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TABLE OF THE NAMES OF CASES

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THE
ONTARIO WEEKLY REPORTER.

(To and Including January 10th, 1903.)

VOL. II. TORONTO, JANUARY 15, 1903. NO. 1.

BOYD, C. JANUARY 2ND, 1903.

TRIAL.

COULTER v. SWEET.

Costs—Scale of—Claim and Counterclaim—Jury.

Action tried with a jury at Windsor. The plaintiff's claim was for money taken by defendant and wrongfully converted to his own use. The jury awarded the plaintiff $100 on this claim, and found in his favour on the counterclaim of the defendant for a declaration that plaintiff was liable to account for the principal and interest due on a promissory note for $975.

J. H. Rodd, Windsor, for plaintiff.

E. A. Wismer, Essex, for defendant.

BOYD, C.—The costs should be taxed to the plaintiff of his claim on the County Court scale, without any set-off, and the costs of the counterclaim dismissed should be taxed to the plaintiff on the High Court scale.

GARROW, J.A. JANUARY 2ND, 1903.

C.A.—CHAMBERS.

RE HUNGERFORD VOTERS' LISTS.

Parliamentary Elections—Voters' Lists—Notices of Appeal—Service—Leaving at Residence of Clerk—Time.

Case stated under sec. 38 of the Ontario Voters' Lists Act by the Judge of the County Court of Hastings.

One Michael Quinn, at between 9 and 10 o'clock of the evening of 10th November, 1902, the last day for serving notices on the clerk of the township of Hungerford of appeals against the voters' list, went to the clerk's dwelling-house, knocked at the door, and, not receiving any response, opened a wire screen door and placed the notices on the outside knob of a house door, and, having closed the screen door, went away, leaving the notices there. The door was on the west side of the house, and was not used as frequently as the door on the

east side. The following day, about noon, a member of the clerk's family discovered the notices, and brought them to the clerk, who was then in the house, and who then for the first time learned of the appeals.

The questions submitted were:

1. Were such notices served in time on the clerk?
2. Should they be acted on?

No counsel appeared to support the service.

W. B. Northrup, K.C., was heard opposing it.

GARROW, J.A.—In my opinion, the service was legally insufficient, and both questions should, therefore, be answered in the negative.

The language of the statute, R. S. O. 1897 ch. 7, sec. 7, sub-sec. 1, is, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc. This must mean, I think, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time. The case saves consideration of what we might have presumed if all that appeared had been simply the placing of the notices between the two doors, because it states distinctly that the clerk did not become aware of the notices until the next day, or a day too late. What actually happened is, I think, what might reasonably have been expected to happen under such circumstances, and I, therefore, think the service was wholly insufficient. See Watson v. Pitt, 5 C. B. 77, a decision under a statute containing somewhat similar language.

JANUARY 2ND, 1903.

ELECTION COURT.

RE SOUTH OXFORD PROVINCIAL ELECTION.

Parliamentary Elections—Controverted Elections—Appeal to Court of Appeal—Settlement of Appeal Case—Evidence Taken at Trial.

Application by the respondent to the trial Judges (STREET and BRITTON, JJ.) to settle the appeal book and define the parts of the evidence to be included therein.

S. H. Blake, K.C., and Eric N. Armour, for respondent.

G. H. Watson, K.C., for appellants, the petitioners.

STREET, J.—No machinery has been provided either by the Act or Rules for the settlement of a case upon an election

appeal. The result, therefore, appears to be, that either party is entitled to treat the whole evidence as being before the Court of Appeal, so far as it bears upon the subject matter of the appeal, and either party may ask the Court of Appeal to look at any part of the evidence taken at the trial of the petition, which he may consider relevant to the appeal.

BRITTON, J.—I agree that no machinery has been provided either by the Act or Rules for the settlement of a case upon an election appeal. That being the case, the trial Judges, after having given their decision and made their report, have no jurisdiction to act further, and they cannot give any direction as to what part of the evidence given at the trial should be submitted to the Court of Appeal.

MACMAHON, J. JANUARY 3RD, 1903.

TRIAL.

CITY OF TORONTO v. GRAND TRUNK R. W. CO.

Highway—Dedication—Plan—Prescription—User—Railway—Estoppel.

The plaintiffs alleged that prior to 25th January, 1855, a large tract of land in the city of Toronto, near the mouth of the river Don, and on the west side thereof, was vested in fee in the trustees of the Toronto General Hospital; that on that day the trustees filed in the registry office for the city of Toronto a plan, No. 108, by which such tract of land was divided into blocks, lots, and streets; that on or before that day Cherry street was dedicated as and for and became a public highway; that the plaintiffs had spent large sums of money to improve Cherry street, and the defendants had been assessed by plaintiffs for part of the cost of such improvements and had paid the amounts assessed; and the plaintiffs asked to have it declared that Cherry street extends across and beyond the right of way of the defendants' railway, and that that street was dedicated and used as and for and became a public highway before the acquisition and use by defendants of their right of way.

The right of way crosses the marsh immediately south of what would be Cherry street if extended to the marsh. In July, 1890, defendants constructed gates across what the plaintiffs allege is Cherry street to prevent the public from crossing the right of way, but in the following September the gates were removed by plaintiffs' orders and have not since been replaced.

In July, 1899, the plaintiffs applied to the Railway Committee of the Privy Council to direct the defendants at their own cost to protect the public from the danger arising from the passing of trains across Cherry street. The application stands adourned until the disposition of this action.

J. S. Fullerton, K.C., and A. F. Lobb, for plaintiffs.
Walter Cassels, K.C., and Walter Gow, for defendants.

MacMahon, J. (after setting out the facts and referring to the evidence):—Assuming, as I must, that the plan registered by the hospital trustees in July, 1855, shews correctly the work done on the ground, it is clear there was no dedication by the trustees of Cherry street south of Mill street as a highway.

Joseph Cadieux, who came to the locality in 1844, said that Cherry street was then open, and that a stream of water ran north-east, and a pond was there which he passed over in his skiff. Lots 10, 11, and 12 were not conveyed by the trustees to Jones until 1850, and lots 13 to 19 to Barnes not until about the same time, and a fence was not built on the west side of 13 until 1859, so that these lots formed an open common, and, according to the evidence of Latham, the traffic was not confined to any definite way. But, even if it be assumed that the public in 1850 commenced to use what is now alleged to be Cherry street, it required thirty years' user to confer a right of way to the public.

There being no right of way created by prescription south of Mill street, and no dedication of a highway by the trustees, they could up to 1880 have sold and conveyed to a purchaser the 60 feet running south of Mill street to the marsh.

If the plaintiffs could not up to that date have contended that it was part of the highway known as Cherry street, as against a purchaser from the trustees, I cannot comprehend how they can successfully contend that in 1857, when the defendants went there, Cherry street formed part of the highway across which they built the railway embankment.

No act done by defendants has created an estoppel preventing them from setting up that when they went there in 1857 and built an embankment through the marsh, Cherry street did not extend further south than a line co-terminous with the north edge of the marsh.

Judgment dismissing the action with costs and declaring that Cherry street does not extend across the right of way of defendants.

Britton, J. January 3rd, 1903.

TRIAL.

CORNELL v. HOURIGAN.

Mortgage—Covenant—Sale of Equity of Redemption—Agreement to Look to Purchaser—Novation—Neglect of Assignee of Mortgage to Insure—Trusts—Parol Evidence.

An action upon the covenant in a mortgage made by defendants upon hotel property in the village of Freelton.

D. O. Cameron, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

BRITTON, J.—The mortgage in question bears date the 17th September, 1889, and is for $1,500 payable in 10 yearly instalments of $150 each, with interest at 6 per cent. per annum. It was made by the defendants, husband and wife, the property apparently belonging to his wife, in favour of J. M. Lottridge and others. The husband kept an hotel in the house upon the premises until about 25th April, 1893, when the property was sold to Frank Howes. The mortgage had then been reduced to $1,200. Frank Howes was to assume the mortgage, and pay the balance in cash. At this time J. M. Lottridge was the owner of the mortgage, the other mortgagees having assigned to him. The account of the transaction given by the husband defendant is that he told Frank Howes he would sell subject to the mortgage, if Lottridge would take Howes for the $1,200. He says he introduced Howes to Lottridge, and said to Lottridge: "If you will take him so as to have no more claim on me, I will sell." Lottridge confirms this, so far as he recollects the transaction. Nothing was said about the wife or to her, although she was the owner of the property. . . . Frank Howes went into possession, and continued the hotel business. The mortgage in question contained the usual covenants for payment and to insure. . . . The building was destroyed by fire in October, 1895. The insurance had been allowed to expire. The person interested in this suit—the real plaintiff—is W. W. Howes, father of Frank Howes, the mortgage having been assigned to Cornell, the nominal plaintiff, for the purpose of collection. . . .

The real defence relied on by defendants is, (1) an alleged agreement between J. M. Lottridge and the defendants to release defendants and look only to the property and to Frank Howes, of which agreement it is said that W. W. Howes was aware when he purchased the mortgage, and that he bought knowing and agreeing that he was to look only to the property and to Frank Howes, and that he was not to look to either of the defendants; and (2) that W. W. Howes, after the purchase of the mortgage, went into possession and was until time of fire mortgagee in possession, and that it was his duty to insure and keep insured, and by reason of his neglect he cannot recover. . . .

There is no evidence that Frank Howes was a trustee for W. W. Howes and that W. W. Howes was the real purchaser of the land from Mrs. Hourigan. Nor does it appear that W. W. Howes in purchasing the mortgage was a trustee for Frank Howes, or that he was acting for Frank. . . .

I find that there was not in this case a novation, that is to say, there was not an arrangement by which the old liability on the covenant of defendants should be released by J. M. Lottridge, the then holder of the mortgage, and an entirely new agreement and liability entered into on the part of Frank Howes to J. M. Lottridge in substitution of the Hourigan covenant. . . .

I am of opinion that W. W. Howes was not, at the time of the fire, in possession of the property. . . .

It would be going very far if, upon evidence such as in this case, persons could be released from their covenants, especially when the one of the covenantors most interested was not present at the time of the alleged conversation, or if upon the evidence in this case, such negligence could be found against a mortgagee as to defeat his claim upon the covenants.

Judgment for plaintiff against both defendants for $1,118.18 with costs.

MEREDITH, C.J. JANUARY 3RD, 1903.

TRIAL.

BALDWIN IRON AND STEEL WORKS (LIMITED) v. DOMINION CARBIDE CO.

Promissory Notes — Company — Authority to Make — Proof against Estate of Surety—Renewal or Substitution of Notes—Formation of Company—Date of Letters Patent.

Action to recover $1,100, being the balance alleged to be due on two promissory notes made by defendants to plaintiffs, one for $863.28, dated 26th March, 1900, payable three months after date, and the other for $800, dated 24th April, 1900, payable two months after date, and to recover also $162.75 for machinery and supplies sold and delivered and work and labour done by the plaintiffs in March and April, 1900. The two promissory notes were given for machinery and supplies sold and delivered and work and labour performed before March, 1900, and were renewed from time to time until the 21st December, 1901, when the indebtedness which they represented was reduced to $1,100. The defendants denied liability.

The defendant company had been projected to carry on a business similar to one already carried on by one McRae, and McRae's business was in fact carried on from 1st October, 1899, under the name of the company, which, however, did not become incorporated until 11th December, 1899, and was not organized till 2nd February, 1900. The notes were finally consolidated into one note given by McRae personally. McRae died, and in administration proceedings plaintiffs had sought to make his estate liable upon the last of the notes.

R. G. Code, Ottawa, and E. F. Burritt, Ottawa, for plaintiffs.

Travers Lewis, Ottawa, and J. F. Smellie, Ottawa, for defendants.

MEREDITH, C.J. (after stating the facts and referring to the evidence) :—It was contended that the effect of the proof of the claim against McRae's estate was to preclude plaintiffs from making any claim against defendants. Had plaintiffs sought to make the estate of McRae liable on the footing that McRae was the principal debtor, it is probable that the effect of the order for administration, coupled with the proof by the plaintiffs, would have precluded them from suing the real principal debtor, the defendant company: Morel v. Westmoreland, 19 Times L. R. 42: but, McRae being only a surety for defendants, at all events in respect of the promissory notes, the proof of the claim has not, in my opinion, as to the notes, any such effect. Assuming that defendants were liable to plaintiffs, they, and not McRae, were the principal debtors, and McRae was a surety only, and proof against the surety's estate is of course no bar to an action against the principal debtor.

Nor did the taking by plaintiffs of the notes of McRae in renewal of the notes of defendants . . . affect the liability of defendants on the promissory note for $863.28, or so much of it as remains unpaid. The note sof McRae were not taken . . . in satisfaction of the promissory note of defendants, and they operated only to suspend the right of action on it during the currency of the renewals made by McRae, though, of course, to the extent of the actual payments made by McRae on his notes, the payments must go in reduction of the claim against defendants.

There remains, however, the question whether the defendants are liable on the promissory note for $863.28.

McRae, as president, and Williams, as secretary-treasurer, were authorized by the by-laws of the company to sign promissory notes on behalf of the company; and by sec. 76 of the Companies Act it is provided that promissory notes made on behalf of the company by any agent, officer, or servant of the company in general accordance with his powers as such under the by-laws of the company, shall be binding on the company. The promissory note for $863.28 being signed in the way prescribed by their by-laws, the company are bound by it, unless McRae and Williams had no authority to make the note in the name and on behalf of the company, and unless also plaintiffs are affected with notice of that want of authority. . . . On the facts of this case, it cannot be said, I think, that the proper finding of fact is either the absence of authority to make the note or knowledge of the

want of authority, if the making of the note was in fact an unauthorized act. . . . The proper conclusion is, I think, that the plaintiffs honestly and on reasonable grounds believed that defendants were their debtors, and that the promissory note of defendants was rightly given in settlement of their indebtedness to plaintiffs. . . .

It is perhaps unnecessary to express any opinion upon the point taken by Mr. Lewis, that the defendant company did not come into existence until the letters patent had been accepted by the applicants, or at all events until the recording of the letters patent took place.

I am inclined to think that, even without the provisions of sec. 9 of the Companies Act, R. S. O. 1897 ch. 191, the acceptance of the letters patent, at all events in the absence of any evidence to the contrary, was unnecessary, or is to be inferred from the fact that they were granted upon the petition of the applicants and in accordance with the prayer of their petition.

However that may be, sec. 9 is decisive upon the point, and makes it necessary for me to hold that the defendant company came into existence as a body corporate and politic on the 11th December, 1899, the date of the letters patent.

The plaintiffs are, therefore, entitled to judgment for $550, the balance remaining due on the promissory note for $863.28, with interest from the 20th December, 1901, but not for the open account. For it McRae was not liable as surety, but only as principal, if at all, and the plaintiffs have chosen to take judgment against his estate for the amount of it, and that, according to the case I have referred to, prevents the plaintiffs from recovering against the real principal, the defendant company.

The claim relating to the transactions prior to the incorporation of the defendant company was not pressed, and there are difficulties in the way of giving effect to it which do not, as it appears to me, apply to the claim in respect of the subsequent transaction.

The judgment for plaintiffs will be with costs.

MEREDITH, C.J. DECEMBER 30TH, 1903.

CHAMBERS.

QUA v. CANADIAN ORDER OF THE WOODMEN OF THE WORLD.

Pleading—Reply—Leave to Deliver after Time Expired—Jury Notice—Notice of Trial—Irregularity—Close of Pleadings.

An appeal by defendants from an order of the Master in Chambers allowing plaintiff to deliver a reply after the time

for delivering one had expired; and motion by defendants to set aside as irregular a notice of trial served by defendants within four days after the delivery of the reply, no joinder of issue having been delivered.

The action was upon a policy of life insurance. The defendants set up that the policy was avoided by untrue representations made by the insured in his application for the insurance. The reply was that the statements alleged to be untrue were made innocently and were not material.

J. H. Moss, for defendants.

R. B. Beaumont, for plaintiff.

MEREDITH, C.J.—I do not think I should interfere with the discretion exercised by the Master in Chambers. It may be that the reply is somewhat open to the objection that all that it seeks to put in issue was already in issue by the statement of defence; still the purpose of it was to enable the plaintiff to file a jury notice, and I think it is a case in which plaintiff should have that right. . . . Some Judges may think it a case which should be tried by a jury. . . . What I am doing will leave it quite open to the Judge at the trial to exercise his discretion and try the case without a jury, if he thinks it ought to be so tried.

With regard to the other matter, I think Rules 257 and 258 make it reasonably clear that Mr. Moss's contention is right. The reply could have been delivered without leave within the time prescribed by the Rules. As I understand Rule 257, read in connection with Rule 262, which provides that the pleadings are to be deemed to be closed as soon as either party has joined issue simply, it is clear, I think, that the defendants had four days within which, if they chose, to file a joinder of issue, or, if they found it necessary to do so, to apply for leave to deliver a further pleading; they had, however, in any case, the right to file a joinder of issue within the four days.

The pleadings were not, I think, therefore, closed until the lapse of the four days, or until they had joined issue, and notice of trial having been given before the lapse of that time, and without a joinder of issue having been delivered, was irregularly given.

I have no power to allow the notice of trial to stand; that would be, in effect, to disregard the cases which hold that there is no power to abridge the time allowed defendant unless he is in such a position that terms may be imposed upon him.

Appeal dismissed, and notice of trial set aside. Costs in the cause.

MACLENNAN, J.A.

C.A.—CHAMBERS. JANUARY 5TH, 1903.

McLAUGHLIN v. MAYHEW.

Appeal—Entry after Time—Motion to Confirm—Refusal of Respondent to Consent—Delay by both Parties—Costs.

Motion by defendants, appellants, to allow the entry and setting down of the appeal, which were made out of time, to stand notwithstanding the irregularity.

F. E. Hodgins, K.C., for the motion.

O. M. Arnold, Bracebridge, for the plaintiff, respondent.

MACLENNAN, J.A.—Judgment for the specific performance of a contract for the sale of land, delivered on the 22nd April, 1902. Notice of appeal, 19th May; security by deposit of $200, 22nd May. Reasons of appeal served 10th September, and reasons against appeal, 13th October. These dates shew considerable delay in preparing reasons by both parties, for which no sufficient excuse is shewn by one or the other. The next sittings was on the 10th November, and the case should have been set down not later than the 6th November to be on the list for that sittings. From the 13th October everything was in order, but to prepare the appeal case and the copies thereof, and what the appellants' solicitor says is, that, owing to unforeseen delays, the books were not received back from the printer properly bound and ready for the setting down of the appeal, that is, as I understand, before the 6th November. On the 7th November the appellants' solicitor wrote to the respondent's solicitor saying he was getting the books prepared as fast as possible, and would have the case put on the list, to which the latter replied on the same day, noting that the books would be completed in a few days, "when I will receive the same." On the following day, however, he wrote saying, "Please, do not ask me to consent to the appeal going on now," and that it would be unjust to ask the plaintiff to wait any longer. This was answered on the 10th, urging consent to set the case down for the sittings beginning on that day. An answer was received on the 15th, saying he must consult his client. No final answer was received until the 10th December, when consent was refused. In the meantime the case was set down on the 17th November. The present motion was made as soon as the refusal of the 10th December was received.

Under all these circumstances, having regard to the dealings on both sides, and to all that had passed between the parties, the respondent's solicitor might well have consented to the setting down of the case as requested in the letter of the 10th November. If that had been done, the appeal

might have been heard, and this motion would have been unnecessary.

One of Mr. Arnold's arguments was that the appellant had not given the security required by Rule 827 (*c*), and so his appeal was fatally irregular. But the security required by that Rule is not essential to an appeal, but only to a stay of execution.

I therefore think the motion to confirm the setting down of the case should succeed, but, as both parties are nearly equally blameable for delay, there should be no costs.

MEREDITH, C.J. JANUARY 7TH, 1903.

CHAMBERS.

RE HOLDEN.

Will — Construction — Property Passing—"Now"—Stock in Trade—Furniture—Books—Legacy—Incomplete Words

Motion upon originating notice under Rule 938 for an order declaring the construction of the will of S. O. Holden, deceased, which was in these terms:—"I give, devise, and bequeath all my real and personal estate of which I may die possessed of or interested in, in manner following, that is to say, first, I give to my sister Eliza Jane Isaac the house and land with all household furniture and all stock and trade now in house and out of house with all book accounts," subject to two legacies of $100 each. The testator was the keeper of a village shop, and shortly after making his will sold his house, land, and business, but subsequently repurchased them.

W. T. Allan, Collingwood, for the universal legatee and administratrix with will annexed.

J. Birnie, K.C., for B. F. Holden.

G. W. Bruce, Collingwood, for W. J. Holden.

MEREDITH, C.J.—Though the bequests were specific, they were specific bequests of what was generic, and they were therefore brought down to the date of the death by R. S. O. ch. 128, sec. 26 (1). if no contrary intention was expressed. See Bothamley v. Sherson, L. R. 20 Eq. at pp. 312-313; Goodlad v. Burnett, 1 K. & J. 341. In spite of the use of the word "now" (as to which see Theobald on Wills, 5th ed., pp. 114-115; Jarman on Wills, 5th ed., pp. 298-299), it is beyond question that the testator did not intend to limit his gift to property owned by him at the date of the will. The constituents of the gift of the stock in trade and book debts were changing from day to day and from hour to hour, and, as the language of the gift itself was ambiguous, the opening

declaration might be referred to as interpreting it. To decide otherwise would result in there being an intestacy as to a part. Further, "stock" has a recognized meaning as a fund, capital—the money or goods employed in trade"—and the gift of the "stock and trade" therefore included money on deposit with testator's banker. cash in hand, promissory notes, cordwood for dwelling and shop, horses, harness, and vehicles, used in the business not very frequently, but as occasion required. The shop fixtures would pass with the land. The books are to be considered household furniture, although cases to the contrary are to be found. The term is elastic. and may vary according to habits and mode of living. Now everybody has books, and it would be a surprise to find that books were not, though pictures were, household furniture. As to the pecuniary legacies, the will provides that the universal legatee shall "pay" to one of testator's brothers $100, and continues "also she shall one hundred dollars" to another brother. The legacy is nevertheless well given: Parker v. Tootal, 11 H. L. C. 143. Order accordingly. Costs out of estate.

FALCONBRIDGE, C.J. JANUARY 6TH, 1903.

TRIAL.

TODD v. TOWN OF MEAFORD.

Railway—Municipal Corporation—Expropriation of Land—Agreement with Land-owner—Construction—Damages—Injury to Prospective Business—Costs.

Action against the town corporation and the Grand Trunk Railway Company to recover damages for injuries sustained by plaintiff by reason of the defendants wrongfully taking certain of plaintiff's lands for the purpose of straightening the Big Head river, thus depriving the plaintiff of the land which he required, or would in the future require, to meet the needs of his expanding business, and injuring him by increasing the difficulties of access and in other ways. The plaintiff had agreed to sell his land to the defendant railway company and to allow them to take immediate possession, without prejudice to him, and subject to the further stipulation that the acceptance of $400 from the company was to be without prejudice to the plaintiff's claim for damages "by flooding (if any) owing to the diversion of the Big Head river."

E. E. A. DuVernet and Grayson Smith, for plaintiff.

R. C. Clute, K.C., and J. S. Wilson, Meaford, for defendants the town corporation.

G. F. Shepley, K.C., and W. H. Biggar, K.C., for defendants the railway company.

FALCONBRIDGE, C.J., held that neither of the defendants could, in view of the agreement, be held to have been trespassers. The damages anticipated by plaintiff (claimed for the first time in his statement of claim) from his inability to expand his business to the extent he otherwise might have done, were so speculative and uncertain as to be beyond the limits of judicial calculation. Hamilton v. Pittsburg B. & L. E. R. Co., 190 Pa. St. 51, and The Queen v. Fowlds, 4 Ex. C. R. 1, referred to. The $375 paid into Court by defendants was adequate compensation for the land taken and the only damage shewn, viz., to plaintiff's rip-rap. Judgment for the $375 in Court. Plaintiff to pay costs as if both defendants had appeared by one solicitor and had been represented by the same (two) counsel at the trial.

BRITTON, J. JANUARY 6TH, 1903.

TRIAL.

SMITH v. CAREY.

Parliamentary Elections—Ontario Election Act—Penalties — Voting without Right—Knowledge—"Wilfully"—Neglecting to Take Oath.

Action for penalties under the Ontario Election Act. The defendant had until about six months before the election resided in the electoral division of the county of Frontenac. He then sold his place there and moved into the city of Kingston. Believing that he was not on the voters' list at his old residence, he presented himself for registration, and was registered as a manhood suffrage voter in the city. He consented to act as agent for Mr. Shibley, one of the candidates for the electoral division of the county of Frontenac, and as agent received a certificate authorizing him to vote at the polling subdivision where he was to act "instead of the Bath Road polling subdivision," this being the first intimation he had had of the fact that he was on the township voters' list. Under the authority so received he, after taking the oath of secrecy only, voted at the subdivision where he was acting as agent, doing so in the presence of his friends and acquaintances and ignorant that residence was requisite to entitle him to so vote. By reason of this fact, he was now proceeded against for three penalties: (1) under sec. 168 for $100 for voting, knowing that he had no right to vote, being a non-resident of the electoral district; (2) under sec. 181 for $200 for wilfully voting without being qualified, not being resident; and (3) under sec. 94 (5) for $400 for having voted without having taken any oath of qualification, having received from the returning officer a certificate, upon the allegation that he was an agent.

John McIntyre, K.C., and E. H. Smythe, K.C., for plaintiff.

J. L. Whiting, K.C., and H. McDonald Mowat, Kingston, for defendant.

BRITTON, J., held, on the first claim, that the defendant did not vote knowing that he had no right to vote. Actual knowledge that he was doing something wrong was necessary: Perth case. 2 Ont. Elec. Cas. 31, 32. On the second claim he held, that wilfully voting as in sec. 181, applying it to the facts of this case, was practically the same as the first claim, and that defendant had not incurred the penalty: Wilson v. Manes, 28 O. R. 419; Re Young and Harston, 31 Ch. 168. On the third claim, he held, that defendant had violated the sub-section and was liable in $400, but that the penalty should be reduced, under R. S. O. ch. 108, to $40, there being no suggestion of fraud or intentional wrong-doing. Judgment for $40 and costs on the third claim, the extra costs of the first and second claims to be set off.

MEREDITH, J. JANUARY 9TH, 1903.

CHAMBERS.

RE HENDERSON.

Will—Construction—Devise—Condition — Survival — Heirs—Title—Vendor and Purchaser.

The will of George Henderson was as follows: "After the payment of all my just debts and the following legacies to my children, viz., to my sons Hubert and John $100 each, to my daughters Isabella and Marian $50 each, to my daughter Emma $100, all my property, personal and real, I bequeath to my wife Mary Henedrson. The aforementioned legacies to my children shall be paid by my wife out of the proceeds of the farm and within a period of five years. Should my sons survive my wife, my farm shall revert to my sons Hubert and John, and in case of their decease to their heirs—said farm shall be equally divided between my two sons. I appoint Edward McHardy my sole executor."

The testator died on the 14th January, 1884. His son Hubert Henderson died on the 30th May, 1892, intestate, leaving a widow and children. Mary Henderson, widow of the testator, died on the 5th June, 1897.

The following question was presented for decision upon an application under the Vendor and Purchaser Act: What estate, if any, did the devisee John Henderson and the heirs of the devisee Hubert Henderson take in the lands in question, under the will, and under the facts and circumstances set forth in an affidavit, and, can they, notwithstanding the

devise in the will to Mary Henderson, make title to the lands in question?

W. H. Blake, K.C., for the vendors.

MEREDITH, J.—My opinion is, that, upon the death of Mary Henderson, John Henderson and the heirs of Hubert Henderson took the whole estate of which the testator died seised in the land, but subject to the legacies charged upon it by the will, if any of them remained unsatisfied; and that, notwithstanding any estate which Mary Henderson took under the will, they can make title.

BOYD, C. JANUARY 10TH, 1903.

CHAMBERS.

RE DENNIS.

Will—Construction—Devise of Land at Majority—Vested Estate Subject to be Divested—Benefit of Rents During Minority—Costs of Summary Application for Construction—Affidavits.

Motion by executors upon an originating notice under Rule 938 for an order declaring the construction of a clause in the will of Jarvis Dennis, deceased, the question being how the rents were to be disposed of during the infancy of testator's grandson, the will being altogether silent upon the point. The land was devised to the infant at majority, but he was not then residuary devisee.

T. Brown, Norwich, for executors.

G. G. Duncan, Norwich, for residuary devisee.

F. W. Harcourt, for the infant.

BOYD, C.—The land devised to the grandson when he arrives at 21 is, by the effect of the proviso that if he dies before receiving the share devised it is to go over, to be treated as vesting in him now, but subject to be divested should he die before attaining 21. See Phipps v. Ackers, 9 Cl. & Fin. at p. 591. The effect of this construction will be to give the infant the benefit of the surplus rent of the place which remains over and above what is duly and properly expended for repairs thereon. This is to be not less than $50 each year, but this amount may be exceeded if the necessity arises in the opinion of the executors. Order accordingly. Costs out of the surplus of rents; but no affidavits are to be taxed which are of a contentious nature and are not of service in presenting the neat question of law.

BRITTON, J. JANUARY 7TH, 1903.

TRIAL.

CAREY v. SMITH.

Parliamentary Elections—Ontario Election Act—Penalties—Bribery—Change in Statute—Civil Remedy Gone—Voting without Taking Oath

Action against the financial agent of John J. Gallagher, one of the candidates for the Legislature of Ontario for the county of Frontenac, (1) under sec. 159 (2) of the Ontario Election Act for $200 for bribery by giving money to one Eli Peters, a voter, to influence him to vote for Gallagher; and (2) under sec. 94 (5) for $400 for voting without having taken the oath of qualification, having received from the returning officer a certificate entitling him to vote elsewhere than at the subdivision at which his name was on the list.

J. L. Whiting, K.C., and J. McDonald Mowat, Kingston, for plaintiff.

John McIntyre, K.C., and E. H. Smythe, K.C., for defendant.

BRITTON, J., held, as to the first claim, that the bribery was proved. Section 159 (2) had until 1900 read as follows:—"Every person so offending shall incur a penalty of $200;" but in that year it was amended to read: "Every person so offending shall, on conviction, incur a penalty of $200 and shall also be imprisoned for a term of six months." This amendment must have been intended to change not only the punishment, but also the way of dealing with offenders, and to prevent an informer proceeding in a civil action for the penalty. This result was to be regretted, but was inevitable. The second charge, he held, was made out, but the penalty should be reduced to $40. Judgment for defendant on the first charge without costs, and for plaintiff for $40 and general costs of the action on the second charge.

BRITTON, J. JANUARY 7TH, 1903.

TRIAL.

LIDDELL v. COPP-CLARK CO.

Copyright—Infringement—Historical Work—Evidence of "Piratical" Use of Copyrighted Book

Action by the executors of the late Dean Liddell for an injunction and for damages for the infringement of their copyright in Dean Liddell's History of Rome in the writing and publication of Robertson and Henderson's High School History of Greece and Rome.

G. F. Shepley, K.C., for plaintiffs.

D. E. Thomson, K.C., and J. B. Holden, for defendants the Copp-Clark Co.

C. A. Moss and A. B. Colville, for defendants Robertson and Henderson.

BRITTON, J.—It was practically admitted that every statement of fact and inference from fact in Dean Liddell's book could have been obtained by the defendants, the authors of the High School History, from common sources, but the particulars charged a resemblance between the two books in 155 instances, in some of which the resemblance was striking, in some so remote that in dealing with the same subject matter, and being true to history, it could not have been less. The plaintiffs urged that the defendants had not the right to save themselves the labour of going to original sources of information or to save themselves the labour of literary work. In nearly every case, if not in every one, the defendants did refer to what might be considered original sources of information. As to the sketch, which defendants used in their book and which was very similar in Dean Liddell's, even in view of the admission of the place whence it was secured, and of the fact that there was no colourable alteration of it, yet in such a sketch there was hardly any such thing as absolute originality, and there should be no finding in plaintiffs' favour upon it alone. They had permitted its use to Dr. Smith, and from its use were not likely to sustain any damage whatever. See Spiers v. Brown, 6 W. R. 352. Defendants' book was not in any considerable part a transcript of plaintiffs'; nor were parts of the latter introduced into the former with only colourable additions and variations, without any real independent literary labour. See Garrold v. Heywood, 18 W. R. 279; Blakewell v. Holcomb, 3 M. & Cr. 737. Defendants had not been guilty of what could fairly be called "extensive copying," or "extracting the vital part" of plaintiffs' book. See Moffatt v. Gill, 49 W. R. 438; Chatterton v. Cave, L. R. 10 C. P. 572, 3 App. Cas. 483.

Judgment for defendants with costs.

BOYD, C. JANUARY 8TH, 1903.

WEEKLY COURT.

HEFFERNAN v. TOWN OF WALKERTON.

Municipal Corporations—By-law—Payment to Mayor—Procedure at Meeting of Council—Reference to Committee—Majority of Council—Mayor not Voting—Sealing By-law—Fraction of Day.

Motion by plaintiff to continue injunction granted by local Judge at Walkerton restraining the defendants from paying $125 to the mayor for his services to the town as mayor. The parties agreed that the motion should be turned

into a motion for judgment. A by-law authorizing the payment was first introduced in June, 1902, but was not finally passed until 13th December.

J. E. Jones, for plaintiff, contended: (1) that there was not the necessary majority in favour of the by-law under sec. 85 of the procedure by-law of the town, which required that, in the case of a money by-law, there should be a vote in its favour of two-thirds of the members present at the meeting; (2) that the by-law was not referred to the committee of the whole, as required in the case of money by-laws passed after the adoption of the estimates; and (3) that the by-law was not sealed when acted upon.

There had been 7 members present at the meeting, among them the mayor, who did not vote. The by-law had been carried by four to two, the mayor not voting presumably under another section of the procedure by-law. The cheque had been written out by 9 a.m. on the morning of 14th December; the by-law was not sealed at 11 a.m.

A. Shaw, K.C., for defendants the town corporation, opposed the application.

BOYD, C.—The money appears to have been paid to the mayor for his costs of a law suit, and to have been included in the estimates. On the question of the reference to the committee of the whole, it appears that it was a mere matter of procedure, which this Court should not interfere with, when it has been considered by the whole council. On the point of the majority, the procedure by-law made it clear that the mayor need not vote if he did not desire to, the by-law distinguishing the mayor from the members. His ruling as to the majority was final, and it seems that the vote was a two-thirds vote. The objection, therefore, fails. The objection as to the sealing of the by-law is a technical one, and the by-law having been sealed on the same day as the transaction was carried out, the day would not be divided into parts, but the transaction would be considered to have been sufficiently authorized.

Action dismissed with costs.

STREET, J.

TRIAL. JANUARY 8TH, 1903.

KING v. MATTHEWS.

Municipal Corporations—Local Improvements—Illegal Expenditure on Sidewalk—Action by Ratepayer against Members of Council—Bona Fides—Protection of Statute.

Action by plaintiff on behalf of himself and all ratepayers of the town of Port Arthur, except the defendants, who were

members of its council, to recover moneys of the municipality spent in practically re-constructing a sidewalk in the town which had fallen into disrepair by reason of the neglect of former councils, and so required the re-construction which was carried out. The claim was based upon sec. 5 of the special Act incorporating the town (47 Vict. ch. 57 (O.)), which provided that "all expenditure in the municipality for the improvements and services for which special provisions are made in secs. 612-624 of the Consolidated Municipal Act, 1883, shall be by special assessment on the property benefited and not exempt."

H. L. Drayton and D. Mills, Port Arthur, for plaintiff.

N. W. Rowell, K.C., and W. F. Langworthy, Port Arthur, for defendants.

STREET, J., held, that the members of the council had the authority of Meredith, C.J., in Re Medland and the City of Toronto, 31 O. R. 243, for believing that what they did was no more than they could be compelled to do under 63 Vict. (2) ch. 26, sec. 41. They had acted in perfect good faith, and in the bona fide belief that they were doing their duty as trustees for the general body of ratepayers. The Act 62 Vict. (2) ch. 15, sec. 1, seemed wide enough to apply to protect them, even if not within its strict letter, in view of the disinclination of the Courts, even before that Act, to render liable municipal officers honestly doing their duty: Baxter v. Kerr, 13 Gr. 367.

Action dismissed with costs.

STREET, J. JANUARY 8TH, 1903.

TRIAL.

SMITH v. HUGHES.

Specific Performance—Contract for Sale and Purchase of Land—Action by Nominal Purchaser—Undisclosed Principal—Property of Speculative Value—Purchaser Sleeping on his Rights

Action for specific performance of a contract dated 29th August, 1900, signed by defendant Hughes, whereby he agreed to sell to plaintiff for $1,500, of which $50 was to be paid in cash, a certain brickyard. The defendant Plummer was under agreement to sell the yard to the defendant Hughes. The plaintiff made the contract as agent for an undisclosed principal, and on the day following the making of the contract went to Hughes and got from him an agreement to pay him (plaintiff) $50 for his services in procuring the sale, since, as he said, the purchaser would pay nothing. This purchaser was one Hamilton, who on 21st September told Hughes he was ready to complete upon the title being made satisfactory.

On the 28th of the same month Plummer, to whom Hughes referred Hamilton, wrote the latter explaining his title, and saying it was all he had, and on 3rd April, 1901, Plummer tore up the deed sent him for execution, saying that he would not complete by reason of the delay. The action was commenced on 9th April. Plaintiff's application to add the defendant Plummer as a party defendant, threw the case over the summer sittings of 1901; it was not reached in September; was not brought on at the special sittings in November; and was tried only at the Winter Assizes. Nothing was ever paid upon the contract.

A. B. Aylesworth, K.C., and J. E. Irving, Sault Ste. Marie, for plaintiff.

M. McFadden, Sault Ste. Marie, for defendant Hughes.

W. R. Riddell, K.C., and P. T. Rowland, Sault Ste. Marie, for defendant Plummer.

STREET, J., held that the objection as to plaintiff being a mere agent, though perhaps of weight, did not need to be given effect to, it having been made for the first time at the trial, and in view of the decision on the merits. On the merits, the value of the land was of a speculative and fluctuating character, and the purchaser was, therefore, bound to proceed with reasonable diligence. He, however, had slept upon his rights, and his conduct was open to the charge that he had been endeavouring to keep alive his claim upon the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy in case it should happen to depreciate. See Huxham v. Llewllyn, 21 W. R. 570; Glasbrook v. Richardson, 23 W. R. 51. Action dismissed with costs.

FALCONBRIDGE, C.J. JANUARY 9TH, 1903.

TRIAL.

WHELIHAN v. HUNTER.

Municipal Corporations — Expenditure — Valid Debt — By-law — Contract — Injunction — Costs

Action by plaintiffs, on behalf of themselves and all ratepayers of the town of St. Mary's, against the corporation of the town, and against the members of the finance, fire, water, and light committees of the council for 1902, as individuals, for a declaration that an item of $3,170 in the report of the finance committee, which it was alleged was introduced into the estimates for the purpose of building a certain water-main, was a valid debt of the corporation which they were bound to provide for during the current year, and for an injunction restraining them from making any payment upon the contract for the water-main in question, on the ground that there was no valid or subsisting contract for the

work, there having been no by-law authorizing it till after this action was begun.

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

J. Idington, K.C., for defendant corporation.

J. W. Graham, St. Mary's, for individual defendants.

FALCONBRIDGE, C.J., held that, in view of secs. 402 and 435 of the Municipal Act (R. S. O. ch. 223), it was doubtful if the debt was a valid debt of the corporation, and that this doubt was sufficient reason for dismissing the action, since the holders of the note given for the liability in question were not parties. Action dismissed. No order as to costs as between plaintiff and the defendant corporation, but plaintiff to pay the costs of the individual defendants, except those incurred on the proceedings for the interlocutory injunction.

JANUARY 9TH, 1903.

DIVISIONAL COURT.

RE PHELAN.

Will—Construction of—Validity of Restriction on Devise—Res Judicata—Case Stated by Master of Titles.

Case stated by the Master of Titles and referred to the Divisional Court by order of a Judge (1 O. W. R. 741). The question was whether Ellen Phelan was entitled to be registered as owner of certain lands free from a provision restrictive of alienation contained in the will of one D. T. O'Sullivan, whereby he devised the land to two nephews (O'Sullivan) subject to the condition that "neither of my said nephews is to be at liberty to sell his half of the said property to anyone except to persons of the name of O'Sullivan in my own family. This condition to attach to every purchaser of the said property." Ellen Phelan was a sister of one of the nephews. The Master asked whether the provision in the will was valid, and, if not, whether the applicant was entitled to be registered as owner free from the condition. The Judge who referred the case was of opinion that the condition was void, but that he was bound by the decision of Robertson, J., in O'Sullivan v. Phelan, 17 O. R. 730.

W. Proudfoot, K.C., for Ellen Phelan.

F. W. Harcourt, for infants.

THE COURT (BOYD, C., MEREDITH, J.) held that as, upon investigation, it appeared that the case relied upon as an estoppel had gone to the Court of Appeal, by which the judgment of Robertson, J., was vacated, but that no final judgment was ever pronounced, the case having been remitted by the Court of Appeal for want of parties, the Master of Titles was, therefore, free to decide untrammelled by any decision binding upon him, but guided by the opinion expressed

by the Judge. Neither of the questions submitted answered, some of the persons possibly interested not being parties. Question of parties and other questions to be re-argued if either party desires it.

JANUARY 9TH, 1903.

DIVISIONAL COURT.

PRING v. WYATT.

Malicious Prosecution—Reasonable and Probable Cause—Case for Jury—Search Warrant—Theft—Information not Charging Crime —Amendment.

Appeal by plaintiff from judgment of nonsuit by County Court of Middlesex. The plaintiff's claim was for damages for malicious prosecution in defendant's having caused to be laid against plaintiff an information that he "unlawfully did have and keep in his possession and take away a black collie dog, the property of W. H. W." Upon this information a search warrant, and later a summons, was issued. At the hearing, the information, without being resworn, was, on application of defendant's counsel, amended by the insertion of the word "stole." The County Judge held that there was an entire absence of the proof necessary to shew that defendant laid the information with a want of reasonable and probable cause, or maliciously, and that the action could therefore not be left to the jury.

J. H. Moss, for plaintiff.

J. R. Meredith, for defendant.

THE COURT (BOYD, C., MEREDITH, J.) held that, as to the search warrant, the judicial action of the magistrate had absolved the defendant from liability in that respect: Hope v. Good, 17 Q. B. D. 338; Smith v. Evans, 13 C. P. 62.

BOYD, C., held that there was ample evidence of an intention to conduct a criminal prosecution: Sinclair v. Hughes, 16 U. C. R. 247; Crawford v. Beattie, 39 U. C. R. 13.

MEREDITH, J., held that the prosecution was the result of an error of judicial opinion in the magistrate's assumption that the information gave him jurisdictioin, although the word "steal" or "theft" did not appear in it; that the defendant had not desired to institute criminal proceedings; and that, so far as the defendant was concerned, the information truly stated the facts, the dispute being purely one about the ownership of the dog. The defendant was, therefore, not liable.

BOYD, C., held that the Judge below was wrong in holding that a man might put the criminal law in motion where there was no crime and then shelter himself behind the action of the magistrate, and that the case should have gone to the jury.

Case to be re-argued if either of the parties desires it.