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DIVISIONAL COURT.

WEIR v. JACKSON.

Trustee—Mal-investment—Competent Advice—Trustee Acting Honestly and Reasonably—Relief under 62 Vict. (2) ch. 15.

Appeal by plaintiffs (Charlotte Weir, G. W. Weir, and W. M. Weir) from judgment of BOYD, C., dismissing without costs action against the executors of Thomas Jackson, to recover the sum of $1,500, part of the estate of the deceased husband of plaintiff Charlotte Weir.

Thomas Jackson was the executor of the will of the deceased Weir. The plaintiff Charlotte Weir was entitled to the income of the estate for life, and the other plaintiffs were entitled to the estate after her decease. The sum of $1,500 was invested by Thomas Jackson in the stock of the Elgin Loan and Savings Co., and, owing to the failure of the company, was lost to the estate.

By this action the plaintiffs sought to make the estate of Thomas Jackson liable for the loss to the Weir estate by the mal-investment of the $1,500.

The Chancellor found that the executor Thomas Jackson had acted honestly and reasonably as a trustee in making the investment, and that his estate ought to be relieved under 62 Vict. (2) ch. 15.

J. R. Green, St. Thomas, for plaintiffs.

W. K. Cameron, St. Thomas, for defendants.

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

MEREDITH, C.J.—This is, no doubt, a very hard case upon the unfortunate plaintiffs, but the statute which the learned

Chancellor applied was passed for the very purpose of relieving executors and trustees, who perform very often a very thankless duty, and onerous at the same time, from the obligations under which they rested at law for breaches of trust.

I think that in this country that statute ought to be very liberally applied for the purpose of relieving an executor or other trustee who has acted in good faith and reasonably.

The learned Chancellor, upon a review of the facts in this case, has come to the conclusion that the trustee acted reasonably in relying upon the advice of Mr. McLean, a prominent citizen and professional man, residing in the city of St. Thomas. There was, at the time the investment was made, not the slightest reason to doubt that the security was an excellent one, from the revenue point of view as well as the substantial character of the investment itself.

The case of Perrins v. Bellamy, [1899] 1 Ch. 797, is a direct authority in support of the judgment of the learned Chancellor, unless this case can be distinguished upon the ground that Mr. McLean occupied the position of vendor of the stock, as well as that of solicitor for the executor, and I do not think that it can be so distinguished.

The executor was a farmer having probably very little knowledge of that kind of business, and I do not think it would be reasonable to say that he should have been aware that it was an improper or an unwise thing for him to take the advice, as I have said he did, of a prominent business man of high repute, simply because that man was the vendor of the stock.

I think the appeal must be dismissed.

We will follow what the Chancellor did as to the costs, and dismiss the appeal without costs.

MEREDITH, C.J., TEETZEL, J. FEBRUARY 10TH, 1905.

TRIAL.

RE WENTWORTH DOMINION ELECTION.

SEALEY v. SMITH.

SMITH v. SEALEY.

Parliamentary Elections—Ballot Papers—Wrongful Numbering by Deputy Returning Officer—Numbers Leading to Identification of Voters — Rejection of Ballots — Voiding Election—Costs.

A petition under the Dominion Controverted Elections Act.

The respondent was declared elected on a recount had before the senior Judge of the County Court of Wentworth, but the petitioner claimed the seat, alleging that upon a proper counting of the ballot papers being had it would be found that he had received a majority of the votes cast and was duly elected.

The petition contained charges of corrupt practices, and there was a cross-petition filed by the respondent making similar charges against the petitioner. These charges were abandoned by both parties, and they agreed on a special case, which contained a statement of the facts upon which the opinion of the Court was asked upon the following questions:—

1. Is the respondent, E. D. Smith, the duly elected member for the electoral district of Wentworth?

2. If not, is the petitioner, W. O. Sealey, the duly elected member for the said electoral district of Wentworth?

3. Or is the said election for the electoral district of Wentworth null and void?

A. B. Aylesworth, K.C., and R. A. Grant, for Sealey.

G. Lynch-Staunton, K.C., W. A. H. Duff, Hamilton, and H. C. Gwyn, Dundas, for Smith.

MEREDITH, C.J.—The result, as far as it is to be determined by the counting of the ballot papers, depends upon whether the County Court Judge was right in rejecting, as he did, all those cast at polling subdivision number 23 in the township of Beverley.

The claim of the respondent that these ballot papers ought not to have been, as they were, counted, by the deputy returning officer, and were properly rejected upon the recount, is based upon the provisions of sub-section 2 of sec. 80 of the Dominion Elections Act, 1900:—"(2) In counting the votes he (i.e., the deputy returning officer) shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified, other than the numbering by the deputy returning officer in the cases hereinbefore provided for."

Each of the ballot papers in question had on the back of it a number which corresponded with that put opposite to the name of the voter in the poll book, and it was placed there by the deputy returning officer before the ballot paper was handed to the voter.

It was argued on behalf of the petitioner that this numbering of the ballot papers did not affect their validity, for two reasons: (1) because it was the act of the deputy returning officer, and, as it was said, the section does not apply to a writing or mark on the ballot paper made by any one but the voter; and (2) because it is only a writing or mark by which, without calling in the aid of extrinsic evidence, the voter could be identified, that requires or justifies the rejection of the ballot paper.

The Election Act by which the system of voting by ballot was first introduced was 37 Vict. ch. 9, and the provision in it as to the rejection of ballot papers was substantially the same as that contained in sub-sec. 2 of sec. 80 of the Act of 1900, except that the concluding words, "other than the numbering by the deputy returning officer in the cases hereinbefore provided for," are not found in the original provision (sec. 55), though the Act contained a provision for the numbering of the ballot paper supplied to any person representing himself to be a particular elector named on the register or list of voters who applied for a ballot paper after another person had voted as the elector: sec. 53.

Two other classes of ballot papers were, by sec. 37 of the Electoral Franchise Act (48 & 49 Vict. ch. 40), required to be numbered.

It was not, however, until the revision of the statutes in 1886, that any change was made in the provision in the Election Act for the rejection of ballot papers by the introduction of any qualification of the generality of the provision as to rejecting ballot papers on which a writing or mark by which the voter could be identified appeared.

In the Consolidated Statutes the Election Act appears as ch. 8, and the section providing for the rejection of ballot papers is sec. 56. There for the first time is introduced the qualification to which I have referred, and it is in the very words in which it is expressed in sec. 80 of the Act of 1900.

The Act of 1900, it may be remarked here, introduced another class of ballot papers which the deputy returning officer is required to number: sec. 67.

It is somewhat singular that nowhere in the Act is there to be found any provision forbidding the voter to place upon his ballot paper any mark by which he can afterwards be identified, nor any declaration that a ballot paper upon which such a mark is placed shall be void, though no doubt in "the directions for the guidance of electors in voting," which the deputy returning officer is, by sec. 41, required

before or at the opening of the poll on the day of polling to "cause to be posted up in some conspicuous place outside of the polling station and also in each compartment of the polling station," electors are informed, among other things, that if the voter "places any mark on the ballot paper by which he can afterwards be identified his vote will be void and will not be counted."

If sec. 80 did not contain the qualification to which I have referred, I should, if unfettered by authority, be disposed to hold that it was only a writing or mark placed on the ballot paper by the voter himself, or by his connivance or with his consent, that justified the rejection of his ballot paper.

On principle, it appears to me most unjust that an elector who has complied with every requirement of the law as to the manner in which he shall evidence his will as to the choice of a member of parliament, should be subjected to have his vote destroyed by the wrongful or improper act of an election officer in dealing with his ballot paper, and the Court is bound, I think, if possible, to avoid construing such a provision so as to lead to that result.

Reading the provision as to the rejection of ballot papers, as it stood before the revision of the statutes in 1886, in connection with the directions for the guidance of electors in voting, no canon of construction would be violated, I think, by interpreting the words "any writing or mark by which the voter could be identified," as meaning any such writing or mark placed on the ballot paper as is mentioned in the directions, and therefore as extending only to those placed on it by the voter himself or by his connivance or with his consent.

We are not, however, at liberty to deal with the question as res integra, for it has been passed upon by election Judges whose decisions we ought to follow, leaving it to an appellate Court, if they ought not to govern, to so declare, especially as, though the Legislature of the Province of Ontario has expressly provided, by an amendment of its election law, against a ballot paper being rendered void by "words or marks corruptly or intentionally or by mistake written or made or omitted to be made by the deputy returning officer on a ballot paper" (42 Vict. ch. 4, sec. 18), the Parliament of Canada has not seen fit to enact such an amendment to its election law.

In the East Hastings case, H. E. C. 764 (27th January, 1879), the question was directly raised, and the election

Judge (Armour, J.), held that ballot papers upon which a deputy returning officer had placed a number corresponding with that which appeared opposite to the name of the voter in the voters' list were rightly rejected.

The Act in force when the election which was in question in that case was held was the Act of 1874, as amended by 41 Vict. ch. 6, the 43rd section of which, as amended, required the deputy returning officer to place on the counterfoil of the ballot paper a number corresponding to that opposite the voter's name on the voters' list.

The voters' lists in use at the election were no doubt copies of the provincial voters' lists, and there would therefore have appeared in them opposite to the voter's name his number upon the assessment roll, and it was these numbers that the deputy returning officer had placed upon the ballot papers which it was held were rightly rejected.

Mr. Aylesworth pointed out, as supporting his second ground of argument, that certain ballot papers upon which a number had been placed by the deputy returning officer were held not to be thereby made subject to rejection, but I am unable, when the circumstances are considered, to see that this supports his contention. The testimony of the deputy returning officer shewed that he had placed the same number both on the counterfoil and on the ballot paper, but those numbers were taken at random, and as he deposed, and the election Judge found, the voter could not be identified by them, and it was upon this ground that it was held that these ballot papers ought not to be rejected.

It was probably in consequence of the decision in the East Hastings case that the amendment of the Ontario Act to which I have referred was made.

The question (arising on the Ontario Act) was again dealt with in the Russell (No. 2) case (4th December, 1879), H. E. C., 519, the election Judges being the then Chief Justice of Ontario and Vice-Chancellor Blake.

In that case the deputy returning officers at certain of the polling subdivisions had placed numbers on the backs of the ballot papers corresponding with the numbers put opposite to the voters' names in the voters' lists.

Referring to the effect of this upon the ballot papers the Chief Justice said (p. 522): "Under the Act of 1874 (R. S. O. ch. 10) that would, I apprehend, have been a fatal objection to the validity of the vote, but the Act of 1879 (42 Vict. ch. 4) was passed for the very purpose of remedying that difficulty." And the Vice-Chancellor said (p. 527): "Un-

fortunately, ignorantly, but honestly, they so dealt with the ballots as that except for the Act of 1879 these votes must necessarily have been rejected, while neither the petitioner nor the respondent is rsponsible for that."

What was said by Vice-Chancellor Blake is important, as much reliance was placed by the petitioner's counsel upon what was said by that learned Judge in the Monck case (January, 1876), H. E. C. 725, particularly at pp. 728 and 731; but the view expressed in the latter case shews that what was said by him in the earlier one was not directed to such a writing or mark on the ballot paper as the numbering of it by a deputy retuning officer as had taken place in the Russell Case (2).

The Russell Case No. 2 is important also, because the numbers which had been placed on the ballot papers were not numbers corresponding with those set opposite the voters' names in the voters' list of the municipality (i.e., the numbers on the assessment rolls), but the numbers which by sec. 6 of the Act of 1874 the deputy returning officer was required to place opposite to every name in his voters' list, which, as the section provides, need not be consecutive numbers, but might be chosen arbitrarily by the deputy returning officer.

In the Bothwell Case (1884), 8 S. C. R. 676, although it was not necessary for the Court to decide, and it did not decide, that the ballot papers which the deputy returning officer had numbered, as the ballot papers in this case were numbered, were bad and ought not to have been counted, Henry and Gwynne, JJ., expressed strong opinions that such ballot papers were illegal and bad: pp. 714, 720, et seq. Fournier, J., also (p. 710) referring to the numbering by the deputy returning officer, at polling subdivision number 1, Sombra, and the erasure by him of the numbers, spoke of the numbering as an error which, if it had not been then repaired, might have had serious consequences (une erreur qui, si elle n'eut pas été réparée alors, auraient pu avoir de graves conséquences). The judgment of the Chief Justice (Ritchie) also indicates, I think, that but for the erasing of the numbers he would have held the numbered ballots to be bad.

Strong, J., however, expressly guarded himself from being taken, by assenting to the judgment of the Court, to preclude himself from the right to consider, in any future case in which the question might arise, whether any mark put on a ballot by mistake and in good faith by a deputy

returning officer was to be held a ground for rejecting the ballot.

It is also to be noticed that the election Judge from whose judgment the appeal to the Supreme Court was taken, had treated it as clear that all the votes at number 3 Dawn must have been rejected because the deputy returning officer had indorsed on each ballot paper the number of the voter on the voters' list, "so that," as he said, "there could be no difficulty whatever in ascertaining how each elector had voted:" p. 680.

In the face of the decision of the Election Court in the East Hastings case and of the body of judicial opinion to which I have referred, it would not be open to me to give effect to my own view as to the scope of the provision for rejecting ballot papers upon which a writing or mark by which the voter could be identified appears, even as that provision stood before the amendment made in the Revised Statutes and subsequently re-enacted in the Act of 1900, and the amendment then introduced and so re-enacted makes it still more impossible for me to do so.

The amendment amounts, in my opinion, to an adoption by Parliament of the construction which had been given to the enactment in the East Hastings case, and was apparently designed to prevent a ballot paper which the deputy returning officer had numbered, in the proper discharge of his duty, and as he was required by the Act to do, from being rejected at the counting of the ballot papers. The amendment was probably unnecessary, as a writing or mark which the deputy returning officer was required by the Act to put upon the ballot paper, although it afforded means for identifying the voter by whom it had been cast, could not by possibility have been intended to be treated as a writing or mark within the meaning of sec. 80. The introduction of the amendment, nevertheless, in my opinion, is a clear indication that it was intended that a writing or mark, though made by the deputy returning officer, if it was one by which the voter could be identified, unless it was the numbering by the deputy returning officer in the cases provided for in the previous section, should render necessary the rejection of the ballot paper in the counting of the votes.

It was said by counsel for the petitioner, that in a comparatively recent unreported case (the North Bruce case) it was held by the Chancellor of Ontario and my brother Street that ballot papers numbered as those in question in this case were, ought not to be rejected under the provisions of sec. 80; but a perusal of the shorthand notes of the proceed-

ings in that case leads me to think that that was not the ruling of the learned Judges, and that, if it had appeared that the numbers which had been put on the back of the ballot papers corresponded with those which were set opposite to the voters' names either in the voters' list or in the poll book, the ballot papers would have been rejected.

It was argued by Mr. Aylesworth that in all the cases in which ballot papers had been rejected because of their being numbered, the number placed on the ballot paper corresponded with that which appeared in the voters' list opposite to the voter's name. I have already pointed out that that was not so in the Russell case, but, even if it were, as Mr. Aylesworth contended, I am unable to discover any reason for rejecting the ballot paper in such a case, which does not apply where the number on the ballot corresponds with that which appears opposite to the voter's name in the poll book. The poll book is, of course, open to the view of the deputy returning officer and the poll clerk, and there is nothing to prevent the agents of the candidates from examining it, if, indeed, they are not entitled to do so, and therefore nothing to prevent any of those persons from ascertaining both the number on the poll book and that on the ballot paper, and in that way discovering the identity of the voter, and so the intended secrecy of the ballot may be violated.

Where the numbered ballot is in use, for the very purpose of guarding against the possibility of the voter being identified, careful provision is made that in counting the ballot papers the number which is on the back of the ballot paper shall not be seen by those who are present when the counting takes place.

The provision in this respect of the Ontario Act, sec. 17, sub-sec. 1, is that the deputy returning officer "shall examine the ballot papers, keeping them with their printed faces upwards, and shall take all proper precautions for preventing any person from seeing the numbers printed on the back of the paper," and a similar provision was contained in the English Act of 1872 (35 & 36 Vict. ch. 33), schedule 1, sec. 33. See also sec. 30 of the Ontario Act, and sec. 4 of the English Act.

On the other hand, in the Dominion Act, sec. 80 (1), it is provided that the deputy returning officer "shall open the ballot box and proceed to count the number of votes given for each candidate, giving full opportunity to those present to examine each ballot."

I refer also to the Haldimand case (1888), 15 S. C. R. 495, and particularly to what was said by Strong, J., at p. 515, and by the present Chief Justice of Canada, at p. 528.

The cases in which the question has arisen on a recount, which were cited by Mr. Aylesworth, are, I think, distinguishable. There the Judge has very limited powers, and is unable, in determining whether a ballot paper should be counted or rejected, to seek assistance from anything but the ballot paper itself.

This is well pointed out in one of the cases, the Digby, Nova Scotia, Election Case (1887), 23 C. L. J. 171, as well as in the recent decision of Ardagh, Co.J., in the North Simcoe Case (1904), 41 C. L. J. 29.

Mr. Aylesworth's contention that the principle of Woodward v. Sarsons (1875), L. R. 10 C. P. 773, had been departed from in the more recent cases, is not, I think, well founded. The Cirencester Case (1893), 4 O'M. & H. 194, which he cited for that contention, does not, I think, support it. The Court was there dealing with marks made by the voter, and there is nothing to indicate that the authority of Woodward v. Sarsons, so far as it dealt with the numbering of the ballot papers, was intended to be denied or questioned.

No doubt there was an advance made in the direction of departing from the more strict rule which had been applied in the former cases to disfranchise a voter who had by his ballot paper clearly indicated the candidate for whom he intended to vote, on account of the imperfect manner in which he had marked his ballot paper, but nothing whatever was said to indicate that extrinsic evidence is not admissible to prove that by the mark which appears upon the ballot paper the voter could be identified; on the contrary, Hawkins, J., said (p. 198) that the question whether the mark is one by which the voter can be identified is a matter of fact.

It is difficult to suggest any mark that it is possible to put upon the ballot paper which, standing alone and without calling in the aid of extrinsic evidence, could be found to be one by which the voter could be identified.

To illustrate by a single case: A voter, John Smith, writes upon his ballot paper the words, "This is the ballot of John Smith," having arranged that that is the sign by which he will shew to the agent of a candidate that he has voted for that candidate. The writing by itself does not shew that the ballot paper is the one handed to John Smith, nor would it

appear that John Smith was an elector who had voted, unless reference were made to the poll book, and what would such a reference be but the calling in of extrinsic evidence?

It is, nevertheless, I confess, singular that the only provision in the Election Act dealing with the effect of a writing or mark on the ballot paper by which the voter could be identified, except the directions for the guidance of electors, is that providing for the rejection of the ballot paper when the counting of the votes is taking place at the close of the poll, and that there is nothing in terms providing that the ballot paper shall be void, and the result of the legislation, as it has been interpreted by the Courts, is certainly anomalous. The deputy returning officer must decide as to the rejection of the ballot paper on the inference which may be drawn from what appears on the ballot paper itself, and that alone, and on the recount the Judge is confined to the same inferences. The decision of the deputy returning officer is final, subject to reversal on recount or on petition questioning the election or return—sec. 81—and yet on petition questioning the election or return, according to the decisions, the scope of the inquiry is widened, and extrinsic evidence is admissible to prove that the writing or mark which appears on the ballot paper is one by which the voter could be identified.

The cases and opinions to which I have referred are conclusive against the second ground urged by Mr. Aylesworth, for they establish beyond doubt that a number placed on the ballot paper, corresponding with that set opposite to the voter's name, is a writing or mark by which the voter could be identified, within the meaning of sub-sec. 2 of sec. 80.

I come therefore to the conclusion that all the ballot papers in question were rightly rejected.

There remains to be considered the question whether the election should be avoided or the respondent should be declared to have been elected.

In Woodward v. Sarsons, L. R. 10 C. P. 733, it was said by Lord Coleridge: "An election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal which is asked to avoid it is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free oppor-

tunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps:" p. 743.

These observations by Lord Coleridge were quoted with approval by Harrison, C.J., in In re Johnson and County of Lambton (1877), 40 U. C. R. 297, at pp. 306-307, and acting upon the same principle it was held in the East Hastings case that the effect of the numbering of the ballots and their consequent rejection was not to seat the candidate who, if the rejected votes had been counted, would have been in a minority, but to avoid the election, and it was avoided accordingly.

The same conclusion ought, in my opinion, to be reached in this case.

In this case the majority of the electors had not in fact a fair and free opportunity of electing the candidate whom they preferred, for enough of them to turn the majority into a minority were prevented from voting by the means of voting according to law being supplied with such errors as to render the voting by means of them void, for every ballot paper supplied at polling station No. 23, when it was handed to the voter, was so marked as to render the voting by means of it void, and so in effect every voter at that polling station was disfranchised.

I would, therefore, answer the questions of the stated case as follows:

That the respondent is not the duly elected member for the electoral district of Wentworth.

That the petitioner is not the duly elected member for the said electoral district of Wentworth.

That the said election for the electoral district of Wentworth is null and void.

And, following the course taken in the East Hastings Case and the Russell Case No. 2, there should be no costs to either party.

TEETZEL, J., concurred.

CARTWRIGHT, MASTER. FEBRUARY 13TH, 1905.

CHAMBERS.

NISBET v. HILL.

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

Motion by sheriff of county of Elgin for an interpleader order in respect of certain goods seized under plaintiff's execution against W. G. Hill, and claimed by the holder of a chattel mortgage from W. G. Hill, and also by the assignee for creditors of one J. B. Hill.

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

F. Arnoldi, K.C., for the execution creditor and the assignee of J. B. Hill.

W. J. Tremeear, for the chattel mortgagee.

THE MASTER.—The appraised value of the goods seized is not equal to the amount of the chattel mortgage.

I thought at first that Rule 1112 would apply under the authority of Stern v. Tegner, [1898] 1 Q. B. 37. But there the validity of the bill of sale was admitted, while here it is strongly contested.

There are two leading principles in the Judicature Act: the first, that, as far as possible, all matters in dispute between the parties should be disposed of at once: sec. 57 (14): and second, to secure "the advancement of justice, determining the real matter in dispute, and giving judgment according to the very right and justice of the case:" Rule 312.

From these salutary provisions it seems to follow that the best order to make in the present case is as follows: that the goods be sold by the sheriff and the proceeds paid into Court (less his costs and charges) to abide further order; that an issue be tried as to whose the goods are, in which the assignee of J. B. Hill shall be plaintiff and the execution creditor and the chattel mortgagee shall be defendants; if this is decided in favour of the assignee, the matter will go no further; if his claim is negatived, then there must be a second issue between the execution creditor and the chattel mortgagee, but the exact form of this need not be disposed of yet. . . .

STREET, J. FEBRUARY 13TH, 1905.

TRIAL.

ASKIN v. ANDREW.

Partnership—Liability of Reputed Partner for Moneys Misappropriated by Co-partner — Executors — Imputation of Payments.

Plaintiff was the surviving executor of his father John Askin, deceased. George Andrew, the defendant, carried on business with one Thomas Howarth, in the firm name of "Andrew & Howarth," as private bankers at Oakville, from November, 1881, until November, 1890, when the partnership was dissolved, but defendant allowed Thomas Howarth to use his name in the banking business, which the latter continued to carry on under the former name. On 1st December, 1902, Thomas Howarth died, and he was found to be insolvent. On 21st October, 1899, a deposit receipt was given by Howarth, in the name of Andrew & Howarth, to John Askin for $1,038.68, and that sum appeared at the credit of an account with John Askin kept by Howarth. It was admitted by defendant that he was originally liable to John Askin for this sum, because defendant had allowed Howarth to hold him out to John Askin as a partner. John Askin died on 26th December, 1900, leaving a will, probate of which was granted in April, 1901, to Howarth and plaintiff, the executors named therein. At the time of John Askin's death, besides the $1,038.68 at his credit with Thomas Howarth, he had a sum of $1,837.65 at his credit on the books of another firm of private bankers at Oakville, C. W. Anderson & Son. Shortly after the grant of probate, Howarth sent to plaintiff several blank cheques upon the Anderson bank, which plaintiff signed in blank and returned to Howarth, who filled one of them up for the full amount at the credit of John Askin in the Anderson bank, and deposited it to the credit of Andrew & Howarth's account in the Ontario Bank at Toronto. On 27th May, 1901, Howarth credited this sum in his banking ledger to his own private account. Between 6th and 14th June, 1901, he paid legacies under the will of John Askin to certain legatees to the amount of $890.35, and later on he paid other debts, legacies, and testamentary expenses, amounting to $290.75, in all $1,181.10. These sums were not charged to any account in the ledger or elsewhere, but were paid to the legatees by cheques drawn by Howarth and plaintiff as executors on Andrew & Howarth and paid by Howarth, but they were

not charged to any account in the ledger, and it did not appear in what manner he procured the money to pay the cheques.

Plaintiff sought to recover from defendant the two sums of $1,038.68 and $1,837.65, with interest.

J. H. Moss and C. A. Moss, for plaintiff.

C. Millar, for defendant.

STREET, J. (after setting out the facts):—I held at the trial that, as defendant had ceased to be actually a partner of Thomas Howarth's before the receipt by the latter of the sum of $1,837.65, he could not be charged with it as an actual partner; and that it could not be held that William Askin had been induced to join in paying it over to Thomas Howarth by any holding out of the continuance of the partnership, because William Askin had signed the cheque upon C. W. Anderson & Son in blank, allowing Thomas Howarth to fill it up as he pleased.

As I held defendant liable for the amount of the deposit receipt, and not liable for the $1,837.65, it becomes important to determine whether the $1,181.10 paid out by Thomas Howarth for debts and legacies of John Askin should be deemed to have been paid out of the amount at credit of the estate represented by the deposit receipt, or out of the sum of $1,837.65 received by Thomas Howarth, after John Askin's death, from C. W. Anderson & Son.

Howarth was insolvent when he died, to the extent of some $45,000 to $47,000. His account was overdrawn in the Ontario Bank $81.74 on 29th May, 1901, two days after he had deposited the $1,837.65 to his credit there.

Upon these facts I am of opinion that the payments made by Thomas Howarth amounting to $1,181.10, for debts and legacies of John Askin's estate, should be treated as having been made out of the $1,837.65 rather than out of the moneys deposited with him by John Askin in his lifetime. The latter moneys were received by defendant as a banker, and he was entitled to mix them with his own moneys; the $1,837.65 was trust money which he was bound to keep separate from other moneys; it is true that he did not do so, but mixed it with the other moneys which came to his hands as a banker, and he had paid it out upon other accounts within two days after he received it, in flagrant violation of his trust. We have nothing but what can be gathered from the books of the defaulting trustee, and from the circumstances of the case, as to the account to which he intended to charge

the payments made to the legatees and creditors of John Askin's estate. The only account opened in the books to which the cheques given for these legacies and debts could have been charged was that represented by the deposit receipt, which shewed $1,038.68 standing at the testator's credit since October, 1899. If Howarth had intended to charge these payments against that account, there was nothing to prevent his doing so; and the fact that they were not so charged is a strong circumstance in favour of the existence of an intention that they should be charged against another fund so lately received from C. W. Anderson & Co. He would naturally prefer to make restitution of the trust fund rather than to relieve himself of liability for an ordinary debt. See Molsons Bank v. Halter, 16 A. R. 323, and the cases there cited. . . .

Plaintiff's claim against defendant for the $1,837.65, and every part of it, must be dismissed, because, in my opinion, the defendant was not a partner at the time it was received, and it was not obtained by Howarth by his holding out defendant to be his partner. But I think the circumstances are such as to disentitle defendant to costs. Defendant is liable for the $1,038.68 deposited by John Askin in his lifetime, because defendant clearly allowed himself to be held out to him as a partner. There will be judgment for this $1,038.68 with interest at 5 per cent. from 21st October, 1899, and costs of the action.

FEBRUARY 14TH, 1905.

DIVISIONAL COURT.

FISHER v. CARTER.

Sale of Goods—Contract—Breach—Rescission—Damages.

Appeal by defendant from judgment of MACMAHON, J., 4 O. W. R. 319, in favour of plaintiff for $298 damages with costs in an action for breach of a contract by which defendant agreed to deliver to plaintiff three mixed car-loads of staves, hoops, and headings.

W. M. Douglas, K.C., for defendant, contended that the contract was rescinded, and a new one made, which was not broken, and that in any event the damages were assessed on a wrong principle.

G. Lynch-Staunton, K.C., and C. H. Pettit, Grimsby, for plaintiff, opposed appeal.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J., STREET, J.), held that the finding of the trial Judge that there was no rescission could not be interfered with, but that the damages should be based upon the price of small car-loads, the assumption being that defendant would have taken the less onerous option under the contract.

Judgment varied by reducing the damages to $241.50. In other respects judgment affirmed. No costs of appeal.

ANGLIN, J. FEBRUARY 15TH, 1905.

CHAMBERS.

RE BRAND.

Will—Construction—Devise—Estate Tail—"Heirs of Body"—"Heirs and Assigns"—"In Fee Simple."

Motion by executors for order declaring construction of will. Testator devised his real estate to his executors, their heirs and assigns, to have and to hold the same "to the use of Nancy G. Skinner . . . for and during the period of her natural life, and at her decease to the use of the heirs of her body begotten, and their heirs and assigns, in fee simple forever;" on her death without issue a gift over in fee.

After the opinion given by ANGLIN, J., 4 O. W. R. 473, he heard further argument.

R. T. Harding, Stratford, for executors and for Nancy G. Skinner and three adult children.

F. W. Harcourt, for infants.

ANGLIN, J.—At the request of the official guardian and with the consent of Mr. Harding, I heard further argument upon this case, and have further considered it in the light of King v. Evans, 24 S. C. R. 356 (Evans v. King, 21 A. R. 519), which had not been cited upon the former argument. . . . That decision is, in my opinion, distinguishable. There the devise to be construed was: "To my son James for the term of his natural life and after his decease to the lawful issue of my said son James to hold in fee simple." . . . The judgments holding that the words "in fee simple" superadded diverted the word "issue" from its prima facie meaning, as "a word not of purchase but of limi-

tation equivalent to 'heirs of the body,'" proceed largely upon the fact that the word "issue" is a more flexible expression than "heirs of the body." . . .

Here not only have we the words "heirs of the body," but the expression "in fee simple" is not immediately superadded to them, but follows after the appended words "and their heirs and assigns." . . .

[Reference to VanGrutten v. Foxwell, [1897] A. C. at pp. 662, 663, 670, 680, and Roddy v. Fitzgerald, 6 H. L. C. 877.]

After a careful consideration of King v. Evans, my opinion remains unchanged that the effect of the devise under consideration is to create an estate tail.

FEBRUARY 16TH, 1905.

DIVISIONAL COURT.

CLIPSHAM v. TOWN OF ORILLIA.

Municipal Corporations—Statute Authorizing Town to Erect and Operate Electrical Works — Damage to Lands by Erection of Dam—Temporary Structure — Independent Contractor — Control by Corporation — Maintenance of Dam by Corporation—Evidence of—Navigable River—Unlawful Act—Nuisance—Abatement—Request.

Appeal by defendants from judgment of ANGLIN, J., 4 O. W. R. 121, in favour of plaintiff for $75 damages for loss sustained by flooding of lands by reason of a dam.

The appeal was heard by BOYD, C., MEREDITH, J., MAGEE, J.

E. F. B. Johnston, K.C., and D. Inglis Grant, Orillia, for defendants.

F. E. Hodgins, K.C., and T. E. Godson, Bracebridge, for plaintiff.

BOYD, C.—The main cause of action relied on by plaintiff does not exist, according to the unappealed findings of Anglin, J. His claim was thus, substantially, that his land was flooded in the spring by reason of two dams put in the river by the contractor for the town of Orillia, which became the property of and were controlled by the municipality when

they assumed the prosecution of the work and dismissed the contractor. The unchallenged finding is that no damage arose to plaintiff from the main dam, which was sanctioned by the statute (62 Vict. ch. 64, sec. 2); that the damage was caused by another and temporary dam, which was not a part of the power works, was not authorized by the statute, was put up for the mere convenience of the contractor, for purposes of navigation and transportation so as to provide more commodious carriage for the material used in the main dam, which was lower down the river. That which is challenged is his finding that defendants have so maintained this temporary dam as to be liable for the damage it caused in 1902. Their contention is, that they did not direct or approve of the erection of this temporary dam, they did not take it over as part of the works, nor did they maintain it in any sense as against plaintiff. On 24th March, 1902, defendants gave notice dismissing Patriarche, the contractor, and thereupon the town took possession of the power works.

The first complaint made (in evidence) was in May or June, 1902, when Mr. Doolittle, a witness, asked Dilworth, another witness, to go with him to the council to see if that body would take away the temporary dam. The precise date is not given, and I take it that as to details the memory of the spokesman, Doolittle, is more accurate than that of his companion. The upshot of the interview was, that the members took the stand which defendants have always maintained: viz., that the temporary dam was not part of the works; it was not authorized nor sanctioned by the town; that the contractor put it up for his own convenience and was answerable for any damage it occasioned, and was alone responsible for its removal. They emphatically declared that they had nothing to do with it, and refused to take it down or to pay damages to the applicant.

The point held of importance by the Judge in this interview was thus stated by Doolittle: "I said to him" (Tudhope, the mayor), "'Well, if you do not take out the dam, I will go down with a gang of men and pull it out' . . . and Mr. Tudhope said, if I went down and pulled out the temporary dam, and it caused any damage to the main dam, they would hold me responsible."

The plaintiff was not then present; it is not shewn that Doolittle was then representing him or that what occurred was then communicated to him; and it is not proved that this was really the action of the council which would bind the municipality. But, assuming all these things as made out,

what does it amount to? Only this: "Do as you like," says the mayor, "about removing the obstruction, but if in doing it you cause damage to our work—the main dam—we shall expect to be compensated." This was not forbidding Doolittle to touch the temporary dam, or maintaining it as against him, but simply a statement consistent with the attitude of the council, which may be thus expressed: "Patriarche put it there; let him take it away; we have an action pending against him: we will not interfere or be mixed up with anybody in reference to the removal of this obstruction in the river." Besides, the proof is salient, on the evidence, and in the actions of plaintiff and his witnesses, that they did not account this to be a prohibition to remove the obstruction. Plaintiff puts the whole situation succinctly thus: "One of the farmers had been and asked the council to take the dam out; they refused; so we told them we were going to take it out ourselves." And, notwithstanding what occurred before the council earlier in 1902, in October of that year Doolittle with plaintiff and others proceeded with the demolition of the temporary dam.

It appears that Patriarche had promised to remove this obstruction in the river, and apparently had begun to do so before his dismissal. Plaintiff first saw this temporary dam in the autumn of 1902, and he then found that part of it had been taken off—he understood that Patriarche had ordered it to be blown up. "And we went down" (he says) "to take some more out."

Thus the work of demolition was taken up by plaintiff and his fellow sufferers in the autumn of 1902. They took off about one-third of it; let the logs or timber which stretched across the river (there about 20 feet wide), go down stream; dislodged one pier, that on the south side of the river on lot 11, so that the current next spring removed what was left of the one pier; and before action, practically, the whole superstructure was gone, and all that was left was an accumulation of stone and brush in the bed and channel of the river Severn. During the first day of the work, some one, said to be a foreman of the workmen engaged on the main dam by the town, forbade the demolition of the temporary dam, but plaintiff's people said they would not stop without a guarantee from the mayor that he would have the dam removed, and, getting no answer, they resumed their operations on the second day, and did all they could with their available utensils to remove the obstruction.

So, by thus helping themselves, the farmers represented by plaintiff had before action practically reduced the obstruction to a pile of stones and brush cast in by the contractor, which, filling up the deep cut in the river at that point, had made it shallow and less able to discharge with proper velocity the volume of water from the upper Severn. . . . The evidence is, that no appreciable injury has resulted from this condition of the river since 1902.

Upon the law Patriarche, who put it there, would be liable for the evil consequences arising from backing the water by this temporary dam. The corporation cannot be liable unless they adopted this piece of work, and took it over and maintained it as their property, or, it being on their property, they forbade any entry on the land in order that it might be abated by the sufferers.

I find no legal proof of any such state of facts as would warrant a judgment against the corporation.

The alleged foreman, who forbade the work going on in the autumn of 1902, is not even identified by name or otherwise, and there is nothing to shew that his work was that of the municipality, or that he had any authority in the premises; at all events the conduct of plaintiff in the prosecution of the work of demolition shews his estimate of the prohibition.

It is a minor point, but it is not clear from the evidence whether the damage to plaintiff's land in 1902 had not happened before Doolittle and Dilworth saw the council in May or June, 1902.

It is, again, not proved that the site of the temporary dam is in any sense owned by defendants. The main dam is on lot 11 in the 11th concession of Matchedash, and the evidence is, that the land is government property—an oral lease of it is suggested in the evidence, but is not legally proved. The recitals in the private Act are not any evidence of what is therein set forth: per Lord St. Leonards in The Shrewsbury Case, 7 H. L. C. at p. 13, though under that Act the Crown could not dispute the claim of the town to erect this power plant where it is situate; that consideration, however, does not extend to the site of the temporary dam, which is an unauthorized work not covered by the statute or the contract of defendants.

Then again, the evidence clearly indicated that this river Severn is a navigable stream, and the placing of the temporary

dam on its channel or bed would be an unlawful act, unless sanctioned in a proper manner by both governments, the provincial and the federal, according to the opinions expressed by the Judges in Re Provincial Fisheries Case, 26 S. C. R. at p. 449. Even if there was a grant of the land to defendants proved, it would not carry title to midstream of the navigable river. The land on which the northerly pier or abutment is left as a relic, is in the township of Wood, in the territorial district of Muskoka. So that I think it is a proper conclusion to say that the obstruction was not upon property owned or controlled by defendants, and it was open for any one aggrieved to enter upon the premises for the purpose of abating what proved to be a nuisance; and defendants did not forbid, nor did they take any steps to protect, the obstruction from being demolished either by the contractor or plaintiff and his neighbours.

In strict law, even if there was a nuisance erected on defendants' property by Patriarche, and it was proved that this was maintained or continued by the town of Orillia, yet an action does not lie against one who continues the nuisance unless plaintiff has made a request that it be abated. The alleged injury in this case in 1902 arose before any request was made to defendants to remove the obstruction, which was not done at all by plaintiff or in any formal way till the spring of 1903, and after that no damage is proved: see Penruddock's Case, 5 Rep. 101, which has settled the law for three centuries. This ancient authority was applied lately in a case similar as to this, by the United States Court of Appeals, in Philadelphia v. Smith, 28 U. S. App. 134 (1894), where it was said: "A grantee should not of course be held responsible for the creation of an injurious structure by his grantor, and if not notified of objection he may be ignorant of its harmful nature, or may legitimately presume that it is voluntarily submitted to, and therefore a plaintiff ought not to be permitted to recover damages for injury alleged to have been done to him by the maintenance of a fore-existing condition during a period when, with full knowledge of his hurt, he had made no complaint of it nor requested the removal of its cause:" p. 138. The application of one farmer, Doolittle, cannot enure to the benefit of another such as the plaintiff, for each cause of action is distinct, and each one seeking damages should make complaint, as a first requisite of relief, in case of a nuisance continued by one who is not the creator of it. Ewing v. Hewitt, 27 A. R. 296, may also be referred to.

On all grounds I do not see how this action could be successfully sustained against defendants, and it should stand dismissed with costs.

MEREDITH, J., gave reasons for the same conclusion.

MAGEE, J., concurred.

CARTWRIGHT, MASTER. FEBRUARY 17TH, 1905.

CHAMBERS.

TORONTO INDUSTRIAL EXHIBITION ASSOCIATION v. HOUSTON.

Evidence—Foreign Commission—Refusal of Motion—Irrelevant Testimony.

Motion by plaintiffs for a commission to England to obtain evidence of witnesses living there.

In January, 1904, plaintiffs made an agreement with Major Rose, the officer commanding the band of the "Black Watch," to bring the band to play at the exhibition to be held at Toronto in August and September, 1904, for a weekly payment of £100.

On 16th April, 1904, plaintiffs made an agreement with defendant, reciting the contract with Rose, and undertaking to furnish the band to defendant for a 4 weeks' tour of concerts throughout Canada to begin on 11th September and end in time to allow the band to go back by steamer sailing from Montreal on 8th October.

This action was brought to recover from defendant $2,917 and interest, and for an account of the profits of the concert tour, and payment of a percentage thereof, under the terms of the agreement of 16th April.

After examinations for discovery of defendant by plaintiffs, and of plaintiffs' manager by defendant, this motion was made. Plaintiffs sought to examine Rose and the bandmaster of the Coldstream Guards.

F. R. MacKelcan, for plaintiffs.

Grayson Smith, for defendant.

THE MASTER.—. . . The statement of defence (1) denies the validity of the agreement of 16th April and alleges that it is ultra vires of plaintiffs, and (2) alleges material

misrepresentation and concealment by plaintiffs' manager in allowing defendant to suppose that the band were to be paid £250 a week, whereas they were to receive only £100 a week, as the agreement of January, 1904, shews on its face. Plaintiffs reply that there was no concealment; that the truth was fully known to defendant before he entered into the contract; and that they offered to allow him to withdraw if he desired to do so.

I have read the pleadings and the examinations for discovery. From these it seems clear that there are two issues, in both of which the onus is virtually on defendant. The first, as to the validity of the contract, is a matter of law, and the present motion cannot have any reference to that point.

The second is a very important matter, and the decision must depend upon the weight which the jury or Judge gives to the conflicting statements. . . . The evidence sought to be taken on commission does not seem to have anything to do with this question. . . . The solicitors for plaintiffs set out the precise facts which they desire to prove by the evidence of the two foreign witnesses, and asked defendant's solicitors to make such admissions as would render any commission unnecessary. This defendant's solicitors are unwilling to do. They say that these facts are not within the knowledge of defendant, and that, even if the proposed evidence were relevant, these matters can easily be proved by persons now in this Province, and that some of the facts are admitted by defendant in his depositions.

I cannot see any reason for taking the evidence of the bandmaster of the Coldstream Guards. Even if defendant had been in treaty with him with a view to bringing out that band last autumn for a concert tour, that would not furnish any ground for claiming damages in the present action.

And as to Major Rose, after reading over the letter of plaintiffs' solicitor, I am unable to see how the facts there set out are (in some instances) material, and why all of them cannot be proved by other witnesses. . . .

It is not often that a commission to examine foreign witnesses is refused. . . .

[Reference to Ehrmann v. Ehrmann, [1896] 2 Ch. 611.]

The main ground of defence is apparently this: that defendant, being a musical expert himself, relied on the representation of the manager that the band were being paid £250 a week; that this justified him in putting the quality

of the band and their earning power at a much higher figure than he would if he had known the truth; that his offer to plaintiffs was properly made on that basis; and that he was therefore entirely misled, to his serious loss and damage. . . . Plaintiffs allege . . . that defendant knew the real amount of the salary before he signed the agreement, and that they offered to cancel it if defendant desired. This is the real issue of fact, and nothing that Major Rose can say will throw any light upon it.

Motion dismissed with costs to defendant in the cause.

MEREDITH, J. FEBRUARY 17TH, 1905.

CHAMBERS.

DUNLOP v. DUNLOP.

Evidence—Examination of Witness on Pending Motion—Ex Parte Motion—Substituted Service of Process—Status of Witness to Move to Set aside Appointment and Subpoena.

Appeal by one Fee from order of Master in Chambers, ante 258, dismissing her motion to set aside subpœna and appointment for her examination as a witness upon a motion made ex parte by plaintiff.

W. E. Middleton, for appellant.

W. J. Elliott, for plaintiff.

MEREDITH, J., dismissed the appeal without costs.

MACMAHON, J. FEBRUARY 17TH, 1905.

TRIAL.

SHAW v. COULTER.

Limitation of Actions — Real Property Limitation Act — Mortgagee in Possession for Ten Years — Service of Notice of Sale on Mortgagors after Ten Years—Nullity —Abortive Sale—"Proceeding"—Redemption.

Action by mortgagors against mortgagee for redemption of the mortgaged land.

T. Hislop, for plaintiffs.

D. C. Ross, for defendant.

MACMAHON, J.—The plaintiff Mrs. Shaw was the owner of the land in question, situated on Sully street, in the city of Toronto, which she mortgaged (her husband joining) to defendant on 8th September, 1892, to secure the repayment of $3,500. On the property were 5 small dwelling-houses, which when occupied rented for about $8 per month each. These were occupied at the time the mortgage was given by tenants who had been let into possession by Mrs. Shaw.

In January, 1894, there was owing on the mortgage $562.40 for interest and taxes. The houses were all occupied at that time, and defendant served notice on all the tenants shortly before 22nd January, 1894, to pay rent to him, and a tenant named Gardiner paid rent to him on 22nd January, . . . for the past month. . . . None of the tenants paid rent to Mrs. Shaw after 1st January, 1894.

This action . . . was begun on 4th July, 1904. . .

Defendant had on 12th May, 1904, served Mrs. Shaw's husband with notice of sale, and . . . Mrs. Shaw on 18th May. The property was advertised and put up for sale under the notice, but the sale proved abortive, there being no bidders. Plaintiffs set this up as creating a right in them as mortgagors to redeem.

The statute having run for the ten years necessary to create a bar against plaintiffs, the serving of the notice of sale and the proceeding to sell were nullities. . . .

An advertisement for the sale of land is a "proceeding" within sec. 23 of R. S. O. ch. 197: Smith v. Brown, 20 O. R. 165: and a notice of sale under the power of sale in a mortgage is also a "proceeding" within that section: Pryor v. City Offices Co., 10 Q. B. D. 504; Neil v. Almond, 29 O. R. 63; In re Woodall, 8 O. L. R. 288, 4 O. W. R. 131; and, as pointed out by Meredith, J., in McDonald v. Grundy, 8 O. L. R. at p. 115, 3 O. W. R. 731, the giving of the notice, the advertising of the property, and putting it up for sale, were "proceedings" which defendant, the mortgagee, was precluded from taking after the lapse of 10 years.

The paper title of the mortgagors having been extinguished by the running of the statute for 10 years, it requires a reconveyance to revest the land in them: Armour on Titles, 3rd ed., p. 299; Doe Perry v. Henderson, 3 U. C. R. 480; McDonald v. McIntosh, 8 U. C. R. 388; Sanders v. Sanders, 19 Ch. D. 373; Dodge v. Smith, 3 O. L. R. 305, 1 O. W. R. 803; Chapman v. Coope, 41 L. T. N. S. 22; Gray v. Richford, 3 S. C. R. 431, 454.

Action dismissed with costs.

FEBRUARY 17TH, 1905.

DIVISIONAL COURT.

TATTERSALL v. PEOPLE'S LIFE INS. CO.

Life Insurance—Assignment of Policy by Beneficiary Subject to Charge — Death of Insured when Renewal Premium Overdue—Right of Beneficiary or Representative of Insured to Tender during Days of Grace—Insurance Act—Conduct of Insurers—Dispensing with Tender —Estoppel.

Appeal by defendants from judgment of IDINGTON, J., upon the findings of a jury, in favour of plaintiff, the widow and administratrix of the estate of Richard Tattersall, for the recovery of $3,950.50, with interest and costs, in an action upon a policy of insurance on the life of the deceased.

The appeal was heard by BOYD, C., MACMAHON, J., MEREDITH, J.

G. H. Watson, K.C., and J. J. Warren, for defendants.

W. R. Riddell, K.C., and P. D. Crerar, K.C., for plaintiff.

BOYD, C.—The company defend on the following grounds: (1) Fraudulent representations by Tattersall on application for insurance. (2) Denial that plaintiff was assured that the policy was all right, or misled. (3) Statement that plaintiff was told that premium had not been paid. (4) All liability ceased on death of Tattersall with overdue premium unpaid. (5) On his death, not possible to renew or revive policy by tender because no beneficiary who could make tender under the contract. (6) Tattersall having died in default, and no tender made by any one within 30 days from due date of premium, liability ceased on policy.

On the matters of fact the jury have found in favour of plaintiff's contention, and the evidence is sufficient to support such finding as right and proper.

On matters of law it is argued that there was no right to tender after death of assured, and if such right existed, there was no beneficiary in this case to make tender.

The last premium of $49.50 fell due on 10th April, 1903, and was not paid. The death was on 22nd April, 1903, intestate, and plaintiff is administratrix.

On 15th December, 1902, the wife, in whose favour was the policy, assigned her interest to the husband, subject to the terms of an agreement referred to in the assignment. This was not notified to the insurance company till after the death.

The policy was assigned to the husband, in consideration of his granting her an annuity of $1,500, on condition that if he predeceased his wife the said policy and the proceeds thereof should be charged with payment of the said annuity. There had been default also in the last payment of the annuity before the husband's death.

Plaintiff, as administratrix of her husband's estate, is entitled to collect the proceeds of the policy and hold them as trustee charged with the payment of the annuity of $1,500, for her life. She was also at his death interested as beneficiary or cestui que trust of the policy and its proceeds for the arrears of annuity then outstanding.

The policy was assigned to the husband, his executors, administrators, and assigns, but charged with payment of the annuity; it was not absolutely his property, but he took it as assignee of the beneficiary named in the policy, and it would go after his death to his administrator as assignee of the same beneficiary; or, in other words, the husband became the beneficiary by the assignment, and his representative could pay the premium in default.

Indorsed on the policy are conditions and provisions, of which Nos. 5 and 8 are important:—"5. Thirty days of grace will be allowed for payment of renewal premiums, if the insured be unable to pay them when due. . . ."

"8. From any sum payable under the policy the company may deduct any lien that may be standing against the policy and the balance (if any) of the yearly premium for the then current policy year. . . ."

The present statute applicable to this policy provides for 30 days of grace during which the payment in default may be made by the assured or by any of the beneficiaries under the contract: R. S. O. 1897 ch. 203, sec. 148 (1). The original section, passed in 1893, provided that this payment might be made "when the event upon the happening of which the insurance money becomes payable has not yet happened:" 56 Vict. ch. 32, sec. 10, sub-sec. 12 (8). These words, in case of life policy, exclude the right so to renew or revive the contract by after-payment when death has happened to the person insured. But this qualification was expunged by the

legislature in the amendment made in 1897, 60 Vict. ch. 36, sec. 148 (1), the section now in the R. S. O. 1897.

The point of law was discussed before the statute provided for days of grace, in Manufacturers Life Ins. Co. v. Gordon, 20 A. R. 309, where the policy provided that a grace of one month should be allowed in the payment of premiums. The Court of Appeal equally divided as to whether the grace payment could be made after the death of the insured. Next year the first statute of 1893 was passed, which adopted the view that the payment must be before the death. But in 1897 the excision of the clause having this meaning indicates the mind of the legislature to be favourable to the views of Burton and Maclennan, JJ.A., who thought that payment might be at any time before the expiry of grace, whether the life had dropped or not. This appears to me to be a correct reading of the existing law, and I think that any one interested, whether beneficiary or representative of the assured, may make a valid tender of payment of the premium in default, within the 30 days of grace.

In this case, therefore, there was a hand existing by which the needful payment might be made, if not relieved therefrom by the conduct of the company: Stewart v. Freeman, [1903] 1 K. B. 47, 54.

I agree with the conclusions of the trial Judge and jury that the facts disclose a case of estoppel against the company, whereby their conduct and statements, as well as the silence (when it was a duty to speak) of the company's agents, operated to mislead the plaintiff and lull her into security during the currency of the days of grace: this on the lines indicated in Sanford v. Accidental Ins. Co., 2 C. B. N. S. at pp. 287, 288. There may be an explanation of all the conduct and statements found by the jury by holding that the company, after the death, and knowing of the intention to pay the premium, decided to waive actual payment and apply part of the proceeds of the policy to defray the premium. But, however it may be put, I think it is a just conclusion to uphold on the merits the finding in favour of plaintiff.

Appeal dismissed with costs.

MEREDITH, J., gave reasons in writing for the same conclusion.

MACMAHON, J., also concurred.

FEBRUARY 17TH, 1905.

DIVISIONAL COURT.

PHILLIPS v. CITY OF BELLEVILLE.

Municipal Corporations—Acquisition of Lands at Tax Sale —Duty to Sell—Sale by Tender—Resolution of Council to Accept Lower Tender — Action by Person Making Higher Tender — Injunction — Equitable Jurisdiction over Municipal Corporations — Duty of Councillors as Trustees—Administration of Trust Property.

Appeal by plaintiff from judgment of STREET, J., at the trial, refusing to make perpetual an interim injunction granted by ANGLIN, J., restraining defendants the corporation of the city of Belleville from proceeding with a sale to defendant Caldwell of certain lots acquired by the corporation under the Assessment Act in satisfaction of arrears of taxes.

The appeal was heard by BOYD, C., MACMAHON, J., MEREDITH, J.

E. D. Armour, K.C., for plaintiff.

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

W. J. Diamond, Belleville, for defendant Caldwell.

BOYD, C.—In December, 1902, the city of Belleville became the purchasers at tax sale of the lots in question under the provisions of the Assessment Act, R. S. O. 1897 ch. 224, sec. 184 (3). Under this statute, as amended by 61 Vict. ch. 25, sec. 5, it became the duty of the council of the municipality to sell such lands within 7 years, and, pursuant to this requirement, the lots in question were offered to be sold, and sealed tenders invited from two competing private bidders, one of whom is plaintiff, suing for himself and all ratepayers of the city, and the other is one of the defendants.

It does not seem very material to dwell on the preliminary offers and the action of the executive committee thereon, for the matter was brought before the council, and the result was, as I have said, that sealed tenders were called for: both parties responded, plaintiff offering $326.50, accompanied by a cheque marked good, and the defendant offering $265 as cash. The council . . . resolved to accept the lower offer, against the protest of the higher bidder. The only

apparent reason assigned is, that Caldwell theatened litigation if some offer he had made was not carried out—but it is said that plaintiff also threatened litigation.

I can see upon the evidence no sufficient grounds for the action of the council in accepting the lower and rejecting the higher offer, regarding the matter as one involving the due and proper administration of corporate property. No evidence for the defence was given, in deference, I think, to the ruling of the learned trial Judge, who seems to have proceeded on the view "that the Courts exercise power over trustees which they do not exercise over municipalities."

The relation of municipal bodies to the equitable jurisdiction of the Court was first considered in this Province by Esten, V.-C., in Paterson v. Bowes, 4 Gr. 180, and he came to the conclusion that the legislation which in England defined the scope and object of corporate purposes so as to impress a distinct fiduciary character upon corporate property and thereby attract the jurisdiction of equity, had worked to like result in the municipal legislation of the Province. . . . [Reference to City of Toronto v. Bowes, 4 Gr. 489, 507, 520, 6 Gr. at p. 77; Bowes v. City of Toronto, 11 Moo. P. C. at p. 524; Attorney-General v. Goderich, 5 Gr. 402.]

As to this particular land, it was acquired by the city under a peculiar provision of the law whereby the property was taken over as a satisfaction for the arrears of unpaid taxes thereon. It became corporate property, and, subject to the right of redemption by the owner, it so remained until sold. It takes the place, as it were, of the unpaid taxes, and by the sale of the land there is afforded some opportunity of recouping the treasury for what is in default. Here the unpaid taxes on the lots amount to some $351—a sum in excess of the highest offer made upon tender.

The councillors had brought before them the correct line of duty when it was said during the meeting that they ought to get all they could for the lots. They were distinctly advised by their solicitor that no contract was made or could be enforced in respect of the Caldwell offer—and this was correct advice. The minority advised that the highest offer should be accepted, and, if no good reason can be given against this course, it is the proper course for the council as trustees to adopt. It is not advisable in dealing with corporate (trust) property to dispose of it in a private way—but some steps should as a rule be taken to ensure competition, whether by inviting tenders or exposing to auction, with, it may be, a reserved bid. This method is recognized by the legislature

in regulating the municipal power to acquire and dispose of "wet lands." When it is deemed expedient to sell, depart with, or dispose of the same, it is to be "by public auction in like manner as they may by law sell or dispose of other property:" R. S. O. 1897 ch. 223, sec. 556, and same section in the Act of 1903.

Of course the money derived from the sale of the lands bought for arrears of taxes can be applied to any legitimate purpose of the corporation—and, even if regarded as "general funds" of the municipality (sec. 424), would be still of fiduciary character.

It was thought at one time that the Court would not interfere to prevent trustees selling at an undervalue, unless the injury was irreparable. This was so held in Pechel v. Fader, 2 Anst. 549, which case is published (though erroneously) in the Revised Reports as an exposition of the law: 3 R. R. 627. This case, however, was repudiated at an early date by the Court of Chancery. . . . [Reference to Attorney-General v. Liverpool, 1 My. & Cr. 210: Dance v. Goldingham, L. R. 8 Ch. 902.] And reasons are given in the early Canadian cases cited to shew that judicial supervision may well be applied to ensure the well-working of the municipal system in regard to its administration aspects as the holder and disposer of corporate property.

I think my brother Anglin was well advised to interfere at the outset by way of preliminary injunction so as to stop the sale at a less price than the highest offer till the facts had been ascertained. In their statement of defence the corporation submit to convey to the person entitled. As between the two before the Court plaintiff is the one who should be accepted as purchaser, and if defendant corporation have no objection to this course, that may now be ordered. But if the corporation desire to prove good reasons which induced a preference for defendant Caldwell, there may be a further trial on that point, with all costs reserved before the Judge at the trial. If the parties agree to close the litigation at this stage, that being communicated to the Court, the costs and any other undisposed of matters will be dealt with.

MACMAHON, J., concurred.

MEREDITH, J., dissenting, was of opinion, for reasons stated in writing, that the appeal should be dismissed.

FEBRUARY 8TH, 1905.

DIVISIONAL COURT.

McDERMOTT v. TRAVERS.

Trespass to Land—Conversion of Timber — Assignment of Claim for Wrongful Act—Dispute of Title—Licensee—Estoppel—Admissions—Husband and Wife—Demand of Price instead of Return of Goods.

Appeal by plaintiff and cross-appeal by defendant John Travers from judgment of junior Judge of County Court of Simcoe in favour of plaintiff against defendant John Travers for $20 and costs, and in favour of defendant Catherine Travers without costs, in an action to recover $100 damages for trespass to land and wrongful cutting and conversion of timber. The action was tried without a jury.

Plaintiff sued as owner and assignee of the land and timber and all rights of action therefor under deed and assignment under seal from prior owner, D. C. Smith, both dated 13th September, 1904, but relating back so as to give plaintiff all rights in respect thereof, the cutting and conversion having taken place in the spring of that year.

The claim was that defendant John Travers, acting as agent or co-principal of his wife, had taken advantage of a license, obtained from the prior owner Smith, to wrongfully cut and remove timber instead of shade trees, which timber was used in the building of a barn on the land of defendant Catherine Travers.

Defendant John Travers admitted the ownership of D. C. Smith, but alleged that what he did was in accordance with the bargain made with him. He also denied plaintiff's title.

There was a general denial of plaintiff's claim and title by defendant Catherine Travers. There was evidence that she knew of the bargain and of the wrongful acts of her husband, also that a written demand had been made upon her for the value of the timber, before it was used in the barn.

At the trial it was contended for defendants that plaintiff was bound to prove by actual survey that the timber was taken off his land, and evidence was taken as to boundaries.

Plaintiff replied that defendants were estopped by their pleading and the admissions of the husband, and also in law, from disputing that timber came off plaintiff's land.

The trial Judge held that there was no real dispute as to boundaries, and that Smith's version of the bargain was the correct one. No reasons were given by him for the judgment in favour of Catherine Travers. The original appeal was by plaintiff against Catherine Travers, and after cross-appeal by defendant John Travers, plaintiff also asked that damages against John Travers be increased to amount claimed.

C. W. Plaxton, Barrie, for plaintiff, argued that a demand of the value of goods was equivalent to a demand of the goods: Thompson v. Shirley, 1 Esp. 31; that admissions of the husband in this case were binding on the wife: Phipson on Evidence, pp. 74, 213, and 220; estoppel by pleading: Richardson v. Jenkin, 10 P. R. 292; licensee estopped in law: Phipson on Evidence, p. 610; Bigelow on Estoppel, p. 542; admissions in evidence: Clarke v. Fisher, 3 O. W. R. 358; conversion: Stimson v. Block, 11 O. R. 96.

[Meredith, C.J., referred to the assignment being one of a claim for a wrongful act, and not good according to Dawson v. Great Western and City R. W. Co., [1904] 1 K. B. 277.]

W. A. Boys, Barrie, for defendants, relied on Huffman v. Rush, 3 O. W. R. 43.

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

MEREDITH, C.J.—This case has been argued with an ability and energy worthy of a much more important one, and I do not think we need to delay giving judgment.

It is impossible to interfere with the finding of the learned Judge, where he has preferred the testimony of witnesses on one side to that of witnesses upon the other, or to interfere with his estimate as to the damages.

I think there was some evidence that the trees for which the damages have been assessed at $20, were cut upon the lands of plaintiff. The evidence of defendant John Travers has been read by Mr. Plaxton, and that proves it, I think, sufficiently, taking all the other circumstances into consideration, and there was prima facie evidence of the ownership by plaintiff of the land on which the trees in question were cut. That being so, it is impossible to disturb the judgment against defendant John Travers for the $20.

As to defendant Catherine Travers, we think that she is liable as for a conversion of the timber as chattels.

There is evidence that, before the timber was worked into the barn, it was lying upon her farm, when a demand was made for the value of the timber as having been unlawfully

cut upon plaintiff's property. Such a demand not complied with is, according to the cases cited by Mr. Plaxton, a sufficient demand to justify a finding that there has been a conversion.

She did refuse to comply with the demand, and the timber was afterwards worked into the barn, and she is liable for $20, for which she might have been sued in the Division Court unless the question of title arose.

On the whole, we think the judgment should be against her as well as her husband for $20, but as to her it will be without costs.

The result is that the judgment stands as against the husband for $20 with costs, as below, and that judgment is given for the same $20 against the wife without costs, and there will be no costs of the appeal or of the cross-appeal to either party.

HODGINS, MASTER IN ORDINARY. FEBRUARY 14TH, 1905.

MASTER'S OFFICE.

COLONIAL INVESTMENT AND LOAN CO. v. McCRIMMON.

Mortgage — Advances for Building — Mechanics' Liens — Priority—Subrogation—Agreement to Postpone.

Action by mortgagees to enforce their security. The moneys advanced upon the mortgage were used in the construction of buildings upon the land. Certain holders of registered mechanics' liens were made parties, and upon the usual reference they contested the plaintiffs' priority in respect of $4,800 advanced to contractors and wage-earners.

A. McLean Macdonell, for plaintiffs.

J. H. Denton and R. F. Segsworth, for lien-holders.

THE MASTER:—At the close of the argument in this case I found, on the evidence, that the sum of $4,800 had been advanced by the mortgagees for the purchase of the land and the erection of the buildings thereon, and that the same had been advanced and paid at the dates mentioned in the account marked as exhibit No. 1.

This finding, I think, brings the mortgagees' claim within the doctrine of subrogation which was illustrated in Baroness Wenlock v. River Dee Co., 19 Q. B. D. 155, where the English Court of Appeal held that the plaintiff's advances of

money borrowed by a company ultra vires, but applied by such company in the payment of their debts and liabilities properly payable by them at the dates of the borrowing, and also in the payment of debts and liabilities which became payable at dates subsequent to the original advances, should be allowed, and that the plaintiffs should be subrogated to the rights of the creditors of the company so paid out of such borrowed money.

But there is another ground upon which the plaintiffs' advances should be allowed. An agreement between the mortgagees and the lien-holders, dated the 13th November, 1901, recites that the mortgagees "have advanced to the said owner upon two certain building mortgages the sum of $4,800," and that "there remains $1,600 yet to be advanced upon the said mortgages." These recitals of advances made and to be made are not impeached, or in any way questioned by the other provisions of the agreement, and must be read as a confirmation of the advance of the $4,800.

The agreement then recites the liens of the contractors, and goes on to authorize the mortgagees, "notwithstanding the said claims of lien," "to advance the balance of the said mortgage moneys, namely, the sum of $1,600, and any further moneys necessary to complete; the said moneys to be applied towards the completion of the said buildings and to be a charge upon the said lands prior to the said claims of lien." The agreement then provides that it shall be without prejudice to the rights of the contractors to enforce their liens against the said lands or the parties primarily liable. And the mortgagees then agree "to advance, as aforesaid, the money, $1,600, to complete the said houses, and if they shall advance the funds necessary, if any, over and above the amount of their mortgages, they shall be at liberty to add any such further advance to the amount of their mortgages."

Taking, therefore, the whole agreement, it is clearly a confirmation of the plaintiffs' mortgages, and a postponement of the claims of liens of the signing contractors.

The claims made by the signing contractors for priority over the $4,800 above mentioned are therefore disallowed; and the extra costs caused to the plaintiffs by reason of such claims must be paid to the plaintiffs by the contesting contractors. Their claims will be allowed as subsequent to the plaintiffs'.