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CARTWRIGHT, MASTER. FEBRUARY 27TH, 1905.

CHAMBERS.

INNES v. HUTCHEON.

Replevin—Sale of Goods Replevied—Rules 1097, 1098.

On 23rd January a replevin order was granted in this action. Under this there were delivered to plaintiff six imported horses of considerable value. To obtain the order plaintiff paid into Court $2,000.

The plaintiff occupied the same position under the Scottish law in regard to defendant as an assignee in bankruptcy would occupy in England.

The horses were at livery at a cost to plaintiff of over $5 a day.

If the action were fought out, it would be necessary to procure evidence from Scotland; no trial was therefore to be expected before the autumn sitting.

In these circumstances plaintiff applied under Rules 1097, 1098, for an order for the sale of the horses.

G. L. Smith, for plaintiff.

W. A. Lamport, for defendant.

THE MASTER.—There can be no doubt under the facts that it is a proper case for the order asked for, if there is power to make it.

In Holmested & Langton, at p. 1218, certain cases are cited on Rule 1097. None of these is similar to the present.

This is not an interpleader proceeding. And it does not appear why plaintiff requires any such order as he is seeking or what protection it would afford him if granted.

He is free to sell if he is prepared to run the risk of an action for damages if he fails in the present action.

No order made now could bind defendant. Plaintiff is, no doubt, acting properly in the course he has taken in acquiring possession of the horses; and he must continue to use the same good judgment in the matter. It looks as if plaintiff might safely sell all except perhaps the one claimed by defendant's wife. But the whole matter rests with him. The motion cannot succeed. But, as it was reasonable, the costs may be in the cause.

CLUTE, J. FEBRUARY 27TH, 1905.

TRIAL.

POHNL v. MILLER.

Damages—Deceit—Purchase of Stock of Company—Measure of Damages—Purchase at Par—Difference between Par and Real Value—Ascertainment of Value—Subsequent Events.

Action for deceit in inducing plaintiff to purchase certain shares in the capital stock of an incorporated company.

J. F. Hollis, for plaintiff.

J. E. Cook, for defendants.

CLUTE, J.—I expressed the opinion at the close of the trial that plaintiff was entitled to recover damages, but reserved the question of the amount for further consideration. . .

Taking the measure of damages to be the difference between the price which plaintiff paid for the shares and their real value at the time of purchase, subsequent events may be looked at to ascertain that value: Peek v. Derry, 37 Ch. D. 541, 578; Twycross v. Grant, 2 C. P. D. at pp. 543-4; Arnison v. Smith, 41 Ch. D. at p. 363.

The stock was purchased on 31st December, 1903—20 shares at their face value of $50 a share.

A statement of the affairs of the company shews a deficit of $11,879.79. In the statement of assets and liabilities for

the year 1904 the loss is put at $4,529.54, and the total impairment of capital to 31st December, 1904, at $6,407, on a paid up capital of $11,235.

The evidence is clear that the company was not a paying concern.

There seems to have been no ready market value for the shares. If the last statement is to be taken as a criterion, as suggested by plaintiff's counsel, and assuming that the net assets represent the value of the stock, it would indicate that the shares were worth on 31st December, 1904, $430, shewing a loss of $570. This, of course, may be too high or too low a valuation.

I think, upon the whole, $500 would be a reasonable sum to fix as the value of the stock at the time of the purchase, and I assess the damages at $500.

Plaintiff's evidence as to loss of time was too indefinite, and I allow nothing on that head.

Plaintiff at the trial having expressed his willingness to transfer the stock to defendant Sapera, on being paid $1,000 and interest from the date of the purchase, I direct that upon payment of $1,000 and interest into Court within 30 days, plaintiff transfer the stock to defendant Sapera, and in default that judgment be entered for plaintiff for $500. Plaintiff is entitled to the costs of this action.

CARTWRIGHT, MASTER. MARCH 2ND, 1905.

CHAMBERS.

REX EX REL. JAMIESON v. COOK.

Municipal Elections—Disqualification of Councillor—School Trustee—Term not Expired—Motion to Set aside Election —Costs—Disclaimer.

Motion to set aside the election of the respondent as a councillor for the town of Midland.

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

J. E. Jones, for the respondent.

THE MASTER.—It was admitted: (1) that the respondent was elected school trustee in January, 1903, for two years,

and took the oath of office on 21st January, 1903; (2) that on 26th December, 1904, he was nominated as councillor, and on the same day was nominated (with four others) as school trustee; but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905;" (3) that the first meeting of the new school board was held on 18th January, 1905, when the same was organized; (4) and that Mr. Cook took the oath of qualification as councillor on 27th December, 1904, made his declaration of office as councillor on 9th January, 1905, and took his seat in the council.

On 7th February the relator caused a letter to be written by his solicitors to Mr. Cook, pointing out that he was disqualified by reason of 3 Edw. VII. ch. 19, sec. 80, sub-sec. 1, as having been a member of the school board at the time of his election, and inviting him to consult his solicitors as to the advisability of disclaiming so as to save costs of proceedings to have him unseated.

To this apparently no answer was given.

The case does not seem in any way distinguishable from Rex ex rel. Zimmerman v. Steele, 5 O. L. R. 565, 2 O. W. R. 242. Mr. Jones argued that the present case did not come within the mischief of the Act relied on. He pointed out that the effect would be that a school trustee would be prevented from seeking election as a councillor for 3 years if his co-trustees were unwilling to accept his resignation; . . . that the Act should not be held to apply unless it seemed quite impossible to distinguish this case from those already decided on this section. He suggested that this was a case which the legislature had never contemplated when sec. 80 (1) of the Municipal Act of 1903 was passed. The learned counsel may very likely be right in this view. I think it safer, however, to follow the observations of Mr. Justice Meredith in O'Connor v. City of Hamilton, 8 O. L. R. on pp. 409 and 410. . . . The motion must be granted, and with costs, as the respondent did not avail himself of the notice to disclaim.

Something was said at the argument as to the relator having voted for the respondent. It was stated that he would deny this on oath. If the respondent wishes to pursue this further, the matter can be spoken to again. But the order should not be delayed.

CLUTE, J. MARCH 2ND, 1905.

TRIAL.

SNOW v. WILLMOTT.

Vendor and Purchaser—Building Restrictions—Covenant—Intention of Parties—Security—Building Scheme—Breach of Covenant—Damages in Lieu of Injunction—Assessment of Damages.

Action to compel defendant to pull down a building erected on certain land sold by plaintiff to defendant, which building was alleged to have been erected contrary to a building restriction which defendant covenanted to observe, and to restrain defendant from erecting any building thereon until the design should be approved by plaintiff, and for damages.

F. E. Hodgins, K.C., and C. B. Nasmith, for plaintiff.

J. R. L. Starr and J. H. Spence, for defendant.

CLUTE, J.—On 6th June, 1902, plaintiff granted to defendant the land in question, subject to the restrictions therein mentioned, among which is the following: "That no building other than a dwelling-house shall be erected upon the said lot, and that no more than one dwelling-house shall be placed thereon, which dwelling-house shall cost not less than $900."

The consideration mentioned in the deed is $400. A mortgage was executed by defendant to . . . the husband of plaintiff for $400, being the full amount of the purchase money; the principal payable on 1st June, 1907, and the interest on the 1st days of June and December in each year. The mortgage provides that the mortgagor may pay on account of principal $25 or more at any time without bonus or notice, provided all arrears of interest, costs, charges, and expenses had first been fully paid. Defendant covenanted "that she will erect . . . on the said lots within 12 months . . . a dwelling-house of modern design, to be approved of by the mortgagee, which shall cost not less than $900. In default thereof, all the rights and remedies of the mortgagee shall be exercisable as are exercisable on the default of payment of interest." . . .

On 16th June, 1904, this mortgage was assigned to plaintiff. The assignment recites that there was then due $100 for principal money, with interest. . . .

Plaintiff charges that defendant has violated the covenant contained in the deed and mortgage by erecting upon the premises a shanty of rough boards, which was and is now occupied as a dwelling-house, and which is not of modern design. Neither was the same approved of by plaintiff's husband, nor did it cost $900. And, in consequence, plaintiff's other vacant lots surrounding the same have largely depreciated in value. . . .

By way of counterclaim defendant claims that the terms and conditions in the said deed and mortgage should be set aside, and the mortgage should be reformed. . . .

At the close of the argument I intimated that the evidence fell very short of satisfying me that there had been any misrepresentation, or such as would justify the reformation of the deed or mortgage. On further consideration of the case I am confirmed in this view, and of the opinion that the case must be dealt with upon the documents as they were signed. I think it is quite clear from the evidence that restrictions in the mortgage, at all events, were intended merely as a matter of security, and that the effect of default or breach of the first covenant is to give the mortgagee "all rights and remedies as are exercisable on default of payment of interest." Advantage was taken of this covenant, and an action was brought upon the mortgage, and $300 paid on account of principal. The interest has been paid.

I think, therefore, that the restrictions contained in the mortgage may be eliminated from this case, and those contained in the deed only further considered. . . . The building erected on the premises, on defendant's own evidence, falls far short of being a compliance with the covenant. . . . I should think that $200 or $250 is probably the full value of the building. . . .

One question to be considered is, whether it was the intention of the parties that this restriction mentioned in the deed should form part of an existing building scheme, so that other purchasers of land from plaintiff would be entitled to avail themselves of the covenant contained in defendant's deed. . . . "A question of intention:" per Wills, J., in Nottingham Brick Co. v. Butler, 15 Q. B. D. at p. 268; a question which can only be determined from the circumstances of each particular case. . . .

[Reference to Collins v. Cassel, 36 Ch. D. 243; Dart on Vendor and Purchaser, 6th ed., p. 867.]

I am satisfied, in the present case, that the object of the restrictive covenants was one of self-protection to the vendor; that there was no scheme whereby all would be benefited in the same way so as to make a common right. . . . I have, therefore, to deal with the question as it affects plaintiff's rights only under the deed.

It is hardly pretended by plaintiff that she has been injured except in respect of the lot adjacent on the north. Plaintiff has sold all her other lots in that vicinity, save the 3 lots on the same street immediately north of the lot in question, and the lot immediately adjacent to the lot in question is the one supposed to be injuriously affected by the construction of the building complained of. I am satisfied from the evidence that the injury to plaintiff is of a very trivial character. It will be noticed that the restrictive covenants contained in the deed are binding for 5 years only. . . . Plaintiff's husband in his evidence stated that it was not a case of time limit. If no house at all had been built on the premises he "would not be complaining." . . . The lands are rapidly rising in value in that vicinity, and the delay in the sale of the adjacent lots, by reason of the nature of the building in question—if such be the case, which is by no means clear to me—has probably resulted in a benefit and not in a loss to plaintiff.

It was strongly pressed upon me by plaintiff's counsel that a breach of a covenant of this kind is not one on which damages may be given in lieu of an injunction, but that the breach, being once established, from the nature of the case carries with it the right to an injunction as the only proper remedy. It was said that damages could not take the place of an injunction, and the following authorities were cited to support that position: Collins v. Cassels, 36 Ch. D. 243; VanKoughnet v. Denison, 1 O. R. 349; Gaskin v. Balls, 13 Ch. D. 324; Manners v. Johnson, 1 Ch. D. 673; Kerr on Injunctions, 4th ed., pp. 413-4. No doubt, the remedy originally was an injunction to restrain a breach of the covenant, but under Lord Cairns's Act, and now under the Judicature Act, sec. 58, sub-sec. 10, "the Court, if it thinks fit, may award damages to the parties injured either in addition to or in substitution of such injunction or specific performance." . . .

[Reference to Shelfer v. City of London Electric Lighting Co., [1895] 1 Ch. at pp. 319, 322.]

In the present case the injury to plaintiff's legal rights is small, and is one which is capable of being estimated in

money, and which can be adequately compensated by a small money payment, and the case is one in which it would, I think, be oppressive to defendant to grant an injunction. . . .

Martin v. Price, [1894] 1 Ch. 276, is, I think, distinguishable from the present. . . . See also Jordeson v. Sutton, [1899] 2 Ch. 217.

I assess the damages in favour of plaintiff at $100. After some hesitation as to giving plaintiff costs, I think that County Court costs without set-off will do justice between the parties. The counterclaim is dismissed without costs.

ANGLIN, J. MARCH 2ND, 1905.

TRIAL.

GEOGHEGAN v. SYNOD OF NIAGARA.

Church—Clergy Commutation Trust Fund—Canons and By-laws Governing—Construction—Annuitants—"Junior on the Pay List"—Decision of Diocesan Chancellor—Effect of—Award—Acquiescence—Laches.

Action by a clergyman for a declaration that he was entitled to payment of an annuity, in priority to two other clergymen, defendants Gardiner and Spencer, out of the income from the Commutation Trust Fund of the Diocese of Niagara, on the pay list of which these three clergymen had been placed, in the event of such income proving inadequate to pay all three annuitants in full; and for payment of a sum of money, part of such income, which the defendant Synod admittedly held. Defendant Gardiner disclaimed and was not represented at the trial. Defendant Spencer maintained his claim to priority over plaintiff, and the defendant Synod supported that claim.

E. D. Armour, K.C., and J. G. Farmer, Hamilton, for plaintiff.

J. A. Worrell, K.C., and D'Arcy Martin, Hamilton, for the defendant Synod.

T. Hobson, Hamilton, for defendant Spencer.

ANGLIN, J.—The Synod of the Diocese of Niagara was incorporated by 39 Vict. ch. 107 (O.) It acquired, subject to the trusts upon which it had theretofore been held by the

Synod of the Diocese of Toronto, who had in turn taken from the Church Society, the share of the Commutation Trust Fund, the outcome of the Clergy Reserve Secularization Act, 18 Vict. ch. 2, and an agreement made by commuting clergy with the then Church Society, which of right belonged to the Diocese of Niagara. The trusts subject to which the fund was so acquired were: "First, to pay the commuting clergy their stipend or allowance during life; and secondly, after the death of each of the clergy so commuting, that the sum for which he had commuted should become the property of the Synod for the support and maintenance of the clergy of the Church of England in Canada within the diocese of Niagara, or such other dioceses as the said diocese should thereafter be divided into, and in such manner as should from time to time be declared by any by-law or by-laws of the said Synod to be from time to time passed for that purpose." Neither plaintiff nor defendant Spencer is a commuting clergyman. Defendant Spencer has served longer in the Diocese of Niagara than plaintiff.

This fund was, until 1893, administered under a by-law passed in 1877. In 1893 the Synod passed a new by-law, which, as corrected in 1894, was that in force when the questions now under consideration arose. The right to pass this by-law cannot well be doubted since the decision in Wright v. Diocese of Huron, 9 A. R. 411, 11 S. C. R. 95.

The by-law is in part as follows:—

"I. The Commutation Fund shall be managed and administered by the standing committee.

"II. The charges on this fund shall be:

"(1) The payment to all the original commutants of their stipulated annuities.

"(2) The expenses of management of said fund.

"(3) The payment to such other annuitants, as have been, or may from time to time be, added to the list, of the amounts to which under this by-law they have been or may become entitled, subject to the provisions of clause V., sub-section (c).

"III. Those eligible under sub-section 3 of clause II. shall be the clergy of the Diocese, in order of seniority, being in priests' orders, and

"(a) Not holding an endowed living, yielding to the incumbent thereof $400 per annum or over. Should, however, the net income from the endowment of any parish fall below

the sum of $400, the rector of the parish, provided he is entitled by seniority to an annuity from this fund, shall receive such an amount as will be sufficient to raise the said net income to $400.

"(b) Not holding the incumbency of a church or parish yielding an income from endowment, pew rents, or salary, amounting in all to $1,200 per annum or over.

"The term 'income' shall not be held to include any allowance for house rent or annual value of parsonage.

"IV. When two or more persons are ordained in the diocese, and their services commence at the same time, he shall be considered senior who is first on the Bishop's ordination list. But when they have been ordained out of the diocese, their seniority shall be determined by the date of their licenses or written appointment from the Bishop of this diocese.

"If there shall be any question of seniority not provided for in this by-law, it shall be decided by the Bishop of the diocese.

"V. As soon as, in the opinion of the standing committee, there shall be income available, it shall be paid to the senior eligible clergyman of the diocese, as above defined, in order as follows:

"Clergymen who have served 15 years or more from the date of their licenses aforesaid shall receive an annuity of $400; those who have served less than 15 years, and more than 10 years, shall receive an annuity of $300, and those who have served less than 10 years shall receive $200, or so much less in each case as may be required to raise the incomes of the respective clergymen to $1,200, computed under clause III. (b), such annuities to be subject to the provisions of clause III. (a). . . .

"(c) Provided further that the senior clergy already receiving $300 shall have first claim to be advanced to $400, and then those receiving $200 to be advanced to $300, before placing any new names on the list, and should any deficiency occur, so that all the clergy on the list cannot be paid, the commuting clergy be paid first, then the next senior, so that, if any clergyman is to be unpaid, he shall be the junior on the pay list. . . .

"VII. Any clergyman once placed on the list shall remain thereon as long as he remains eligible in accordance with this by-law, continues to do duty in this diocese, or is on the

superannuated list thereof; but on his removing from the diocese, not being superannuated, or on his coming under ecclesiastical censure, his claim shall meanwhile be suspended. Provided, however, that in special cases a discretionary power with respect to the enforcement of this rule shall be accorded to the Bishop, with the concurrence of the standing committee.

"VIII. Nothing in this by-law shall be construed so as to prevent an exchange being made between the incumbent of an endowed parish and an annuitant of this fund, provided such change has the sanction of the Bishop, and any clergyman who by reason of ill-health shall resign his incumbency, shall be entitled to be placed on the list of the annuitants as aforesaid."

In 1898 plaintiff, who was incumbent of St. Peter's parish, which was not an endowed rectory, and did not yield an income of $1,200 per annum, and who had for some time been pressing upon the Synod of Niagara a claim against its mission fund, and also a claim to be put upon the commutation trust fund, placed his case in the hands of the late Mr. B. B. Osler. A letter from Mr. Osler stating his client's claims was brought before the meeting of the standing committee on 9th May, 1898, when the following resolution was passed: "That, subject to the conditions of the by-law, the Rev. T. Geoghegan (plaintiff) be placed on the commutation fund list for $400 per annum from 1st April, 1898, provided that all other claims preferred by him on the diocese or the funds thereof be abandoned." . . . Plaintiff on 13th May, 1898, accepted this arrangement, and continued to receive his annuity of $400 until the year 1902, when, owing to a deficiency of income, his right to further payment was questioned. The first instalment of his annuity was paid to plaintiff in June, 1898.

Defendant Spencer was in 1897-8 rector of Thorold. He received from his rectory, for the year ending 31st March, 1898, $373.95. The sum of $26.05 being required to raise his net income from this source to $400, he made claim for that amount under clause (a) of sec. III. of the by-law of 1894. This claim was also allowed at the meeting of the standing committee held on 9th May, 1898, and payment was accordingly then made. For the year ending 31st March, 1899, he received $42.12. . . .

In 1899 defendant Spencer resigned his rectorship of Thorold, and became incumbent of Hagersville and Jarvis, a parish not an endowed rectory, and yielding an income less than $1,200 per annum. He was notified . . . in May

of that year that there was income available to place one more clergyman, if not two, on the pay list. On 14th September he made formal application to be placed on the list of annuitants for $400 per annum. The minutes of the Synod of 1900 contain a report of the standing committee shewing that on 1st October, 1899, defendant Spencer was placed on the pay list of the commutation trust fund for $400 per annum. He also appears to have been paid in full down to 1902.

In 1902 there was a deficiency in the revenue of the fund. The standing committee resolved "that the opinion of the chancellor of the diocese"—the late Mr. Edward Martin, K.C.—"be obtained as to who should receive the reduced amount, and that the secretary be instructed to act in accordance therewith." Notice of this resolution was sent . . . to the several annuitants interested, including plaintiff and defendant Spencer. Plaintiff took no action upon this notice. The Chancellor did not himself cause any notice to be sent to the interested clergymen, or in any way call upon them to uphold their claims before him or give them any opportunity to be heard. On 15th May, 1902, the Chancellor advised the secretary of his opinion that defendant Spencer "must be regarded as the junior on the pay list, and so is the clergyman to be unpaid owing to there being a deficiency." Of this opinion plaintiff and defendant Spencer were notified. Payment was made to and accepted by plaintiff of his full annuity to 31st October of that year. Defendant Spencer accepted payment of a comparatively small balance which remained after plaintiff's annuity had been paid.

At the Synod of June, 1902, the following amendments to the commutation trust fund by-law of 1894 were adopted:—

"I. Clause VIII., strike out and substitute:

"VIII. (a). Nothing in this by-law shall prevent a change being made between the incumbent of an endowed parish and an annuitant of this fund, provided such change has the sanction of the Bishop, and provided the incumbent of the endowed parish is senior to the other clergy who are not annuitants or rectors.

"(b) Any clergyman who shall have resigned his incumbency, either by reason of ill-health or to avail himself of an annuity under the canon from time to time in force under the A. and D. C. fund, shall not thereby forfeit any rights of seniority he may have acquired at the date of his resignation, but he shall (subject always to the provisions of clause V. hereof) be entitled to be placed on this fund as soon as there is income available for him. Provided that in deciding

any questions of seniority which may arise under this clause, nothing shall be allowed any clergyman resigning as aforesaid for time which had expired subsequent to the date of his resignation, and that clergymen then junior to him on the list may gain priority over him by reason of service after his resignation.

"2. Add new clause XI.:

"XI. Whenever a surplus in the commutation trust fund is reported to the standing committee, the committee shall cause a notification to this effect to be sent to all clergymen who would be entitled by seniority to go on the fund were it not for sub-sections (a) and (b) of clause III. hereof.

"Add new clause XII.:

"XII. Should any doubt at any time arise as to the interpretation of this canon, the same shall be referred to the chancellor of the diocese, whose decision thereon in writing, after due notice to all concerned, shall be final."

For 1903 no payments were made to plaintiff, defendant Spencer, or defendant Gardiner. In March, 1904, $384.13 had accumulated to the credit of the fund after meeting all other charges. To this money defendant Spencer and plaintiff both made claim. Defendant Gardiner was also a claimant. The standing committee resolved that the opinion of the chancellor be obtained as to the distribution of the surplus income, amounting to $384.13, and that the secretary be instructed to act in accordance therewith. . . .

Mr. Kirwan Martin, who had been appointed chancellor on 9th May, 1904, proceeded to deal with this question. He caused notice to be given to the 3 claimants of an appointment to consider it and to hear the respective claimants. Defendant Spencer attended in person pursuant to such notice. Defendant Gardiner appeared by counsel. Plaintiff refused to attend or be represented. The chancellor delivered not merely an opinion for the guidance of the committee, but what purports to be a decision adjudicating upon the priorities of the respective claimants, and awarding the $384.13 to defendant Spencer. In taking this course the chancellor, as I understand the matter, professed to proceed under clause XII. of the by-law added in 1902. . . . There can be, as far as plaintiff is concerned, no suggestion of a voluntary submission to the arbitration of the chancellor. . . .

For plaintiff it was argued that the opinion of the late chancellor, given in 1902, is in effect an award of a referee in plaintiff's favour, acquiesced in by both defendants, and

therefore binding upon them . . . Taylor on Evidence, 8th ed., sec. 760 et seq. I have examined all the cases cited by the learned author, and other cases. In my opinion, they do not support plaintiff's position, with which I find myself unable to agree. There was here no reference by consent of all parties, nor was there any agreement to submit the matter in dispute to a referee. There was nothing more than a determination by a body of trustees to take and act upon the opinion of their legal adviser. That opinion . . . bound nobody. It was in no sense an adjudication or award. . . It cannot be considered as in any sense disposing of the rights of the parties.

Neither am I able to find such acquiescence or laches on the part of defendant Spencer as precludes him from advancing the claim which he now makes.

For defendants it is argued that, upon the true construction of the canon of 1894, plaintiff is, on the undisputed facts, "junior on the pay list" to defendant Spencer; and also that the "decision" to this effect of the present chancellor is conclusive against plaintiff.

It will have been noted that the provision which plaintiff accepted in May, 1898, in settlement of his claims, was expressly made "subject to the conditions of the by-law." Whatever rights he then acquired are, therefore, clearly governed and restricted by the terms of the by-law.

That by-law in clause II. declared and defined three classes of charges upon the trust fund: 1st. The payment to original commutants of their stipulated annuities. 2nd. The expenses of management. 3rd. The payment to such other annuitants as have been, or may from time to time be, added to the list, of the amounts to which under this by-law they have been or may become entitled, subject to the provisions of clause V. (c).

By clause III., those eligible under sub-clause (3) of clause II., being clergy of the diocese, in order of seniority in priests' orders, are divided into two classes, viz.:

(a) Incumbents of endowed livings yielding less than $400, for an amount sufficient to raise such net income to $400.

(b) Clergy not holding the incumbency of a church or parish yielding in all $1,200 per annum.

Clause V. governs the amounts of the payments to be made to charges under sub-clause (b).

Incumbents of endowed rectories yielding over $400 per annum, and of other parishes or churches yielding over $1,200 a year, are thus ineligible.

Though for different amounts, clergymen within either class (a) or class (b) are, under clause II., "such other annuitants as have been or may be added to the list." It is upon that qualification that the right to payment of clergymen of both classes rests. Both are "other annuitants;" both are "added to the list;" both are subject to the diminution or extinction of their claims upon the fund by increase of income.

By clause VII., "Any clergyman once placed on the list shall remain thereon so long as he remains eligible in accordance with this by-law, continues to do duty in this diocese, or is on the superannuated list thereof."

Defendant Spencer became entitled on 31st March, 1898, under sub-clause (a) of clause III., to be "added to the list." That right the standing committee recognized on 9th May, 1898, but as a right for the year ending 31st March, 1898. Plaintiff was on 9th May, 1898, put on the list as of 1st April, 1898. Defendant Spencer was entitled, other things being equal, to go on the list in priority to plaintiff by virtue of his seniority in service. But the material point is, that defendant Spencer was added to the list in priority to plaintiff. He was put on in respect of a right or claim which accrued on 31st March, 1898. The resolution recognizing and ordering payment of his claim preceded that by which plaintiff was added to the list as of 1st April, 1898. Though both resolutions were passed on the same day, where, to determine the rights of the parties, it became necessary to do so, the Courts do not hesitate to consider fractions of a day.

From 31st March, 1898, defendant Spencer always remained "eligible in accordance with the by-law," always "continued to do service in the diocese." He, therefore, under clause VII., always remained on the list, and, apart entirely from the effect or operation of the amendments to clause VIII. made in 1902, it is immaterial that he was in 1899 transferred from class (a) to class (b).

By sub-clause (c) of clause V., it is provided that "should any deficiency occur, so that all the clergy on the list cannot be paid, the commuting clergymen shall be paid first, then the next senior, so that if any clergyman is to be unpaid, he shall be the junior on the pay list."

In my opinion, it is impossible to argue successfully that "junior on the pay list" means anything other than "last

added to the pay list." It cannot mean, as counsel for defendants urged, that clergymen upon the list, who, regardless of when he was added to it, happens to be junior in service in the diocese.

I, therefore, find that plaintiff is, upon the undisputed facts of this case, "junior on the pay list" to defendant Spencer, and is therefore the clergyman "to be unpaid" until the claim of the defendant Spencer upon the fund has been satisfied.

This conclusion renders it unnecessary for me to consider the effect of the "decision" of the present chancellor of the diocese.

The action will be dismissed with costs.

MARCH 2ND, 1905.

DIVISIONAL COURT.

CAMPBELL v. BAKER.

Costs—Taxation by Local Officer—Motion to Review—Limitation to Specific Objections—Reference of whole Bill to Taxing Officer at Toronto as upon Revision—Erroneous Practice—General Objection to all Items—Inefficacy—Delegation of Judge's Duty to Taxing Officer.

Appeal by plaintiff from order of FALCONBRIDGE, C.J., in Chambers, referring plaintiff's bill of costs to the senior taxing officer at Toronto to be taxed as upon a revision of taxation and to report.

The order appealed from was made on the application of defendants, pursuant to Rule 774, to review the taxation of plaintiff's costs by a local taxing officer.

Defendants, being dissatisfied with the taxation, delivered, pursuant to Rule 1182, to plaintiff and to the taxing officer, objections in writing to the taxation.

These objections, besides specifying, as objected to, a large number of the items of the bill, and giving in each case the reason for the objection, concluded with the following general complaint: "The defendants also complain that the bill generally is exorbitant, that the allowances as a rule are too large, and that altogether too much has been taxed for folios, attendances, etc., etc."

The local taxing officer, according to his certificate of 28th January, 1905, considered the objections, and confirmed his taxation, but he did not state "the grounds and reasons of his decision" on them—probably because he was not required to do so by either party.

W. E. Middleton, for plaintiff.

Grayson Smith, for defendants.

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

MEREDITH, C.J.—It was contended before us by the appellant . . . (1) that . . . the general complaint was not a sufficient objection within the meaning of Rule 1182, and that, therefore, as to all the items not otherwise specified in the objections, the certificate of the taxing officer was final and conclusive (Rule 774); and (2) that upon an application to review the taxation as to any items objected to, it was not proper to refer the items for taxation as upon a revision, and much less to refer the whole bill of costs for taxation in that way.

The Chief Justice appears to have followed the course adopted by the Chancellor in Quay v. Quay, 11 P. R. 258 (1886), which is thus stated by him at p. 260: "I have thought it a convenient practice, when any case is made on appeal as to several items or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto as upon a revision: Snider v. Snider, 11 P. R. 140."

I am, with great respect, of opinion that the course which the Chancellor is reported to have adopted is not warranted by the Rules or sanctioned by the course of judicial decisions on the provisions of the corresponding English Rules.

The Con. Rules, having been confirmed by legislation, have the same effect as an Act passed by the provincial legislature itself. . . .

[Rules 85, 774, 1182, and 1183, referred to.]

It would seem to be reasonably clear from these provisions that the local taxing officer had in respect of the bill in question no less powers than the taxing officers at Toronto possess for the taxation of costs; that the only remedy for an improper taxation by the local taxing officer is an application to a Judge in Chambers to review the taxation; that only the items objected to in the manner provided by Rule 1182 are open to review; and that, as to all items not so objected to, the certificate of the local taxing officer is final and conclusive.

If this be the correct view, it follows that any practice of sending the whole bill to a taxing officer in Toronto for taxation, as upon a revision, is not warranted by the Rules.

A revision of the bill of costs by the taxing officer at Toronto is a re-taxation of the bill: Keam v. Yeagley, 6 P. R. 60; Re Robertson, 24 Gr. 555, at p. 560. A review of a taxation upon an appeal from the certificate of the taxing officer is a very different thing. On an appeal the discretion of the taxing officer in matters as to which a discretion is vested in him will not be interfered with unless it is manifest that he has failed to exercise it in a reasonable manner: Holmested & Langton, pp. 957-8, and cases there cited; Snow's Annual Practice, 1905, p. 1014, and cases there cited; and, though the Court may, it will slowly and reluctantly, enter into questions of mere quantum: Smith v. Butler, L. R. 19 Eq. 473, at p. 478. On a revision of a taxation, the officer re-taxes the bill, and it is his discretion that governs as to matters which are left to the discretion of the taxing officer, and that discretion is substituted for the discretion of the taxing officer whose taxation is being revised.

The English Rules corresponding to our Rules 774, 1182, and 1183, are Order LXV., rule 27, sub-rules 39, 40, 41, and 42; they contain some provisions which are not in our Rules.

. . .

There are to be found in the books numerous cases in which the effect of these Rules has been considered. The cases shew that the Court has invariably refused, on an application to review the taxation, to consider objections which have not been carried in before the taxing officer: Re Nation, 54 L. T. 648; Hester v. Hester, 34 Ch. D. 607, 617; Strousberg v. Sanders, 38 W. R. 117; Shrapnel v. Laing, 20 Q. B. D. 334, at p. 337; Craske v. Wade, 80 L. T. 380; and that it is very difficult where, owing to a mistake of the solicitor, objections have not been carried in, to obtain any relief: Re Furber, 33 L. J. 303, 343; Geake v. Greenways, 38 L. J. 132.

. . .

[Stevens v. Griffin, [1897] 2 Q. B. 368, referred to and distinguished.]

The Chancellor in Quay v. Quay (p. 260) quoted as "not inapposite to the state of affairs in this province" what was said by Chitty, J., in In re Wilson, 27 Ch. D. 242, 245, as to the undesirability of district registrars acting as taxing masters; but, fortunately or unfortunately, the legislature has decentralized taxations, and has not vested in a Judge in Chambers the powers which, by Order XXXV., rule 4, is conferred upon an English Judge, and which enabled Chitty, J., to give practical effect to the view expressed by him.

Even if the course of decision in this province had been uniformly in accordance with the practice adopted by the Chancellor in Quay v. Quay, I should have gravely doubted whether, when it came to be challenged for the first time in a Divisional Court, it would have been proper to have sanctioned it, if it be, as I think it is, directly opposed to the express provisions of the statute law of the province; but we are not called upon to deal with such a state of things. . . .

[Reference to Platt v. Grand Trunk R. W. Co., 12 P. R. 273; Cameron v. Cameron, 9 C. L. T. Occ. N. 196; Snowden v. Huntington, 12 P. R. 248.]

I come, therefore, to the clear conclusion that the Chief Justice had no jurisdiction to refer any of the items objected to for taxation as upon a revision, or to review, either of himself or with the assistance of the taxing officer at Toronto, any item or part of an item of the bill as to which an objection had not been brought in to the local taxing officer, pursuant to Rule 1182.

There remains to be considered the question whether what I have spoken of as the general complaint is a sufficient objection to the items not specifically mentioned, within the meaning of Rule 1182, and I am of opinion that it is not. It may be that the Rule is complied with if the party complaining states in his objection that he objects to each and every item of the bill, but that has not been done in this case. The complaint is not directed in terms to all the items not specifically referred to, and it is impossible to say to which of them objection is intended to be taken. Such an objection does not, as the Rule requires that it shall, specify "concisely the items objected to," and it was not, therefore, open to defendants to question any of the items sought to be covered by this general complaint.

Appeal allowed, and order varied by making the reference to review the taxation as to the items objected to as upon an appeal from the taxation by the local taxing officer. No costs of appeal to either party.

I should not have been disposed to make the order in the form I have proposed that it should take, if Mr. Middleton had not consented to that being done.

A Judge in Chambers, upon an application to him under Rule 774 to review a taxation, has, in my opinion, no jurisdiction to delegate the duty which the Rule imposes upon him, to a taxing officer at Toronto or to any one else. That he may take the opinion of that officer as to any and all matters arising upon the application, I do not question, but that opinion must be obtained only for the information of the

Judge, whose own opinion the parties are entitled to have, and it, and it alone, is that which the Rule permits to prevail in determining the questions raised by the appeal.

MACLENNAN, J.A. MARCH 2ND, 1905.

C.A.—CHAMBERS.

RE PRINCE EDWARD PROVINCIAL ELECTION.

Parliamentary Elections—Ballots—Recount — Jurisdiction of Deputy County Court Judge—Absence of Statement by Deputy Returning Officer as to Result of Poll—Substituted Statement — Two Crosses on Ballot — Erasure of one—Irregular Cross.

Appeal by R. A. Norman, one of the candidates, from the decision of the deputy Judge of the County Court of Prince Edward, on a recount of ballots.

E. E. A. DuVernet and D. C. Ross, for appellant.

C. H. Widdifield, Picton, for Morley Currie, the other candidate.

MACLENNAN, J.A.—An objection to the jurisdiction of the deputy Judge, taken by the respondent and overruled by the Judge, was renewed before me.

I do not think the objection well founded. Sections 9 and 10 of the Local Courts Act, R. S. O. 1897 ch. 54, provide for the appointment of a deputy Judge, and that in case of the death, illness, or absence of the Judge, he shall have authority to perform, in the place of the Judge, in the county for which he is deputy, all the duties of and incident to the office of the Judge of the County Court, and all acts required or allowed to be done by the Judge of the County Court under that or any other statute, unless when by such statute it is otherwise expressly provided. It is admitted that the County Court Judge was ill at the time this proceeding was taken and proceeded with, and there is no express provision of any statute excluding the application of the section in the case of a recount.

The principal ground of the appeal is that the Judge should not have counted the ballots marked at polling subdivision No. 1, Hallowell, but should have rejected them all, because of non-compliance by the deputy returning officer with the statutory directions contained in secs. 112 and 114 of the Election Act, as to proceedings at the close of the poll. It is not disputed that the alleged non-compliance by the

deputy returning officer occurred, but it does not appear that the returning officer had any difficulty in ascertaining the number of votes cast at that poll for the respective parties.

The returning officer, finding that the deputy at this poll had not made or signed the statements required by the Act, took a written statement on oath from him, that he remembered that the number of votes cast for Currie was 69, and for Norman 48, and that he had given a certificate to that effect to the agents of the respective candidates. The correctness of that statement on oath is not questioned, nor that the numbers were 69 for Currie and 48 for Norman.

There is nothing in the Act making invalid or void the votes cast at any particular poll in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll. And sec. 133, as amended by 62 Vict. (2) ch. 5, sec. 4, makes provision for ascertaining the true facts in case the deputy returning officer has failed to comply with any such requirements. I am, therefore, of opinion that the Judge rightly decided that the votes polled at the subdivision referred to had been properly counted and ought not to be rejected.

Objection was made by the appellant to the Judge's decision with respect to . . . 18 particular ballots. I disposed of 16 of these on the argument, affirming the decisions of the Judge, and I reserved two for further consideration. These were No. 5140, subdivision 1, South Maryburgh, and No. 6814, subdivision 7, Picton.

No. 5140 had a well-formed cross in Norman's division, but in Currie's division there was distinct indication that a cross had been placed there, which was afterwards carefully erased with a knife or other sharp instrument. It is said to have been found in the spoiled ballot envelope, but it is not marked "cancelled," as required by sec. 109, in the case of a spoiled ballot; and moreover the total number of ballots found is one short of the number of votes polled at that subdivision unless this one is counted. I think the fair inference is that this was not a spoiled ballot, and that it was placed in the envelope for spoiled ballots by mistake. If that is so, it ought to have been counted for Norman, as was done in the West Elgin case, 2 Ont. Elec. Cas. 45; and in the Lennox case, 4 O. L. R. 378, 1 O. W. R. 472.

The other ballot, No. 6814, was also marked in Norman's division, but was rejected, the mark being something like a capital Q. I think numerous decisions require me to hold that this ballot was well-marked, and ought to have been

allowed for Mr. Norman: see West Huron, 2 Ont. Elec. Cas. 58.

The result is that the appeal fails, and must be dismissed, except as to the two ballots numbered 5140 and 6814, and that the appellant must pay the costs.

MACLENNAN, J.A. MARCH 2ND, 1905.

C.A.—CHAMBERS.

RE WEST HURON PROVINCIAL ELECTION.

Parliamentary Elections — Ballot — Recount — Sufficiency of Marks—Mistake in Initials of Deputy Returning Officer—Torn Ballot—Ballot without Initials—Mistake of Officer—Ballots Wrongfully Numbered by Officer—Disclosing Identity of Voters.

Appeal by D. Holmes, one of the candidates at the election, from a recount of votes by the senior Judge of the County Court of Huron.

E. L. Dickinson, Goderich, for appellant.

H. M. Mowat, K.C., and J. L. Killoran, Goderich, for M. G. Cameron, the other candidate.

MACLENNAN, J.A.—The appeal was limited to 6 ballots; No. 5358, not counted for Holmes; Nos. 3189, 4183, 9493, 7699, and 6084, counted for Cameron; and all the ballots in polling subdivision No. 4, Goderich.

The only question as to 3189, 4183, and 9493, is the sufficiency of the mark as a cross, and I think the Judge was clearly right in holding the marks sufficient, and the ballots valid.

The objection to No. 6084 was that the initials of the deputy returning officer on the back were the letters "B. S.," instead of "R. S." The learned Judge came to the conclusion that the initials were placed thereon by the deputy returning officer, and were in his handwriting, and that B. was a mistake for R., and that the validity of the ballot was saved by sec. 112 (3) of the Act. I cannot say that his conclusion of fact is wrong, and I must therefore affirm his decision.

No. 7699 was objected to on the ground that, when produced, it was found to be torn in two along an irregular line, lengthwise of the ballot, and the two parts were pinned together, no part of the original ballot being absent or wanting. In all other respects it was perfect, and properly marked for Cameron. . . The case differs from that of West Huron,

2 Ont. Elec. Cas. 62, where a substantial part of the ballot, the part having the official number upon it, had been torn off and was wanting, and is more like Re West Elgin (No. 1), 2 Ont. Elec. Cas. 32: and see Woodward v. Sarsons, L. R. 10 C. P. 733; and Edgar v. McCallum, H. E. C. 725 and 734. I affirm the Judge's decision as to this ballot.

No. 5358 was marked for Holmes, but had not the initials of the deputy returning officer on the back. It was rejected by the deputy returning officer, and returned in a rejected ballot envelope. There was another ballot, No. 5359, in the same division, which was not marked for either candidate, but had the deputy's initials indorsed thereon. This ballot was returned in the spoiled ballot envelope, but is not marked "cancelled," as required in such a case by sec. 109. Nor does it appear that the counterfoil was similarly marked.

Both parties suggest that, inasmuch as 5358 and 5359 are consecutive numbers, the deputy returning officer must by mistake have torn both off the counterfoils at once, have put his initials on the lower one of the two, and have handed both to the voter, who, without observing that there were two, marked the upper one. The appellant suggests that the mistake was discovered when the ballots were about to be placed in the box, and that 5358 was then put in the box, 5359 put aside as spoiled, and put in the spoiled envelope. The respondent, on the other hand, suggests that the voter folded both ballots as directed by sec. 103, and delivered them so folded to the deputy returning officer, who, without unfolding or discovering that there were two ballots, deposited them both in the box.

The learned Judge's statement and finding is as follows: ". . . In this polling division 111 persons voted, and 112 ballot papers were returned by the deputy returning officer, including 5358 and 5359, and Mr. Dickinson contends that, treating 5359 as a spoiled ballot, 5358 is necessary and must be counted to equal the number of voters. In the absence of evidence, I do not find as a fact that the spoiled ballot paper 5359 was in the ballot box, but from the fact that it bears no mark of any kind that could be said to spoil it, and is not mutilated, and as 5358 was undoubtedly found in the ballot box without the initials of the deputy returning officer, and as they are consecutive numbers, I infer that they must have adhered together, and have been given out as one ballot, and as such went into the ballot box, and were found to be two ballot papers at the close of the poll, which made one ballot too many, and that the deputy returning officer, following sec. 112, sub-sec. 1, rejected 5358 as not bearing his in-

itials; and, as I felt bound by the same section, I felt it my duty under that section to reject 5358 and to count 5359 as one of the ballots cast."

I have felt a desire, if possible, to allow this ballot, fairly and honestly marked by the voter for the candidate of his choice. Even if he noticed that there were two papers, he may have thought that was the proper method of voting, having received them both from the deputy returning officer. He therefore complied with sec. 103, folded them across so as to conceal the names of the candidates and the mark on the face of the paper, and so as to expose the initials of the deputy returning officer and the number on the back, and delivered them so folded to the deputy returning officer. The folds of both papers correspond exactly, shewing that he must have done all that. The same section, 103, requires the deputy returning officer, when the ballot is delivered to him, to deposit it in the ballot box, *without unfolding it,* or in any way disclosing the names of the candidates, or the mark made by the elector. His duty is merely to verify his own initials and the number on the back of the paper, and he is expressly forbidden to unfold it. I am therefore compelled to agree with the inferences of the Judge that both papers folded together were placed in the box by the deputy returning officer, and that when the ballots were counted at the close of the poll, No. 5358, although properly marked, being found without initials, had to be rejected, as required by sec. 112. I have considered whether these papers could not be treated as one ballot, and be allowed; but I think I may not do that. That would be to condone the error of the deputy returning officer, and to encourage laxity in the discharge of an important public duty. The ballot must be held to have been rightly rejected.

The remaining objection is as to the ballots in polling subdivision No. 4, Goderich.

The contention was that all those ballots should have been rejected, for the reason that they were all marked on the back with the number in the poll book opposite to the name of each voter, and that by that means the identity of each voter could be discovered.

The Judge came to the conclusion that the numbers were placed on the ballots by the deputy returning officer, and that the case was governed by sub-sec. 3 of sec. 112, and that the validity of the ballots was not thereby affected.

The Judge had ample evidence before him to enable him to judge whether the numbers had been placed by the deputy returning officer or his poll clerk, evidence which I have not

before me, the appeal being a limited one, and I cannot review his decision on that question of fact.

This objection was not urged before me with much confidence; nor could it be, having regard to the decision in Re Russell (2), H. E. C. 519, which decides the very point involved.

The appeal fails on all the grounds of objection, and I think must be dismissed with costs.

CARTWRIGHT, MASTER. MARCH 3RD, 1905.

CHAMBERS.

CITY OF TORONTO v. RAMSDEN.

CITY OF TORONTO v. McDONELL.

Dismissal of Action—Delay in Delivery of Statement of Claim —Irregular Delivery after Time Expired — Validating Order—Terms—Possession of Land—Improvements.

Motion by defendants to dismiss actions for want of prosecution or to strike out statements of claim as irregular.

J. E. Jones, for defendants.

F. R. MacKelcan, for plaintiffs.

THE MASTER.—Plaintiffs seek to recover possession of certain lands forming part of what is called "the sand-bars," south of Ashbridge's bay. The writs of summons were issued and served on 9th September, 1902, and defendants duly appeared on 19th September, 1902. The solicitor for the plaintiffs stated on affidavit that "about the date when the time expired, under the Rules, to deliver statements of claim, I asked a member of the firm of defendants' solicitors to grant further time to deliver same, to which he assented." This is not denied. The affidavit goes on: "No particular time was mentioned, and, as I never received any request since that time from the said solicitors to deliver statements of claim, or any notice that they objected to the matter standing, I took it for granted that there was no objection." The affidavit further states that the delay was due to a doubt as to whether the lands were within the jurisdiction of the Dominion or the Province, and also from inability to get evidence to meet the defence of title by possession which he thought would be raised.

Without any order a statement of claim in each action was filed on 3rd February, 1905. . . .

It would have been better had plaintiffs filed their statements of claim within a shorter time than 2 years and more

after they were due. Plaintiffs were not justified in waiting so long without the express consent of defendants' solicitors or obtaining an order for that purpose. . . .

In the first action an affidavit has been filed stating that towards the end of last year there was a fire on the premises in question in that action, and relying upon the supposed fact that the action was at an end, the mother of defendant in that action rebuilt part of the burnt premises, and expended considerable money thereon.

The defendant in the second action . . . says that, in the belief that the litigation was at an end, he has laid out a great deal of time and money on the buildings and premises, having practically rebuilt the house. . . . and that it is now worth 6 times as much as when this action was begun.

In these circumstances, I think that an order should be made allowing the statements of claim to stand, and giving defendants such further time to put in their defences as they may desire. But plaintiffs must agree, in case they succeed in the actions, to allow defendants to have the benefit of R. S. O. 1897 ch. 119, sec. 30, as to any lasting improvements made by them since 1st April, 1903, and before 1st February, 1905; and a direction to that effect should be inserted in the order.

The costs of the motions will be to defendants in any event.

TEETZEL, J. MARCH 1ST, 1905.

WEEKLY COURT.

RE BOWER.

Settlement—Trust Deed—Construction—Equitable Estate in Fee of Settlor — Rule in Shelley's Case — Devolution of Estates Act—Distribution of Estate.

Motion under Rule 938 by John Balmer and Cornelius McBrayne, trustees under a certain trust deed, dated 31st January, 1884, executed by William Bower, since deceased, for an order determining two questions arising upon the construction of the trust deed, viz.: (1) Who are to share in the trust estate as the right heirs of William Bower according to the laws of descent in Ontario? (2) Whether under the trust deed the property vests in the administratrix of the estate of William Bower, under the Devolution of Estates Act, for the purposes of distribution.

The trust deed conveyed to the applicants (and another trustee, since deceased) a farm of 80 acres, "to have and to

hold the same, with the appurtenances unto the said parties of the second part (trustees), their heirs and assigns forever, to the use and upon the following trusts, namely, first, to lease and demise the said land . . . and out of the rents and profits of said land to pay any rates or taxes that may be levied or become payable upon said land, and the expenses and disbursements incidental to the carrying out of this trust, and to pay the balance of said rents and profits over to the said party of the first part (settlor) for his maintenance and support, annually, without any abatement or deduction whatever, during the remainder of his natural life, and after the death of the said party of the first part, then in trust to convey and assign the said lands to such person or persons as the said party of the first part shall, by his last will and testament in writing executed by him so as to pass real estate in the Province of Ontario, limit and appoint, and in the event of his dying without making such will, then to hold the same in trust for the right heirs of the said party of the first part, according to the laws of descent in Ontario, in fee simple."

William Bower died on 21st February, 1903, without having made a will, leaving as his next of kin a brother and two sisters, and the children of two deceased sisters.

W. S. McBrayne, Hamilton, for the trustees and the administratrix, contended that there was an equitable estate in fee in the settlor by reason of the application of the rule in Shelley's case, and that the property vested in the administratrix at his death in precisely the same manner as if there had been no trust deed: Farwell on Powers, 2nd ed., p. 56; Richardson v. Harrison, 16 Q. B. D. 85; Cooper v. Kynock, L. R. 7 Ch. 398; In re White and Hyndle, 7 Ch. D. 201; Armour on Devolution, p. 17; Preston on Estates, pp. 504, 506.

The next of kin were not represented.

TEETZEL, J.—Upon the authorities cited . . . it is quite clear that the settlor was possessed of an equitable estate in fee simple in the lands described in the trust deed . . . which estate is now, under the Devolution of Estates Act, vested in the administratrix. There being no disposition of the estate provided for under the deed upon the testator's death, the duty is cast upon the administratrix to proceed to realize upon and distribute the estate under the provisions of that Act.

As there appears to be no conflict between the trustees and the administratrix, I do not consider it at present necessary

to determine whether the legal estate is in the trustees or administratrix. To remove any question on this point, when title is being made both should join in the conveyance.

Costs out of the estate.

HODGINS, LOC.J. DECEMBER 1ST, 1904.

EXCHEQUER COURT OF CANADA.

(IN ADMIRALTY.)

REX v. THE "TUTTLE."

Ship—Arrest—Release—Re-arrest—Escape—Burden of Proof —Bond—Pleadings.

Motion by the Crown for a bond and pleadings.

A. G. Murray, North Bay, for the Crown.

E. G. Morris, for the ship.

HODGINS, LOC.J.—The proceedings before me on this interlocutory application disclose several irregular and unexplained proceedings on the part of some of the officials concerned in the following matters.

On 2nd August, 1904, a writ of summons and warrant of arrest were issued out of this Court against the ship "H. B. Tuttle" for injuries caused by her to the Indian Point bridge in Manitoulin. On 4th August the ship was arrested at French River by the collector of customs at that port. On 8th August the following telegram from the public works department was sent to the solicitor for the Crown at Gore Bay:

"H. B. Tuttle was sold by marshal Admiralty Court in 1903. Claim now invalid. Attorney advises release."

On the following day the above telegram was cancelled by the following to the same solicitor:

"Message of yesterday cancelled. On further information with regard to the Tuttle withdraw order for release at once."

This telegram was supplemented by the following on the same day:

"On reading your letter of 6th, Attorney-General desires Tuttle held and wire of yesterday cancelled."

But it was admitted during the argument that some person interested in the ship obtained from the public works department (whether from the head or a subordinate officer of the department has not been disclosed) a copy of the first

mentioned telegram advising release of the ship. A copy of this telegram appears to have been telegraphed to the collector of customs to whom the warrant of arrest had been sent, in whose custody the ship then was, who, without any communication with the solicitor for the Crown to whom the telegram had been addressed, and without any order of the Judge, or direction from the registrar of the Court, or any other warrant than the copy of the telegram mentioned above, released the ship "Tuttle" from the arrest which had been made on 4th August under the authority of the warrant of arrest which had issued from this Court.

The rules of this Admiralty Court respecting the release of ships and property so arrested are set out in Rules 53 to 59. Ships so arrested can only be released by order of the Judge or by a release issued by the registrar under the prescribed conditions as to security.

On 12th August the collector of customs at Little Current sent the following telegram to the solicitor for the Crown:

"Have cleared Str. Tuttle for Buffalo, to save further expense, on copy of McNaughton's telegram 8th. Send formal release."

The act of the collector in releasing the "Tuttle," "on copy of McNaughton's telegram 8th" (the first telegram above), appears to have been unauthorized, and in entire disregard of the rules of this Court, above cited, authorizing releases of "property arrested by warrant."

No explanation has been given by any official of the public works department of the circumstances in which a copy of the first or McNaughton's telegram was furnished to some person interested in the ship. Nor has any explanation been given by the collector of customs of the circumstances in which he released the ship without the authority which the Admiralty rules prescribe.

I cannot, on this interlocutory application for pleadings and a bond, try the questions involved in the arrest and release of the ship on the 11th August last. All the facts affecting these questions have not been proved or explained, and they must therefore be reserved for the trial.

On 12th August an appearance was entered by a solicitor for the ship "Tuttle," and the owners thereof.

Mr. Murray, solicitor for the Crown, in his affidavit states that "no release was sent to the customs officer, as requested by his telegram, but I immediately requested the public works department to have the ship arrested at Windsor by His Majesty's collector of customs there, in whose hands I had previously placed a warrant of arrest; and I am informed

that the collector of customs at Windsor did duly arrest the said ship, but that she escaped from his custody, as appears from the telegram now shewn to me and marked exhibit C. hereto." The telegram is as follows: "Windsor, August 17, 1904. Tuttle arrested on Saturday but escaped later; am sending full report to department, Toronto. J. A. Smith, collector."

Some of the facts respecting the arrest of the "Tuttle" appear to be as follows:

On 13th August the following telegram was sent from the Attorney-General's office to the collector of customs at Amherstburg (not Windsor): "Arrest steam barge H. B. Tuttle on passing through channel there on warrant from Maritime Court at instance of public works department of Ontario."

On the same day a customs officer of the Amherstburg office went on board the "Tuttle," and shewed the master the telegram and "placed the ship under arrest." The vessel, however, proceeded for about two miles and then ran aground. The detailed statement of the customs officer in making the arrest is set forth in his affidavit. But he is silent as to the escape.

Neither the "full report" of the collector of customs at Windsor, nor a report from the collector of customs at Amherstburg, whose officer made the arrest, as to how the ship escaped from custody, has been furnished on this interlocutory application.

The full and consecutive proceedings affecting the arrest and release, the re-arrest and the escape of the ship, are therefore incomplete and unsatisfactory. But, from what appears, I think the fact of the arrest and improper release of the ship at French River is prima facie established, and that the onus of proving that the ship was lawfully released from custody by the collector of customs at French River, lies therefore on the owners.

Then as to the bond moved for by the Crown. I find that the correspondence between the solicitors shews that the solicitor for the owners, as late as 26th September, 1904, over a month after the alleged release by the collector of customs at French River, agreed to give a bond. I must, therefore, hold that the owners are bound to give the bond agreed upon. After the bond has been given and approved, an order for pleadings may issue.

Costs are reserved to the hearing.

JANUARY 23RD, 1905.

C.A.

SMART v. DANA.

Bond—Sheriff—Predecessor in Office—Agreement to Pay Annuity out of Revenues—Appointment Conditional on Payment—Bond for Payment—Effect of Resignation and Unconditional Re-appointment—Res Judicata—Judgment on Issue—Right of Appeal.

Appeal by defendants from judgment of FALCONBRIDGE, C.J., 3 O. W. R. 89, in favour of plaintiff on the trial of an issue directed at the hearing of a petition by way of sci. fa. upon a judgment recovered in an action by the former sheriff of Leeds and Grenville against the present sheriff and his sureties on a bond for $10,000 to secure payment to plaintiff out of the revenues of the office of $1,200 a year.

FALCONBRIDGE, C.J., held that defendant Dana could not by resignation and re-appointment to the office relieve himself and his sureties from liability.

The facts are set out in the judgment of STREET, J., 5 O. L. R. 451, 2 O. W. R. 287.

A. B. Aylesworth, K.C., for defendants, appellants.

G. F. Shepley, K.C., and J. A. Ritchie, Ottawa, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

OSLER, J.A.—. . . Upon the evidence it must be taken, although I do not specially rest my decision upon it, that defendant Dana's resignation was made in good faith, that is to say, that it was absolute and unqualified, and not upon any understanding, express or implied, that, if accepted, he should be re-appointed to office. Want of good faith is not to be imputed to the Crown, who undoubtedly had the right to permit, and who did permit, the resignation, and who by accepting it made it effectual. The office thereby became vacant, and a few weeks afterwards, without any solicitation on defendant Dana's part, was again granted to him, as a mere act of grace and favour, discharged of the condition in the former commission.

This, with all due respect, was, in my opinion, an entire discharge of defendants from all further liability upon their bond.

Regard must be had to the peculiar nature of the contract. Apart from the consent of the Crown, authorizing payment of an annuity out of the fees, etc., of the office, testified in

the commission itself, such a contract would be illegal as being contrary to the 5 & 6 Edw. VI. and 49 Geo. III. ch. 126: Regina v. Mercer, 17 U. C. R. 601; Regina v. Moodie, 20 U. C. R. 389: and, by the very terms of the condition, and of the obligation referring to and reciting it, the annuity was payable out of the fees of the office held under the particular commission of the 1st November, 1898. It was attached to that commission, and was payable only during the occupancy of the office thereunder, and when the commission was gone there ceased to be any contract to pay it. The office is now held under the new commission, and the former, which alone gave any force to defendants' obligation, has ipso facto been revoked or discharged.

Whether, in any circumstances, an action would have lain against defendant Dana for procuring or inducing the Crown to cancel the former, it is not necessary to determine. I do not suggest that it would. The office was not one from which defendant Dana could have discharged himself by his own act. So long as he held it under the earlier commission, he was bound to pay the annuity to the extent to which the fees, etc., receivable thereunder would have enabled him to do so, but I can see no implied obligation on his part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him. By his own act alone he could not disable himself from complying with it, but, if the Crown should think it right, in all the circumstances of the case, to do so, either by accepting his resignation or discharging him, there can be no reason, in my opinion, why that should not effectually be done.

For these reasons, the principle of such cases as McIntyre v. Belcher, 14 C. B. N. S. 654, Ogden v. Nelson, [1904] 2 K. B. 410, and Day v. Singleton, [1899] 2 Ch. 320, is inapplicable, the liability having been put an end to, or the defence to any further claim upon the bond having arisen from the act of the Crown, not the act of defendant.

It was contended that the question was res judicata by the principal judgment, but I do not think so. The defence is one which arose after that judgment was recovered, and was in no way involved in the decision. It is as much open to defendants now as a release or discharge of that judgment would have been.

I am also of opinion that the judgment on the trial of the issue is appealable as a final judgment upon the matters set up as a defence to any further liability to damages in respect of alleged breaches of condition occurring subsequent to the new appointment.

I think the appeal should be allowed, and the petition dismissed.