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ARDAGH, CO.J. SIMCOE. FEBRUARY 25TH, 1905.

CHAMBERS.

REX EX REL. PAYNE v. CHEW.

Municipal Elections — Town Councillor — Disqualification—Contract with Corporation—Exemption of Partnership from Taxation — Qualification — Interest in Partnership Property in Part Exempted—Status of Relator—Voting for Respondent—Secrecy of Ballot—Prohibition against Violating.

Application by the relator in the nature of a quo warranto to declare the respondent disqualified from holding his seat as a member of the council of the town of Midland, a fiat for that purpose having been granted.

Before the application came on to be heard, the relator was cross-examined upon the affidavit he had made before obtaining a fiat.

The objections made by the relator were: (1) that the respondent was disqualified by reason of his having an interest in a contract with the corporation of the town of Midland; (2) that he was not qualified, by reason of his not being assessed sufficiently under sec. 76 of the Municipal Act, 3 Edw. VII. ch. 19.

The relator also objected that the respondent did not reside in the town of Midland, and he claimed the seat on behalf of one Wilson.

At the hearing it was admitted that the respondent resided within the two miles allowed by sec. 76 of the Act, and any claim to the seat for Wilson was formally abandoned.

W. A. Finlayson, Midland, for relator.

F. E. Hodgins, K.C., and D. S. Storey, Midland, for respondent.

ARDAGH, Co.J.—At the election for municipal councillors for the town of Midland, held in January last, the respondent was declared duly elected, as having the second highest number of votes.

At the hearing before me the respondent was examined on behalf of the relator. His evidence, so far as it is material, was as follows:—

That he was a member of the firm of Chew Bros., which consisted of his father, George Chew, one Edwin Leatherby, and himself. Up to about 3 years ago the firm consisted of George Chew and his brother Thomas Chew.

In 1902 or 1903 respondent and Leatherby purchased the business, and in 1904 (about midsummer) George Chew became and still continues to be a member of the firm, but no writing passed, only "word of mouth."

The property assessed consists of some 12 or 13 acres leased by the Grand Trunk Railway Company to George Chew and Thomas Chew (Chew Bros.) in September, 1895, for a term ending 31st December, 1905.

The Grand Trunk Railway Company are the owners of considerable property (of which the above 12 acres form a part), and they are assessed for and pay taxes on the same upon an assessment of $75,000, by an agreement with the town, confirmed by 61 Vict. ch. 47, upon the entire property of the company.

Upon the 12 acres so leased, buildings of various sorts to the value of $30,000 at least (the respondent stated) have been erected and are owned by the firm of Chew Bros., the railway company having no interest therein.

Under an agreement made by Chew Bros. with the corporation in 1894, the assessment of the former was fixed at $2,000, but their agreement had to be confirmed by an Act of the provincial legislature (3 Edw. VII. ch. 65), which enacted that "the assessment of the said property of the said Chew Brothers, being the mill yard and buildings connected with and used by the said Chew Brothers in their business, is fixed for all purposes, including school rates, at the sum of $2,000 for the years 1903, 1904, and 1905."

The following is an extract from the assessment roll of Midland for last year, 1904:—

"200 Chew Bros. Con. 1 Tay, Pt. of 108. G.T.R. lease.

201 Leatherby, Edwin, M.F.F.

202 Chew, Manley, M.F.F. $2,000.00."

From this it would appear that they are not styled tenants, but freeholders,—that being the word for which the

letter F (after M.F.) stands. It is under this assessment that the respondent qualified.

The statute 3 Edw. VII. ch. 19 (O.), by sec. 76 enacts that no person shall be qualified to be elected a councillor of any local municipality unless he has, at the time of the election, as owner or tenant, a legal or equitable freehold or leasehold, or an estate partly freehold and partly leasehold, or partly legal and partly equitable, which is assessed in his own name on the last revised assessment roll, to at least the value following, over and above all charges, liens, and incumbrances affecting the same—in towns, freehold to $600, or leasehold to $1,200.

Before I consider these two points I may say that an objection was taken by Mr. Hodgins, acting for the respondent, that the relator had no status as such, having voted for the respondent at the election in question.

Evidence was given before me by three several witnesses that the relator had stated to them that he had so voted, and these statements were made both before and after these proceedings were begun.

To this Mr. Finlayson, for the relator, put in his cross-examination upon the affidavit he made to obtain the fiat for these proceedings, in which he says:—

"I did not vote for Chew (the respondent) this year, but I told Mr. Chew I did vote for him, as I did not want to create any hard feelings. It was after these proceedings were taken that I told Chew I had voted for him at the 1905 election. I did not mind telling a little falsehood, but I was not then under oath as I am now. I also told Mr. Craig that I voted for Mr. Chew. Didn't tell any one else that I can remember . . . if I told anybody immediately after the election that I voted for Chew it has escaped my recollection."

And Mr. Finlayson contends that this denial on oath by the relator that he voted for Chew outweighs his admissions to the contrary, not made on oath, and which should therefore be rejected.

It is, of course, well established that if the relator did actually vote for the respondent he has no status here. Some difficulty occurs to me here as to how it is ever brought out that a relator has voted for a respondent.

It is quite clear that under sec. 200 of the Act he could not "be required to state for whom he has voted," and it appears from the judgment of the late Chief Justice Moss in Re Lincoln Election, 4 A. R. 206, that evidence of statements voluntarily made by a voter as to how he voted cannot be

received (sec. 115 of the then Election Act referred to in the judgment corresponds with sec. 200 of our present Municipal Act).

It seems to me, however, that that case and the present are not quite analogous.

There the statement was relied upon to shew how the witness voted so as to ascertain whether he voted for the respondent or not. And the fact as to how he voted was an issue upon which the election depended, either in part, or, it might be, in whole, if the vote of this witness would decide the election. How this relator voted is not in issue here except so far as it is a side issue raised on the argument.

If the voluntary statements of relator, both before and after these proceedings were commenced, that he had voted for respondent be received to shew that he has now no status here, I cannot accept his statement on cross-examination that he did not so vote, as a sufficient rebuttal.

The admission that he had voted for the respondent was evidently made before he became aware of the effect of such an admisison, and I have no doubt that after he became aware of it, he tried to repair the mischief he had done. I am not trying in this case the question as to whom the relator voted for, or I might perhaps have to consider whether it would be right to refuse to allow the relator's oath to outweigh his oral statements to the contrary. All I can say at present is that I consider the denial on oath is not evidence. The question was put in contravention of sec. 200, and so I am bound to reject the answer whether on oath or not.

If I am not to accept as evidence the statements of the relator previous to the matter coming up for adjudication, I am at some loss (as I stated above) as to how the knowledge how a relator voted was obtained, in those cases where the fact that he so voted was held sufficient to take away his status. If I were now driven to decide upon it, I should say the relator now is disqualified. I will, however, leave this point in medio, as I prefer to decide the question on its merits.

The next point to be considered is as to the qualification of the respondent: and, first, is the respondent assessed as a freeholder or a leaseholder? The roll shews "F" opposite his name, shewing that he is a freeholder: see the Assessment Act, R. S. O. 1897 ch. 224, s. 13 (4). The assessor has also placed the assessment of $2,000 in the column headed "Total value of real property."

It becomes unnecessary, therefore, to consider whether, as the railway company are assessed for "the entire property of

the company" at $75,000, and pay taxes thereon, the portion leased to Chew Bros. could be rightly taxed over again.

The assessment roll I must consider as conclusive, and it shews the respondent and his partner assessed at $2,000 for certain "real property." Under the Assessment Act, sec. 2, "real property" and "real estate" include "all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty."

The assessor appears, therefore, by his action to have intended the assessment to be upon the buildings, etc., for, though he has placed opposite the respondent's name "G.T.R. lease," this must have been only to distinguish what portion of "Con. 1 Tay, part lot 108" (which he had just before entered on the roll) he intended to assess.

Evidence was tendered to shew that, besides the respondent and Leatherby, George Chew was a partner in the business, though "only by word of mouth" as respondent stated. Even if I should hold that this was sufficient to deprive the respondent of any claim to more than one-third of the property, there was still enough to permit three persons to qualify—the assessment being $2,000, and the required qualification only $600—that is, by considering the property assessed as "real property." The case of Regina ex rel. McGregor v. Kerr, 7 U. C. L. J. O. S. 67, shews that this $2,000 may be equally divided to qualify candidates, as well as to qualify electors.

Another objection was taken by Mr. Finlayson, viz., that this property was affected by a large incumbrance.

The evidence the respondent gave on this point was this: "The property is subject to $2,000 and upwards of liens, charges, and incumbrances." And to Mr. Hodgins he stated: "We gave the bank security to the extent of $10,000 for money borrowed . . . timber limits are part of the security to the bank—value $60,000 to $80,000."

The manager of the bank, Mr. Craig, being called, said that the timber limits were sufficient to satisfy the bank.

This, then, would appear to me to be a case for marshalling, and it must not be forgotten that, taking an equitable view of the case, the firm of Chew Bros. have, in a manner, contributed their quota to the taxes of the municipality by carrying out their agreement to do certain things (for the evident benefit of the municipality) which entitled them to exemption from taxation, except as to the $2,000 agreed on.

The statute evidently intended that no one should have the right to be a member of the governing body unless, first, he owned a certain amount of property, and, secondly, that he was assessed therefor, so as to be liable to be called upon to pay his share of the amount to be made up for municipal purposes.

Well, the respondent appears to own a much larger amount of property than is required to qualify, and if he does not appear on the assessment roll as liable for taxes on it, he, as I have said, does, indirectly, do so.

The respondent appears to stand second on the poll, and the ratepayers have thus expressed their confidence in him, so that I would be loath to set aside their choice, unless I was clearly driven to do so.

I come now to the last question to be considered, and that is the alleged disqualification of the respondent.

Section 80 of the Act enacts that "no person having by himself or his partner an interest in any contract with or on behalf of the corporation . . . shall be qualified to be a member of the council of any municipal corporation."

And it is charged that, by reason of the agreement above set out, whereby Chew Bros. are exempt from any taxation beyond $2,000, the respondent is disqualified.

In the first place, no contract is shewn to exist between respondent and the corporation.

A contract for this exemption exists between the firm of Chew Bros., consisting of George Chew and Thomas Chew, and they gave good consideration for the exemption.

When they transferred the business to the new partners, the respondent (Manley Chew) and Leatherby, they, doubtless, had to pay for the benefit attached to the property by reason of the exemption, and that exemption cannot be said to benefit them so as to bring them within the spirit of the Act.

I think it immaterial, however, to consider that point.

I am referred to the case of Regina ex rel. Harding v. Bennett, 27 O. R. 314, in support of the objection. Without, however, going into an examination of that case, I would point out that the Municipal Act of that day has been materially amended since on that point.

The amendment I refer to is that contained in the Municipal Amendment Act, 1903, 3 Edw. VII. ch. 18, sec. 17, and this amendment has been carried into the following Act, ch. 19, that which governs throughout in this case.

There we find it enacted that no person shall be held disqualified . . . (b) "by reason of any such exemption

being founded on any contract or agreement made between him and the council . . with respect to such exemption."

And then it is further enacted that though he is not disqualified under such a contract, yet "no person shall vote on any question affecting the property so exempt from taxation." This, then, is all the penalty attached to being a party to such a contract.

The contract in question is one made with respect to the exemption created by it, and it does not, therefore, in my opinion, disqualify the respondent.

The motion must be dismissed, and, following Regina ex rel. Harding v. Bennett (supra), with costs, including the costs of examinations and cross-examinations.

The following were some of the other cases referred to on the argument. Though I have endeavoured to be guided by them as far as possible, I have not thought it expedient to import any of the language used in them into my judgment, which is sufficiently long without that: Rex ex rel. McLeod v. Bathurst, 5 O. L. R. 573, 2 O. W. R. 246; Rex ex rel. Ivison v. Irwin, 4 O. L. R. 192, 1 O. W. R. 371; Regina ex rel. Burnham v. Hagerman, 31 O. R. 636; Regina ex rel. Ferris v. Speck, 28 O. R. 486; Regina ex rel. Joanisse v. Mason, ib. 495; Toronto General Trusts Corporation v. White, 3 O. L. R. 519, 5 O. L. R. 21, 1 O. W. R. 198, 760; Davis v. Taff Vale R. W. Co., [1895] A. C. 542; Smith v. Richmond, [1899] A. C. 448.

SCOTT, LOC. MASTER AT OTTAWA. MARCH 2ND, 1905.

MASTER'S OFFICE.

GRAHAM v. McVEITY.

Chose in Action—Assignment of—Salary of City Solicitor—Agreement — Repudiation — Action—Notice to City Corporation—Service on Treasurer — Public Policy — Public Officer—Equitable Assignment—Parties.

An action referred to the Master for trial and adjudication under the provisions of the Arbitration Act. Plaintiff claimed on two agreements, both dated 29th October, 1901, whereby an indebtedness from defendant McVeity to plaintiff of $1,715.83, bearing interest at 8 per cent., was acknowledged, and provision made for its gradual liquidation, and whereby the whole of defendant McVeity's salary as solicitor for defendants the corporation of the city of Ottawa, amounting to $2,500 per annum, was assigned to plaintiff. One of the

agreements authorized plaintiff to collect defendant McVeity's salary from the city treasurer each month, as the same became payable, until the whole of the indebtedness with interest, together with the amount of any future advances made by plaintiff to defendant McVeity, with interest at the rate aforesaid, should be fully paid and satisfied. By the other agreement defendant McVeity agreed to pay off his indebtedness, with interest at 8 per cent., in monthly instalments of $40 each. Plaintiff agreed to accept payment of the same in instalments of $40 or more per month, and not to enforce the assignment so long as no default was made in payment of the instalments. Both agreements referred to and confirmed a previous assignment of salary to plaintiff, dated 8th March, 1898. Plaintiff claimed the full balance of the indebtedness.

The defence of defendant McVeity was that at the date of the issue of the writ, 2nd July, 1904, there had been no default and that in consequence nothing was due.

G. F. Henderson, Ottawa, and G. D. Graham, Ottawa, for plaintiff.

J. E. O'Meara, Ottawa, for defendant McVeity.

Taylor McVeity, Ottawa, for defendant corporation.

THE MASTER.—No date is fixed for the payment of the first instalment, nor is the day of the month on which instalments are to be paid specifically set forth. The first payment was in fact made on 2nd November, and the agreements bear internal evidence that payments were to be made at or about the beginning of each month. Plaintiff is authorized to collect the salary "each month as the same becomes payable;" but he agrees not to enforce the assignment so long as no default is made in payment of the instalments. It appears to me to have been the intention that an instalment should be paid each month at the time of receipt by defendant McVeity from the city of his monthly cheque, which is shewn to have been at the beginning of each month. Reckoning in this way, the 33rd instalment was due on 1st July, 1904, the day before the issue of the writ. The payments on account after the first two, were made quite irregularly, both as to amount and time of payment, and Mr. McVeity was frequently in default. On 23rd December, 1903, a notice reciting default and claiming under the assignment was served on the city treasurer, but nothing further was done, and other payments were subsequently made. On 8th March, 1904, while Mr. McVeity was in England, plaintiff secured from the

city treasurer his whole monthly instalment of salary, amounting to $208.33. This took place without the knowledge of Mr. McVeity, and on his return on 22nd March, in consequence of his protest, plaintiff returned him $100. I am quite clear that this cannot be treated as a new advance. It was evidently a refund out of the salary cheque, reducing the payment on account to $108.33. This makes the total payments for the whole period $1,188.33, and 33 instalments of $40 each would be $1,320. Even if we assume the time of payment to have been the end of each month, and exclude the July instalment, defendant McVeity was still clearly in default at the time of the issue of the writ. Quite apart from this, I think plaintiff is entitled to recover on the ground that defendants have repudiated the agreements. On 29th April Mr. McVeity wrote to the city treasurer as follows:—

"I hereby withdraw all orders heretofore given by me to Dr. Charles E. Graham in connection with my monthly cheques, and hereby forbid you hereafter to deliver my cheque to Dr. Graham or to any one on his behalf or to any person other than myself, and I hereby require you to deliver the same to me each month after the same has been signed."

On 28th May a notice similar to that of 23rd December, 1903, was served on the city treasurer. On 3rd June Mr. McVeity wrote plaintiff asking for an adjustment of the account, and adding, "So soon as it is adjusted I intend to provide for the payment in full of the balance due you;" and again on 15th June, "Since the receipt of your letter I have not had an opportunity of going over the account, but shall do so before the end of the month and shall see you on the subject of a settlement." Then on 2nd July, when Mr. McVeity's monthly cheque was again due, Mr. Geo. D. Graham, acting for plaintiff, applied to the city treasurer for payment, but was refused, the treasurer basing his refusal on Mr. McVeity's letter. This was all, to my mind, clear intimation to plaintiff that defendants did not propose to further carry out the terms of the agreements, and sufficient justification for his commencing an action. I therefore find that plaintiff is entitled to recover from defendant McVeity $790.95, being the balance due for principal on 28th April, 1904, the date of the last payment on account, together with subsequent interest on that sum.

The defendant corporation raises several defences, one of which is that the assignment of the unearned salary of a public officer is void as against public policy. This is of

course clear law, the only question being whether the city solicitor is a public officer within the meaning of the rule.

Part V. of the Municipal Act deals with officers of municipal corporation. Division I. deals with The Head; II., The Clerk; III., The Treasurer; IV., The Assessors and Collectors; V., Auditors and Audit; VI., Valuators. In each of these cases provision is made for the election or appointment of the officer, and his duties are defined. Division VII. deals with the "Duties of Officers respecting oaths and declarations," and Division VIII. with "Salaries, tenure of office, and security." This last division, in sub-sec. 3 of sec. 320, contains the only reference to a solicitor to be found in the Act. It is to the effect that where a municipality employs a solicitor whose remuneration is wholly or partly by salary they may nevertheless in certain cases recover costs. The by-laws of the defendant municipality relating to the subject have been put in. They define the duties of the city solicitor and fix the salary to be paid to him. The defendant McVeity was however appointed, not by by-law, but by a resolution of the council. The office of city solicitor is not therefore a statutory office, but one established solely by by-law; and the relations of the city solicitor to the municipality are purely contractual. . . .

[Reference to Am. & Eng. Encyc. of Law, 2nd ed., vol. 23, p. 322, under the head of "Public Officers;" p. 324, under the caption "Distinction between office and employment;" Mechem's "Law of Public Offices and Officers," secs. 1, 5; Henly v. Mayor of Lyme, 5 Bing, 107; White & Tudor's Leading Cases, vol. 2, p. 894, notes to Ryall v. Rowles; Flarity v. Odlum, 3 T. R. 681.

It cannot, I think, be said that the salary or retainer paid by the city to the solicitor it chooses for the time being to employ (and who, it must be remembered, is in no way precluded from carrying on a general practice at the same time) is either "paid to him for the purpose of keeping up the dignity of his office or to assure the due discharge of its duties," or is "granted for the dignity of the state and for the decent support of those persons who are engaged in the service of it." It is paid in return for the legal services rendered and for no other purpose. It, to my mind, differs in no essential particular from a fee paid to an independent counsel for appearing for the city in a specific action. . . . In In re Mirams, [1891] 1 Q. B. 594, a decision of Cave, J., the chaplain to the Birmingham workhouse and to the Birmingham workhouse infirmary, made an assignment of his

unearned salary, which was attacked on the ground, among others, that he was a public officer holding a public appointment, and paid out of the public funds, and that the assignment was therefore void as against public policy. The appointment was solely in the hands of the Birmingham guardians, and the salary was paid out of the local rates; but the insumbent was removable only by the local government board. It was held that the chaplain was not a public officer within the meaning of the rule. The judgment is quite in point. . . . This decision is, I think, fatal to the contention under consideration. The case was a much stronger one than the present for invoking the rule by reason of the fact that the chaplain though appointed by the guardians was not removable by them. Here the corporation by resolution appoints a solicitor with whom they contract to perform certain duties for a certain remuneration, but whom, subject to the terms of their contract, they can dismiss at pleasure. He is paid, not out of national funds nor under the authority of a statute, as in Central Bank v. Ellis, 20 A. R. 364, to be presently referred to, but by the corporation, under the authority of a by-law. The office is not public in the strict sense of that term, and the due discharge of the duties is only in a secondary and remote sense for the public benefit. It is not, in the light of In re Mirams, public within the meaning of the rule.

Mr. McVeity relied on Central Bank v. Ellis, but it does not help him. It was there held that the salary of a police magistrate appointed by the Crown, but paid by a municipality, could not, on grounds of public policy, be attached. Osler, J.A., puts the decision on the ground that the office of police magistrate is a public, judicial one, the incumbent of which is appointed directly by the Crown, by whom alone he can be removed, and he pointed out that the fact that the legislature has chosen to provide for payment of a salary by the municipality can make no difference. . . . It is plain that the present is in all respects the converse case. The city solicitor is not appointed by the Crown, nor even under the authority of any statute. His salary is not fixed by the legislature, but by a by-law of the municipality. It does not attach to the office, nor is its payment made obligatory on the municipality, but it is a mere matter of contract between the latter and the officer. On the authority of this case, therefore, as well as on that of In re Mirams, it is clear that the city solicitor is not a public officer within the meaning of the rule.

Another defence raised by the city is that the assignment does not come within the terms of sub-sec. 5 of sec. 58 of the Judicature Act, and that, being therefore an equitable assignment merely, the action should have been brought in the name of the assignor. The short answer to this is that all parties are before the Court, and that nothing more is required even in the case of an assignment that is purely equitable.

It is further contended that leaving the documents with the city treasurer was not notice of the assignment to the corporation. I do not deem it necessary to deal with this objection at any length, as it is clearly untenable. The city treasurer was, to my mind, eminently the right official to be served. He is a statutory officer, one of whose duties it is to pay out money, when payable by statute or under a by-law or resolution of the council. The salary of the city solicitor is payable under a by-law, and the responsibility of determining whether it was payable to the city solicitor himself or to his assignee must necessarily rest on the officer whom the statute charges with the duty of making the payment.

There will therefore be judgment against the corporation also, for the sum of $416.66, the amount of the two instalments falling due between the service of the notice and the issue of the writ. I do not take the notice of 21st December, 1903, into consideration, as I consider it to have been afterwards practically abandoned by plaintiff.

FALCONBRIDGE, C.J. MARCH 6TH, 1905.

TRIAL.

DOMINION PAVING AND CONTRACTING CO. v. EMPLOYERS' LIABILITY ASSURANCE CORPN.

Insurance — Employers' Liability — Condition of Policy — Breach—Avoidance of Policy.

Action to recover the amount which plaintiffs were obliged to pay under the judgment in Kirk v. City of Toronto, 4 O. W. R. 496, 8 O. L. R. 730. It was not disputed that the damages recovered in that action came within the terms of a policy issued by the defendants insuring the plaintiffs against claims arising out of the prosecution of their works, but it was alleged that plaintiffs were not entitled to recover by reason of their breach of a condition of the policy as to leaving the defence of any action brought against them to defendants.

G. H. Kilmer, for plaintiffs.

E. E. A. DuVernet, for defendants.

FALCONBRIDGE, C.J.—I am of the opinion that plaintiffs cannot recover by reason of their breach of agreement and condition 2 indorsed on the policy, particularly in that they refused to execute the bond for security on the proposed appeal to the Supreme Court of Canada. And such breach avoids the policy: Wythe v. Manufacturers Accident Ins. Co., 26 O. R. 153; Talbot v. London Guarantee and Accident Co., 17 C. L. T. Occ. N. 216; Victorian Stevedoring, etc., Co. v. Australian Accident Ins., etc., Co., 19 Vict. L. R. 139.

Defendants having offered to abide by any equitable arrangement which the Court might suggest, I give plaintiffs the option of accepting within 20 days $1,000 without costs in full satisfaction of their claim. Otherwise the action will be dismissed with costs.

CARTWRIGHT, MASTER. MARCH 7TH, 1905.

CHAMBERS.

LOVELL v. LOVELL.

Alimony—Interim Order—Right to—Amount—Disbursements.

Motion by plaintiff for order for payment by defendant of interim alimony and disbursements.

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

G. H. Watson, K.C., and H. E. Irwin, K.C., for defendant.

THE MASTER.—. . . It has been made quite plain by such cases as Keith v. Keith, 7 P. R. 41, that an order should be made.

It is only where such facts exist as in Falvey v. Falvey, 2 O. W. R. 476 (see final result at p. 832), that an order can be refused, or where Pherrill v. Pherrill, 6 O. L. R. 642, 2 O. W. R. 1096, would apply.

I have no recollection of having refused an order in any other case than these two, except one in which it was not denied that the plaintiff had in her possession over $600 which defendant had given her shortly before the action was commenced; they being both citizens of the United States and domiciled there, and there being no issue of the marriage; there was also evidence that a similar motion made by plaintiff in Ohio had been refused. In these cases my decision was accepted by the parties. The present, however, is a very different case. Whatever may be the result at the trial, there is nothing to displace plaintiff's right to reasonable alimony. Nor has there been any delay to oblige me to fix a materially

later date than is usual for the commencement of the allowance. The plaintiff has a child of two years old, and they are both living at her father's house, and dependent on him.

The defendant's income is admitted to be about $3,000, and there was evidence of his ability to indulge in tastes and pursuits which are somewhat costly. It is only fair to say that he says he does so on medical advice and not as a matter of self-indulgence.

In some of the cases it is said that interim alimony is to be dealt with a sparing hand, because the plaintiff is expected to live while the action is pending in quiet and retirement. I think a fifth of the income of the husband was stated in that case to be reasonable (see Holmested & Langton, p. 548). Applying that principle, I consider that $12 a week, to commence from 1st September last, would be a proper sum, and that necessary disbursements should also be furnished.

The amount of these will be settled by the Clerk in Chambers if the parties cannot agree.

MARCH 7TH, 1905.

DIVISIONAL COURT.

NISBET v. HILL.

Interpleader — Seizure by Sheriff — Inconsistent Claims to Goods Seized—Form of Order—Sale of Goods by Sheriff—Trial of Separate Issues.

Appeal by claimants Green and Smale from order of STREET, J. (ante 337), dismissing appeal from interpleader order made by Master in Chambers (ante 293).

W. J. Tremeear, for the claimants, chattel mortgagees, contended that, as the legal title was vested in them, a sale of the goods seized by the sheriff should not have been directed.

W. H. Blake, K.C., for sheriff of Elgin.

F. Arnoldi, K.C., for execution creditor.

W. E. Middleton, for assignee.

THE COURT (FALCONBRIDGE, C.J., GARROW, J.A., BRITTON, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. MARCH 9TH, 1905.

CHAMBERS.

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

Master in Chambers—Jurisdiction—Motion to Set aside Appointment of Referee to Proceed with Reference—Jurisdiction of Referee Questioned—Rule 42 (2), (12)—Appeal—Prohibition.

Motion by defendants to set aside appointment issued by the senior Judge of the County Court of York, on 7th January, 1905, to proceed with a reference directed by a consent judgment pronounced on 14th January, 1903.

The reference was to "the senior Judge of the County Court of the county of York." The senior Judge was then Joseph E. McDougall, who died before entering upon the reference.

The appointment was issued by his successor, John Winchester.

J. Bicknell, K.C., for defendants, contended that the appointment was issued without jurisdiction, the reference being to the deceased Judge, and not to his successor.

J. S. Fullerton, K.C., for plaintiffs, objected that the Master had no jurisdiction to entertain the motion.

THE MASTER (after setting out the facts):—In . . . Re Glen, Fleming v. Curry, 27 A. R. 144, a certificate was obtained from the new Master that he proposed to proceed with the reference. From this an appeal was taken to a Judge in Chambers, and carried from him to a Divisional Court, and finally to the Court of Appeal.

It was argued by Mr. Bicknell that I had the jurisdiction which I had exercised in Dryden v. Smith, 17 P. R. 500, where the appointment of a special examiner was set aside. . . . There my jurisdiction was founded on irregularity, and the arguments proceeded entirely on that ground.

But by Rule 42 (2), the Master in Chambers is forbidden to hear "appeals and applications in the nature of appeals," and by sub-sec. 12, "applications for prohibition, mandamus, or injunction."

Now, the present motion seems to be really both an appeal and to involve a prohibition if successful.

The Judge of the County Court has given an appointment to proceed. He has, therefore, construed the judgment as giving him jurisdiction, and I cannot hear an appeal from his ruling. Nor, even if I were of opinion that his ruling

was wrong, could I make an order setting aside his appointment, and so, indirectly, but not the less effectually, prohibit him from going on with the reference. . . .

Motion dismissed without costs.

STREET, J. MARCH 9TH, 1905.

CHAMBERS.

RE MARSHALL.

Insurance—Life—Benefit Certificate—Apportionment among Children—Will.

Application by executor of the will of John A. Marshall, deceased, for an order under Rule 938 determining the persons entitled to a sum of $2,000 payable under a beneficiary certificate of the Ancient Order of United Workmen issued to the deceased.

W. S. Morden, Belleville, for the executor.

W. B. Northrup, K.C., for certain beneficiaries.

E. D. Armour, K.C., for Herbert E. Marshall.

F. W. Harcourt, for infants.

STREET, J.—The certificate was issued on 11th February, 1892, and upon its face declared that John A. Marshall, to whom it was issued, had designated three of his children, Helena, Ella, and Eva, as the beneficiaries. Afterwards on 27th January, 1899, he revoked this designation, by indorsement on the certificate, and directed payment to be made to the executor or executors named in his will, as trustees for his children, in such shares and proportions as in his said will set forth.

The testator died on 31st May, 1904, leaving a will dated 30th May, 1904, by which he appointed his widow and his son Oliver to be executrix and executor. The material clauses of the will are the following:—

3. To my wife, Anna Victoria Marshall, I give, devise, and bequeath the income of all my real and personal property of every kind whatever during the time that she remains my widow, after which time it shall be divided equally between all my children, except that $1,000 shall be given to my son Oliver Marshall to be divided between said Oliver Marshall and my son Herbert Marshall, as Oliver thinks best and directs, that is to say, Oliver shall be guardian of Herbert's share and Oliver shall get (4) possession of the said $1,000 at any time in agreement to pay or secure the interest at 4

per cent. till my youngest child shall be of the age of 21 years, after which time said payment of interest on the $1,000 shall be discontinued. 5. Also my wife, Anna Victoria, shall have the sum of $1,000 absolutely to be used to support the family till an income shall begin to accumulate. 6. If said executors, together with the advice of my brother Joseph P. Marshall, shall deem necessary to use not more than $300 more than the income any year during the first 5 years after my demise, they may do so. 7. If said executrix and executor shall deem advisable, and on the recommendation of said Joseph P. Marshall, the sum of $100 may be given to any one of my children for 3 years in succession, to complete an education, said sum to be deducted from said child who receives it at the final distribution.

This will was not made until more than 5 years after the date of the indorsement upon the beneficiary certificate, and its terms are inconsistent with an intention to declare in it the trusts which the testator intended to declare by will when he made the indorsement on the certificate. He evidently intended by this will to deal only with the property over which he had full disposing power; he did not intend by it to set forth the shares and proportions in which the money secured by the certificate should be divided amongst his children. In my opinion, the matter stands as if the testator, after making the indorsement on the certificate, had died intestate. He has declared that the fund is to go to his children (which means all his children) in proportions to be thereafter fixed by him by will; he has died without fixing these proportions; and the result must be that all his children take the fund in equal shares, and I so declare.

Costs of all parties out of the fund, those of the executor as between solicitor and client.

ANGLIN, J. MARCH 9TH, 1905.

TRIAL.

HUNT v. TRUSTS AND GUARANTEE CO.

Distribution of Estates—Ascertainment of Next of Kin of Intestate—Questions as to Legitimacy of Uterine Brother—Marriage Laws of State of New York—Bigamous Marriage of Wife of Absentee—Statutes—Presumptions.

Action for a declaration of plaintiffs' status and rights as next of kin of one George W. Todd, who died intestate at Hamilton, leaving a considerable fortune. Plaintiffs and defendants other than the company (administrators) were

grandchildren of one Philinda Ellison, whose matrimonial experiences gave rise to the question raised by defendants as to the legitimacy of plaintiffs' father, Parley Hunt the younger. Philinda Ellison first married one Gideon Todd in 1820. By him she had issue Mary Ann Todd, the mother of defendants, and George W. Todd, the intestate. In 1824 Gideon Todd deserted his wife, and caused a story to be published that he had been drowned. Believing him dead, Philinda Todd in 1826 entered into marriage relations with Parley Hunt the elder, which continued until her death in 1833. Of this marriage Parley Hunt the younger was born in November, 1829, more than 5 years after Gideon Todd had deserted his wife, who always remained unaware that he was not in fact dead. He returned many years afterwards to his former home, in the State of New York, where all the parties were domiciled. The estate of George W. Todd consisted entirely of personalty.

E. E. A. DuVernet, and A. M. Lewis, Hamilton, for plaintiffs.

D'Arcy Tate, Hamilton, for defendant Mary D. Vincent.

A. W. Marquis, St. Catharines, for the other defendants.

ANGLIN, J.—. . . I have no doubt, from a perusal of the evidence taken on commission, that Philinda Ellison, throughout the period of her relations with Parley Hunt the elder, acted in entire good faith, and honestly believed that Gideon Todd was dead. . . .

The question of the legitimacy of Parley Hunt the younger, and the right of succession of his children to his half brother's property, depends . . . upon the law of the State of New York: In re Goodman's Trusts, 17 Ch. D. 266, 292; In re Ferguson's Will, [1902] 1 Ch. 483: and according to that law it must be determined.

Expert evidence as to the law of the State of New York was given on behalf of both plaintiffs and defendants. Upon some points the expert witnesses agree. These present no difficulty. Upon others they differ to the degree of absolute contradiction, each expert resting his opinion upon the authority of decided cases to be found in the State reports. Upon this conflict of testimony, I am driven to an examination of the authorities upon which the experts respectively rely. Reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, I am obliged to determine to the best of my ability what is in fact, upon such

controverted points, the law which obtains in the State of New York.

In the first place, the expert witnesses agree that by the law of New York an agreement between a man and woman presently to become husband and wife constitutes a valid marriage without any ceremony whatever, and that such consent need not be given in presence of any witness, nor need it be evidenced in any particular form. It is also common ground that marriage will be presumed from cohabitation, reputation, acknowledgment of the parties, reception into the family, and other circumstances of a like character—the usual concomitants of the marriage state: Hynes v. McDermott, 91 N. Y. 451; Rose v. Clark, 8 Paige (Ch.) 574; Caujolle v. Ferrie, 23 N. Y. 90; Jackson v. Claw, 18 Johns. 346; Fenton v. Reid, 4 Johns. 51.

There was no dissent by the expert witnesses from the proposition that, where the connection began under a contract of marriage supposed to be legal, though in fact void in consequence of a disability of one of the parties, a marriage after the removal of the disability may be presumed from acts of the parties evidencing recognition of each other as husband and wife, and from continued matrimonial cohabitation and general reputation, and this though there had been no marked change in the character of the relations between them, and the invalidity of the marriage had remained unknown to them while both were living, the inference being of consent at the first moment when you find the parties able to enter into the contract: Hynes v. McDermott, 91 N.Y. 451; Fenton v. Reid, 4 Johns. 51. This doctrine is not unfamiliar, having been enunciated in DeThoren v. Attorney-General, 1 App. Cas. 686, as prevailing in . . . Scotland, where marriage by consent, followed by cohabitation, is valid. Upon its applicability to the present case the experts do not agree.

By the statute 1 Jac. I. ch. 2, it was enacted that a person marrying a second time whose husband or wife had been continually absent for 7 years immediately preceding the second marriage, and not known by such person to be living within that time, should not be guilty of bigamy. In 1788 a similar Act of the Legislature of the State of New York reduced the requisite period of absence to 5 years. This provision is still in force. The experts agree that it does not render a second marriage valid, if the absent spouse be in fact alive. . . .

[Reference to Price v. Price, 124 N. Y. 589, 597.]

"If any person whose husband or wife shall have absented himself or herself, for a space of 5 successive years, without

being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a Court of competent authority:" 2 R. S. N. Y. ch. 139, sec. 6.

"When it shall appear, and be so decreed, that such second marriage was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead, the issue of such marriage born or begotten before its nullity be declared, shall be entitled to succeed, in the same manner as legitimate children, to the real and personal estate of the parent who at the time of the marriage was competent to contract . . . :" ib. ch. 142, sec. 23.

The statutory provision contained in sec. 6 of ch. 139, above quoted, became law in 1830. It is upon its construction and effect that the members of the New York Bar called as witnesses disagree.

Mr. Orcutt, an attorney in practice for 25 years, swears that this statute is restrospective, and affects marriages contracted and issue born of such marriages before it became law. This position is controverted by Mr. E. Corey Townsend, a practitioner for 21 years, and by Mr. W. S. Jenkins, who has been in practice for 25 years, who both maintain that the statute applies only to marriages contracted after its enactment. . . .

Mr. Orcutt relied upon the decision of the Court of Appeals in Brower v. Bowers, 1 Abbott (C. A.) 214, decided in 1850. . . . This decision, if it correctly expounds the law of the State of New York, settles in favour of plaintiffs the question of the retroactivity of the statute of 1830. All three legal witnesses concur in stating that the decisions of the Court which disposed of this case bind all the Courts of the State of New York. . . . A contrary view as to the retroactivity of the statute was expressed by Chancellor Walworth in Valleau v. Valleau, 6 Paige at p. 210. But nowhere do I find any judicial observation upon Brower v. Bowers which casts the slightest doubt upon its authority. It is referred to, without any adverse comment, in Price v. Price, 124 N.Y. at p. 600, and Bailey v. Bailey, 45 Hun at p. 282. Upon cross-examination, Mr. Jenkins admitted that Brower v. Bowers has never been overruled. I therefore find, upon the evidence before me, that that case correctly states the law of New York to be that the statute of 1830 is retrospective in its operation. In the view I take of the present action, this finding may not be material.

What then, if any, is its effect upon the relations of Philinda Todd and Parley Hunt the elder? In their inception, in 1826, clearly none. Not because Gideon Todd was still alive. That is the very circumstance to which, and to which only, this legislation has application: Re Nesbitt, 3 Demarest at p. 336. But because the requisite period of 5 years had not then elapsed. These parties, it is admitted, went through a ceremony of marriage in 1826. They never intended to cohabit illicitly. The 5 years from her desertion by Gideon Todd expired, I have found upon the evidence, prior to the time, in November, 1829, when Philinda Ellison gave birth to Parley Hunt the younger. If it were proved that a marriage had taken place between these parties during this interval, the Act of 1830 would apply to it. Should such a marriage by mutual consent be presumed?

I do not see how such a presumption can be made. The fact of the continued existence of Gideon Todd being established, there was no presumption of his death. Nothing had occurred to remove or extinguish the impediment of the marriage to him up to the end of 1829. Though, if there had been actual proof of a marriage in 1829, after the 5 years had expired, the statute of 1830, by its retrospective operation, might validate it, it is quite another thing, in the absence of such evidence, to presume that these parties did an act which, though not criminal, by reason of the saving statute of 1788, would certainly have been, at that time, illegal. Nothing in the statute of 1830 compels or even countenances a presumption so contrary to the fundamental principles of jurisprudence. It is only upon the cesser of the impediment, actual or presumed, that even the strong presumption in favour of marriage can prevail. It being, therefore, impossible to presume that a marriage took place between his parents in 1829, the statute of 1830 finds no subject of that date upon which it could operate, and it necessarily follows that Parley Hunt the younger was born out of lawful wedlock and as an illegitimate child.

But, if the effect of the statute of 1830 when it became law was, in the case of a person whose husband or wife had been absent for 5 successive years, without being known to such person to be living during that time, to extinguish or neutralize the obstacle opposed to his or her marriage by the former marriage undissolved, and to render such a person capable of entering into a new marriage contract, may not and should not it be presumed that parties in the position occupied by Philinda Ellison and Parley Hunt the elder married eo instanti that the statute became law? Upon the

authority of DeThoren v. Attorney-General, 1 App. Cas. 686, which Mr. Townsend accepted as correctly stating the law which obtains in the State of New York, in my opinion that presumption may and should be drawn. It is a presumption in favour of morality, legality, and legitimacy. It involves nothing which is at all irreconcilable with the actual facts in evidence. . . .

[Reference to O'Gara v. Eisenlohr, 38 N. Y. 296; Williamson v. Parisien, 1 Johns. (Ch.) 389; Valleau v. Valleau, 6 Paige (Ch.) 207, 210; Spicer v. Spicer, 16 Abbott P. R. N. S. 112; Taylor v. Taylor, 63 App. Div. 231, 173 N. Y. 266; Tracy v. Frey, 95 App. Div. 579; Schouler on Domestic Relations, sec. 21; Bishop on Marriage and Divorce, sec. 970; Gall v. Gall, 114 N. Y. 110; Griffin v. Banks, 24 How. P. R. 213; Price v. Price, 124 N. Y. 589; Bailey v. Bailey, 45 Hun 278; Circus v. Independent Order of Ahawas, 55 App. Div. 534, 536; Oram v. Oram, 3 Redfield 300.]

I have no hesitation in concluding . . . that Mr. Orcutt's exposition of the effect of the statute of 1830 was sound when he stated that in a case to which it applies, it confers the right to remarry upon the party deserted; that it makes such person competent to marry; that it removes the disability resulting from the former marriage; and that a marriage within the purview of the statute is and remains absolutely valid, and the issue thereof legitimate, unless and until a decree has been pronounced by a competent court declaring it null. Any other conclusion, apart entirely from authority, appears to me to be based upon a fundamental misconception of voidability. But the authorities by which Mr. Orcutt supported his testimony render its acceptance imperative.

Deducing, therefore, from the continued cohabitation of Philinda Ellis and Parley Hunt the elder as man and wife, from 1830 to 1833, a presumption of their marriage by mutual consent upon the passing of the statute of 1830, and it being admitted that the marriage was never annulled, I find that it was and remained a valid marriage.

Though this does not render Parley Hunt the younger, born in November, 1829, legitimate, it paves the way for that result. Parley Hunt the younger . . . died in 1896. On 3rd May, 1895, the legislature of the State of New York passed the following statute, chaptered 531 of the laws of that year:—

"1. All illegitimate children, whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for

all purposes. Such children shall enjoy all the rights and privileges of legitimate children. Provided, however, that vested interests in estates shall not be divested or affected by this Act.

"2. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

"3. This Act shall take effect immediately."

There could be in 1895 no vested interests in the estate of George W. Todd, who did not die until 1903. Nemo est hæres viventis. The proviso in sec. 1, therefore, does not, for the purposes of this case, exclude Parley Hunt the younger from the beneficient operation of the statute. Although illegitimate when born, the subsequent intermarriage of his parents in 1830 legitimatized him for all purposes. His issue can, therefore, claim through him as a half brother of the intestate George W. Todd.

Judgment will be entered declaring plaintiffs to be of the next of kin of George W. Todd, deceased, and for payment to them of their costs of this action by defendants other than the Trusts and Guarantee Co., who will have their costs as between solicitor and client out of the estate of the intestate.

CARTWRIGHT, MASTER. MARCH 10TH, 1905.

CHAMBERS.

GOLD RUN (KLONDIKE) MINING CO. v. CANADIAN GOLD MINING CO.

Writ of Summons — Service on Company Defendant — Head Office Removed from Province—Substituted Service.

Motion by defendants to set aside an order made by the Master in Chambers on 16th February, 1905, upon the ex parte application of plaintiffs, permitting them to serve defendants with the writ of summons by publication in the Ottawa "Free Press" newspaper, and by sending a copy of the order and writ to one Chabot in Montreal, Q.

C. A. Moss, for defendants.

E. Bristol, for plaintiffs.

THE MASTER.—The writ issued on 17th December, 1904. At that time the head office of defendants was at Ottawa. On 20th January, 1905, defendants assumed to change it to Montreal: but it is "at least doubtful if the necessary formalities were complied with. Defendants have no office either in Ottawa or Montreal, nor any officer in this province. Chabot has lately been appointed by defendants to be their official representative. . . .

If it is only a question of the substituted service, the motion must fail. It is made on behalf of defendants, and so clearly has come to their knowledge.

In Taylor v. Taylor, 6 O. L. R. 545, 2 O. W. R. 953, the Chancellor said: "The Court will not set aside substituted service if it appears or can fairly be inferred that defendant had notice of what was going on."

But it was contended that the service was irregular in this, that defendants were not resident in Ontario, and that a writ for service in this province was not proper, and that service on Chabot in any case was bad.

It seems on the material doubtful whether the head office of defendants is now in Ottawa or Montreal. It certainly was in Ottawa before 20th January, 1905, when the resolution was passed changing this to Montreal. The advertisement in the Canada Gazette only speaks of it as a resolution. It would not seem that the certificate of the Under Secretary of State calling this "a by-law and resolution" can make it one.

In the case of this company, of which, as it is said, all the shareholders reside in England, it can make no practical difference whether they are sued in Ontario or in Quebec. . . .

I think that defendants are properly sued in Ontario, as their head office was there at least as recently as 20th January. I am not satisfied that they have proceeded with such regularity as to have changed it to Montreal.

Without imputing any such design to the present defendants, it is clear that by constantly shifting the head office from one to another of the 8 or 9 provinces of the Dominion, the company could practically make any legal proceedings against them almost impossible.

Then, if defendants are resident in Ontario, the order for substitutional service was properly made, they being shewn to have no place of business in this province, nor any representative on whom service could be made. It was, therefore, proper to serve them, as was done, by advertisement in the Ottawa "Free Press," which was, in my contemplation, the actual service. The sending of notice to Mr. Chabot was done merely as a matter of grace to defendants, and to prevent anything being done to their prejudice without their knowledge. In one way or the other, the existence of the action has been brought to defendants' knowledge, and the time for delivery of statement of defence has been extended until this motion is disposed of. . . .

Motion dismissed. Costs in the cause.