and a conveyance thereof was made by the sheriff to the purchaser, McGibbon, on 25th August, 1896, for $100. McGibbon was then the assignee of the judgment, and as purchaser he held this interest in the land till 23rd September, 1897, when he sold it to Lowery, the mortgagor, for $50, and made to him the usual short form conveyance under R. S. O. ch. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. McGibbon assigned the judgment (so paid in part) on 22nd April, 1902, to Stovel, and thereafter an alias writ of fi. fa. lands was issued on 3rd July, 1902, and placed in the hands of the sheriff, and in respect of this execution Hawthorn and Stovel were made parties. The Master held that the release of all claims in the short form deed from McGibbon to Lowery operated to discharge the land from this judgment and execution.

J. Bicknell, K.C., for appellant.

C. E. Hewson, K.C., for defendant Lowery and subsequent mortgagees.

D. L. McCarthy, for plaintiff.

BOYD, C.—When the equity of redemption was sold and conveyed by the sheriff, the judgment was satisfied pro tanto, and the equitable interest in the mortgaged premises became vested in the execution and judgment creditor as owner. The land was no longer affected by that judgment and execution,

as it had passed from the ownership of the mortgagee to that of the creditor. So matters remained till the sale and conveyance of McGibbon to the mortgagor Lowery, a year afterwards. The effect of this was to invest the mortgagor with a new interest in the land as conveyed to him by the sheriff's purchaser. That new interest (apart from the covenants of the short forms deed) would fall under the operation of the writ against lands, which was still in the sheriff's hands till August, 1899. On the non-renewal of the writ, the equitable estate held by Lowery would be exempt from the execution, till there was placed in the sheriff's hands the alias writ of 1902, as to the effect of which the contest arises.

The covenants relied upon are No. 4, as to incumbrances, and No. 8, as to the release of all claims. Now, when the land was in the hands of McGibbon, it was not subject to any incumbrances by reason of this judgment and execution. It did become subject to the execution issued by or for Stovel in 1902, which would rank in priority only from that date. There was nothing effecting the land in the mere judgment till execution against lands issued thereon. The writ left in the sheriff's hands till 1899 was spent by non-renewal and may be left out of the case. All claims possessed by McGibbon on the equitable estate were conveyed by him when he made the conveyance. It was not till after the conveyance to the mortgagor that this claim under the execution became possible ; and then the claim arises by operation of law for the satisfaction of a judgment debt (still unpaid by Lowery) out of the new estate acquired by him from the sheriff's purchaser.

I do not read the expansion of No. 4 as embracing a judgment or execution obtained or issued by the grantor, but rather one which effects the lands in contravention of his absolute ownership, i.e., one issued or enforceable against the lands in his hands, and one which as against his vendee he ought to pay.

As to the unique provision No. 8, it has its origin in the abortive legislation of Lord Brougham in the English Short Forms Act of 1845 (8 & 9 Vict. ch. 119, Imp.), which, after remaining in disuse for many years, was finally repealed in 1881 by sec. 71 of the Conveyancing Act of that year. It is not commented on in the books, and there have been, I believe, no cases on the provision for the "release of all claims on the land" either in England or in this Province, where it was introduced in 1846 (9 Vict. ch. 6, C.). But I take it not to be applicable to this transaction. The protection afforded by the release clause is as against all claims which the

purchaser would not have to pay or meet but for the ownership of the land. The clause applies to claims on the land which it is and was the duty of the vendor to remove in order to assure the purchaser a complete title at the date of conveyance. But such title was conveyed to the purchaser by the vendor. There was nothing outstanding which affected or could or might affect the lands or the purchaser in respect of the lands, as and when the conveyance was made to the purchaser, in respect of the unsatisfied judgment and possible execution upon it; but it was the duty of the purchaser to pay that judgment, and it was not part of the bargain that the vendor was to discharge his claims in respect of that unpaid judgment—nor does the general release extend to it It would be a misuser of the release clause were the purchaser to be thereby absolved from paying the balance due on the judgment, and if he is not free from the incidence of the judgment, why should the land be freed from the effect of an execution issued upon that judgment in regard to the newly acquired estate?

The judgment is the principal thing, and the execution is its accessory and legal incident.

All claims of the plaintiff as to the land have been conveyed and released to the purchaser; what has not been released is his claim upon the unsatisfied judgment: Barrow v. Gray, Cro. Eliz. 552.

Appeal allowed. Costs to appellant to be added to his claim.

BOYD, C. NOVEMBER 9TH, 1903.

WEEKLY COURT.

GURNEY FOUNDRY CO. v. EMMETT.

Trade Union—Interference with Employers' Business—Injunction—Action against Members of Union—Parties—Representation—Local Bodies—General Council.

Motion by plaintiffs for an injunction against the members of the Ironmoulder's Union to restrain them from injuring the plaintiffs' business by interfering with workmen, etc., and for an order authorizing defendants to represent the other members.

E. E. A. DuVernet, for plaintiffs.

J. G. O'Donoghue, for defendants.

BOYD, C.—An order should go restraining defendants from issuing and publishing the placards, posters, and printed

matter complained of, or any like productions, till the trial or further order. I say nothing as to the other branches of relief sought, as the evidence is not complete on the part of defendants, who did not argue on the merits, and it is possible they may be helped by the examination of plaintiffs. But the immense volume of viva voce examinations already before the Court should not be increased unless the parties propose to have the case tried on this motion. Order to go for representation of the various local orders or bodies whose heads are now defendants, but not as to the Trades Council. Costs in cause, if not otherwise ordered at the trial. This order to be without prejudice to the prosecution of other parts of plaintiffs' motion after the evidence has been made complete on both sides, if the parties are so advised.

BOYD, .C NOVEMBER 9TH, 1903.

TRIAL.

SMITH v. GORDON.

Sale of Goods—Cordwood—Measurement—Tender—Insufficiency—Resale—Privity—Estoppel— Contract—Setting apart Wood—Scale of Costs.

Action for an injunction restraining defendants from removing any or all of the Cordwood at Christie's Pit on the Canada Atlantic Railway, for a declaration that the cordwood is the property of plaintiffs, and against defendant Gordon for $1,000 damages for breach of contract.

J. A. Macdonell, K.C., for plaintiffs.

G. McLaurin, Ottawa, for defendants.

BOYD, C.—The case of the plaintiffs rests on the sufficiency of the tender made on or about 2nd April, 1903, of $873 which it is argued was the price of all the wood then piled at the Christie Pit and sold to the plaintiffs by the defendant Gordon. That is based on the evidence of a mutual measurement and settlement of the quantity there as 355 cords, less six per cent., 334 cords in all. But I think the result of all the evidence is, that there was a mistake in these figures, and that this quantity was not accepted by the defendant as correct. The error in computation of the plaintiffs' scaler is proved, and both men who measured agree in the actual and correct result as being a total of 382 cords. So that I find the amount tendered was insufficient, and the defendants were justified in going on to sell again after due notice given to

the plaintiffs. There was an arrangement to allow something for unfitness and bad wood, and I think the fair amount of wood of merchantable quality was 380 cords, at which it was measured by the purchaser Barrett.

The sale to Barrett was had with the privity of the plaintiff Smith, and I think the plaintiffs are thereby estopped from making objection. On this sale there was a loss of 45 cents a cord, 380 cords, equal to.....$171 00

I allow discount on Barrett's notes.....	17 70
And expenses properly incurred by plaintiffs on and about the resale at.....	62 30
	251 00
Add 201 cords delivered to defendants.....	703 50
	$954 50

which being deducted from $1,000 paid by plaintiffs, leaves in their favour a balance of $45.50 to be paid by defendants to plaintiffs.

There was no setting apart of any wood to answer for $1,000 paid. The contract says "party of first part can own wood to value of all money paid in advance," but this imports some transaction by which an appropriate part should be designated on the ground.

The defendants should have accepted the offer of the plaintiffs to settle on the basis of the accounts as I now find them, which was practically offered in the letter of 6th April, and have avoided litigation.

I give plaintiffs costs on County Court scale and judgment for $45.50.

NOVEMBER 9TH, 1903.

DIVISIONAL COURT.

RE WARBRICK AND RUTHERFORD.

Landlord and Tenant—Overholding Tennants Act—Proceedings under—Motion for Prohibition or Certiorari—No Writ of Possession Issued—Exclusive Remedy under sec. 6.

Appeal by Rutherford, the tenant, under the Overholding Tenants Act, R. S. O. ch. 171, from order of MACMAHON, J. (2 O. W. R. 609) refusing appellant's application for an order under sec. 6 of that Act commanding the Judge of the County

Court of Peel to send up the proceedings into the High Court, and prohibiting the Judge and the sheriff from taking any further proceedings under an order made by the Judge for a writ of possession to issue to place the landlord in possession. No writ of possession had been issued.

The appeal was heard by STREET, J., BRITTON, J.

R. McKay, for appellant, contended that the ordinary right to certiorari and prohibition in respect of proceedings under the Act is not interfered with by the special provisions contained in sec. 6.

W. T. J. Lee, for landlord.

STREET, J., was of opinion that sec. 6 was intended as the means, and the only means, by which the tenant may have the proceedings taken by his landlord removed into the High Court and examined there. If the Court were to hold that a tenant could have the proceedings removed before the writ issued, it would open a door for delays which it was the object of the Act to prevent.

BRITTON, J., without going so far as to hold that sec. 6 is the only means by which the proceedings may be removed, held that sec. 6 amply protects the tenant, and the applicant is not entitled ex debito justitiæ to certiorari.

Appeal dismissed with costs.

BRITTON, J. NOVEMBER 10TH, 1903.

CHAMBERS.

RE ROWE.

Criminal Law — Extradition — Fugitive Offenders Act — Forgery — Theft—Evidence—Prima Facie Case—Presumption—Identification of Prisoner—Judicial Notice of Statute.

Application under R. S. C. ch. 143 for the discharge from custody of Anthony Stanley Rowe. By the return to the writ of habeas corpus it appeared that the prisoner, having been apprehended under the Fugitive Offenders Act, had been committed to prison to await his being conveyed to London, England, for trial upon charges made against him. There were three warrants of committal: (1) On the ground of his being accused of forging and uttering knowing to be forged certain orders for payment of money with intent to defraud, as follows: on the 26th September, 1902, a banker's cheque for

£3,125; on 15th October, 1902, a banker's cheque for £4,666 3s. 8d.; on 24th November, 1902, a banker's cheque for £2,022 14s. 1d (2) On the ground of his being accused as the servant of "The Great Fingal Consolidated Limited," of stealing valuable securities belonging to that company, the securities being the cheques above mentioned. (3) On the ground of his being accused as a public officer of "The Great Fingal Consolidated Limited" of unlawfully taking to and for his own use and benefit the cheques mentioned. These warrants were sent to Canada. The prisoner was arrested at Toronto and brought before the police magistrate for that city. The question was, whether or not there was produced before the magistrate such evidence, subject to the provisions of R. S. C. ch. 143, according to law as ordinarily administered by the magistrate, as raised a strong or probable presumption that the prisoner (a fugitive under the Act) committed the offence mentioned in any of the warrants, and that the offence was one to which the Act applied.

T. C. Robinette, K.C., for prisoner.

J. R. Cartwright, K.C., and J. W. Curry, for the Crown.

C. W. Kerr, for the prosecutors.

Britton, J.—The evidence of one Bartholomew was distinct upon the following points. That the prisoner was secretary to "The Great Fingal Consolidated Limited," and acted as such until the 28th December, 1902, when he absconded from England. That the bankers of that company were Robert Lubbock & Co., of Lombard street, London. That the company had two accounts with Robert Lubbock & Co., one of which accounts was for the payment of dividend No. 5 of the company, and was called dividend No. 5 account. That the warrants for dividends could be signed by prisoner alone as secretary of the company, and a cheque so signed would be honoured when funds sufficient were to the credit of the company. That prisoner, having become possessed of two cheques drawn by Vivian, Younge & Bond in favour of the company, which ought to have been paid for the company to the Union Bank of Australia, deposited these cheques to the company's credit in dividend No. 5 account with Robert Lubbock & Co. That prisoner had no power to draw money from the Union Bank of Australia upon the company's cheque signed by himself. That the two cheques so deposited to the credit of dividend No. 5 account amounted together to £4,606 3s. 8d. That a dividend warrant or cheque for £4,606 3s. 8d., being the one stated in the warrants of committal, was drawn

by the prisoner in favour of Bewick, Moering & Co. That the indorsement of Bewick, Moering & Co. is in the handwriting of the prisoner. That the cheque so indorsed was put to prisoner's credit in the London Joint Stock Bank, Limited. A similar account was given of the £2,022 14s. 1d. cheque or dividend warrant, which was produced. The cheque for £3,125 was produced before the magistrate in London, but it was deposed to that a sum of £3,125 was charged by Robert Lubbock & Co. as paid to the company on the 26th September, 1902, and on the same day the prisoner's account at the London Joint Stock Bank was credited with £3,135.

A prima facie case of stealing at least two of these dividend cheques has been made. It may be that a stronger prima facie case is made for the stealing of the large sums represented by these cheques, but even as to the cheques they were the property of the company, valueless until signed, but when signed by the prisoner, of value, and could only be properly handed out to persons entitled to receive them in payment for dividends. The prisoner paid them to himself, nominally to a firm of which he was a member, and upon his own indorsement in the name of that firm got the money. That makes a prima facie case of theft of the cheques as well as of the money. A prima facie case of forgery is also made out. If it is true, as deposed to, that there were no such amounts for dividends payable to Bewick, Moering & Co., as represented by the dividend warrants, and if the prisoner fraudulently made these warrants for the purpose of transferring the money from dividend No. 5 account to his own pocket, it was forgery.

The evidence of Thomas Edgar Smith fully identifies the prisoner as the person who was charged in London, against whom the warrants were issued, and who is now the fugitive under the Act.

There is raised by the evidence a strong and probable presumption that the prisoner committed the offences, and that the offences are of the kind to which the Fugitive Offenders Act applies. By the Canada Evidence Act, 1893, sec. 7, the magistrate was, and the Judge is bound to take judicial notice of the Imperial statute.

Motion for discharge refused. Prisoner remanded to custody for return to London, England.

FERGUSON, J. NOVEMBER 11TH, 1903.

TRIAL.

SMITH v. GRAND ORANGE LODGE OF BRITISH AMERICA.

Life Insurance—Cancellation of Policy—Material Mistatements as to Disease.

Action for a declaration that a certain contract of insurance of plaintiff's life for $1,000 entered into by defendants is a good, valid, and subsisting contract; to restrain defendants from cancelling the contract; or for damages. The defendants counterclaimed for cancellation of the contract upon the ground that plaintiff made material misrepresentations in his application for the insurance.

H. M. East, for plaintiff.

J. A. Worrell, K.C., for defendants.

FERGUSON, J., found that plaintiff stated that he had not consulted or been attended by a physician for six years next prior to his examination upon the application for insurance, whereas he had consulted four physicians within four months immediately prior thereto. This statement of plaintiff he warranted to be true, and it, amongst other statements, representations, and answers by him, formed the basis of the contract. The statement was made and was not true, and was a material statement. The plaintiff also stated that he had not had any illness except a slight attack of la grippe for three years next prior to his examination, whereas he had been ill for two months immediately prior to his examination, and had consulted two doctors, who told him that he was suffering from, at any rate, anæmia. The statement was not true and was material. The plaintiff concealed symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. This concealment was in violation of plaintiff's warranty and was material. The plaintiff had phthisis or tuberculosis, which, though undeveloped by physical signs, was existing, and he having warranted that he was free from disease, there was a breach of the warranty, even if he did not know he was diseased. For these reasons the certificate or policy was void and should be delivered up to be cancelled. Honour v. Equitable Life Assurance Society, [1900] 1 Ch. 852, and Connecticut Mutual Life Ins. Co. v. Home Ins. Co. 17 Blatch. 142, referred to.

Judgment dismissing the action with costs and for defendants on their counterclaim with costs.

BRITTON, J. NOVEMBER 12TH, 1903.

TRIAL.

COOK v. TOWN OF COLLINGWOOD.

Way—Non-repair—Open and Unguarded Trench—Injury to Person—Nonfeasance—Statutory Limitation of Action—Time—Liability of Municipal Corporation.

Action for damages by reason of alleged defective highway, tried at Barrie without a jury. The plaintiff, George Cook, on the evening of 2nd December, 1902, between 6 and 7 o'clock, was going to his own house in Collingwood, and in crossing a temporary bridge over a ditch on Hurontario street he stepped off the bridge and fell into a trench made by workmen for the defendants for the purpose of supplying water to a house recently erected in that street, and was injured. Plaintiff alleged that the trench was negligently made and that defendants were guilty of negligence in leaving it unguarded.

L. G. McCarthy, K.C., for plaintiff.

J. Birnie, K.C., for defendants.

BRITTON, J., held, upon the evidence, that plaintiff had not succeeded in shewing that this accident was in any way caused by the negligence of defendants. Even if there were negligence by reason of not guarding the trench, the action would be barred, not having been commenced within 3 months from 2nd December, 1902. See Pearson v. County of York, 41 U. C. R. 378.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

RE JELLY, UNION TRUST CO. v. GAMON.

Executors and Administrators—Claim against Estate of Deceased Person—Running Account—Entries in Books of Creditor—Corroboration—Statute of Limitations.

Appeal by plaintiffs, the executors of William Jelly, from order of Master in Ordinary in an administration matter, allowing the claim of one Tuck as a creditor. Tuck had been

tenant to the testator of the Royal Hotel in Shelburne under an oral agreement, at $650 a year from February, 1886, until May, 1901. During that period he had a running account with his landlord, making payments from time to time on account of his rent, and advancing money from time to time on account of rent to his landlord and on various other dealings between them, including the purchase by Tuck from Jelly at the beginning of his tenancy of the stock in hand of liquors and groceries and of the furniture in the hotel. Tuck kept a cash book and ledger in which the cash transactions between him and Jelly were entered by him from day to day. All the larger cash transactions were evidenced by cheques given by Tuck to Jelly, entered regularly in the cash book and produced in evidence. A considerable amount made up of small sums alleged to have been paid in cash by Tuck to Jelly from time to time, and entered in Tuck's books, but not otherwise vouched, was disputed by the executors, but allowed by the Master. The testator kept no books of account or memoranda of his transactions with Tuck. No settlement of accounts between Tuck and the testator had ever been made.

J. Bicknell, K.C., for appellants.

J. H. Moss, for Tuck.

THE COURT (STREET, J., BRITTON, J.) held that the Master, giving credit as he did to the evidence of Tuck in support of his own claim, was justified in holding that the claim was sufficiently corroborated by some other material evidence. It was impossible to exclude from consideration the books of account kept by Tuck, because he was entitled to refer to them to refresh his memory as to the items. The entries in his books were sworn to by him as being correct, and they were vouched in perhaps 100 entries by the production of cheques payable to the testator's order and indorsed by him, and in other cases by oral testimony other than Tuck's own. The general correctness of the books was shewn, therefore, by other material evidence, and the oath of the creditor was sufficiently corroborated to entitle the Master to act upon it: Green v. McLeod, 23 A. R. 676.

The account between Tuck and the testator was a running account, with frequent entries in each month from its beginning to its end, and therefore the Statute of Limitations could not apply to any of the items: Banning on Limitations, p. 220.

Appeal dismissed with costs.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

RE MCDONALD.

Will—Construction—Devise—Estate Tail—Vested Remainder in Fee over—Uncertainty—Repugnancy—Absolute Bequest of Personalty.

Appeal by Jane Burke from order of FALCONBRIDGE, C. J., declaring the construction of the will of Charles McDonald. The testator after directing payment by his executors of all his debts and funeral and testamentary expenses, proceeded as follows:—"I give . . . to my daughter Jane McDonald all my real and personal property that I die possessed of, after the dissolution of the partnership company known as L. McDonald & Co., and after a division is made, and after the following bequests, namely, the maintenance of my wife . . . the amount being for that purpose $20 in advance every three months during her lifetime, and $500 to be paid Margaret Streath and to St. Joseph's Union Homeless Child of New York $100. In the event of my daughter Jane McDonald predeceasing me, or in the event of her dying without heirs, then I direct that all my property left at that time be equally divided between my brothers and sisters."

J. H. Moss, for Jane Burke.

H. J. Wright, for the executors of Charles McDonald.

F. W. Harcourt, for infants.

J. H. Spence, for John and William McDonald.

A. W. Holmested, for executors of Lewis McDonald.

THE COURT (STREET, J., BRITTON, J.) held that Jane McDonald (now Jane Burke) took under her father's will an absolute estate tail in possession in the lands devised, subject to the charges set forth in the will, with a vested remainder in fee over to the brothers and sisters of the testator. Reference to Jarman on Wills, 5th ed., p. 1175.

It was argued for Jane Burke that the gift over being only of "property left at that time," that is to say, at her death, must fail because of its uncertainty, and because of its repugnancy to the prior absolute gift to her, upon the authority of the cases cited in Jarman, 5th ed., p. 333. The Court held, however, that the cases, or the principle upon which they have gone, do not apply to a case where the previous devise is in tail.

With regard to the personalty, it was held that Jane Burke took it absolutely, subject to the charges set forth in the will: Jarman, 5th ed., p. 1366; Hawkins, ed. of 1885, p. 188.

Order accordingly. Costs of the appeal of all persons who properly appeared upon it to be paid out of the estate.

NOVEMBER 12TH, 1903.

DIVISIONAL COURT.

DICKSON v. TOWNSHIP OF HALDIMAND.

Way—Dangerous Condition—Wall and Ditch—Injury to Person—Misfeasance—Want of Guard—Contributory Negligence—Liability of Municipal Corporation.

Appeal by defendants from judgment of BOYD, C., who tried the action without a jury at Cobourg, in favour of plaintiff for $350 damages. Action for misfeasance in the condition of a highway. There was an open ditch by the side of the road and a stone wall to protect the road; the plaintiff fell against the wall and into the ditch and was injured.

E. C. S. Huycke, K.C., for defendants, contended that the negligence proved, if any, was nonfeasance (the want of a guard), and the action was not brought in time under the Municipal Act; and also contended that there was contributory negligence, the plaintiff having frequently passed the place where he fell and knowing the condition.

W. F. Kerr, Cobourg, for plaintiff, contra.

The Court (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the finding of the Chancellor that there was no contributory negligence was well supported by the evidence; that it was not the duty of plaintiff to look for danger at every step, even if he knew the highway was dangerous; that all he was bound to do was to use care proportionate to the danger. The Chancellor found that the cause of the injury was the stone wall, and there was evidence to support that finding. That was clearly misfeasance. The defendants had built a wall which was dangerous and caused the injury. They might have put up a guard, but their not doing so did not make the cause of the injury nonfeasance. The cases of Rowe v. Corporation of Leeds and Grenville, 13 C. P. 515, and Bull v. Mayor of Shoreditch, 19 Times L. R. 64, governed the case. Pearson v. County of York, 41 U. C. R. 378, is not a satisfactory decision, and the others should be preferred. At

present it must be held that an act of misfeasance is not one to which the statutory limit applies, though that is a question which may have to be considered by a higher Court.

CARTWRIGHT, MASTER. NOVEMBER 13TH, 1903.

CHAMBERS.

RENOUF v. TURNER.

(TWO ACTIONS.)

Security for Costs—Claimants of Fund in Court both out of Ontario—Cross-motion for Security—Stay of Proceedings—Security by Reason of Part of Fund Unclaimed by one Claimant—Consolidation of Actions.

These actions arose out of the death of one Harney, who had two policies for $1,000 each, one in the Commercial Travellers' Association, and the other in the Commercial Travellers' Mutual Benefit Society. The amounts of these policies had been paid into Court—$1,940 more or less.

Renouf and Turner were the only claimants to these funds. The former claimed under an instrument dated 16th January, 1899. Turner claimed under a notarial transfer dated 25th March, 1902. Renouf claimed to be entitled to at least $800. Turner claimed the whole fund.

Both parties were resident in Quebec, and had no assets in Ontario. Renouf made affidavit that he was worth over $30,000, while Turner was financially worthless. Neither of these allegations was disputed.

In the second action an order was made on 13th October, on application of Turner and on notice to Renouf, requiring the latter to give security for costs.

In the first action Renouf moved for an order requiring Turner to give security for costs and for an order consolidating the issues.

In the same action Turner moved for an order requiring Renouf to give security.

In the second action Renouf moved also for security and consolidation of the issues.

W. M. Douglas, K.C., for Renouf.

C. A. Moss, for Turner.

THE MASTER.—As a preliminary objection to the last motion, Mr. Moss relied on the decision in Weeks v. Underfeed, 19 P. R. 299. In that case a Divisional Court held that "an order for security for costs has the effect of staying all pro-

ceedings." By this decision I am clearly bound. Then as to the other motions.

First, as to that requiring Turner to give security in action No. 1.

Mr. Douglas relied on the decision in Knickerbocker v. Webster, 17 P. R. 189, and cases therein cited, and followed; also Sinclair v. Campbell, 2 O. L. R. 1, and cases there cited by the Chancellor.

On consideration I think that the argument of Mr. Douglas must prevail unless otherwise displaced.

But it was pointed out by Mr. Moss that in this case Renouf has abundant security, inasmuch as there is in Court a fund of nearly $1,900, of which Renouf only claims about a half.

To this it was replied that, although Renouf and Turner are the only claimants, it does not follow that some other may not appear before the decision of the issues. Johnston v. Catholic Mutual Benefit Society, 24 A. R. 88, was cited as shewing that possibly legatees or next of kin might come in yet, and that neither claimant might be entitled to any part of the fund in Court. I think, however, that it will be time enough to consider this when any rival claimant appears. In the meantime there are only two claimants. If any cause is shewn later, the motion can be renewed.

The orders to be made now will, therefore, be as follows:—

The motions in the first action must be dismissed with costs to Turner in any event. The motion in the second action by Renouf to consolidate will also be dismissed with costs to Turner in the issue. And in the same action the two motions for security for costs will be reserved to be disposed of when the claimant Renouf has complied with the order for security, which he is to do not later than 16th instant. At the same time the motions for consolidation can be renewed. If granted, the motions for security will be unnecessary in all probability.

OSLER, J.A. NOVEMBER 13TH, 1903.

CHAMBERS.

ROBERTS v. CAUGHELL.

Mortgage—Foreclosure—Final Order after Abortive Sale —New Day—Rule 393—Time for Redemption.

Appeal by defendant from order of Master in Chambers, ante 939.

The appeal was heard by OSLER, J.A., holding Chambers for a Judge of the High Court.

E. Meek, for appellant.

F. E. Hodgins, K.C., for plaintiff.

OSLER, J.A., dismissed the appeal with costs.

OSLER, J.A. NOVEMBER 13TH, 1903.

CHAMBERS.

McDONALD v. PARK.

Venue—Change of—Substantial Grounds—Preponderance of Convenience—Cause of Action—Residence of Parties—Witnesses—Expenses.

Appeal by plaintiff from order of Master in Chambers, ante 812, changing the venue from Toronto to Chatham.

The appeal was heard by OSLER, J.A., sitting for a Judge of the High Court.

Casey Wood, for appellant.

W. E. Middleton and C. A. Moss, for defendants.

OSLER, J.A., affirmed the Master's order, holding that the decided cases have not forbidden a change of venue in a proper case; that each case must be judged by its own facts; and that this was eminently a case for trial at Chatham.

BRITTON, J. NOVEMBER 13TH, 1903.

TRIAL.

THORNTON v. THORNTON.

Master and Servant—Wages—Claim against Estate of Brother—Evidence—Corroboration—Claim against Brother's Widow—Amount of Wages—Costs of Action.

Plaintiff was the brother of Henry M. Thornton, who died on the 28th July, 1899, and who in his lifetime kept the Queen's hotel, Orillia. The action was brought against Henry M. Thornton's widow to recover wages for plaintiff's services as bar tender, from 15th February, 1898, to 28th July, 1899, against the defendant as administratrix of her husband's estate, at $10 a week, and from 28th July, 1899, to 1st December, 1900, against the defendant personally, at $12 a week.

F. E. Hodgins, K.C., and G. D. Grant, Orillia, for plaintiff.

R. D. Gunn, K.C., for defendant.

BRITTON, J.—The plaintiff for some time prior to the 15th February, 1898, was the owner of or interested in this hotel at Orillia, and his brother Henry M. Thornton kept a hotel at Atherly.

The plaintiff is an unmarried man, and was in the habit of working for wages, but apparently he was not, and is not, a man careful about making bargains or about saving money. It is not pretended that he went to his brothers in Orillia as the result of any distinct bargain, but he says his brother paid him small sums occasionally, and that his brother said he would treat him, the plaintiff, fairly and right.

That is not enough, upon the facts in this case, as against the deceased brother's estate, to make out a promise to pay. It may well be that the deceased thought in giving the plaintiff a home and board and occasionally a small sum of money, and allowing plaintiff to go and come as he pleased, he was in fact treating him "fairly and right." The plaintiff has to make out that the deceased was indebted to him. Ordinarily the onus would be shifted by shewing services, from which there would be an implied promise to pay. I have carefully considered the evidence. No doubt some service was rendered, but, upon the evidence, it was not of any such value as claimed by the plaintiff, and it was, in my opinion, rendered under such circumstances as from it a promise to pay would not be implied. It was such a service between brothers that in order to entitle plaintiff to recover he must shew either an express hiring or a promise on the part of the deceased to pay, or what would fairly amount to such a promise, or an intention on the part of the deceased to pay, or at the very least a knowledge on the part of the deceased that the plaintiff was working with the expectation of being paid. Having seen the plaintiff and heard his evidence, I have no hesitation in coming to the conclusion that he was quite willing to remain at his brothers, making that his home, without any bargain and with no expectation that he would be paid wages. This seems to me consistent with his actually getting from time to time small sums of money for clothes and his pleasure. . . . There is plenty of evidence that plaintiff was at his brother's hotel and that he did some work, but there was no corroborative evidence as against the deceased. Even if there was the presumption that the work was to be paid for, I think that presumption is rebutted by the facts in this case. . . . It is important that during the time the plaintiff was at the hotel he made no claim for wages, nor did he ask for a settlement or make any claim after his brother's decease until

shortly before bringing this action. The plaintiff fails against defendant as administratrix.

After the death of Henry M. Thornton the plaintiff continued on, or on and off, at the hotel in the same way as before his brother's death until the autumn of 1899, when defendant was not willing that he should stay longer. The plaintiff when leaving did not ask for wages against defendant personally or from her husband's estate. . . .

In the spring of 1900 . . . the plaintiff returned at the defendant's request. The plaintiff, as against the defendant, is entitled to be paid for his services from March to December, 1900, 36 weeks, but he is not, in my opinion, entitled to any such sum as claimed. His services were not worth so much. It was not within the contemplation of either plaintiff or defendant that any such wages should be paid. . . . I think plaintiff should get $6 a week and his board, and I allow him that without any deduction for loss of time.

The defendant has paid $124, leaving a balance of $92, for which amount plaintiff is entitled to judgment.

Considering the whole case . . . the relationship of the parties, and the circumstances under which plaintiff returned to work for defendant, I think no costs should be allowed to plaintiff, and no costs to defendant as administratrix, and no set-off of costs to defendant individually.

FERGUSON, J. NOVEMBER 13TH, 1903.

TRIAL.

HOME LIFE ASSOCIATION OF CANADA v. SPENCE.

Mortgage—Covenant for Payment—Subsequent Dealings with Equity of Redemption—Merger—Accord and Satisfaction—Liability—Reference.

On the 6th December, 1900, defendant executed in favour of plaintiffs a mortgage upon his electric plant in the village of Colborne to secure $3,000 advanced. The mortgage embraced not only the land on which the plant or part of it stood, but also the electric light and power plant, machinery, tools, etc., as a going concern throughout the village of Colborne, and like property which should thereafter be brought upon the premises. The defendant covenanted that he would, until the principal money and interest should be paid, repair and keep in repair, and that he would not sell or allow to be destroyed or removed any of the plant, and would keep and continue the premises as a going concern, &c.

The defendant afterwards sold and transferred the equity of redemption in the premises to Mary M. Coyne, taking a mortgage upon the equity of redemption to secure $700, part of the purchase money thereof.

Afterwards and on the 1st October, 1901, Mary M. Coyne gave the plaintiffs another mortgage upon the premises to secure the payment of $550 advanced to her. In this mortgage Mary M. Coyne covenanted, among other things, that she would pay the principal and interest on the former mortgage made by defendant, and that she would perform, abide by, observe, and keep all the covenants, provisoes, and conditions contained in that mortgage.

On the same day an agreement was entered into by Mary M. Coyne and her husband with the plaintiffs, in which she and her husband covenanted, amongst other things, to pay the moneys secured by the mortgage made by defendant.

On the 2nd January, 1902, the plaintiffs obtained consent under seal from Mrs. Coyne and her husband and from the defendant, to the plaintiffs taking possession of the premises. The plaintiffs went into possession of the property, and they alleged that they expended $5,000 in repairs and improvements thereon.

On the 24th March, 1902, the defendant quit-claimed all his interest in the property to plaintiffs, reserving, however, his rights on the covenant contained in his mortgage from Mary M. Coyne, and on the same day Mary M. Coyne, executed in favour of plaintiffs a quit-claim deed of all her interests in the property. This contained a provision that its execution should not operate as a merger.

This action was brought upon the covenant to pay the mortgage money and other covenants and provisoes contained in the mortgage for the $3,000 made by defendant. The plaintiffs claimed payment of the principal, $3,000 ; interest, $390.04 ; money paid for insurance, $116 ; money properly expended on the premises, $5,510 ; paid for running expenses after crediting earnings, $778.16.

E. E. A. DuVernet, for plaintiffs.

S. B. Woods, for defendant.

FERGUSON, J. :—The defendant contends that he is not liable because, upon the execution of the quit-claim deeds, there was a merger and an extinguishment of the mortgage debt.

The equity of redemption was at the time in the hands of Mrs. Coyne, and the deed executed by her provides specifically against a merger. The interest that the defendant had at the time was that of a mortgagee upon the equity of redemption, and he provided for the retention of some of his rights and remedies upon his mortgage.

I have considered the matter and examined the cases on the subject, and I have become satisfied that there was not a merger.

Counsel for the defence did not contend so strenuously that there was a merger as that there was (in equity at all events) an accord and satisfaction of the mortgage debt. . . .

In my opinion there is not evidence upon which I can say that there was an accord and satisfaction. The case, Forrest v. Gilson, 6 Man. L. R. 612, so much relied upon, does not apply at all, as I think. That case was decided upon demurrer. The accord and satisfaction was alleged in the plea that was demurred to, and by the demurrer the plea was admitted.

I am of the opinion that, notwithstanding all that appears to have been done (and the parties seem to have done much to complicate the matter), the defendant still remained liable to pay the mortgage money and interest, and from this it follows that the other liabilities and rights of a mortgagor attach to him. . . .

The proper way to dispose of the case is to refer it to the master to take all the accounts between the parties. Such reference will embrace the mortgage account, and necessarily involve an account between the defendant and the plaintiffs as mortgagees in possession, in which the plaintiffs will be charged with all rents and profits received by them, or which but for wilful neglect or default would have been received by them, in respect of the mortgaged property, regard being had to the character and condition of the property, as well as its position with respect to any covenants or contracts made by defendant with the village or the plaintiffs as to repairing, renewing, and continuing it as a "going concern" in proper repair, or otherwise howsoever, as also to any authorizations by defendant to expend moneys on the premises, if any such there were. . . .

The costs down to this judgment should be awarded to the plaintiffs against the defendant. Further directions and subsequent costs will be reserved till after the report.

BOYD, C. NOVEMBER 13TH, 1903.

TRIAL.

WILLIAMSON v. TOWNSHIP OF ELIZABETHTOWN.

Municipal Corporation—Audit at Instance of Provincial Municipal Auditor—Appointment of Auditor—Payment for Services—Demand—Practice of Department of Provincial Government—Attorney-General—Scale of Costs—Jurisdiction of County Court—Ascertainment of Amount Claimed.

Action to recover $399.14, amount of auditor's bill, certified by the Provincial Municipal Auditor, under sec. 16 of R. S. O. ch. 228, an Act to make better provision for keeping and auditing municipal and school accounts.

G. H. Kilmer, for plaintiff.

E. E. A. DuVernet and H. A. Stewart, Brockville, for defendants.

BOYD, C.—The plaintiff was appointed to make audit under sec. 9 of the Act, and, in the absence of any specific defence, it is to be assumed that all prior pre-requisites have been duly observed. The defence is simply denial of all alleged by plaintiff and putting him to its proof.

It was objected that the action is premature, because there is no evidence that the allowance of the bill by the Provincial Municipal Auditor was approved by the Attorney-General, and no evidence of a demand thereafter at the office of the municipal treasurer of defendants. The proof made was, that the bill as allowed by the Provincial Municipal Auditor was forwarded to the head of the municipality, with a request that it should be "attended to," by letter of 4th May. The council of the defendants were told of the amount of the bill on 11th May, and on 1st June all the papers, report, bill, and letters were read at a council meeting to all the members then assembled. This I take to be a sufficient demand to justify an action brought three months afterwards on 1st September. The demand was not at the office of the financial agent of the corporation, but was made to his principals, the municipal council—which, though other, was yet more, than the letter of the law requires. Then it appears from the certificate of the Attorney-General, which was allowed to be put in, that the practice of the Department is to act upon a tariff provided for such cases, and that the allowance of the Provincial Municipal Auditor according to such tariff is accepted as of course

by the Attorney-General, and his signature is regarded as relating to the date of that allowance. The statute does not call for the signature of the Minister, and this practice of the department does not appear to be in contravention of the statute.

An objection was raised as to the scale of costs, but this action could not have been brought in the County Court; it is for a statutory debt exceeding $200 and one in which the amount is not liquidated or ascertained by the act of the parties or signature of the defendants.

Judgment for plaintiff for $399.14 and costs.

NOVEMBER 13TH, 1903.

DIVISIONAL COURT.

MOONEY v. GRANT.

Master and Servant—Claim against Executors of Deceased Person for Services—Members of Same Family Living Apart—Presumption—Expectation of Benefit from Will.

Appeal by plaintiff from judgment of MEREDITH, C. J., dismissing action (tried without a jury at L'Orignal) to recover for services rendered by plaintiff to her sister Frances Mooney, the defendants being the executors of her will. Plaintiff was a married woman living with her husband at East Hawkesbury; the defendant was a widow without children living by herself at Vankleek Hill, five miles from plaintiff's residence. On 2nd November, 1901, the deceased, having been taken ill, sent for plaintiff to go to her to nurse her. The plaintiff went and found her in bed, and remained with her, at her request, nursing her at the house of the deceased until the 12th May following, with some short intermissions. On 12th May, 1902, the plaintiff being unable to remain away from her own home any longer, the deceased was moved to plaintiff's house, where she remained until she died on 31st July, 1902. During all this time plaintiff nursed and cared for her. The deceased was at the time of her death the owner of a small house and lot worth about $1,800, of some household furniture of small value, and of about $1,250 in cash and mortgages. She had told plaintiff some months before her illness that she had made a will, and the plaintiff swore that she understood that she was to have the house and lot for her life, but that the money was to be hers absolutely; that, believing this to be the case, she had not intended to make any charges for her services to the deceased; and after the death of deceased was surprised to learn that under the

will of the deceased she took only the income of the money for life, in addition to the house and lot for life.

R. C. Clute, K.C., and J. A. McInnes, Vankleek Hill, for plaintiff.

A. H. Marsh, K.C., and F. W. Thistlethwaite, Vankleek Hill, for defendants.

THE COURT (STREET, J., BRITTON, J.) held that the presumption that services rendered by one sister to another, when they are not living together as members of the same family, are to be paid for, is much more easily rebutted than it would be if the services had been rendered to a stranger. The plaintiff, until she heard the contents of the will, had no intention of making a charge for her services. There was no reason to suppose that the deceased ever thought that plaintiff expected to be paid. In the absence of any offer of or request for payment during the nine months that plaintiff attended upon her sister, the Court should assume an understanding on the part of both that the provision in the will of the deceased in favour of plaintiff was to be her remuneration for her trouble, and that no charge would be made. There was no contract while the services were being rendered, and plaintiff had no right to claim pay for them upon finding that the income of the money only and not the principal had been bequeathed to her: Osborn v. Guy's Hospital, 2 Str. 728; Baxter v. Gray, 3 M. & G. 771; Roberts v. Smith, 4 H. & N. 315; Robinson v. Shistel, 23 C. P. 114; Morris v. Hoyle, 28 C. P. 598; Mackey v. Brewster, 10 Hun. 16; Wood on Master and Servant, sec. 76; Maddison v. Alderson, 8 App. Cas. 467; Smith on Master and Servant, 4th ed., p. 202.

Appeal dismissed with costs.

NOVEMBER 13TH, 1903.

DIVISIONAL COURT.

HILL v. ROGERS.

Execution—Summary Inquiries in Aid of—Ascertainment of Interest of Execution Debtor Under Will—Mortgage—Rules 938, 1016, 1019.

Appeal by plaintiff (judgment creditor) from order of STREET, J., dismissing an application by plaintiff for an order under Rules 1016, 1017, and 1018, and under Rules 938 and 1019, or any of them, declaring the rights and interest of the defendant John Rogers the younger (the judgment debtor) under the will of his grandfather, John Rogers.

J. Nason, for plaintiff.

C. H. Porter, for defendants.

THE COURT (BOYD, C., FERGUSON, J.,) held that, so far as the application was based on Rule 938 asking for construction of the will of the grandfather, it was defective because of the absence of the representatives of that estate, which was necessitated by the directions of Rule 939 (2), and it was also defective because of the absence of the eldest son of defendant Rogers. Besides, "assignment" in this rule should not be read as extending to the case of an execution creditor of one of the beneficiaries under the will. The summary relief contemplated in the case of an execution creditor by "proceedings without writ," the general title of ch. XV. of the Con. Rules, is that embraced under sub-title 9, entitled "Summary inquiries in aid of execution," beginning with Rule 1015. The motion was also launched under Rules 1016-1019 of this sub-title. But it is inexpedient to attempt so to use these Rules in this particular case, both because of the absence of the representatives of the estate and because an action was already pending upon the Pearce mortgage, in which the applicant was served with notice T., before he made this motion. He submitted to the jurisdiction of the Court in that action and proved his claim as subsequent incumbrancer. If not redeemed, the interest of the defendants the mortgagees in the property seized in execution will be determined by the Master before it is sold, and the relief now sought on this application will then be the proper subject of adjudication, with all parties interested before the Master.

Appeal dismissed with costs to defendants; such costs to be deducted from plaintiff's judgment.

MACLAREN, J.A. NOVEMBER 14TH, 1903.

CHAMBERS.

RE CLARKE.

Trusts and Trustees—Investments—Realization—Tenants for Life—Remaindermen—Election—Apportionment of Proceeds of Sale—Rate of Interest.

Motion by the Toronto General Trusts Corporation, who were trustees under the will of the late Mrs. H. M. Clarke, and under a settlement by one of the defendants, for an order and direction as to whether any portion, and if so what portion of the purchase price of the premises Nos. 40, 42, 44, King street

east, in the city of Toronto, is payable to the respondents as life tenants under her will. Mrs. Clarke died on 6th November, 1878, leaving a will whereby she bequeathed all her real and personal estate to three executors in trust to sell and convert the same into money, which was to be invested by them. After providing for the payment of debts, the education and maintenance of three daughters and one son during their minority, and the payment of a legacy of $5,000, she directed the residue to be divided equally among her four children. The share of each daughter was to be held in trust by the same trustees, or by others to be named by the daughter, she to receive the income for life, and her children the capital after her death ; the son to receive his one-fourth share absolutely on coming of age. On the 1st July, 1887, after all the children had attained their majority, a deed of partition was made. The investments, which consisted of mortgages and bonds and shares, and certain cash in the hands of the trustees, were divided into four equal parts. The trustees also held the real estate now in question, in addition to certain premises in King street west, both of which had belonged to the testatrix. In the deed an undivided fourth of this property was allotted to each of the children, each share being valued at $4,000. The former property was subject to a lease for 42 years, renewable, to expire on 1st May, 1893, the rental being £154 per annum. The children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the same trustees, they to hold his share in trust for him during his life, remainder to his children. On 30th November, 1889, the applicants, with the consent of all parties, were appointed in all these trusts in the room of the original trustees. The lease of the property in King street east on its expiry was renewed for a term of 21 years at a rental of $1,850 per annum. The lessee paid the rent for a year, but defaulted in May, 1894, and made an assignment for the benefit of his creditors. The applicants took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. The lessee and his assignee made over to the applicants all their rights in the lands and buildings. In November, 1902, a sale was effected for $47,500.

A. Fasken, for the applicants.

W. R. Riddell, K.C., for the life tenants, contended that they were entitled to a portion of the purchase price, because such a large price was obtained only by a long delay in selling, during which time they obtained a precarious and inadequate income, and that the $47,500 was made up in considerable

part of accumulated income, and of the amount by which the buildings obtained by the default in payment of their rent went to make up the purchase price, which was shewn to be $6,000; Wilkinson v. Duncan, 23 Beav. 469; Beavan v. Beavan, 24 Ch. D. 649 n.; Re Chesterfield's Trusts, ib.; Walker v. Appach, 55 L. J. Ch. 422; Matthewson v. Goodwin, 62 L. T. 216; that it should be ascertained what sum, at the date of the death, or one year after that date, invested at 6 per cent. up to 7th July, 1900, and at 5 per cent. since that time, with half-yearly rests, and giving credit for the income actually received by the life tenants, would have produced the purchase price of $47,500 in November, 1902; that such sum would be capital, and the difference between that amount and the $47,500 should be paid them as deferred income.

F. W. Harcourt, for the infant remaindermen.

MACLAREN, J.A.—The argument of the life tenants does not present a correct application of the rule. The deed of partition of 1st July, 1887, and the acceptance by each of the life tenants of an undivided fourth of the real estate as capital, the ratification of the acts of the trustees, and the appointment by them of these trustees to the new separate trusts, preclude them from going back beyond that date. It was in effect an election on their part to treat this as a satisfactory investment, and they cannot say that the property was unproductive. However, the default of the lessee in 1894, the fact of the property remaining largely unproductive until 1902, the impossibility of making an advantageous sale before that time, and the fact that the price then obtained was in a considerable part at the expense of the life tenants, raise different consideration; and the principles laid down in Re Cameron, 2 O. L. R. 756, should be applied. (Boustead v. Cooper, [1901] 2 Ch 779, referred to.)

As to the rate of interest, the Interest Act, R. S. C. ch. 127, does not apply. The rate is to be determined by the rate which can be obtained on securities upon which trustees may invest, and 4½ per cent. net would be a fair rate here. Walters v. Solicitor for the Treasury, [1900] 2 Ch. 107, 118, referred to.

Order directing a reference to Neil McLean, Official Referee, to determine what sum invested on 1st May, 1894, would have produced $47,500 on 15th November, 1902, interest being calculated at 4½ per cent. per annum, with half-yearly rests, and credit being given for the sums actually received by the life tenants from the rents accruing during that period. Costs and further directions reserved.