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STREET, J. JULY 11TH, 1902.

TRIAL.

NEELY v. PETER.

Water and Watercourses—Injury to Land by Flooding—Claim for Damages—Summary Procedure—Costs of Action—Erection and Maintenance of Dam—Liability of Owners—Tolls—Liability of Lumbermen Using Dam.

Action by the owner of land upon a river against the original defendants for flooding such land by a dam. At the trial it appeared that the dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R. S. O. ch. 194, and that the original defendants had used it for the purpose only of floating logs down the river; and the improvement company were added as defendants.

O. M. Arnold, Bracebridge, for plaintiff.

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

STREET, J., held, that, although (as decided in Blair v. Chew, 21 C. L. T. Occ. N. 404) a plaintiff is not bound to proceed summarily upon a claim such as this, under R. S. O. ch. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of doing so.

2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done.

3. Nor were the defendants assisted by secs. 15 and 16 of R. S. O. ch. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence.

4. But sec. 1 of R. S. O. ch. 142 places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so, and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any dam necessary to facilitate the transmission of their timber down the stream.

5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by sec. 15 of R. S. O. ch. 194.

The action was dismissed as against the original defendants; and judgment was given for the plaintiff against the added defendants for $142, but without costs, the defendants having paid that amount into Court.

MEREDITH, C.J. JULY 14TH, 1902.

WEEKLY COURT.

MORSE v. MORSE.

Trust—Right of Beneficiary to Enforce in Her Own Name—Conveyance.

Motion by plaintiff for judgment in default of defence.

E. F. Gunther, for plaintiff.

No one for defendants.

MEREDITH, C.J., held that Edmison v. Couch, 26 A. R. 537, supports the contention that the conveyance mentioned in the statement of claim created an irrevocable trust for plaintiff as to the provision which is made by it for her benefit, enforceable by her in her own name. Judgment so declaring and for the realization of the charge by sale of the lands in question, with costs. No personal judgment for payment, no claim therefor being made. Usual reference to Master in Ordinary, if plaintiff desires a reference.

OSLER, J.A. JULY 14TH, 1902.

C.A.—CHAMBERS.

RE HALTON PROVINCIAL ELECTION.

NIXON v. BARBER.

Parliamentary Election—Ballot—Straight Mark instead of Cross—Cross not in Compartment—Writing on Ballot—Circular Mark—More than One Cross—Cross with Blue or Indelible Pencil—Evidence.

Appeal by both candidates from the decision of the Judge of the County Court of Halton upon a recount of the votes cast at the general election.

J. W. Elliott, Milton, and Eric N. Armour, for Nixon.

E. F. B. Johnston, K.C., and W. I. Dick, Milton, for Barber.

OSLER, J.A.—The majority for Barber as ascertained by the County Court Judge was 22. On the candidate Nixon's appeal, the following ballots were in question: No. 1, Esquesing, ballot 96; No. 3, Nassagaweya, No. 2523; No. 1, Trafalgar, ballot 4300; South Ward, Milton, ballot 5470. These were all marked with a single stroke for Barber, and were allowed by the County Court Judge. I think that they must be disallowed, as required by the Act and directions. Appeal allowed. The head-note to the West Huron Recount Case, 2 Ont. Elec. Cas. 58, is wrong. It is there stated that ballots marked as above were allowed. The opposite was the case; they were disallowed by the County Court Judge, and his ruling was affirmed.

No. 6, Esquesing, ballot 954, marked with a cross in Nixon's compartment. clear and well defined, and also a cross quite plain in Barber's compartment. The latter is fainter, and the paper surrounding it has a slightly clouded appearance which might be described as a smudge caused by rubbing the finger over it. The deputy returning officer and County Court Judge have not allowed this ballot for Nixon, treating it as one marked for both candidates. From an inspection of the ballot, it cannot be said with certainty that they were wrong. I dismiss the appeal as to this.

No. 1, Burlington, ballot 3472, marked for Barber and counted by the County Court Judge. This ballot has the name "Barber" written upon it. I think, having regard to the West Huron case, supra, and the recent decision of Maclennan, J.A., in the Lennox and North Grey cases, ante, pp. 472, 474, that this is not a good ballot. I allow the appeal as to this.

No. 4, Trafalgar, ballot 4380, marked wth a clear cross on the right of the margin below the lower line of Nixon's compartment, as defined by lines on the ballot paper. This was rejected by the County Court Judge, but is claimed for Nixon. I think, having regard to the recent decision of Maclennan, J.A., in the Lennox case, supra, that the ballot should be counted for Nixon. I allow the appeal as to this.

No. 3, Trafalgar, ballot 4619, allowed by deputy returning officer for Nixon, but rejected by the County Court Judge, on the ground that it is clearly marked for both candidates. The upper cross in Barber's compartment is fainter than the one in Nixon's, but it is an unmistakable intentional cross. I think that the County Court Judge was right. I dismiss appeal as to this.

No. 3, Nassagaweya, ballot 2527, marked with a circle, naught, in Barber's compartment and a deformed circle in Nixon's. Treated by the deputy returning officer and County Court Judge as a spoiled one, not marked with a cross in Nixon's compartment. I think this was a spoiled ballot. I dismiss appeal as to this.

No. 6, Esquesing, ballot 1015, and No. 3, Trafalgar, ballot 4717, marked with a cross in Barber's compartment and a line in Nixon's. This was counted by County Court Judge for Barber. The Judge below was right. I dismiss appeal as to this.

On the candidate Barber's appeal:—No. 3, Trafalgar, ballot 4596, and No. 5, Trafalgar, ballot 5044, counted by County Court Judge for Nixon. Barber's appeal dismissed.

No. 1, Acton, ballot 1585, marked with a clear cross for Nixon and so allowed by County Court Judge. There is a faint mark in the upper or Barber's compartment which is said to be a cross, and to have the effect of spoiling the ballot. I think that the mark has every appearance of being an inadvertent one. I dismiss appeal as to this.

No. 3, Esquesing, ballot 449, allowed by the County Court Judge for Nixon. There are two plain strokes united at the top and forming an inverted V plainly, though not very widely apart at the bottom. I think that enough appeared to shew that the voter meant to make a cross and not a single straight stroke. I dismiss appeal.

No. 3, Esquesing, ballot 413, allowed by the deputy returning officer and County Court Judge for Nixon, marked with three clear crosses in a line for Nixon. This is a good ballot. I dismiss appeal as to it. Monck Case, H. E. C. 735, and Bothwell Case, 8 S. C. R. 718, 719, followed.

No. 1, Nassagaweya, ballot 2048, marked and counted for Nixon. I think that the cross, though clumsy and ill-made, is well enough for a ballot. I dismiss appeal as to this.

No. 3, Oakville, ballots 4058, 4073, 4077, 4098, 4099, rejected by the deputy returning officer, but counted by the County Court Judge for Nixon. Each is well marked with a plain cross in Nixon's compartment. The cross is made with blue or indelible, or at least not with a common black pencil, and the ballots are objected to as offending against the requirements of sec. 31 (3) and 71 of the Election Act, not being marked with the pencil provided by the deputy returning officer for the use of voters, and thus shewing marks of some common design to disclose the identity of the voter. I think that on an inquiry of this kind evidence cannot be received by the Judge; he deals with the ballots in the condition in which they come before him. There is nothing to shew that the pencil with which these ballots were marked was not supplied by the deputy returning officer, nor to shew on what ground he rejected the ballots. Appeal dismissed.

The certificate will be according to these findings. No costs.

OSLER, J.A. JULY 14TH, 1902.

C. A.—CHAMBERS.

RE CENTRE BRUCE PROVINCIAL ELECTION.

STEWART v. CLARK.

Parliamentary Election—Petition—Clerical Error—Service—Formal Objection—Amendment.

Motion by respondent to set aside copy and service of the petition.

E. Bristol, for respondent.

A. B. Aylesworth, K.C., for petitioners.

OSLER, J.A.—A petition regular in form was duly presented by the defeated candidate. Notice of the presentation was duly served on the respondent, and, together therewith, a paper purporting to be a copy of the petition. By some error on the part of a clerk, a pen was run through the last clause of the copy—the prayer of the petition—which was served in that condition. The respondent moves to set aside copy and service. The petitioner, while contending that nothing is wrong, moves to amend. If the pen stroke through the final clause of the printed copy of the

petition is intended to signify its deletion, as I suppose must be taken to be the case, the paper served is undoubtedly not a true or complete copy of the petition. Nevertheless, the respondent is not left in any uncertainty as to the relief claimed as appropriate to the long string of charges set forth in the petition, and I cannot see that he is prejudiced in the least by the omission he complains of, irregular as it is. Mr. Bristol argued very earnestly that the slip was fatal, and could not be amended, relying upon such cases as Williams v. Mayor of Tenby, 5 C. P. D. 135; Lisgar Election Case, 20 S. C. R. 1; Burrard Election Case, 31 S. C. R. 459; and other cases in which it has been held that a petition cannot be amended by the addition of a new or further ground for avoiding the election, or the entire omission of some statutory condition or preliminary, cured. These cases, however, are not analogous to the case in hand. There was in them either the attempt to set up at too late a period some special ground for avoiding the election, or the clear absolute omission to do something which the statute required to be done, e.g., to give notice of the presentation of the petition, or to leave a copy of it within the prescribed time for the returning officer, an essential part, as Ritchie, C.J., said in the Lisgar Case, of the presentation or filing of the petition. The objection taken here is, under the circumstances, a purely formal one, to which by Rule 60 no effect ought to be given, and I see nothing in the Act which forbids the exercise of the powers of the Court under sec. 2 (1) of the Controverted Elections Act to cure it by amending the copy served (which is before me) just as a defect in the copy of a summons in an action in the High Court may be amended. The petitioner must pay the costs of the application, which are to be the respondent in any event of the cause, and over and above any costs which may be awarded to him at the trial.

MACLENNAN, J.A. JULY 19TH, 1902.

C. A.—CHAMBERS.

RE STORMONT PROVINCIAL ELECTION.

McLAUGHLIN v. McCART.

Parliamentary Election—Petition—Status of Petitioner—Statement of Right to Petition—What is Sufficient—Defeated Candidate.

Application by respondent to set aside petition, and to remove same from files of Court, on the ground, amongst others, that the petition did not contain a statement of the right of the petitioner to petition, as defined by the Election Acts.

J. H. Moss, for respondent.

I. F. Hellmuth, K.C., and E. Bayly, for petitioner.

MACLENNAN, J.A.—I am of opinion that the motion should be refused, but without costs.

The motion is by the respondent to set aside the petition and to remove it from the files on several grounds, only one of which was insisted on before me. That was that the petition did not contain a statement of the right of the petitioner to petition, as defined by the Election Acts.

The Act 62 Vict. (2) ch. 6, sec. 1, enacts that a petition may be presented by any one or more of the following classes of persons:—

(a) Some person who was a candidate at such election; or

(b) Three persons who voted or who had a right to vote at such election, and who are severally rated on the last revised assessment roll in respect of real property in the municipality in which they reside, for at least $1,000.

Rule II. of this Court relating to elections declares that an election petition shall contain the following statement among others :

(a) The right of the petitioner to petition as defined by the said Act.

Rule LX. declares that no proceeding under the Ontario Controverted Elections Act shall be defeated by any formal objection.

Section 112 (2) of R. S. O. ch. 11 declares that the rules shall be of the same force as if they were enacted in the body of the Act.

The petition, to the end of the first two paragraphs, is as follows:

Petition of John McLaughlin, of the township of Roxborough, in the county of Stormont, farmer, whose name is subscribed.

1. Your petitioner is a person who had a right to vote and who voted at the election above mentioned, and who is rated on the last revised assessment roll in respect of real property in the municipalities in which I reside for at least $1,000.

2. Your petitioner states that the said election was held on the 22nd day of May, A.D. 1902, and the 29th day of May, 1902, when John McLaughlin, of the township of Roxborough, in the county of Stormont, farmer, and William McCart, of the township of Roxborough, in the county of Stormont, were candidates, and the returning officer has returned the said William McCart as being duly elected.

It is not disputed that the petitioner John McLaughlin is the same person who was the defeated candidate at the election; and if the question had depended on the statute alone, that fact would be sufficient to support the petition, for the statute says it may be presented by a person who was a candidate.

The rule, however, goes further, and requires the petition to contain a statement of the right of the petitioner to petition as defined by the Act. In the present case the petitioner's right to petition is the fact that he was a candidate at the election.

The question is, does this petition contain a statement of that fact?

I think it does contain a sufficient statement of that fact. The petitioner is John McLaughlin, of the township of Roxborough, farmer, and it states that John McLaughlin, of the township of Roxborough, farmer, was one of the candidates at the election. I think that, reading the document alone, the petitioner and the candidate, upon a fair construction of it, must be taken to be one and the same person. There might be a latent ambiguity, but none is shewn, the other John McLaughlin in the constituency residing in a different township and being of a different occupation.

I dismiss the motion, but without costs, as I think the petition not carefully drawn, whereby the motion was invited.

See Re Centre Bruce, lately before Mr. Justice Osler (ante, p. 503).

FALCONBRIDGE, C.J. JULY 15TH, 1902.

CHAMBERS.

HEPBURN v. VANHORNE.

Judgment Debtor—Examination of—Unsatisfactory Answers—Preference—Committal.

Motion by plaintiff under Rule 907 to commit defendant for unsatisfactory answers upon his examination as a judgment debtor.

J. H. Moss, for plaintiff.

W. E. Middleton, for defendant.

FALCONBRIDGE, C.J., held that the debtor had not refused to answer, nor had he so equivocated as to render his answers not "satisfactory" answers. He had made a pretty full disclosure of what he had done. On his own shewing he had preferred his wife to other creditors, and to plaintiff

in particular, but no case referred to would justify a holding on this evidence that his preference was fraudulent, so as to make it "appear that" he "has concealed or made away with his property in order to defeat or defraud his creditors."

Motion refused without costs.

MEREDITH, C.J. JULY 15TH, 1902.

CHAMBERS.

PENNINGTON v. HONSINGER.

Costs—Taxation—Evidence—Brief of, Used by Counsel for Opposite Party.

Appeal by defendants from allowance by the senior taxing officer, on the taxation of the plaintiff's costs, of the charge for brief for senior counsel on the argument of an appeal to a Divisional Court. Senior counsel was retained by plaintiff for the argument in the Divisional Court, and the brief in question was prepared for and handed to him, but, owing to the intricacy of the case and his other engagements, the counsel who was retained was unable to argue the case, and returned the brief to the plaintiff's solicitor, who acted alone as counsel for the plaintiff on the argument. When the appeal came on to be heard, counsel for defendants had not been furnished with any brief of the evidence, and after the appeal had been opened it was found to be impracticable on that account to conclude the argument, and at the suggestion of the Court the plaintiff's counsel handed the brief in question to counsel for defendants, in order that he might, when the argument was resumed on the following day, be prepared with reference to the parts of the evidence on which he relied in argument. Counsel for defendants made use of the brief for this purpose, and retained and still retains it. Under these circumstances the taxing officer allowed the plaintiff so much of the brief as consisted of the copy of the evidence.

W. J. Tremeear, for defendants.

Shirley Denison, for plaintiff.

MEREDITH, C.J., held that the allowance made by the taxing officer was correct.

Appeal dismissed with costs.

MEREDITH, C.J. JULY 15TH, 1902.

WEEKLY COURT.

RE PUBLISHERS' SYNDICATE.

HART'S CASE.

Company—Winding-up—Shares—Allotment—Contributory.

Appeal by T. S. Hart from an order of a special referee settling appellant on the list of contributories for $300 in respect of five shares in the Publishers' Syndicate, Limited, a company which is being wound up under R. S. O. ch. 129 and the amendments thereto. As to one of the five shares there was no contest; it was fully paid up, and a stock certificate for it was issued and sent to the appellant. The application for the other four shares was made on 26th July, 1900, and they were allotted to appellant on the same day. No formal written notice of the allotment was shewn to have been given to the appellant; but letters were written to him by the company demanding payment on account of the shares, and personal applications for payment were made to him.

Gideon Grant, for appellant.

C. D. Scott, for liquidator.

MEREDITH C. J., held that the letters and what took place when the personal applications were made were sufficient to justify the conclusion that the appellant knew that the company had accepted his application for the shares and had treated him as a shareholder accordingly, which is enough to constitute a complete agreement. In re Universal Banking Corporation, Gunn's Case, L. R. 3 Ch. 40, referred to. Appeal dismissed with costs.

BOYD, C. JULY 15TH, 1902.

WEEKLY COURT.

OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Contract—Electric Light—"Unforeseen Accident Through no Default of Company"—Breach—Damages.

Appeal by plaintiffs and cross-appeal by defendants from report of local Master at Ottawa, heard at the Ottawa Weekly Court. The reference was for trial of the action, which was brought to recover $18,669.50 for electric lamps and lighting, under a contract with the defendants. The controversy was as to the legal relationship of the parties in consequence of the destruction of the works of plaintiffs, in common with a large part of the city of Ottawa, by the

great fire in April, 1900. The result was, as found by the Master, that the city was left without electric light from the plaintiffs for a long period, and, though due diligence was used in the restoration of the works, for a further considerable period there was but a partial supply of light by plaintiffs.

G. F. Henderson, Ottawa, for plaintiffs.

T. McVeity, Ottawa, for defendants.

Boyd, C.:—It was well found by the Master that this was "an unforeseen accident, not occurring through any default of the company"—a contingency provided for in these terms by the agreement between the parties. The solution of the difficulty with regard to the non-lighting during this period depends upon the construction of the 7th clause of that part of the agreement which embraces covenants and conditions. This group of clauses is preceded by the declaration: "It is hereby covenanted and agreed between the said parties hereto as follows, and these presents are on the express conditions." The 7th clause provides that the company shall at all times keep lighted the lamps at their own cost, unless when prevented by some unforeseen accident, not occurring through any default of the company, but in any event the company shall pay 50 cents for each night for each lamp that is not kept lighted to the satisfaction of the superintendent of fire alarms, whose report is to be final and conclusive as to the number of lamps not kept lighted by the company, according to the terms of this agreement. The Master held that the company were to be paid the contract price for the period when no light was furnished, and that the city was entitled to deduct therefrom penalties liquidated at 50 cents for each unlighted lamp during the same period. I read the contract as meaning that if no light was furnished from unforeseen accident, there was to be no pay and no penalty during such time; when light began to be furnished, then pay began *quo tanto*—the company all the while being in no default.

Appeal of plaintiffs allowed with costs, and appeal of defendants dismissed with costs.

Meredith, C.J. July 15th, 1902.

CHAMBERS.

Re THOMSON v. STONE.

County Court—Jurisdiction—Action by Division Court Judgment Creditor for $92 to Set Aside Chattel Mortgage for $520—Subject-matter Involved.

Motion by defendants for an order prohibiting (after

judgment) further proceedings in this action in the County Court of York, on the ground that the subject-matter involved in the action is not within the jurisdiction of that Court. The action was by a Division Court judgment creditor of defendant Charles E. Stone (for $92.05 and costs) to set aside as fraudulent as against the plaintiff a chattel mortgage for $520 made by that defendant to his w fe, the other defendant.

John MacGregor, for defendants, contended that, the mortgage being for a greater sum than $200, and the value of the goods conveyed by it being (as he contended was shewn) greater than $200, the County Court had no jurisdiction.

B. E. Swayzie, for plaintiff.

Meredith, C. J., held, following Forrest v. Laycock, 18 Gr. 611, and distinguishing Dominion Bank v. Heffernan, 11 P. R. 504, and Re Lyons, 10 P. R. 150, that the subject-matter involved in an action such as this must be taken to be the amount due on the judgment in respect of which equitable relief is sought. Motion dismissed with costs.

Meredith, C.J. July 15th, 1902.

CHAMBERS.

McGILLIVRAY v. WILLIAMS.

Lis Pendens—Vacating—Ex Parte Application of Plaintiff—Judicature Act, secs. 98, 99.

Appeal by defendant from order of local Judge at London vacating (on an ex parte application by plaintiff) the certificate of *lis pendens* registered by him, and on application by defendant to vacate the registration of the order.

F. A. Anglin, for defendant.

W. E. Middleton, for plaintiff.

Meredith, C.J., held, that the registration of the certificate of *lis pendens* was a proceeding taken by plaintiff for his own benefit and protection, which he might get rid of whenever he saw fit, and also that secs. 98 and 99 of the Judicature Act are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered.

Appeal and motion dismissed with costs.

JULY 18TH, 1902.

DIVISIONAL COURT.

STACK v. T. EATON CO.

Fixtures—Shop Fittings—When so Annexed to Land as to Pass to Purchaser on Conveyance.

Appeal by plaintiff from judgment of MACMAHON, J., dismissing an action brought to decide the ownership of certain shop and gas and electric light fittings which were placed by one Guinane in a building on freehold land then owned by Guinane and which the respondents, purchasers of the land, claimed as having passed to them as part of the realty by the conveyance of the land to them. The shop fittings consisted of shelving made in sections, screwed to bra kets affixed to the wall of the building, readily removable without damage either to the fittings themselves or to the building; and the gas and electric fittings were also removable by unscrewing without injury to the building.

W. R. Smyth, for the appellant.

G. F. Shepley, K.C., for the respondents.

MEREDITH, C.J.—I take it to be settled law:

1. That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.

2. That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

3. That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.

4. That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

5. That even tenants' fixtures, put in for the purposes of trade, form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

I am unable to see why the shelving affixed by Guinane when he was the owner of the freehold for the purposes of

the business he carried on there, is not to be deemed a part of the land, and I can see nothing in the degree or object of the annexation of it to lead to the conclusion that such an intention existed as is necessary to alter the prima facie character of the article arising from the fact of its being affixed, but the contrary.

The title to the gas and the electric light fittings is, as it seems to me, to be determined by the same considerations, which lead necessarily, I think, to the conclusion that when affixed as they were they became part of the land, and passed by the conveyance of it to the respondents. I see no reason for differing from Argles v. McMath, 26 O. R. at p. 248.

The appeal, in my opinion, fails, and should be dismissed with costs.

LOUNT, J., concurred.

The following cases were cited: Bain v. Brand, 1 App. Cas. at pp. 762, 772; Holland v. Hodgson, L. R. 7 C. P. 328; Hobson v. Gorringe, [1897] 1 Ch. 182; Haggert v. Brampton, 28 S. C. R. 174; Argles v. McMath, 26 O. R. at p. 248.

MACMAHON, J. JULY 17TH, 1902.

WEEKLY COURT.

MORROW v. PETERBOROUGH WATER CO.

Company—Voluntary Winding-up—Surplus Assets—Distribution—Second Preference Shareholders—Ordinary Shareholders—Fully and Partly Paid Shares—By-laws and Resolutions—Profits.

Action on behalf of plaintiff and all other holders of partly paid shares of the stock of the defendant conpany to recover a distributive share of certain moneys in the hands of the company.

A special case was stated, shewing that the company was incorporated in 1881 by registration under R. S. O. 1877 ch. 157, for the purpose of supplying the town of Peterborough with water. The nominal capital stock was $200,000, divided into 10,000 shares of the par value of $20 each. The working capital was made up as follows:

1,000 shares first preference 5 per cent. stock subscribed and fully paid.

1,250 shares second preference stock subscribed and fully paid.

1,452 shares common stock subscribed and fully paid up.

25 shares common stock subscribed and paid up to the extent of 60 per cent.

3,444 shares common stock subscribed and paid up to the extent of 55 per cent.

175 shares common stock subscribed and paid up to the extent of 35 per cent.

The plaintiff was the owner of 117 shares of common stock on which 55 per cent. had been paid. The first preference shares were issued pursuant to by-law 26 of the company, and were wholly subscribed for by the directors of the company in trust for the company, and no claim in respect thereof was made to the moneys in question. On the 31st January, 1902, all the property, franchises, etc., of the company were sold to the corporation of the town of Peterborough for $230,000, under the provisions of the Municipal Waterworks Act, and it became impossible for the company to continue its business.

(9) The second preference stock was created and issued pursuant to by-law 27 of the company, passed 16th April, 1895, which by-law provided that such second preference stock should be subject only to the first preference stock issued and subscribed under by-law No. 26, and should have preference and priority over all other stock of the company theretofore created or issued or which should thereafter be created or issued, in the respects following:

(*a*) Dividends on such preference stock at the rate of 6 per cent. per annum, to be computed from the date such stock should be subscribed for and allotted, were to be paid out of the net profits of the company before any dividends on ordinary stock; and for a period not to exceed five years from 15th April, 1895, the holders thereof should not be entitled to participate further in the profits of the company; in case of default of any such payment, then the deficiency should be paid out of the net profits of succeeding years, and no dividend should be declared or paid on the ordinary capital stock of the company until such deficiency should be fully paid.

(*b*) On 15th April, 1900, or any subsequent year, the holders of such preference stock should be entitled to surrender the same and receive in lieu thereof the par value, or at their option to surrender the same and receive in lieu the corresponding amount of shares of the ordinary capital stock of the company.

No surrender had ever been made by any of the holders of the second preference stock.

(10) By-law 27 further provided that in the event of the company being wound up, if any surplus of the capital assets was to be returned to shareholders, the holders of the second preference stock should be entitled to have the full nominal value of their shares, and all dividends thereof up to that date, returned and paid to them before any return of capital in respect of ordinary stock; and, subject thereto and to the first preference stock, the holders of the ordinary shares should be entitled to such surplus of the capital assets.

(12) The full nominal amount of the second preference stock and all dividends thereof up to 31st January, 1902, were duly tendered to the holders of such stock, and were accepted by them.

(16) The amount paid in by the holders of ordinary stock were returned and paid to them, with interest to 31st January, 1902.

(17) After providing for all the liabilities of the company, the return of all share capital, and the payment of dividends as above, there remained in the bank to the credit of the company a surplus of $19,039.24.

The question for the opinion of the Court was: In what proportion or proportions were these surplus moneys distributable among the shareholders other than the holders of the first preference shares?

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

R. E. Wood, Peterborough, for defendants Rogers and Lewis.

L. M. Hayes, Peterborough, for defendant Collins.

C. H. Bradburn, Peterborough, for defendant company.

MacMahon, J.—No language could more clearly provide for exclusion of the second preference stockholders from participating in the surplus assets than that employed in the concluding words of the part of the by-law set out in paragraph 10 of the special case. Had the second preference stockholders not thus been contracted out of participation in the surplus assets, they might have been entitled to share therein with the holders of ordinary stock. [Reference to Birch v. Cropper, In re Bridgewater Navigation Co., 14 App. Cas. 525.] The second preference shareholders are not entitled to share in the surplus assets.

The remaining question is: How are the surplus assets to be distributed amongst the holders of the ordinary stock? Some of such shareholders had fully paid up their shares;

others had paid 60 per cent.; some 55 per cent., and some only 35 per cent., on their shares. It was urged by counsel for the holders of fully paid up shares that the surplus assets should be distributed amongst the members in proportion to the capital paid on the shares held by them. In some cases the articles of association of a company make provision that on the winding-up the surplus assets shall be so divided, as was done in In re Anglo-Continental Corporation of Western Australia, [1898] 1 Ch. 323, and In re Mutoscope and Biograph Syndicate, [1899] 1 Ch. 896, and when that is the case the principle of distribution thus provided for must be carried out.

The only provision made by the Peterborough Water Company for the distribution of the assets was by a resolution passed at a general meeting of the shareholders of the company on the 2nd March, 1900, which, after providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on the respective shares, and dividends thereon to 31st January, 1902, and after payment of the liabilities and the costs of winding-up, etc., directs that "the surplus at the credit of the company's account in the bank be distributed amongst the members according to their rights and interests in the company." This resolution was, no doubt, framed from the English Companies Act, 1862, sec. 133.

Where the articles of association or regulations (resolutions) of a company do not provide for the distribution of the assets on the winding-up of a company, then, as stated by Mr. Buckley in his work on Companies, 7th ed., p. 322: "If the surplus assets are sufficient to repay every member his capital in full and leave a surplus, such surplus, except so far as it consists of undivided profit, forms part of the joint stock which at the winding-up represented the capital, and, in the absence of provision to the contrary, is divisible among all the members in proportion to their interests in capital, that is, in proportion to the amount of their shares, not to the amounts paid on their shares." [Reference again to Birch v. Cropper, supra.]

I have just a word to say respecting the sum of $5,279.64, which appeared as the net amount carried on the 31st December, 1901. Mr. Wood contended that this sum, being the profits for the year, should have been distributed as dividends among the shareholders, and formed no part of and should not have been included as part of the surplus assests for distribution under the winding-up. The admission in

the special case (paragraph 13) is that on the 31st December, 1901, there remained only $2,075.13 on hand, and this sum is, I find, included as part of the receipts in a statement of receipts and payments of the Peterborough Water Company from 1st January to 16th June, 1902. That and other receipts of the company were expended between those dates in payment of liabilities of the company.

All the stockholders, both second preference and the holders of ordinary shares of stock, having had returned to them the amount paid in by them on their shares, together with the dividends payable thereon up to the period of distribution, and all the debts and liabilities having been paid, I direct that, after payment out of the surplus assets on hand of the costs of all parties of this motion, the remaining assets of the company be distributed among all the holders of the ordinary stock of the company in proportion to their shares.

FALCONBRIDGE, C.J. JULY 28TH, 1902.

TRIAL.

WHITESELL v. REECE.

Tenant for Life—Waste—Cutting Timber—Remaindermen—Injunction—Payments by Tenant for Life on Mortgage—Subrogation.

Action by the persons entitled under the will of G. Seealey, deceased, to an estate in remainder in certain lands in the township of Bayham, against the life tenant and the purchaser from her, to restrain waste by cutting timber, etc. The land in question was devised to the tenant for life subject to a mortgage made by testator to trustees to secure annual payments of $200 to testator's wife during her lifetime.

D. J. Donahue, K.C., and W. E. Stevens, Aylmer, for plaintiffs.

J. A. Robinson, St. Thomas, for defendants.

FALCONBRIDGE, C.J.—The life tenant, defendant Reece, has kept up the payments on this mortgage since testator's death; and recently undertook to sell standing timber on the land to her co-defendant James Payne. Under that agreement defendant Payne proceeded to cut a large quantity of timber until restrained by order and injunction of the Court. The tenant for life claims to be entitled to be subrogated to the rights of testator's widow and of her trustees in respect of and to the extent of the amounts which the tenant for life has paid on the mortgage; and argues that these payments,

or a great proportion of them, ought to be regarded as principal, and that tenant for life is bound, as between herself and the remaindermen, only to keep down the interest, and invokes the doctrine of Brethour v. Brooke, 23 O. R. 658, 21 A. R. 144, viz., that where the security is scanty and the interest in arrear, the mortgagee may provide for his own safety by cutting down trees. The present value of the farm is, on the evidence of all the witnesses, not more than $1,500; but plaintiffs' witnesses swore that, if it had been kept in the same condition as it was in at the time of testator's death, it would be worth $2,500.

Defendant Reece cannot make the above-stated doctrine applicable to her case. The estate came to her subject to that mortgage. What she has paid on it was paid for her benefit, she no doubt taking chances on the probability of life of an aged woman. If defendant Reece has paid or may pay, under these circumstances, more than the value of the estate, that is her affair; and she is not entitled to any particular consideration, inasmuch as she took under testator's will, besides this land, the bulk of his property. If defendant Reece has, in truth, paid off anything which can be considered as principal, she will be entitled to hold it without interest as a charge on the land as against the remaindermen, under Macklem v. Cummings, 7 Gr. 318; but this is not the point in question here; and defendant Reece had and has, therefore, no right to commit the acts of waste complained of.

As to amount and value of timber cut, and as to relative condition of the farm fences and buildings now and at time of testator's death, the evidence for plaintiffs is far superior to that offered by defendants, both in quantity and quality; and it is also quite clear upon the evidence that defendants cannot shelter themselves under Drake v. Wigle, 24 C. P. 405, for I find that the timber was not cut down for the purpose of bringing the land under cultivation, nor was it done in conformity with good husbandry, and defendant Reece is not farming the property or making reasonable use of that part of the lot which is supposed to be arable land, and the inheritance is damaged, beyond question, by the acts complained of.

Judgment making injunction perpetual, and awarding plaintiffs $400 damages, and full costs of suit. Stay of proceedings for 30 days, except as to the injunction; and if within that time defendant Reece shall pay $400 into Court, she may have the interest thereon paid to her during her life; on her death the principal to be paid out to the plaintiffs.

FALCONBRIDGE, C.J. JULY 29TH, 1902.

TRIAL.

LACHANCE v. LACHANCE.

Costs—Plaintiff Successful at Trial—Costs as of Motion for Judgment Only.

Action for recovery of dower and for damages for detention. Trial at Sandwich, where judgment was given for plaintiff, costs being reserved.

J. H. Rodd, Windsor, for plaintiff.

J. W. Hanna, Windsor, for defendant.

FALCONBRIDGE, C.J.—The defendant should pay to plaintiff the costs of the action as if judgment were on motion before a single Judge, after pleadings closed, including costs of examination for discovery.

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LOUNT, J. JULY 29TH, 1902.

WEEKLY COURT.

ALLEN v. CITY OF TORONTO.

Municipal Corporation—Contract—Specifications—Construction—Injunction.

Motion by plaintiffs for order continuing until the trial an interim injunction granted on 16th July restraining the defendants, their officers, servants, and agents, from proceeding to the completion and execution of certain contracts between defendants the City of Toronto and defendant Hole, trading under the name of the Forest City Paving Company, for the construction of an asphalt pavement upon Spadina avenue, from Queen street to College street, and on the west side of Spadina avenue from Baldwin street to College street, and upon Fern avenue, from Sorauren avenue to Roncesvalles avenue.

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

A. F. Lobb and W. C. Chisholm, for defendants the City of Toronto.

E. F. B. Johnston, K.C., for defendants the Forest City Paving Company.

LOUNT, J.—This whole matter turns upon the question as to the true construction and meaning of the contracts and of the specifications thereunder, and the board of control having, under the powers vested in them by the Municipal

Act, called for tenders, and certain persons having tendered, and the board having received and considered such tenders, the board is bound to accept asphalt of any of the three kinds mentioned in the third clause of the contract, or of any kind which, in the sole opinion of the city engineer, is as good as Trinidad asphalt, and there is no prohibition of the use of any other kind of asphalt than Trinidad, Bermuda, or German Rock, provided the tenderer states in his tender the kind proposed to be used. The time for the demonstration of the fact of whether the asphalt proposed to be supplied conforms to the specifications, is when such asphalt is about to be laid down, and, therefore, the contract in question is good and binding between the parties, and can only be put an end to by the contractor not providing, in the opinion of the city engineer, at such time for laying it, as good a quality of asphalt as the specified kind.

There is in the contract complained of a term departing from the specifications, and an undertaking will be given by defendants' counsel to strike out from the body of such contract the words "and that the asphalt to be used shall be in all respects equal to Alcatraz and other brands of California asphalt that have been used and are being used in the city of Brooklyn and other cities," and to strike out from the recital in the contract the following: "Whereas the engineer of the said city has reported to the board of control of the said city that the Alcatraz brand of California asphalt is equal in quality to Trinidad asphalt, and that asphalt equal in quality to the said Alcatraz brand of California asphalt will be satisfactory to him."

Motion dismissed and interim injunction annulled. No costs of application to either party.

FALCONBRIDGE, C.J. JULY 18TH, 1902.

CHAMBERS.

IVEY v. MOFFAT.

Judgment Debtor—Examination—Insufficient Answers—Further Examination.

Application by plaintiffs to commit defendant for refusal to disclose his property, or his transactions respecting the same, on his examination as a judgment debtor.

E. E. A. DuVernet, for plaintiff.

E. F. B. Johnston, K.C., for defendant.

FALCONBRIDGE, C.J.:—It is extremely unsatisfactory to atempt to dispose of an application of this nature on an examination taken down in narrative form and in ordinary handwriting—particularly so when the writing is not very legible, and erasures and interlineations appear in critical parts.

If I had to dispose of the matter as it stands, I should find it difficult to say that defendant had made satisfactory answers within the meaning of the statute. On his own figures, defendant has received a large amount of money which has not been properly accounted for. I shall give him a further opportunity to shew that these moneys have been properly dealt with by him. It will be to his advantage to take some trouble to give a proper account.

The defendant will attend at his own expense to be further examined.

Costs of the application reserved for the present.

When the matter comes up again, the solicitors will put in typewritten copies of the present material and of the further examination.

JULY 18TH, 1902.

DIVISIONAL COURT.

REX v. JAMES.

Fraud—Conviction—Fruit Marks Act, 1901—Fruit in Possession for Sale—False Representation of Contents of Packages—"Faced or Shewn Surface."

Motion to make absolute a rule *nisi* to quash defendant's conviction for an offence against sec. 7 of the Fruit Markets Act, 1901, made by the police magistrate for the city of Toronto on 17th February, 1902.

J. D. Montgomery, for the applicant.

R. B. Beaumont, for the respondent.

The judgment of the Court (MEREDITH, C.J., and MACMAHON, J.) was delivered by

MEREDITH, C.J.:—The conviction is in respect of 18 packages of apples, and is for selling and having in possession for sale the apples packed in these packages, in which the faced or shewn surface gave a false representation of the contents of the packages.

Ten of the packages were, according to the admission of the parties, in storage, and not intended for sale, and were

not in fact sold; and as to them the conviction cannot be supported. There must be, to constitute an offence against the section, either a selling or an offering or exposing or having in possession for sale; and there was neither.

The other eight packages were exposed for sale and actually sold; an offence against the section was complete, though no sale or offer to sell had taken place. The having of them in possession for sale is an offence against the section. This being so, it is immaterial that when sold the purchaser was not imposed upon, because, as the fact was, the whole contents were tipped out of the packages for his inspection, and he saw the quality of the bulk.

The Legislature, for the purpose of protecting the public against the frauds which the Act is designed to prevent, has chosen to make the law so stringent that the mere having in possession packages of fruit fraudulently packed—where the having in possession is for the purpose of sale—is an offence, and we have no warrant for refusing to give effect to the law it has enacted, because in the particular case no one was imposed upon and no fraud was intended by the person charged with the offence.

As at present advised, I do not see why the branded end of the package is the only place where "a faced or shewn surface" may be forced, or why, if the bottom of the barrel is faced with fruit of a better quality than the bulk, that is not enough to bring the case within the section. As pointed out by Mr. Beaumont, if it were otherwise, the provisions of the section might be easily evaded and purchasers imposed upon by the bottom of the barrel being opened and the fraudulently packed surface exhibited to the purchaser.

The conviction must be amended by confining it to the eight packages, and the offence to having them in possession for sale, and the fine will be reduced to $20.

There will be no costs to either party.

It would be well, I think, if the Act were amended by defining the meaning of the term "the faced or shewn surface," and possibly also by relieving from the penalty one who has in possession for sale packages fraudulently packed, if he is able to shew that he did not know of the fraudulent packing and was not ignorant of it negligently.

JULY 17TH, 1902.

DIVISIONAL COURT.

DELAHEY v. REID.

Sale of Goods—Unconditional Covenant to Pay Price—Counterclaim for Damages for Non-delivery of Part of Goods—Nominal Damages.

Appeal by defendant from the judgment of the County Court of Renfrew in favour of the plaintiff on a claim by the plaintiff, the manufacturer of the scales known as handy truck scales, to recover $140, agreed to be paid by defendant to plaintiff for a full outfit for selling said scales in Orillia. The defendant counterclaimed for $200 damages for loss of profit occasioned by the plaintiff making default in supplying within a reasonable time the truck scale which was part of the "outfit" agreed to be supplied. The County Judge gave judgment in favour of the plaintiff for the sum claimed, and dismissed the counterclaim.

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

J. H. Moss, for plaintiff.

MEREDITH, C.J.:—In the circumstances of this case, we think that the omission of the respondent to supply within a reasonable time after the making of the contract the truck scale which was part of the "outfit" which, by the terms of the agreement, the respondent gave and assigned to the appellant—assuming it to have been the duty of the respondent to have forwarded it to the appellant—did not go to the root of the consideration, so as to relieve the appellant from liability to pay the purchase price of the rights which he bought from the respondent, and for which he unconditionally covenanted to pay on the 1st March, 1901, the $140 which the respondent has recovered against him.

The other articles comprised in the "outfit" appear to have been furnished to the appellant in due time, and had he called attention to the omission to send the truck scale it would, no doubt, have been supplied at once; the reason why he did not appears from his letter of the 30th January, 1900, in which he unreasonably and unwarrantably assumed to repudiate his agreement, because, owing to a mistake in the address (the initial of the second Christian name having been written L. instead of T.), the respondent's letter accompanying the articles, which were sent before reaching the appellant, was handed out of the post office to another Alexander Reid, who, it was said, had, therefore, an opportunity of

learning the terms of the arrangement between the appellant and the respondent.

The cases collected in Re Canadian Power Co., 30 O. R. 185, may be referred to as shewing that the appellant was not discharged by the omission to send the truck scale. The judgment in favour of the respondent was, therefore, right and should be affirmed.

As to the counterclaim, assuming that the respondent was in default in not sending on the truck scale, no damages have been proved to have been sustained by appellant owing to the omission to send it in due time, and we ought not to interfere with the disposition made of the counterclaim in the Court below, merely to give nominal damages.

Appeal dismissed with costs.

MacMahon, J., concurred.

July 17th, 1902.

DIVISIONAL COURT.

Re SUMMERS.

Executors and Administrators—Administration of Estate—Payment of Voluntary Debts—Bond—Natural Love and Affection—Evidence of Actual Valuable Consideration—Assignment of Securities at Face Value.

Appeal by Margaret Summers, widow of William R. Summers, against an order made by the Judge of the Surrogate Court of Elgin allowing an item of $4,000 in the passing of the accounts of the executors under the will of William R. Summers.

T. W. Crothers, St. Thomas, for appellant.

A. B. Aylesworth, K.C., and John Crawford, Aylmer, for John R. Summers, W. B. Summers, and A. Chambers.

The judgment of the Court (Meredith, C.J., MacMahon, J.) was delivered by

MacMahon, J.:—The executors, in payment of a debt to John R. Summers of $4,000, claimed as being due to him under an agreement or bond of his father, the testator, dated 10th March, 1899, assigned to him three several mortgages given to the testator, amounting in the aggregate to $4,100. The difference between the $4,000 and a month's interest thereon and the $4,100, was accounted for by John R. Summers to the testator's estate.

The objection taken was that the agreement or bond was voluntary and without consideration, and payment thereof could not be enforced against the testator's estate by the obligee.

At the passing of the accounts by the executors, counsel for Margaret Summers objected to extrinsic evidence being given of another consideration than that mentioned in the agreement (which was "natural love and affection"), as it would contradict the deed. The evidence was received subject to the objection, and was to the effect that, twenty years prior to his death, the testator, who was a farmer, received an injury which incapacitated him from manual labour on the farm; that his two sons and their mother (who died in January, 1898) worked the farm they were then living on, and paid on a mortgage of $1,600 that incumbered it; that by their combined industry they accumulated sufficient money to purchase another farm, which was conveyed to the father and stood in his name; that the two farms were worked by the sons, and the profits arising therefrom deposited by them to the father's credit in a bank at Aylmer until June, 1897, when the moneys standing to his credit were, by his direction, transferred to the credit of William R. Summers & Sons, which firm included the two sons mentioned; that the moneys in the bank were, as opportunity offered, invested in mortgage securities, only one of which was taken to the members of the firm, the others being taken to the father.

Prior to the agreement of the 10th March being entered into, the son William B. Summers was married, and was then residing in the house on the farm conveyed to him; his father and his brother John were living with him. At that time John was about to marry, and it was thought better that there should be separate households, and the family arrangement was entered into, by which each of the sons was to become the owner of a farm; the funds in the bank to the credit of the firm were to be retransferred to the credit of the father; the father was to retain all the mortgages, including the one taken in the names of the partners, which was to be assigned to him. This arrangement was carried out, and the assets thus transferred amounted to about $14,000.

About a year later the father married a second time, and his widow is the present appellant.

In the agreement of 10th March there is a covenant by the father to pay his son John $4,000, although the same is not payable until the death of the covenantor. Had this been merely a voluntary covenant, the only effect would be

to postpone its payment "to simple contract debts which are bona fide owing for valuable consideration; but such bond or covenant, if not to the prejudice of creditors, must be paid by the executors, and in preference to legacies:" Williams on Executors, 9th ed., pp. 869-870; Cox v. Barnard, 8 Hare 32; Hales v. Cox, 32 Beav. In England a change was made in the law as to payment of voluntary creditors by the Judicature Act of 1875, sec. 10, which introduces into the administration of the estates of deceased insolvents the rule in bankruptcy that voluntary creditors are to be paid pari passu with creditors for value. See In re Whittaker, [1900] 1 Ch. 9. The above section is not embodied in our Judicature Act.

Were it necessary to shew any other consideration than that which appears in the agreement, natural love and affection, evidence of such other consideration was properly received: Clifford v. Turrell, 1 Y. & C. Eq. 138, 9 Jur. 632; Marsh v. Hunt, 9 A. R. at p. 602.

The evidence shews that on the 10th March a family arrangement was agreed upon and consummated. There were the conveyances by the father to the sons, by which each became the owner of a farm; the giving by the father of a bond to his son John for the purpose of effecting an equalization as between the two sons. Then there was a transfer by the two sons to the father of their interest in the fund standing to the credit of the firm in the bank; the assignment on the same day by the sons of their interest in the Nisbet mortgage for $1,000; and their agreement that the father should retain for his own benefit the other mortgage investments made from the funds in the bank. There was thus proved a general settlement and arrangement between these three, a division of the property in which all claimed an interest: Persse v. Persse, 7 Cl. & F. at p. 318; Williams v. Williams, L. R. 2 Ch. 294.

The only other point to be disposed of is that relating to the transfer by John R. Summers and his co-executor, Farthings, of the three mortgages belonging to the testator's estate in payment of the debt due to John R. Summers. There is nothing illegal or objectionable in this proceeding; the mortgage securities were taken at their par value. See Williams on Executors, 9th ed., p. 567; Elliott v. Kemp, 7 M. & W. at p. 313.

Appeal dismissed with costs.

MEREDITH, C.J. JULY 16TH, 1902.

CHAMBERS.

FOLEY v. TRUSTS AND GUARANTEE CO.

Executors and Administrators—Bill of Costs for Services to Testator—Proceeding for Taxation—Application by Residuary Legatee—Rule 938—Assets—Indemnity.

Motion by plaintiff (residuary legatee), under Rule 938, for an order requiring defendants, the administrators with the will annexed of the estate of the late John Foley, deceased, to take proceedings to obtain an order for the delivery and taxation of the bill of costs, charges, and disbursements of a firm of solicitors who acted for the testator in the matter of an arbitration between him and the corporation of the city of Toronto. There were no assets in the hands of defendants, and they declined to proceed for a taxation unless under the direction of the Court and on being indemnified against costs.

S. W. McKeown, for plaintiff.

W. R. Smyth, for defendants.

MEREDITH, C.J.:—In dealing with the motion, it is to be treated as if an order had been made for the administration of the estate: Re Warham, Hunt v. Warham, [1892] 3 Ch. 59; Re Sherlock, 18 P. R. 6.

The practice where such an order has been made, and it is desired to take proceedings against one who is alleged to be a debtor to the estate, appears to be—where the personal representative desires the leave of the Court to bring the action or take the proceeding—for him to apply for the leave, and where he does not wish to apply, but a beneficiary is desirous that the proceeding shall be taken, for the latter to apply, and an inquiry is then had as to whether any, and what, proceedings should be taken against the alleged debtor, and if the result of that inquiry is that it is determined that the case is a proper one for proceedings to be taken, leave is given to take them. If the personal representative has been guilty of no misconduct and desires to conduct the proceedings, they are taken by him at the expense of the estate. If there has been misconduct on his part, or the personal representative does not desire to take the proceedings, leave is given to the beneficiary to take them in the name of the personal representative at the expense of the estate. Where there are no assets, it would seem that the personal representative is, in either case, entitled to be indemnified against the costs

to be incurred by the person desiring that the proceeding shall be taken.

The facts disclosed on this application, I think, warrant the giving of leave on the terms of the plaintiff indemnifying the defendants against the costs of and incidental to the proceedings and paying the costs of this application, and leave will be granted on these terms. The defendants will have the right to take the proceedings if they desire to do so, and they may be such as are indicated in the notice of motion, or such proceedings as may be advised for obtaining from the solicitors an account of the moneys received by them on behalf of the testator, and payment of any balance which may be found to be due by them as the result of the accounting. See Barker v. Birch, 1 DeG. & S. at p. 381; Harrison v. Richards, L. R. 1 Ch. 473; Yeatman v. Yeatman, 7 Ch. D. 210.

MEREDITH, C.J. JULY 17TH, 1902.

WEEKLY COURT.

EARLE v. BURLAND.

Interest—Charging Accounting Party with—Further Directions —Costs.

Motion by plaintiffs for judgment on further directions and as to subsequent costs reserved by judgment at trial, as varied by the Court of Appeal and Judicial Committee.

F. H. Chrysler, K.C., for plaintiffs.

W. D. Hogg, K.C., for defendants.

MEREDITH, C.J.:—The only question in controversy is whether defendant G. B. Burland shall be charged with interest on sums which the local Master at Ottawa has, by his report of 11th April last, found him to be liable to account for and to pay over to defendant company under the reference directed by the judgment.

It is in accordance with the practice of the Court in a proper case to award interest against an accounting party on further consideration, although the question has not been reserved by the original judgment; and this is a proper case in which to direct the payment of interest by defendant Burland. Daniell's Chy. Prac., 7th ed., p. 950, and cases there cited, referred to.

Judgment directing defendant G. B. Burland to pay to defendant company the amount with which the local

Master has found him to be chargeable, together with interest upon it, and also the subsequent costs reserved by the judgment.

JULY 18TH, 1902.

DIVISIONAL COURT.

RAT PORTAGE LUMBER CO. v. KENDALL.

Contract—Division of Profits—Partnership—Question of Fact—Burden of Proof—Appeal.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., at the trial, in action to recover $2,486.30, being the amount claimed for lumber, etc., alleged to have been supplied by plaintiffs to defendant, and $1,500 alleged to have been advanced by plaintiffs to defendant. The defendant counterclaimed for $4,530.87, alleged to be due by plaintiffs under a contract for division of profits and for materials supplied. The trial Judge found that there was no dispute as to plaintiffs' claim, and, the evidence as to the counterclaim being conflicting, that the defendant had not satisfied the burden of proof; and he, therefore, gave judgment for the plaintiffs on their claim, and dismissed the counterclaim.

The appeal was heard by MEREDITH, C.J., MACMAHON and LOUNT, JJ.

R. C. Clute, K.C., for defendant.

N. W. Rowell, K.C., for plaintiffs.

THE COURT held that, on the evidence, it would be impossible to set aside the findings of the trial Judge; and, assuming that Kendall and Harty were partners, and that most of the work and expenditure in connection with the contract was by the partnership, with the knowledge of the plaintiffs, that would be of no avail to defendant in this action, which is against Kendall alone.

Appeal dismissed with costs; but judgment of trial Judge varied by adding a provision that it is to be without prejudice to defendant's rights in respect of the moneys received by plaintiffs on account of the contract with one Caldwell, and the same as to the sum allowed and deducted by the trial Judge from plaintiffs' claim.

FALCONBRIDGE, C.J. JULY 19TH, 1902.

TRIAL.

GREAR v. MAYHEW.

Vendor and Purchaser—Action for Purchase Money—Evidence—Trespass to Goods.

Action to recover $400, the purchase price of certain land which, as the plaintiff alleged, she agreed to sell to defendant, and of which the defendant obtained a conveyance without payment of the purchase money, and for damages for trespass to person and assault, and trespass to goods.

Solomon White, Windsor, and D. S. McMillan, Sarnia, for plaintiff.

F. W. Kittermaster, Sarnia, for defendant.

FALCONBRIDGE, C.J.:—As to the real estate transaction, the evidence of N. Gurd for defendant is quite clear and satisfactory; and as to the goods, plaintiff's evidence is not sufficiently satisfactory or lucid to found a judgment for any sum whatever. As defendant might have condescended to clear up that matter, if she could, by evidence on her part, the present action shall be dismissed without costs, and without prejudice to any action which plaintiff may be advised to bring in a Division Court in respect of the goods only.

ROBERTSON, J. JULY 21ST, 1902.

TRIAL.

BREAKENRIDGE v. MASON.

Building Contract—Action for Balance Due—Counterclaim—Evidence.

Action to recover $262.80, balance claimed by plaintiff for work on a barn. The defence was that the work was negligently and unskillfully performed, and the defendant also asserted a set-off, and counterclaimed for damages for material spoiled.

G. W. Wells, K.C., for plaintiff.

S. G. McKay, Woodstock, for defendant.

ROBERTSON, J., dealing with the case as a jury would, and reviewing the conflicting evidence, found all the issues for the plaintiff, in whose favour he gave judgment for $260.55, with interest from 1st November, 1901, and full costs on the High Court scale; and dismissed the defendant's counterclaim with costs.

JULY 15TH, 1902.

DIVISIONAL COURT.

MINERVA MANUFACTURING CO. v. ROCHE.

Costs—Scale of—Jurisdiction of County Court—"Amount Ascertained by the Act of the Parties or the Signature of the Defendant."

Appeal by the defendant from an order of FALCONBRIDGE, C.J., affirming a ruling of the senior taxing officer at Toronto that the costs should be taxed on the High Court scale.

The action was brought to recover $282.10 as the price of goods sold and delivered by the plaintiffs to defendant, the invoice for which comprised a great many items. The goods were shipped from Toronto by the Canadian Pacific Railway to the defendant's address at Ottawa, and on the day after their arrival at the Ottawa station were destroyed by fire. The defendant brought an action against the railway company for the loss of the goods, which was dismissed.

While the action against the railway company was pending plaintiffs threatened to sue defendant for the price of the goods, but after a discussion between the solicitors, the defendant's solicitor on the 21st November, 1901, signed the following undertaking on behalf of his client, addressed to the plaintiffs :

"We hereby admit liability of our clients to you for goods destroyed in the Ottawa fire, and agree to pay for them immediately after trial of our suit against the C. P. R., which we agree to get disposed of as expeditiously as possible; the consideration for the above being your agreement to wait till the said case is tried or otherwise earlier disposed of. And it is understood that the above admission of liability and agreement to pay is not conditional on our succeeding in said suit."

On 4th December, 1901, the plaintiffs commenced this action in the High Court for the price of the goods, and after the defendant had filed a statement of defence, she was examined for discovery, and the plaintiffs, on summary application, were allowed to enter judgment for the amount claimed with costs. Upon the taxation of such costs, the question arose.

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

A. C. McMaster, for plaintiffs.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.—By the County Courts Act, R. S. O. ch. 55, sec. 23, sub-sec. 2, that Court has jurisdiction "in all causes and actions relating to debt, covenant, and contract to $600, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant."

The defendant admitted that certain goods purchased by her from the plaintiffs were destroyed by fire at Ottawa, but there is no admission as to the value of the goods, and where the claim exceeds $200 it is only in cases where the "amount" is ascertained by the act of the parties or the signature of the defendant that the action is within the jurisdiction of the County Court. And had the plaintiffs proceeded to trial, in order to recover they must have given evidence as to the value of the goods which they had shipped to the defendant.

An affidavit made by the plaintiffs' solicitor was filed on the motion before the Chief Justice of the King's Bench, in which he states that the defendant's solicitor, when the undertaking of the 21st November was given, refused to admit the amount or value of the goods shipped.

We cannot interfere with the order made by the Chief Justice. The appeal will, therefore, be dismissed with costs, fixed at $20.

ROBERTSON, J. JULY 21ST, 1902.

PILGRIM v. CUMMER.

Partnership—Offer of Partner to Sell Share to Co-partners—Acceptance—Specific Performance — Terms—Improvidence—Security—Costs.

Action for an account of the transactions between plaintiff and defendants, who, in May, 1899, entered into partnership as manufacturers of aerated waters at Hamilton under the firm names of "Pilgrim Bros. & Co." and "The Hamilton Mineral Water Co., Pilgrim Bros. & Co., Proprietors," and continued until 15th February, 1902, when, the plaintiff alleged, the defendants excluded him from the partnership premises and affairs, since when the defendants have been carrying on business with the partnership assets.

The defendants alleged that prior to 15th February, 1902, they purchased the plaintiff's interest in the partnership; that on the 21st December, 1901, the plaintiff offered in writing to sell his interest to the defendants for $2,000 cash, upon his being freed from all liabilities of the firm, and to covenant not to carry on the same kind of business within 200 miles of Hamilton, and to procure his wife to join in such covenant and to secure it upon her property in Hamilton; that the defendants accepted the offer, and had always been ready and willing to carry it out, but the plaintiff had refused to do so on his part; and the defendants asked for specific performance of the agreement.

The plaintiff replied that the offer or agreement was an improvident one, and that he was not able to carry it out because of his wife's refusal to give the security mentioned.

G. Lynch-Staunton, K.C., and E. H. Ambrose, Hamilton, for plaintiff.

J. P. Mabee, K.C., and G. C. Thompson, Hamilton, for defendants.

Robertson, J.—I am forced to the conclusion that what is alleged by plaintiff in reply to the defence set up by defendants is substantially true, and I, therefore, find all the issues of fact in favour of plaintiff. . . . I find specifically that plaintiff always was, and now is, ready to carry out the agreement on his part, and that it is a fact that he has been unable to procure his wife to execute the security mentioned in the letter containing the offer. And I think defendants are entitled to have judgment for specific performance of so much of the agreement as is not involved in plaintiff procuring the execution by his wife of the covenant in said letter mentioned. I am of opinion that plaintiff, when he signed the letter, did not intend to bind himself to procure his wife to join in the covenant so as to charge her lands with a consequence of the breach thereof on the part of plaintiff, and I so find. He promised, no doubt, to ask her to do so; but to be bound that she would do so, or that he would accept an abatement from the purchase money of $2,000 in case she refused, he had not in contemplation; and, in my judgment, it would not be just or equitable to order any abatement, or to compel plaintiff to furnish other security. . . .

The authorities are overwhelming that plaintiff cannot be compelled to procure his wife to charge her lands, even if he

had intended to agree that she should do so. Courts of Equity long ago endeavoured to enforce specific performance of such agreements; but all they could do then was to imprison the husband until the wife complied, but that was at last determined to be unreasonable. . . . Now the rule is not to decree specific performance of such an agreement, leaving the party aggrieved to seek compensation for any loss. As to loss, however, or damages therefor, how can they be assessed here? If the plaintiff performs his covenant not to carry on the same business, there is no damage; and, as the Courts afford ample protection by injunction, the defendants are amply protected. . . .

In regard to the costs, it is clear from the evidence and correspondence that plaintiff was ready and willing and by his solicitors offered before the action was commenced to do and perform all that plaintiff was legally or equitably bound to do; but, by a system which has not commended itself to my mind, the defendants have endeavoured to force plaintiff into doing what was unconscionable, thus driving him into this litigation. The defendants should pay to plaintiff the costs of this action.

[The following authorities, among others, were considered: Van Norman v. Beaupre, 5 Gr. 599; Loughead v. Stubbs, 27 Gr. 387; Fry on Specific Performance, sec. 1222. and cases cited; Hughes v. Jones, 3 DeG. & F. 1, 315.]

FALCONBRIDGE, C.J. JULY 30TH, 1902.

TRIAL.

STYLES v. TOWERS.

Way—Private Way—Easement—Implied Grant—Intention.

Action for damages for deprivation of use of an alleged right of way; and for a declaration as to plaintiff's right, and for an injunction.

The plaintiff claimed a right of way by implied grant, or by general words, such as those used in R. S. O. 1897 ch. 119, sec. 12, treating the right as a quasi-easement, not of absolute necessity, yet in some sense essential to the enjoyment of the property conveyed to him.

J. A. Robinson, St. Thomas, for plaintiff.

C. F. Maxwell senior and C. F. Maxwell junior, St. Thomas, for defendants.

FALCONBRIDGE, C.J.—The numerous cases cited by plaintiff do not establish his contention; and this is not a case where there was a right of way existing from one close to another, which has become merged by the fact of the same person having become the owner of both properties, but is at most the user of a way which has been made by the owner of adjoining closes, and first used during unity of possession. It is not in continuous use like a waterway; and, therefore, would not pass by general words, unless the necessary intention were shewn that it should pass; and such has not been shewn in this case. I refer to Thompson v. Waterlow, L. R. 6 Eq. 36; Bolton v. Bolton, 11 Ch. D. 968; Goddard on Easements, 3rd ed., p. 139; and Elphinstone on Interpretation of Deeds, Bl. ed., p. 192. Taking this view, I deem it unnecessary to consider the effect of the mortgages, or of the part discharge thereof.

Action dismissed without costs.

JULY 31ST, 1902.

DIVISIONAL COURT.

RE WILLIAMS.

Trustees—Remuneration of—Quantum of Allowance—Capital—Income Solicitor-trustee—Profit Costs.

Appeal by G. M. Macdonnell, one of two trustees of the estate of E. Williams, deceased, from an order of the Judge of the Surrogate Court of Frontenac fixing the appellant's remuneration for his care, pains, and trouble in and about the estate for the period since August, 1891. The Surrogate Judge allowed the trustees five per cent. upon the interest collected, and made no allowance of any kind for any other services, giving as a reason that he had in a former order fixing the remuneration up to August, 1891, and allowed the trustees two and a half per cent. for taking over the principal.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

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

J. A. Hutcheson, Brockville, for the other trustee and the beneficiaries.

The judgment of the Court was delivered by

STREET, J.—The Court is warranted under Re Berkeley's Trusts, 8 P. R. 193, and the authorities there referred to, in holding that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make to them an annual allowance for their services in looking after the corpus of the fund, receiving repayments upon principal, and re-investing it; and this allowance should not depend upon the amount so collected and re-invested, but should be a fixed annual allowance based upon the nature of the property and the consequent degree of care and responsibility involved. Under the authorities referred to the Surrogate Judge adopted an erroneous basis for the remuneration of the trustees during the period ending in 1891, in allowing them a percentage upon the principal sum taken over, and nothing for the collection of interest upon the trust fund during the period, excepting for the interest accrued at the testator's death; he should have allowed the trustees nothing for taking over the estate, but should have allowed them a percentage upon all the interest collected and paid over, and an annual sum for the care of the estate. The amount allowed the trustees in 1891 should, perhaps, upon any final computation of their remuneration, be treated as a satisfaction for their services in the collection of interest and the care of the principal down to 1891, rather than for the taking over of the principal; which seems to be a matter to be dealt with at the conclusion of the trust. The sum allowed for taking over the principal by the former order had all been well earned during the period covered by that order, in caring for the principal and collecting the interest during that period, and the trustees were entitled to a new allowance based upon their services between 1891 and 1902; and $100 per year would be a reasonable and proper allowance to make for the receipt of repayments on principal invested, their re-investment, and the constant watchfulness and care required in order to guard from loss a fund invested upon ordinary securities. In addition to this, the allowance of 5 per centum made by the Surrogate Judge for the collection of the interest and its payment over

to the persons entitled under the will, is by no means excessive, when the nature of the securities (small mortgages) is considered; the result being a yearly charge to the trust of about $280 in all, for management, a sum representing less than one-half of one per cent. per annum upon the principal of the fund. The appellant should have been allowed $2,314, instead of the $1,500 allowed him by the Surrogate Judge.

Regarding the question raised before the Surrogate Judge as to the appellant's having charged certain profit costs to the estate to which he was not entitled, the general rule is that a trustee-solicitor is not entitled to charge the estate with any professional services; but an exception, which is not to be extended, has been established by the decision of Lord Cottenham in Cradock v. Piper, 1 D. M. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustees, is entitled to recover profit costs, and, therefore, to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This exception is not to be extended to proceedings or professional services rendered to the estate out of Court: Re Corsellis, 34 Ch. D. 675; Re Mimico Sewer Pipe Co., 26 O. R. 288; Lewin on Trusts, 10th ed.; Broughton v. Broughton, 5 D. M. & G. 160; and Re Doody, [1893] 1 Ch. 129, 138, 139, 141.

There are charges in the appellant's accounts for professional services which do not come within the exception sanctioned by Cradock v. Piper; and these should be deducted. If there should be any dispute as to such items, the matter may be spoken to again, and a reference ordered, if necessary. Costs of appeal to be paid out of Court to all parties, to be taxed as between party and party.

JULY 31ST, 1902.

DIVISIONAL COURT.

MIDDLETON v. SCOTT.

Mortgage—Mortgagee's Costs—Unnecessary Proceedings—Tender—Waiver.

Appeal by plaintiff from order of STREET, J., 3 O. L. R. 27, allowing defendant's appeal from report of local Master

at Chatham, to whom this action (for redemption) was referred; and cross-appeal by defendant (mortgagee) from so much of such order as precluded defendant from having the costs of the action and deprived defendant of interest post diem at the rate of 8 per cent. per annum, as stipulated for in the mortgage deed.

M. Wilson, K.C., and J. B. O'Flynn, Chatham, for plaintiff.

W. E. Middleton, for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MACMAHON, J.:—Counsel for plaintiff contends that the conduct of defendant's solicitor in claiming from plaintiff $8.13 in connection with some alleged proceedings under the power of sale in the mortgage, in addition to principal and interest, amounted to a dispensing with a tender of principal and interest to the agent and solicitor of defendant. [Reference to Ex p. Darch, 22 L. J. N. S. Bkcy. 75; Jones v. Tarleton, 9 M. & W. 675; Kerford v. Mondel, 20 L. J. Ex. 303; Llade v. Morgan, 23 C. P. 517; Robbins on Mortgages, pp. 710, 711; Fisher on Mortgages, p. 1503.]

There is nothing in the evidence or correspondence that would warrant the view that a tender of the principal and interest was dispensed with, and the solicitor's claim for $8.13, the costs of the alleged proceedings under the power of sale, could by no possibility dispense with a tender of the amount due on the mortgage; and, there being no tender and no dispensation with a tender, the interest continues to run.

Although by paragraph 3 of the judgment of reference the Master is directed to report specially his findings on all matters relating to the alleged tenders or excuses for tender, and to any matters affecting the question of costs, since the question of costs is not reserved to be afterwards dealt with, this direction is an inconsequential and useless one; and, in any case, insufficient to control the direction contained in paragraph 4 to tax costs, and the provision of Rule 756, that they shall be taxed to defendant; and therefore Mr. Justice Street's view that the costs of the action, except in the event mentioned in paragraph 7, are not dealt with, is erroneous; and under the terms of the judgment, in the event that has happened, the defendant is entitled to the costs

of the action. The provision in the mortgage that interest is to be paid at the rate of 8 per cent. per annum after maturity means after the principal money has become payable, that is to say, after the expiration of the five years as well as before, and in that view of its meaning there is no room for the application of the principle applied in such cases as People's Loan Co. v. Grant, 18 S. C. R. 262, such a construction of the proviso for redemption being here excluded by the provision that interest at 8 per cent. is to be paid after the maturity of the principal sum—in other words, after the principal sum has, according to the terms of the proviso, become payable.

Plaintiff's appeal dismissed with costs, and defendant's cross-appeal allowed with costs; and order of STREET, J., varied by directing interest on the whole $324 to be calculated at rate of 8 per cent. per annum, and the defendant's costs of the action to be added to the principal and interest.

ROBERTSON, J. JULY 28TH, 1902.

WEEKLY COURT.

FALLS v. BANK OF MONTREAL.

Lunatic—Residence abroad—Domicil in Ontario—Money in Bank in Ontario—Right of Foreign Committee to—Change of Domicil—Private International Law—Costs.

Motion on behalf of plaintiff, Frederick W. Falls, a lunatic so found by judicial declaration of a Court in the State of Pennsylvania, by Charles William Allen, his committee, for judgment on the pleadings in an action for payment by defendants to the committee, for plaintiff, of $2,005.50 and interest from 31st December, 1901, and for a declaration that such payment is a valid discharge of defendants. The moneys in question were deposited by the plaintiff, before he was declared insane, with the defendants in the savings bank department at the Yonge street branch in the city of Toronto. The defendants admitted that they had the money on deposit, and claimed the protection of a judgment before paying it over, and asked for costs. The plaintiff is a British subject, born in the Province of Ontario, 30 years ago, and resided therein until about four years ago, when, after travelling in

Europe, he went to Philadelphia, where his mother and sister lived, and where he has since resided. He is an artist, and had a studio in Philadelphia, where he painted numerous pictures of considerable value. The principal part of the moneys in question were remitted by plaintiff to the defendants from Philadelphia in a letter dated the 31st December, 1901. He became a lunatic on the 9th January, 1902, and Allen was appointed committee of his estate (consisting of about $12,000) on the 3rd March, 1902.

S. B. Woods, for plaintiff.

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

Robertson, J.—A British subject, before he can be held to have become a subject or citizen of a foreign country, must not only express clearly an intention to do so, but must perform some act from which the inference to be drawn is conclusive. In re Patience, 29 Ch. D. 976, Bell v. Kennedy, L. R. 1 H. L. Sc. 307, Udny v. Udny, L. R. 1 H. L. 441, Moorhouse v. Lord, 10 H. L. C. at p. 291, Doucet v. Geoghegan, 9 Ch. D. 441, Urquhart v. Butterfield, 37 Ch. D. 357, King v. Foxwell, 3 Ch. D. at p. 520, and Didisheim v. London and Western Bank, [1900] 2 Ch. 15, considered.

The plaintiff's original domicil was in Ontario, and there is no evidence that by any act of his he has changed it. There is nothing to shew any intention to become an American citizen. The lunatic is, therefore, a British subject, and the fund being in this country, the complexion of the case is altered in regard to the disposal of it. As the lunatic has been judicially declared such by the Court in Philadelphia having jurisdiction in that behalf, and as that Court has authorized its officer, the committee, to take these proceedings, on general principles of private international law the Courts of this country are bound to recognize the authority conferred on him by that Court; and if a proper case is made out to warrant the Court, in its discretion, in ordering the amount to be paid over, it should be so ordered. If the amount now sought to be recovered were necessary for the maintenance of the lunatic, it should be paid over to the committee. The committee is not entitled to get in all the estate, wherever found, for the purpose of preserving it. In re Brown, [1895] 2 Ch. 666, referred to. The committee has in his hands money and property of the value of more than $12,000. So that this money is not

necessary for the support of the plaintiff. Therefore the defendants should not be ordered to pay over the whole sum, but the defendant should be discharged upon payment of the amount into Court to the credit of plaintiff, and the interest now accumulated should be paid over to the committee, who may apply for further payments of interest or principal as occasion may arise. The defendants are entitled to costs, as between solicitor and client, out of the fund. Vane v. Vane, L. R. 2 Ch. 124, Jones v. Lloyd, 22 W. R. 787, In re Bligh, 12 Ch. D. 364, In re Tower, 32 Ch. D. 39, and New York Security Co. v. Keyser, [1901] 1 Ch. 666, referred to. Judgment accordingly.