THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 10TH, 1906).

VOL. VIII. TORONTO, NOVEMBER 15, 1906. NO. 16

NOVEMBER 1ST, 1906.

DIVISIONAL COURT.

RE TOTTEN.

Will—Construction—Distribution of Estate — Shares—Income — Corpus—"Remaining Sons" — Survivorship—Period of Distribution.

Appeal by the children of Warren Totten, deceased, and of Norman Totten, deceased, from order of FALCONBRIDGE, C. J., 7 O. W. R. 886, declaring that upon the true construction of the will of Daniel Totten, deceased, the respondent Osborne Totten was entitled during his lifetime to the income derived from the principal of the estate of Daniel Totten, deceased, producing the income to which Henry Totten, deceased, was entitled upon his death, and that upon the death of Osborne Totten, the principal was to be divided share and share alike between the children of Osborne Totten who should attain the age of 21 years or die under that age leaving lawful issue, such issue to take the part or share their parent would have taken if living, and if more than one as tenants in common.

E. D. Armour, K.C., for the children of Norman Totten.

N. Sommerville, for the children of Warren Totten.

C. A. Moss, for Osborne Totten and his children.

M. C. Cameron, for official guardian, representing unborn children of Osborne Totten, and unborn great-grandchildren of testator.

J. B. Holden, for the Toronto General Trusts Corporation.

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

MEREDITH, C.J.:—The testator died on 3rd April, 1877, and left surviving him 4 sons, Warren, Henry, Norman, and Osborne. Warren died on 30th December, 1899, leaving 4 children surviving him, all of whom have attained their majority. Norman died on 23rd February, 1899, leaving 2 children surviving him, both of whom have attained their majority. Henry died on 8th February, 1906, without issue. Osborne is still living, and has two children, both of whom have attained their majority.

The testator devised and bequeathed all his property, real and personal, to his executors and trustees upon trust, after payment of his debts, funeral and testamentary expenses, and the expenses of registering his will, and a legacy of $1,500 to each of his four sons, to pay and divide the net annual income of his "residuary estate" between and among his 4 sons, in equal shares during their respective natural lives.

After making these dispositions, provision is made for the disposition of the corpus of the residuary estate in the following words:—

"And on the death of any one of my said 4 sons and on the death of each of them to pay and divide the principal or corpus of one-fourth part of my said residuary estate equally between and among such of the children of the said deceased son as shall attain the age of 21 years, or die under that age leaving lawful issue, the issue of any such deceased child to take the share the parent would have taken if living, and if more than one as tenants in common, but in case any of my said sons so dying shall have only one child who shall attain the age of 21 years or die under that age leaving lawful issue, then I direct that my said trustees shall pay and divide only the one-half part of the said one-fourth part to or among such child or issue."

It is manifest that had the will contained no other disposition providing for the event of there being no child or issue of any deceased child of one or more of the sons entitled to take under the provision of the will which I have just quoted, that part of the corpus which was bequeathed to the children or their issue of these sons would have been undisposed of and would have passed to the next of kin of the testator.

In order, therefore, to provide for the contingency mentioned and probably for the case of a legatee dying in his lifetime, and to prevent an intestacy as to the part of the corpus that might otherwise have been disposed of, the will contains a declaration in these words:

"I declare that all lapsed legacies and shares of my estate under this my will, and all portions of my estate of which but for this provision I might die intestate, shall become part of my residuary estate, and shall be payable and divisible, as near as the then existing circumstances will permit, in like manner as hereinbefore directed with respect to such residuary estate, and this provision shall apply as well to lapsing and accruing legacies and shares as to original legacies and shares and till my estate is finally distributable, my will and intention being that all legacies or shares lapsing or failing of effect shall revert to and be divided among my remaining sons and their issue in the manner, shares, and proportions hereinbefore directed, as far as may be possible, and, to prevent an intestacy of any part of my estate, I direct that any portion thereof which at the date of the final distribution shall remain undisposed of shall be equally divided among all my then surviving grandchildren, and the issue then living of any deceased grandchildren, such issue to take the part the parent would have taken if living, and if more than one as tenants in common."

The present controversy has arisen owing to Henry Totten having died childless, and his brothers Warren and Norman having predeceased, and his brother Osborne alone having survived, him.

The Chief Justice of the King's Bench treated the words "remaining sons" as meaning "surviving sons," and accordingly determined that the children of Warren and Norman, as these sons had predeceased Henry, were not entitled to share in that part of the corpus which was set free owing to Henry having died childless.

I am unable with great respect to agree with that view.

It is manifest from the provisions of the will that equality between the sons as to the income of the residuary estate, and equality between their respective families as to the corpus, is the dominant idea of the testator. Each son has given to him an equal share of the income during his lifetime, and for the family of each son the same provision is made out of the corpus, one-fourth to each in the same events

and under exactly the same conditions, and having this equality in view one would scarcely expect to find that when providing for the case of any of these provisions failing to take effect the testator would wittingly have made it possible that children of two of his sons should in any event take each but one-fourth of his residuary estate, and the children of a third son one-half of it, and yet that is the result reached by the judgment appealed from.

If the language which the testator has used bears that meaning, effect must of course be given to it, but before adopting such a construction, it is, I think, the duty of the Court to endeavour to find, if without disregarding or doing violence to any of the provisions of the will that may be done, a meaning which accords better with the general scheme which the testator had in mind.

The only difficulty is created by the expression "remaining sons and their issue" which the testator uses; but, taking the provision of which it forms part as a whole, that difficulty is not, I think, insurmountable.

The lapsed legacies or undisposed of shares are "to be payable and divisible as near as the then existing circumstances will permit in like manner as hereinbefore directed with respect to such residuary estate." In the events that have happened the undisposed of share is the one-fourth of the residuary estate which upon Henry's death would have been divisible between his children and their issue, if he had left any entitled to take. Then what is the manner in which the residuary estate has in the former part of the will been directed to be payable and divisible? It is by a division into equal shares between the families of the 4 sons; it is true that it is one-fourth to each family as the respective heads die, and it is not unlikely that, observing this, the testator used the words "as near as the then existing circumstances will permit" to indicate that there was to be the same equality as prevailed under the original provision, and that the shares were not to be one-fourths.

Had the provision stopped at this point, this would, I think, have been reasonably clear.

Then does what follows make it necessary to give a different meaning to the whole of the provision? As I have said, the difficulty is created by the use of the words "my remaining sons and their issue."

Bearing in mind that the shares lapsing or failing of effect spoken of are shares of the corpus, of the residuary estate, there can be no division of them "in the manner, shares, and proportions hereinbefore directed" between the remaining sons, for nothing out of the corpus has been given to any of the sons,—they take income only.

It would seem that this provision of the will declared to be intended to make the meaning of the testator more clear only obscures it.

The expression "remaining sons" does not, however, necessarily mean "surviving sons;" it may, and in this case, I think does mean—if it means anything—other sons surviving in person or in stirpes, that is to say, sons surviving in person or in stirpes, a son or sons dying without issue capable of taking under the earlier provisions of the will, and, so reading it, there is nothing in the language used to alter the effect of the earlier part of the provision.

"Remaining" is not, I think, so strong an expression pointing to survivorship as "surviving," and yet had the latter been the word used by the testator, there is ample authority for holding in such a case as this that it ought to be read as "other surviving in person or in stirpes:" Lucena v. Lucena, 7 Ch. D. 255; Re Bilham, [1901] 2 Ch. 169; and, though involving an idea of a survivorship, means surviving in person or in stirpes. See, also, O'Brien v. O'Brien, [1896] 2 I. R. 459.

It is not without significance that the words "remaining" and "surviving" are both used in the provision of the will with which I am dealing. Where the testator means "surviving in person" he uses the word "surviving." I refer to the provision as to surviving grandchildren, and it is not unreasonable to infer that if he had meant to convey the same idea when speaking of his sons he would have said "surviving" and not "remaining" sons.

As Osborne is still living, it is not proper to express an opinion as to the destination of the share intended for his children or their issue, if it should happen that there is no issue of his capable of taking.

The result is that, in my opinion, the appeal should be allowed and the order of the Chief Justice should be discharged, and in lieu of it an order should be made declaring that upon the true construction of the will, in the events that

have happened, the children of Warren are entitled to one-third of the one-fourth of the corpus which would have gone to the children of Henry if he had left children entitled to take; the children of Norman to one-third of the same one-fourth; and that the remaining one-third of the same one-fourth is vested in the trustees upon and subject to the same trusts as are declared in respect of the one-fourth devised to the children of Osborne.

The costs of all parties will be paid out of the trust estate, those of the trustees between solicitor and client.

NOVEMBER 5TH, 1906.

DIVISIONAL COURT.

CRAWFORD v. TILDEN.

Railway—Dominion Undertaking—Mechanics' Liens — Provincial Act—Application of—Constitutional Law.

Appeal by defendants the Guelph and Goderich Railway Company from judgment of CLUTE, J., declaring plaintiff and other lien-holders entitled to a lien upon the lands of the appellants in the county of Huron.

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

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

E. L. Dickinson, Goderich, for plaintiff.

A. M. Stewart, for defendants Piggott & Co.

BOYD, C.:—Apart from special statute, the law of Ontario still is that a railway as a going concern cannot be sold under execution by the sheriff, unless he is able to sell the whole undertaking. It is not competent under judicial process of this kind to sell by piecemeal so as to disintegrate the road. That was recognized as the law by the Privy Council when directing, in Redfield v. Wickham, that a railway undertaking might be as a whole sold under execution, according to the proper construction of the Dominion railway law: 13 App. Cas. 473, 475, 476.

For like reasons that make against the sale of part of a railway under execution, it was held that a mechanic's lien against part of a railway could not be enforced in Ontario, in King v. Alford, 9 O. R. 643. And that was the state of the law when the Mechanics' Lien Act was amended by extending it in terms to railways. But the machinery supplied by the Act does not provide for working out a sale of the entire undertaking. The remedy seems to be restricted to that part of the railway where the work was done, and if the right of relief to the wage-earner in respect of his lien was analogous to that enjoyed by a vendor of land in right of his lien for the price, relief might be given and worked out by the Court under the provisions of the provincial Act.

But we are precluded by the decision in King v. Alford from holding that the mechanic's lien is of like legal character with a vendor's lien. It was there held that the mechanic's lien was operative as a statutory lien issuing in process of execution, of efficacy equal to but not greater than that possessed by ordinary writs of execution. Under a writ of execution against lands the sheriff can only sell what is in his bailiwick, and this limited process is not applicable to the sale of a line of railway running through many counties of the province.

Even if the mechanic's lien was to be regarded as a vendor's lien, I question the competency of the province to put that burden upon the lands and property of a federal railway undertaking.

By Dominion statute 4 Edw. VII. ch. 81, the railway company in question was incorporated, and the undertaking was declared by sec. 11 to be a work for the general advantage of Canada. By this enactment it was brought within the exception as to local works and undertakings specified in the British North America Act, sec. 92, No. 10 (c), and thereby placed under the exclusive legislative authority of Canada by virtue of sec. 91, No. 29. Being thus a federal railway exclusively under the legislative control of the Dominion, it is not competent for the local legislature of Ontario to enact any law which would derogate from the status and rights and property enjoyed and held by the federal corporation under its constitution created by the Dominion of Canada. That result follows inevitably, I think, from what has been decided in the earlier case of Bourgoin v. Montreal, etc., R. W. Co., 5 App. Cas. 381, and the more recent cases

of Attorney-General for Canada v. Attorney-General for Ontario, [1898] A. C. at p. 715, and Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. p. 367; and Madden v. Nelson and Fort Sheppard R. W. Co., ib. 626.

The Mechanics' Lien Act of Ontario is extended to railway companies as owners and to railways and other lands with the safeguard in sec. 52:—"The provisions of the Act, so far as they affect railways under the control of the Dominion of Canada, are only intended to apply so far as the legislature of the province has authority or jurisdiction in regard thereto." This was passed in 1896, after the decision in King v. Alford (1885).

The effect of this legislation is to operate at once upon the property of the railway—affecting it in rem, and creating a statutory lien on the undertaking for the benefit of the wage-earner: secs. 4, 7, 13. The initial proceedings under the Ontario Act is to place a burden on the lands of the railway in addition to what may be imposed upon them under the Dominion Railway Act, secs. 111, 112, &c., Act of 1903. That appears to me to be a piece of legislation beyond the competence of the provincial legislature.

I foresee, besides, great difficulties in working out the provisions of the Mechanics' Lien Act, as applied even to Ontario railways, under the existing law, which forbids the disposal of a railway piecemeal. To make the local law effective it would appear to be requisite to provide for a sale of the particular part of the land benefited by the work in respect of which a lien is given. The Act as it stands at present, can only be worked out by attributing the lien to all the line of railway lands, and selling the whole as an entire thing, while yet the lien is registered only in the county where the work has been done: sec. 17, sub-sec. 3, and sec. 7.

Upon the main point, however, as to the constitutional aspect of the Mechanics' Lien Act, I think the appeal should succeed. It is not a case for costs.

It was suggested, but not strongly argued, that there might be a difference where the federal railway was not a completed and running concern, but only in course of construction. That, however, is not, to my mind, an essential difference—it is still a federal work entered upon and being prosecuted for the advantage of the whole Dominion, and it

should not be frustrated or interfered with by provincial legislation of the kind in question.

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

MAGEE, J., also concurred.

GARROW, J.A. NOVEMBER 5TH, 1906.

C.A.-CHAMBERS.

STEPHENS v. TORONTO R. W. CO.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court—Practice—Scale of Costs—Conflicting Decisions.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court upon a question of practice as to the estate of costs taxable upon taking money out of Court paid in with the defence.

D. L. McCarthy, for defendants.

W. A. Skeans, for plaintiff.

GARROW, J.A.:—The point is one of considerable practical importance, and, in view of the difference of opinion expressed in the cases of Chick v. Toronto Electric Light Co., 12 P. R. 58, and Badcock v. Standish, 19 P. R. 195 (in which apparently the earlier decision was not cited), the leave should be granted. But, as plaintiff acted upon the practice as settled by the case in 19 P. R., I think it is only fair that the leave to appeal should only be on condition that defendants shall pay plaintiff's costs of this motion and of the appeal to this Court in any event.

GARROW, J.A. NOVEMBER 5TH, 1906.

C.A.—CHAMBERS.

REX v. LAFORGE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court Refusing to Quash Conviction—Special Grounds—Municipal By-law.

Application by defendant for leave to appeal to the Court of Appeal from the order of a Divisional Court (ante 104)

refusing to quash a conviction of defendant for a violation of the terms of a by-law of the town of Berlin respecting hawkers and pedlars.

W. Proudfoot, K.C., for defendant.

J. E. Jones, for the informant.

GARROW, J.A.:—The point mainly relied on by defendant is that the by-law has fixed so high a license fee ($75) as to be prohibitive. I have read the evidence, and, while there is some evidence tending to support this objection, and that that was the intention of the town council in fixing so high a license fee, and assuming the objection to be a valid one, there is also evidence to the contrary. In these circumstances, the Divisional Court had, I think, no alternative upon this objection but to affirm the conviction.

The only other ground of importance was as to the construction and effect of the amendments to the original by-law, and as to these I am unable to see any error in the conclusion of the Divisional Court.

Application dismissed with costs.

CARTWRIGHT, MASTER.. NOVEMBER 6TH, 1906.

CHAMBERS.

CUMMINGS v. TOWN OF BERLIN.

Venue—Statement of Claim—Naming Place of Trial other than the Proper one under Rule 529 (b)—Irregularity—Waiver by Pleading—Motion to Change Venue under Rule 529 (d)—Time for making — Necessity for Defined Issues—Practice—Costs.

Motion by the defendant town corporation to change the venue from Toronto to Berlin.

J. E. Jones, for applicants.

G. B. Strathy, for plaintiff.

THE MASTER:—The facts of this case appear sufficiently from the judgment in Re Town of Berlin and Berlin and Waterloo Street R. W. Co., 8 O. W. R. 284.

Since that decision the present action has been brought by a ratepayer of the town on behalf of himself and the other ratepayers, against the town corporation and the street railway company.

The statement of claim sets out the facts, which do not seem to be in dispute, and asks a declaration that the town corporation cannot proceed with the arbitration and an injunction restraining the town corporation and the street railway company from proceeding in the matter, and also restraining the town corporation from paying any moneys towards the cost of the arbitration and from taking any steps to take over the railway.

The venue has been laid at Toronto.

The defendants the town corporation delivered their statement of defence on 16th October, and six days later gave notice of motion to change the venue to Berlin, on the ground that the case came within Rule 529 (b).

The defendants the street railway company have not delivered any statement of defence. . . .

The form of the action suggests the question which was raised in Connor v. Dempster, 6 O. L. R. 354, 2 O. W. R. 833. It was not neccessary to decide it there. While it seems that in these cases there is no "cause of action" as that phrase is commonly understood, yet it may well be that if it should appear that any evidence (other than documentary) will be required, the analogy of Rule 529 (b) should be applied, as was held to be right in Saskatchewan Land and Homestead Co. v. Leadley, 9 O. L. R. 556, 5 O. W. R. 449.

But, however that may be, it was contended by counsel for plaintiff that the motion was premature if made under Rule 529 (d) and too late if made under 529 (b). If the case comes strictly within sub-sec. (b), then the statement of claim was irregular, and defendants should have moved against it if they thought it worth while to do so: see Brown v. Hazell, 2 O. W. R. 784, and Rule 310. Being only an irregularity, it could be waived, and is conclusively waived under Rule 311 if a fresh step has been taken after knowledge of the irregularity. In this case I think the irregularity (if it be one) was waived by the defendants who now move. This is quite different from a nullity, which can never be cured by waiver: see Hoffman v. Crerar, 18 P. R. at p. 479.

I am, therefore, of opinion that the motion fails if made on the ground of irregularity.

No doubt, even if the irregularity is waived, that will not prevent a similar motion under 529 (d) within the proper time. But is it not as yet too soon to invoke clause (d)? So far from the cause being at issue, the statement of defence of the street railway company has not yet been delivered. It was stated on the argument, and seems probable, that the action will be disposed of on admissions of fact, and it was argued that Powell v. Cobb, 29 Ch. D. 488, shews that such a motion cannot be made until the issues are defined, and it is made plain whether evidence will be required, and, if so, where the action can most conveniently be tried. Then clause (b) could usually be followed if applicable to the particular case.

The motion, therefore, fails and is dismissed. This will not prejudice defendants in renewing the application at the proper time, if so advised.

The correct practice seems to be to move against the statement of claim before pleading, if the motion is made under clause (b). If not made then, it can still be brought up after the cause is at issue, but should not be made till then—and the application will not be prejudiced by the delay because many actions are settled before going to trial, and the motion, though justifiable, may be unnecessary.

As the question is new, and the practice has not been considered and defined on this particular point, the costs will be in the cause.

FALCONBRIDGE, C.J. NOVEMBER 6TH, 1906.

CHAMBERS.

DAVIES v. SOVEREIGN BANK.

Parties—Joinder of Defendants — Pleading—Specific Performance—Motion to Compel Plaintiff to Elect to Proceed against one of two Defendants—One Claim against both Defendants.

Appeal by defendants the corporation of the city of Toronto from order of Master in Chambers (ante 484) dis-

missing motion by appellants to compel plaintiff to elect whether he proceed against the appellants or against defendant Eckardt.

F. R. MacKelcan, for appellants.

W. H. Blake, K.C., for defendant Eckardt.

F. Arnoldi, K.C., for plaintiff.

FALCONBRIDGE, C.J., dismissed the appeal with costs against the appellants in any event.

MABEE, J. NOVEMBER 6TH, 1906.

CHAMBERS.

RE BADEN MACHINERY CO.

Costs—Winding-up of Company—Costs of Alleged Contributories Ordered to be Paid out of Assets—Deficiency of Assets—Costs of Petitioning Creditor and Others — Costs and Compensation of Liquidator — Priorities—Abatement.

Application by Hood and Snow for an order that the liquidator of the Baden Machinery Company pay out of the assets of the company certain costs which the applicants had been adjudged by the Supreme Court of Canada to be entitled to.

W. E. Middleton, for Hood and Snow.

J. E. Jones, for Lewis & Co. and the Staebler estate.

J. C. Haight, for the liquidator.

MABEE, J.:—The winding-up order was made upon the application of Messrs. Lewis & Co., creditors of the company, J. R. Eden being appointed liquidator, and upon his application Hood and Snow were placed upon the list of contributories; they appealed, and Ferguson, J., sustained the order of the local Judge, and he in turn, upon a further appeal, was upheld by the Court of Appeal. The matter was then carried to the Supreme Court of Canada, where Hood and Snow were successful in their contention, and an order

was made striking their names off the list of contributories. See Hood v. Eden, 36 S. C. R. 476. The formal order of the Supreme Court made the following disposition of the costs: "And this Court did further order and adjudge that the said respondent (the liquidator) should and do pay to the said appellants (Hood and Snow), out of the assets of the said the Baden Machinery Company, the costs incurred by the said appellants as well in the Court of Appeal of Ontario, and in the Hight Court of Justice, as in this Court." The costs of the appellants were taxed in the Supreme Court at $852.69, and in the Court of Appeal and High Court at $868.37, making a total of $1,721.06, which the liquidator has been ordered to pay "out of the assets" of the Baden Machinery Company. The affidavit of the liquidator shews that the assets of the company consist of $1,184.09 in Court and $600 to his credit in the bank, and "that the costs of the winding-up proceedings and of the litigation incident thereto, including the fees payable to the local Judge to whom the matter was referred, and before whom the proceedings have been carried on, are still unpaid: . . . that I have not as yet received any remuneration for my services as liquidator." The affidavit further sets forth the steps taken to ascertain the facts connected with the supposed liability of Hood and Snow to the company, and the care taken by the liquidator.

This feature of the case, I think, must be resolved in favour of the liquidator, and it would appear that he was entirely justified in the attempt made; he had the judgment of the local Judge, in turn affirmed by Mr. Justice Ferguson, and by the Court of Appeal, as well as the views of two Judges in the Supreme Court in his favour. Out of 11 Judges before whom the matter came, 8 were of opinion that the contention of the liquidator was right, and that Hood and Snow were liable as contributories. The liquidator was well advised in the course he took; indeed, had he omitted to present to the Court the evidence in his hands looking to the liability of Hood and Snow, he would have scarcely been doing his duty.

The costs of Lewis & Co., the creditors who obtained the winding-up order, have not been paid, and the representatives of Mr. J. M. Staebler have an order against the liquidator for the payment of certain costs.

Counsel for the liquidator contended that his costs and compensation should form a first charge upon the estate in his hands, while counsel for Hood and Snow, Lewis & Co., and the Staebler estate, contended that the funds should go first in payment of the costs of Lewis & Co., and that the balance of the fund should be divided pro rata between Hood and Snow and the Staebler estate. If this latter contention prevails, the liquidator is left without funds to pay his own costs of the liquidation proceedings, and loses his compensation.

The affidavit of the liquidator shews that the $600 in his hands was recovered by him in consequence of certain litigation with other alleged contributories of the company, and in respect to which he incurred costs that have not been paid, and that he gave personal attention to settlements made connected with the recovery of this $600.

The cases seem to shew that upon the facts stated here Hood and Snow, Lewis & Co., and the Staebler estate, are entitled to be paid in priority to the liquidator, and that the reasonableness of the proceedings of the liquidator forms no element in the matter; this is settled by In re Home Investment Society, 14 Ch. D. 167, and In re Dominion of Canada Plumbago Co., 27 Ch. D. 33.

This principle, however, should not extend to that part of the fund that was realized by litigation undertaken by the liquidator and the costs of which have not been paid: In re Staffordshire Gas and Coke Co., [1893] 3 Ch. 523. . . .

I think, in addition to the realization costs connected with the $600, the liquidator should have priority for a reasonable sum as his compensation for the care taken and time spent upon that branch of the liquidation.

The matter is still before the local Judge, and he may fix a proper sum for the liquidator's costs connected with realizing the $600, including therein a sum that will fairly compensate the liquidator for his services connected with that matter alone. These proceedings were all taken before the local Judge, and he is in a favourable position to know what would be proper to allow for costs and compensation.

The sum so allowed may be retained by the liquidator out of the $600, and the balance must be paid over to the

applicants. The $1,184.09 in Court must also be paid out to the applicants.

Counsel for Hood and Snow, Lewis & Co., and the Staebler estate, said they were agreed upon the division of the moneys between their clients, so the formal order may be settled by consent or spoken to again.

The case involves much hardship upon the liquidator, and I make no order as to the costs of this application.

MABEE, J. NOVEMBER 7TH, 1906.

CHAMBERS.

ANDERSON v. NOBELS EXPLOSIVE CO.

Writ of Summons — Service out of Jurisdiction — Cause of Action—Rule 162 (e)—Tort Committed in Ontario—Injury to Plaintiff by Defective Fuse Supplied to his Employers by Defendants in Foreign Country.

Appeal by plaintiff from order of Master in Chambers, ante 439, setting aside order obtained by plaintiff allowing service upon defendants in Glasgow, Scotland, of the writ of summons and statement of claim, and dismissing the action with costs. Action to recover damages for injuries sustained by plaintiff in Ontario, owing, as alleged, to the premature explosion of a defective fuse supplied by defendants, in Scotland, to plaintiff's employers, in Ontario.

T. N. Phelan, for plaintiff.

W. H. Blake, K.C., for defendants.

MABEE, J.: . . . Rule 162 (e) provides in effect that service out of Ontario may be allowed in an action founded upon a tort committed in Ontario, and the question is whether the statement of claim discloses such a cause of action. If the contention of plaintiff prevails, the scope of the Rule will be greatly widened. No case is reported where the Rule has been applied to an action like the present, and doubtless foreign manufacturers will be greatly startled if the practice of our Courts permits what plaintiff is contending for. A similar action could not be brought in England or Scotland against a Canadian manufacturer upon a

like state of facts, had the position of matters been reversed. The practice there would not permit it. Assuming the truth of the facts set out in the statement of claim, where was the tort "committed?"

Rourk v. Wiedenbach, 1 O. L. R. 581, is more like the present case than any other I know of. Counsel for the plaintiff sought to distinguish it upon the ground that if the bailee of the picture knew the terms upon which the bailor held it, the wrong done was to the property of the plaintiff, which was at that time in Quebec; that here the wrong was to the person of the plaintiff. It seems to me that the mere fact of plaintiff receiving his injury in Ontario is not conclusive that the wrong of defendants was committed here—their tort was in manufacturing in Scotland the alleged defective fuse. The moment it left their hands, it may be said a tort was committed. The final stage, the explosion and injury, is only the evidence of the wrong, or defective manufacture of the fuse in question.

The cases cited by the Master are all interesting, but, after all, throw little light upon the application of Rule 162 (e). I am unable to bring myself to believe that the Rule was ever intended to apply to a case like the present, or that it in fact does apply; the result of its application would be altogether too far-reaching.

In my opinion, the learned Master properly set aside the order, and the appeal is dismissed with costs.

TEETZEL, J. NOVEMBER 7TH, 1906.

WEEKLY COURT.

BOHAN v. GALBRAITH.

Vendor and Purchaser—Contract for Sale and Purchase of Land—Specific Performance—Correspondence — Agent—Completion of Contract—Subsequent Formal Offer to Purchase and Refusal—Effect of.

Motion by plaintiff for judgment on pleadings and admissions filed in an action for specific performance.

J. A. Paterson, K.C., for plaintiff.

W. E. Middleton, for defendant.

TEETZEL, J.:—Defendant, who resides in California, is the owner of 468 and 470 Yonge street, and 3 Grenville street, Toronto, and, I infer from the correspondence, has placed this and other property in the hands of H. Graham & Son as agents to collect the rents and to receive offers of purchase and submit the same to defendant, but they had no authority from him to make sale agreements.

On 9th December, 1905, Graham & Son received from plaintiff and forwarded to defendant a formal written offer for the property, signed by plaintiff, the price offered being $14,000, payable $7,000 cash and balance in 10 half-yearly payments of $700 each, with interest at 5 per cent. A previous offer of $13,000 on similar terms had been refused.

In reply to the letter enclosing the last offer, defendant, on 15th December, 1905, wrote the following letter to Graham & Son:—

"Dear Sir:—Your offer from Mr. Bohan of $14,000 for Yonge street is not what I wish to accept. I told you last summer I would not let it go for less than that amount, but I would not care to sell it on payments.

"I have several times told you that I will not have payments on my properties. I might make an exception as to Danforth avenue, only.

"You told me money loans would now be 6 per cent. when I spoke to you about possibility of borrowing to buy more property.

"Therefore, if Mr. Bohan wants the property, he can get his own loan as suggested in your first letter, and pay me $14,000 cash, or I will take a straight mortgage for 5 years at 6 per cent., payable half-yearly. If he can get it at 5 per cent. himself, he is welcome to do so elsewhere. If he borrows from the same party who had the loan before, his expense would be small, and the title searched free of cost. Please consider this final."

And on 20th December Graham & Son, with plaintiff's authority, wrote the following letter to defendant:—

"Dear Sir: Your favour of 15th inst. to hand; in reply we beg to inform you that Mr. Bohan accepts the terms named therein, and will pay the $14,000 in cash. We enclose blank deed in duplicate, which you can fill out and forward with instructions how to dispose of proceeds.

Kindly forward title papers or inform us where they are to be obtained.

"We are glad to get such a good offer, and believe you can, if you wish, reinvest here to good advantage."

When this letter was received by defendant, I would infer that he still had in his possession plaintiff's formal offer of 9th December, which he altered by making the whole of the purchase money payable in cash on 1st February, 1906. That offer had contained these words: "This offer to be accepted by 23rd December, otherwise void, and sale to be completed on or before 1st January, 1906." The defendant altered this language by changing "23rd December" to "15th January" and "January" to "February."

With these alterations defendant returned the offer to Graham & Son, with the following note written by him at the bottom:—

"Dear Sir:—You forgot to send amended offer from Mr. Bohan. I have returned this for signature when re-written."

On 3rd January, Graham & Son got plaintiff to sign an engrossed copy of the amended offer, and enclosed same to defendant in a letter, stating:—

"Dear Sir: As you request, we have had amended offer made out and signed by Mr. Bohan, and forward the same for your acceptance. We did not think this necessary, as, if title papers had been forwarded, Mr. Bohan was ready to pay over the money at any time."

On 9th January defendant wrote Graham & Son as follows:—

"Dear Sirs: Yours of the 3rd inst. enclosing amended offer from Mr. Bohan received, and after due consideration I have decided not to accept it. It will not be necessary for me to give my reasons now, as I will be in Toronto in a month or two and will call on you."

It seems to me that upon the correspondence and papers the two principal questions are: Does the correspondence down to the letter of 20th December disclose a complete contract between the parties? (2) Assuming it does, is defendant entitled to withdraw in consequence of the amended offer of 9th January, signed by plaintiff, which

contained the words: "This offer to be accepted by 15th January, 1906, otherwise void."

It was strongly argued by Mr. Middleton that the letter of 15th December, was at most only in the nature of a quotation of price and terms, and not an offer the acceptance of which would be binding on defendant, and he relied upon Harvey v. Facey, [1893] A. C. 552, and Johnston v. Rogers, 30 O. R. 150, as supporting this contention. . .

This case is, I think, clearly distinguishable upon the documents from each of the two cases cited, because the letter of 15th December is, in my opinion, not merely a statement or quotation of price, but conveys an offer to sell to plaintiff at the price named.

Plaintiff had made two offers, which were both refused by defendant, and it seems to me the only purpose that can be imputed to the letter of 15th December was to make clear defendant's counter-proposal, and the only terms upon which he would sell. It was not a case of merely answering an inquiry as to lowest price, nor making an original quotation, but an individual link in a chain of negotiations leading to an agreement which both parties contemplated would be entered into.

The letter may, in the light of the previous correspondence, be fairly paraphrased thus: "The terms of Mr. Bohan's offer of $14,000 for the Yonge street property are not what I wish to accept, because, as you know, I will not accept instalment payments on any property; therefore, my final proposal is that if Mr. Bohan wants the property at that sum, he can have it by arranging his own loan, and paying me $14,000 cash, or I will take a straight mortgage for the half for 5 years at 6 per cent. half-yearly."

Upon the first question, therefore, I am of opinion that when the letter of 20th December was sent, the parties had concluded a complete contract of sale and purchase.

Then, does what happened afterwards entitle defendant to withdraw? I am of opinion that it does not. There was nothing in the correspondence indicating any condition that plaintiff should sign a further formal offer. He had unconditionally accepted defendant's terms, which only essentially differed from his offer of 9th December in regard to the mode of payment, and it was therefore quite unnecessary for plaintiff to sign a further amended offer.

It is difficult to understand why defendant should have asked for that, except on the assumption that he did not know that the agent's letter of 20th December was binding upon plaintiff. In my view, the sending of the amended offer by plaintiff after the contract was concluded, was simply a supererogatory act, which did not discharge, alter, or add to the contract already made.

Judgment should, therefore, be entered in favour of plaintiff for specific performance as prayed in the statement of claim, and costs.

NOVEMBER 7TH, 1906.

DIVISIONAL COURT.

SCHUEL v. HAMILTON.

Fraudulent Conveyance — Issue as to — Determination in Favour of Validity—Appeal—Evidence that Conveyance Made as Security only—Refusal to Give Relief.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in favour of defendants without costs upon the trial of an issue as to whether a conveyance of land by defendant Hamilton to defendant Fairchild, was or was not void as being in fraud of the creditors of defendant Hamilton.

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

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

T. Langton, K.C., for defendant Fairchild.

MABEE, J.:—The evidence does not shew any sale of the property by defendant Hamilton to defendant Fairchild; no price was agreed upon, and none of the elements that are always found connected with a sale of lands are present in this case. There were undoubtedly advances made, and I think the property was conveyed, without fraud, to secure such advances, and that the grantee would be entitled to hold the land as security for all moneys advanced to or paid by him upon Hamilton's account, both before

and after the conveyance. In this view plaintiff, I think, would have been entitled to have had the deed cut down to a mortgage, had an account taken, and a sale of his debtor's equity, but the difficulty is that no such case was made upon the pleadings, nor does it seem to have been so presented at the trial, so that, even if it were now open to us at this late date, it is at most discretionary. The case comes before the Court in the form of an issue, directed by the County Judge, and the only matter that seems to be presented by the issue is whether the conveyance was fraudulent, and that has been resolved against plaintiff, and such finding should not be disturbed. The Chief Justice may have regarded, and doubtless did regard, that as the only matter involved in the trial, and the form of the claim, fraud being eliminated, should not now be entirely altered. It might be that defendant, if fraud had not been charged, would, to avoid litigation, have submitted to be redeemed by plaintiff, and in that event he would have been entitled to add his costs to his mortgage debt. The Chief Justice has dismissed the action without costs, and if plaintiff were now permitted to redeem, it could only be upon payment of all defendant's costs.

In view of the course of the litigation, the family relationship of the parties, and the Chief Justice doubtless having considered the matters above indicated, and held plaintiff to the issue presented, notwithstanding my view that the deed was a security only, I think the appeal must be dismissed, but without costs.

BOYD, C., and MAGEE, J., agreed in the result.

NOVEMBER 7TH, 1906.

DIVISIONAL COURT.

SCHAEFFER v. ARMSTRONG.

Costs—District Court—Unorganized Territory Act, sec. 11—Action beyond Jurisdiction of County Court—Discretion of District Court Judge as to Scale of Costs—Application of Rules of Court.

Appeal by the plaintiff from the judgment of the Judge of the District Court of Manitoulin, in an action for re-

plevin and conversion of logs, etc., depriving plaintiff of High Court costs, though he succeeded in recovering judgment for recovery of the logs and $258 damages, and allowing him County Court costs only.

J. E. Jones, for plaintiff.

A. J. Thomson, for defendant.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—By the interpretation clause "County Court" includes District Court: Rule 6 (b).

By Rule 1216, all the Rules and the practice and procedure in actions in the High Court are made to apply to County Court actions.

By Rule 1130 the Court or Judge has unlimited discretion as to the award of costs—subject to the provisions of the Judicature Act and to the express provisions of any other statute.

By Rule 1137 a lump sum may be awarded for costs by the Court, and this means that costs may be given on the County Court scale even when the action is beyond County Court jurisdiction: see Palmer v. Perth, cited in H. & L., 3rd ed., p. 1368.

By sec. 72 of the Judicature Act, no appeal lies in respect of an order as to costs which are by law left to the discretion of the Court.

Now is there "any express provision" in the Unorganized Territory Act, R. S. O. 1897 ch. 109, in contravention of this result? The District Judge has power over costs whether in jury or non-jury cases. In a jury case costs follow the result unless the Judge otherwise orders. In a case tried by himself he has to give costs before any can be taxed. In this case, disposed of without a jury, no costs could be taxed to the plaintiff without the direction of the Judge. His order is to tax on the County Court scale. I do not think that sec. 11 of the Act (ch. 109) is to be read so as to give no alternative between withholding costs altogether, and having them taxed on the High Court scale. I read the section as if it were there expressed, as to costs in actions beyond the jurisdiction of County Courts, that costs awarded to a successful defendant should be taxed

according to the High Court tariff, unless the Court otherwise orders, and costs awarded to a successful plaintiff shall be taxed according to the High Court tariff, unless the Court otherwise orders. There is no express declaration negativing such a manner of awarding costs in the District Court. And I think the plain provisions of the Rules, which have the force of statutory clauses, control the general enactments in ch. 109. This decision appears a uniform method of dealing with costs in all the series of Courts of record.

The appeal is dismissed, but, as the point is a new one and fairly arguable, no costs should be given.

JUNE 15TH, 1906.

DIVISIONAL COURT.

BUSH v. PARK.

Lunatic — Magistrate's Commitment of Sane Person as a Lunatic—Judicial Proceeding—Subsequent Discharge—Action for Damages—Malicious Prosecution—Failure to Prove Favourable Termination.

Appeal by defendant Emily Bush from judgment of BOYD, C., upon the findings of a jury, at London on 18th April, 1906.

Plaintiff and his wife Emily Bush, one of the defendants, had been separated for a number of years, living in two separate houses upon the same land, and had for many years been at variance. It was alleged that in September, 1905, on account of the ill-feeling between the parties, defendants conspired to have plaintiff placed in an asylum for the insane, although, as alleged, they knew he was not insane. The plaintiff was on 2nd September, 1905, brought before a justice of the peace, who committed him to gaol, and thence he was sent to the London Asylum for the Insane on 24th October, 1905, and there was kept until 17th November, 1905, when he was discharged on the ground that he was not and had never been insane.

This action was brought to recover damages for false imprisonment, etc., and was tried with a jury, who found against the conspiracy charge, and in favour of defendants Archibald Park and Esther Park, but found against defendant Emily Bush and assessed damages at $700, for which judgment was entered by the Chancellor.

E. T. Essery, London, for defendant Emily Bush.

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

The Court (MEREDITH, C.J., TEETZEL, J., ANGLIN, J.), held that the action, leaving out the conspiracy charge, was in effect one for malicious prosecution, and that plaintiff had not proved a favourable termination of the proceedings before the magistrate—the inquiry before the magistrate being a judicial proceeding.

CARTWRIGHT, MASTER. NOVEMBER 9TH, 1906.

CHAMBERS.

BELL v. GOODISON THRESHER CO.

Venue—Contract as to—Motion to Change—Effect of Statute 6 Edw. VII. ch. 19, sec. 22 (O.)—Application of—Retroactivity—Costs—Preponderance of Convenience.

Motion by defendants to change venue from Barrie to Sarnia, where defendants' head office was situated.

T. N. Phelan, for defendants.

W. A. Boys, Barrie, for plaintiff.

THE MASTER:—The statement of claim is not distinguishable, in my opinion, from that in Wright v. Ross, 11 O. L. R. 113, 7 O. W. R. 69. Here, as there, plaintiff is seeking on similar grounds a return of money paid on the agreement, damages for breach thereof, return of plaintiff's notes given thereunder, and cancellation of the agreement. That agreement was made on 28th February, 1905, and supplemented or varied on 23rd December. The original provided that "if any action or actions arise in respect of the said machine or

notes or renewals thereof, the same shall be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the said company is located." It was further agreed that "any action brought with respect to this contract shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia, no matter where the same may be laid." There can be little doubt (if any) that these last words would be decisive in favour of the motion had it not been for the recent legislation on the question.

By 6 Edw. VII. ch. 19, sec. 22 (O.), it was enacted that no such proviso, condition, etc., shall be of any force or effect; but sub-sec. (2) enacts that "the provisions of this section shall not apply to or be available in any action . . . in any other Court than a Division Court unless and until the defendant therein shall make a motion to change the venue or place of trial according to the practice of such Court."

But it was argued (1) that the statute was not applicable to such a case as the present, and (2) that it was not retrospective, and therefore could not take away from the defendant company their vested right to have the venue changed to Sarnia.

As to the first argument, it may be that such a motion as the present was not in the contemplation of the draftsman, but the words are unambiguous and fit the present case. Nor does there seem any good reason for straining after an interpretation which would make the statute operative only when one party to the contract, i.e., the seller, was taking action. This is plainly a remedial enactment, and is to be interpreted so as to advance the remedy. Hardcastle says, 3rd Eng. ed., p. 70: "Almost every statute may be described as remedial, since its passing presupposes some grievance which the Act is intended to rectify." What that grievance is in these cases is only too manifest, and is shewn in Wright v. Ross, supra.

On the second ground, also, I think the motion must be dismissed. So far as I can see, the question of where an action is to be tried is clearly a matter of procedure only, and there is no such vested right created by the agreement as would prevent the operation of the statute. The question is dismissed in Hardcastle, supra, p. 359, where the cases are given. The leading one is Wright v. Hale, 6 H. &

N. p. 230. There it was held that a much more substantial right of a successful plaintiff was taken away by an Act passed after the commencement of the action. See too in our Courts, a case of Bank of Montreal v. Scott, 17 C. P. 358; cases cited on the argument in Wright v. Hale, supra; and Maxwell on Statutes, 4th ed. (1905), pp. 336 et seq.

So far as I am aware, the effect of the Act on existing contracts has now come up for the first time. Therefore, while the motion is dismissed, costs will be in the cause.

. . .

There was no attempt to argue that there was not a preponderance of convenience in favour of Barrie.

CARTWRIGHT, MASTER. NOVEMBER 9TH, 1906.

CHAMBERS.

YAPP v. PEUCHEN.

Pleading—Defences to Counterclaim—Motion to Strike out Paragraphs—Contract—Breach—Agency—Conclusion of Law—Joint Agreement—Foreign Defendants — Submission to Jurisdiction by Pleading to Counterclaim.

Motion by defendants (plaintiffs by counterclaim) to strike out certain paragraphs of the statements of defence of the defendants by counterclaim.

G. B. Strathy, for applicants.

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

THE MASTER:—This action is on a contract made on 1st September, 1902, between plaintiff and the original defendants. Under this plaintiff was to buy from defendants in each of the ensuing 5 years 250,000 lbs. of acetic acid at 8½ cents per lb. This quantity defendants were to furnish if and as required, and it was stipulated that if either side made default the other party was to pay 4½ cents per lb. as liquidated damages.

Up to a certain time plaintiff made default and has paid defendants for same $2,371.62. But plaintiff alleges that

for several months prior to the commencement of this action, in July last, defendants were in default, for which he seeks to recover $15,076.45.

Defendants say that they fulfilled their contract, and that if, in any respect, they committed any breach, such breaches did not damage plaintiff, and in any case were waived, and they then set up that the object of the agreement sued on was that defendants should supply with such quantities of acid as they might require certain other persons (who were afterwards brought in as defendants by counterclaim), and that they did so apply them. Finally they counterclaim as above to the following effect. They first set out in extenso an agreement also made on 1st September, 1902, between plaintiff and the added defendants, and say that by and under the authority of this agreement plaintiff entered into the other and first agreement as agent for the other parties who were added as defendants to the counterclaim. And the same damages are asked as against plaintiff and the others as plaintiff claims against the original defendants.

Some of these added defendants reside in the province of Quebec. They were served under Con. Rules 162 and 209, and have all put in statements of defence without objecting to the jurisdiction. These statements of defence are objected to, and the present motion is to strike out certain paragraphs in each of them. . . .

It will be sufficient to deal with the defence to the counterclaim of the original plaintiff, as the others were similar to it. The paragraphs attacked are numbers 2, 3, 4, and 5.

Paragraph 1 denies that plaintiff was acting as agent for the added defendants in making the agreement with original defendants.

Paragraph 2 says that the original defendants were not parties to the agreement set out in their counterclaim, and are therefore not entitled to any benefit thereunder.

It is objected that this latter clause is a statement of law, and so improper. But, however that may be, it is not in any sense embarrassing, and as to this the motion fails.

Paragraph 3 is as follows:—"The plaintiff further says that if the defendants are entitled to sue for anything contained in or arising out of the said agreement set out in the counterclaim, they are not entitled to set it up by way of

counterclaim in this action." On its face it seems open to the objection that this, if a defence, should have been raised by a motion to strike out the counterclaim. But it was explained to mean that if the agency of plaintiff was not established, then the counterclaim must fail. If that is so, then it seems to be of no service to the parties. It does not state any fact on which they rely but only a conclusion of law.

Paragraph 4 is in the same way explained to mean that in any case the agreement relied on in the counterclaim was a joint agreement, and that some of the parties had withdrawn, so that this agreement was at an end. If it will be of any assistance to defendants, this paragraph can be made more precise by way of particulars.

Paragraph 5 alleges that many of the added defendants reside and carry on business in Quebec, so that they should not in any case be made parties by counterclaim.

This seems clearly bad under Preston v. Lamont, 1 Ex. D. 361, unless there is a difference between a person brought in by writ and one brought in by counterclaim. It was contended that this was the case, because here there was no writ and therefore no appearance, and consequently no submission to the jurisdiction.

This, however, seems to be opposed to the wording of Con. Rule 249, and is also at variance with the uniform practice.

In these cases the added party is not served with a writ but only with the counterclaim, which is in place of the writ and has the same effect.

In the case of a foreign defendant made so by counterclaim, if he puts in a defence, he cannot therein or afterwards question the propriety of the service. See Dunlop Pneumatic Tire Co. v. Ryckman, 5 O. L. R. 249, 2 O. W. R. 699, 820. There it was said by Street, J., 5 O. L. R., at p. 255.: "None of the parties defendants to the counterclaim . . . have pleaded to it or admitted the jurisdiction of the Court." It would seem from this that by pleading the defendants have admitted the jurisdiction of the Court over them personally. See Boyle v. Sacker, 39 Ch. D. 249. This does not debar them from shewing hereafter, if they can, that the Court has jurisdiction over the subject matter, as in Gunn v. Harper, 2 O. L.

R. 611, at p. 621. See also Stokes v. Grant, 4 C. P. D. 25, 28.

In my opinion paragraphs 5 and 3 should be struck out, but not paragraph 2. Paragraph 4 should be more precise if required by the other side. The defendants may amend their defences to the counterclaim if they desire to do so. Costs will be in the cause. The other defences will be dealt with in the same way.

MACMAHON, J. NOVEMBER 9TH, 1906.

TRIAL.

CARMAN v. WIGHTMAN.

Mortgage — Assignment — Agreement—Executors—"Acting Executor"—Solicitors—Investment of Funds—Liability for Loss.

Action by R. B. Carman against the executors of the will of John Wightman to recover the amount due upon a mortgage, and counterclaim by defendants against R. B. Carman, James Leitch, and R. A. Pringle, for malinvestment of funds, etc.

R. Smith, Cornwall, and A. Langlois, Cornwall, for plaintiff and defendants by counterclaim.

D. B. Maclennan, K.C., and C. H. Cline, Cornwall, for defendants.

MACMAHON, J.:—One Farquhar McCrimmon on 27th February, 1889, mortgaged to Patrick Purcell the north half of lot 27 in the 3rd concession of the township of Lancaster, to secure the repayment of $2,000 in 5 years, with interest at 6 per cent.

On 23rd October, 1891, McCrimmon conveyed the mortgaged land to John Wightman, in consideration of $5,300. The conveyance is made free from all incumbrance, "save and except a mortgage to Patrick Purcell, dated 27th February, 1889, upon which $2,000 is payable, which sum is deducted from the consideration of $5,300 within mentioned."

On 8th March, 1893, John Wightman and his wife (to bar dower) conveyed this land to his son John Wightman the younger, the consideration being natural love and affection and $1. The grantor covenants that the grantee shall have quiet possession of the land free from all incumbrances, and that he has done no act to incumber the lands.

John Wightman the younger . . . in 1892 was let into possession of the land by his father, and has remained in uninterrupted possession ever since.

John Wightman the elder died on 15th April, 1897, having on the 9th of that month made his will, which contains the following direction: "I direct that out of the moneys, securities for moneys, etc., in the hands of Leitch & Pringle the mortgage now standing upon the property of my son John Wightman be fully paid and discharged."

In January, 1898, the interest on the mortgage given by McCrimmon to Purcell being largely in arrear, the solicitors of the Purcell estate served notice under the power of sale in the mortgage, or the copy of a writ which they had issued, on Mr. McNaughton, one of the executors, and upon William Wightman, who was living with his mother on the homestead farm. . . . Immediately after the service of this notice or writ, a consultation was held between the two executors, Mrs. Wightman and Mr. McNaughton, and it was concluded that some immediate action should be taken, and Mr. McNaughton and William Wightman (at his mother's request) came to Cornwall and saw Mr. Pringle and wanted to obtain from him sufficient money to meet this claim of the Purcell estate. . . . One of them had a copy of the notice or writ, which was given to Mr. Pringle.

Mr. Pringle said that the firm of Leitch & Pringle had not sufficient funds of the Wightman estate in their hands to pay the whole amount due on the Purcell mortgage, but they had $419.45, which they would pay on account of the interest, which would leave a balance of $2,200 due for the principal and interest. Mr. Pringle said he would see Judge Carman and ascertain if he had $2,200 to lend, which would be sufficient, with the $419.45, . . . to pay off the Purcell mortgage. Mr. Pringle saw Judge Carman, who told him that his (Carman's) wife could let the Wightman estate have the $2,200, and he gave Mr. Pringle a cheque for the amount, he (Carman) supposing he would receive a new mortgage from the executors of Wightman. In this nego-

tiation with Judge Carman, Mr. Pringle was acting solely as the agent of the executors of Wightman.

McNaughton and William Wightman were told of the arrangement . . . and I think it is due to Mr. Pringle to say that, although Leitch & Pringle had in their hands, as solicitors of the Wightman estate, more than the $419.45, he was quite pronounced in his statement to them that the balance of the money would require to be raised from an outside source, and that was why he suggested applying to Judge Carman to lend it.

Judge Carman said he consented to make the advance on condition that the balance due on the Purcell mortgage should be payable one-half in one year and the other half in two years, for the reason, I suppose, that he did not desire to have the money repaid sooner, in the event of the executors desiring to obtain a loan on more advantageous terms. Hence the agreement of 15th January was entered into.

It is beyond question that the agreement was read over and fully explained to Mr. McNaughton, although he apparently had forgotten a good deal of what took place between himself and Mr. Pringle. . . .

The whole matter is set out in the recital to the agreement as to the ownership of the property by the late John Wightman, subject to a mortgage to Purcell for $2,000; that there was now due on the mortgage $2,200; and that the executors of Purcell were making an asignment of the mortgage to Judge Carman. The . . . executors of Wightman covenanted to pay the amount of the mortgage one-half in one year and one-half in two years, with interest payable half-yearly.

Mr. McNaughton, on 17th March, 1904, replying to a letter of Judge Carman of the day previous . . . said, "I will attend to it at once." On 22nd June, 1904, Judge Carman wrote again about payment of the mortgage, and Mr. McNaughton replied on the 24th, saying: "Perhaps you are not aware that Leitch & Pringle had a few hundred dollars more of Wightman's money than was required to pay that mortgage. They claimed it was impossible at that time to collect enough to pay Maclennan, and they suggested that we get the money from you until they could arrange for Wightman's money, and that the interest of one would meet the interest of the other. I agreed to that, and left the matter in their hands, and Wightman supposed

everything was arranged, and so did I until I got your first letter. Something must and will be done soon, and I hope you will not take any proceedings against us without further notice. I am very sorry you have this trouble getting your money, which should have been paid long ago." . . .

McNaughton said he was quite satisfied that the words "acting executor" were not in the document when he signed it. The agreement is said to have been in duplicate, and there is evidence that a duplicate of it was thrown off by the typewriter, and Mr. Pringle supposed that the duplicate was given to Mr. McNaughton to shew his co-executor. Mr. Pringle said that he desired its execution by the co-executor, but Mr. McNaughton stated to him that it was unnecessary to ask Mrs. Wightman to sign it, that she had not interfered in any way in the estate, and he was the acting executor, and therefore all that was necessary was that he should sign it in order to bind the estate; and, in consequence of that statement being made, Mr. Pringle says that the words "acting executor" were added. I find that the words were added before execution by Mr. McNaughton. . . .

On 21st March, 1901, the executors of Wightman, through Leitch & Pringle, paid to Judge Carman, $426.98 in full of interest up to 15th January, 1901, and on 15th July, 1904, they paid, through Leitch & Pringle, $505.75, being the interest up to 15th June, 1904. . .

By the agreement entered into with Carman on 15th January, 1898, no new liability was created by the executors of Wightman. The executors of Purcell had commenced proceedings to enforce their claim under the McCrimmon mortgage, which John Wightman the elder had impliedly covenanted to pay. And it is clear from the will of John Wightman that he intended that the land which he had conveyed to his son John should be freed from that incumbrance. The executors regarded it as a liability of the estate, and so treated it, for they arranged that the McCrimmon mortgage should be transferred from the Purcell estate to Carman, and entered into the agreement, already referred to, to pay that mortgage.

If John Wightman had lived for say two years after the making of his will, and in the meantime had withdrawn all the moneys and securities from the hands of Leitch & Pringle, it is, I consider, clear that the executors must have

satisfied the McCrimmon mortgage out of the general assets of the estate. And because Leitch & Pringle were not, at the time the Purcell estate were proceeding either to sell the land under the mortgage or eject John Wightman the younger from the land, in funds to pay off that mortgage, the executors were bound under the terms of the will to protect him against a sale of his land or ejectment therefrom.

Upon the facts as disclosed . . . Manley v. London Loan Co., 23 A. R. 139, Canada Landed Co. v. Shaver, 22 A. R. 377, and Campbell v. Morrison, 24 A. R. 224, referred to by counsel for defendants, have no application here.

I must hold that the estate of John Wightman the elder is liable to Carman for the amount due on the mortgage and interest thereon. . . .

Now, in relation to which is known as the Gillespie mortgage: Messrs. Carman, Leitch, & Pringle were acting as solicitors for the late Mr. Wightman, and in 1882 they lent out considerable sums of money for him. Plaintiff Carman left the firm in 1885, and was then appointed Judge of the County Court. Among the investments made was a loan of $495 on a house and lot in the village of Newington, the lot having a frontage of 66 feet by a depth of 150 feet. Mr. Duval, who lived at Newington and knew the property, said the main building was 20 by 24, with a kitchen and outhouses 18 by 30. Mr. Monro, the agent of the Royal Insurance Co.—which is a rather conservative institution—insured the house for $500. Mr. Leitch said he knew the building very well, and his idea was that the house cost some $800. He was satisfied from his knowledge of the property in that district, and after consulting Mr. Munro, who knew the village and inspected the property, and frequently acted as valuator for the late John Wightman, . . . that the amount was a fair one to lend on the property. Unfortunately, a few years after the loan was made, property in the village began to depreciate in value, and the house itself, by reason of no expenditure being made for repairs, had become somewhat dilapidated, so that when it was sold in 1892 the best price that could be obtained was $375.

At the time the loan was made, it was regarded as a fair investment, and the depreciation which took place was unlooked for, and Carman, Leitch, & Pringle should not

be held liable for negligence or want of care in making that investment.

In addition, Mr. Leitch said that Wightman had gone to see the property after the investment was made, and was quite satisfied with it; and when it was discovered, in after years, that it could not be readily sold, he said he did not impute any negligence to the firm, and would bear the loss himself.

In these circumstances, I must hold that Carman, Leitch, & Pringle are not liable for any loss that resulted from that investment. . . .

By consent of counsel, there will be judgment in favour of the plaintiffs by counterclaim against James Leitch and Robert A. Pringle, defendants by counterclaim, for $2,300 with costs of the counterclaim.

The original defendants to pay plaintiff's costs of the action.

FALCONBRIDGE, C.J. NOVEMBER, 9TH, 1906.

TRIAL.

ARMSTRONG v. SHERLOCK.

Landlord and Tenant—Distress for Rent—Suspension of Remedy—Promissory Note — Rent of Chattels—Abatement of Claim—Illegal Distress—Excessive Distress—Detention of Chattels—Damages—Counterclaim.

Action for illegal and excessive distress and detention of goods. Counterclaim for rent, etc.

C. Kingstone, St. Catharines, for plaintiff.

H. H. Collier, K.C., for defendant.

FALCONBRIDGE, C.J.:—The parties differ as to the kind of note which was to have been given, i.e., whether it should or should not be indorsed by some responsible person other than plaintiff and his wife, and so plaintiff fails to prove an agreement to suspend the remedy by distress during the currency of the note, of which agreement the note, if accepted, would have been some evidence.

The amount of rent due was in fact fixed between the parties as being $231. Defendant issued her warrant to the bailiff for . . . $393, improperly assuming to include $162 as for rent of certain tools, but, by notice served on plaintiff several days before the sale, defendant undertook not to make out of the goods more than $231. No tender of this true amount had been or was subsequently made by plaintiff.

Plaintiff has not established that there was an excessive distress, nor that there was any irregularity or unlawful act in the appraisement or sale of the goods.

Plaintiff had in his possession small tools of his own and larger ones which were the property of defendant. Some of defendant's tools, on a separation being made by plaintiff himself, were ascertained to be not on the premises but in some other place where plaintiff had been using them, and the suggestion was made by the bailiff that plaintiff could get his own tools when he brought back defendant's, and plaintiff acquiesced in this arrangement. His tools were not, in fact, distrained, were not included in the inventory, and were delivered to him before the sale.

If any special damage had to be awarded in respect of the alleged detention of the tools, it would have been assessed at an inconsiderable sum.

The same remark applies with greater force to plaintiff's books of account, which were not distrained, but locked up in the shop for a while and afterwards returned to him.

Plaintiff has not established any cause of action.

Defendant is entitled to recover on the counterclaim . . . $182. . . .

Action dismissed with costs, and judgment for defendant for $182 with costs.