THE

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FERGUSON, J. SEPTEMBER 24TH, 1903.

CHAMBERS.

## ROBERTS v. CAUGHELL.

*Report—Necessity for Confirmation—Sale under Judgment—No Bidders.*

Appeal by defendant from two orders of a local Judge made on the 8th September, 1903.

One of the orders professed to confirm a report on sale, dated the 4th September, 1903, but was not made upon the consent of the defendant, and the other appointed a new day for redemption and directed foreclosure in default of redemption.

E. Meek, for defendant.

F. E. Hodgins, K.C., for plaintiff.

FERGUSON, J.—The report on sale made by the Master at St. Thomas and dated the 4th September, 1903, though a report that there was no sale for want of bidders, was a report that might have been appealed from, and one that required confirmation. It was admitted that the order professing to confirm the report was bad; and that being so, the order for foreclosure was bad also, the report not being confirmed.

Appeal allowed with costs.

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MACMAHON, J. SEPTEMBER 28TH, 1903.

TRIAL.

## KENT v. ORR.

*Timber—Agreement for Sale—What Passes under—Trespass—Injunction—Reference—Damages.*

Action to recover damages for trespass and cutting and removing timber from part of lot 13 in the 9th concession of

the township of Medonte, in the county of Simcoe; and for an injunction restraining the defendant, his agents and servants, from entering upon and removing or cutting timber on said land; also for an order setting aside an assignment, or transfer, by William E. Irish to the defendant, dated the 24th October, 1902, of all timber, wood, and trees standing upon the said lot; and also for a direction that the registration of the said assignment be vacated.

H. Lennox, Barrie, for plaintiff.

E. F. B. Johnstone, K.C., and F. C. Jarvis, for defendant.

MacMahon, J.—The plaintiff became owner of the lot forty-five years ago, and said that in August, 1871, when the lot was in a state of nature and wooded with pine, oak, elm, basswood, whitewood, spruce, tamarac, and cedar, he sold the pine and the oak timber on the lot to Zachariah Casselman for $1,000, $200 being paid in cash, and the balance—$800—being payable when Casselman had removed the pine and oak. There was no time mentioned within which the timber was to be removed. At that time the pine and oak comprised the only timber of any value; and Casselman cut all that he considered suitable for his purpose during the winter of 1871-2, and then paid Kent the balance of the purchase money, $800. The plaintiff stated that after Casselman paid the $800 he wanted to sell the timber then remaining on the land to him (Kent), but he would not purchase, and Casselman then sold to Gregoire Yon.

The plaintiff and Casselman both said that there was no written agreement between them when the sale took place, and that only the pine and oak were sold. Casselman sold his interest in the timber remaining on the land to Yon, in 1872, for $250. Yon (whose evidence was taken under commission) said that Casselman at the time of the sale produced and read to him an agreement purporting to be between Kent and Casselman for the sale to the latter of all the timber on the lot, and that the agreement as read by Casselman purported to be signed by Casselman and Kent; and that there were receipts sent by Kent for the $200 and the $800 on the paper produced. He said Casselman wrote—at the foot of the agreement between Kent and Casselman—an assignment of his interest in the timber to him (Yon). Yon, who could not read, said that after he had purchased his son read the agreement over to him several times. Yon took pine and oak off the property during the winters of 1874-5 and 1875-6. In 1878 or 1879 Yon sold and assigned his interest in the timber remaining on the lot to Thomas Blaney, the consideration being a set of harness and $15. Yon said he gave to Blaney

the agreement between Kent and Casselman, and the assignment from Casselman to himself; and Blaney said he had the paper until about 1889, when it was lost or destroyed; and that during the time it was in his possession he kept it in an envelope, but looked at it four or five times during the period. He stated it had the signature of George L. Kent to it, which he said resembled the signature of the plaintiff to the affidavit on production sworn by him and filed in this cause.

Blaney shortly after getting the assignment from Yon took 360,000 pine shingle bolts off the lot, besides cordwood for his own use. And in 1885 or 1886 John Robins asked Blaney what timber he owned on the place, and Blaney said the oak and pine, which he sold to Robins for $200, giving him two years in which to remove the timber. Robins did not remove the whole of the pine and oak, as the time limit was too short.

From the evidence of Robins and of nearly every other witness called, the tamarac, hemlock, and cedar on the place ten years ago was of little or no value.

William E. Irish went into possession of part of the lot as tenant of the plaintiff, Kent, in 1880, under a clearing-lease, and cleared sixteen acres. At the time he went on he said that Kent had cleared between 35 and 40 acres of the land.

According to the statement of Irish he commenced to cut timber in 1890, when Blaney (who is his brother-in-law) forbade him cutting any more. Irish then saw Kent, and wanted to buy some of the timber, and Kent, he said, told him that all the timber belonged to Blaney. He then saw Blaney again, when Blaney said if he would cut down the one original pine tree then on the lot, and draw the logs cut therefrom to the mill, he could have the remaining timber on the land. Between the time that Irish entered into this agreement with Blaney and the 1st October, 1902, Irish had taken off and sold 160 cords of hardwood. I find as a fact that for seven winters in succession Irish, while taking off timber, paid Kent for it each year by ploughing on his land and cutting firewood for his (Kent's) use. And that each year a different bargain was made.

During the time Irish was cutting the timber the plaintiff, Kent, was selling timber off the land to other persons. In 1882 he sold to Robert Parker the cedar and balsam on the lot for $100, giving him three years in which to get it out. Parker cut timber for one year only. Kent also sold to George Dunlop the right to cut all the different kinds of timber during the years 1890 to 1897. What Dunlop took off was principally cedar, whitewood, spruce, and balsam.

At that time, Irish said to Dunlop that Kent was selling all the timber, and would not have enough to fence the place, but he (Irish) did not care, so long as he did not sell the pine, as that belonged to him.

Robert Young said that in 1892 he went on the place to cut rails, and Irish was there in the bush, and asked him what he was doing, when Young told him he was cutting rails. Irish said he could take any cedar he wanted, as it was not his, but he must not cut any second growth pine, as that belonged to him. Young said there was at that time some very small second growth pine, varying from two to twelve inches, and one oak about eight inches in diameter.

Irish told Rowland Young he did not care what Kent did with the cedar, as he had no claim to it. And in 1890 Hawke bought balsam, spruce, and hemlock from Kent. Irish (who is Hawke's uncle) knew he was cutting, and asked him how he was getting along. At that time Irish made no claim to any timber but the pine; Blaney gave no written authority to Irish to cut timber.

On the 1st October Kent served a notice on Irish to deliver up possession of the land, and at the same time he caused notices to be posted up on the land forbidding any one trespassing or removing the timber therefrom. On the 18th October Irish purported to assign, by the agreement already referred to, all the timber on the land to the defendant, Orr, The price to be paid is not mentioned in the agreement, and, whatever the price was, it was not to be paid until Orr had removed the timber.

I find that there was a written agreement signed by Kent, when he sold to Casselman, and that it included the "timber" then on the land. As I have already stated, Casselman, as well as the plaintiff, denied that there was any writing; but the plaintiff admitted having signed a leaf in a book as to the sale and purchase of the lot. What he signed may have been in the nature of a receipt, but containing the terms of the contract for sale. Casselman desired to purchase the oak and pine "timber," which was the only timber of any value to him, and the only timber he cut. That was the only kind of timber cut by Yon; and the pine for shingle bolts was the only "timber" cut by Blaney except cordwood for his own use. And, although the agreement included "the timber on the land," I would, having regard to the kind of timber Casselman at that time considered of any value, and which alone he removed, have been inclined to hold that it was not intended to include the cedar, but for the admission of Kent that about four years after he sold to Casselman he obtained

Casselman's consent to cut cedar for fencing. Casselman had at that time no interest in the timber, as he had in 1872 assigned his interest to Yon, but the admission of Kent shews that he considered the cedar as "timber" and as included in the contract. Casselman was called on behalf of the plaintiff, and denied that there was any agreement in writing, but said that he tok a receipt for the money in a pass-book which he stated was afterwards worn out by being carried in his pocket.

Casselman was a most unsatisfactory witness. He admitted having made, on other occasions, statements regarding the contract differing from his statements in the box. He admitted having a conversation with Dr. McGill on the 30th April last, when Mr. Jarvis, the solicitor for the defendant, was present, and with Dr. McGill in August last, when Sylvester Campbell was present, and also Blaney and Orr. He denied telling Dr. McGill in April, 1903, that he had a written agreement from Kent and that he afterwards sold what remained to Yon; and said he did not remember telling Dr. McGill in August that he had bought all the timber on the lot from Kent, and that he afterwards sold what remained to Yon. He also denied that he told Blaney and Orr that Kent had signed the writings, and that he (Casselman) had prepared a document to take to Kent, and brought a witness with him to see it executed. Dr. McGill, Mr. Campbell, Blaney, and Orr were all called, and swore that these statements that Casselman denied making were made to them on the occasions deposed to in the evidence. The manner in which they gave their testimony satisfied me that the statements were made by Casselman to them, and that the evidence which he gave at the trial could not be relied upon.

I find that the agreement between Kent and Casselman was handed to Yon, and an assignment of Casselman's interest was executed by him to Yon, and that Yon afterwards assigned his interest to Blaney.

I find that Irish did not consider he was entitled under the assignment to him from Blaney to cut the cedar, whitewood, basswood, balsam, spruce, hemlock, etc. His claim was confined to the second growth pine and the oak; and "timber" under the contract would not include cordwood which he either removed surreptitiously or had Kent's authority to cut, the latter assuming he was cutting under the license he had given him (Irish).

I find also that Irish was aware, prior to 1890 and during all the subsequent years, that Kent was disposing of timber on the land to Parker, Dunlop, Rowland Young, Robert

Young, and others, already named, and that he acquiesced in what Kent was doing.

Then what would be included in the word "timber" in the contract between Kent and Casselman? In Corbett v. Harper, 5 O. R., the learned Chancellor said, at p. 97: "In this country I apprehend the term 'timber' would be properly applicable to whatever trees are used in building or the mechanical arts. Timber primarily means, 'wood fit for building.' See Latham's English Dictionary. In the Imperial Dictionary it is described as that sort of wood which is squared, or capable of being squared, and fit for being employed in house or ship building or in carpentry, joinery, etc. In Nash v. Disco, 51 Maine R. 417, the Court adopt as correct Webster's definition as that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like. And it is there said that in a contract for the purchase of timber no title would be acquired by the purchaser to trees not suitable for any purpose but for firewood."

The Chancellor in his judgment adopts the rule of law laid down in Aubray v. Fisher, 10 East 446, and recognized in Ireland in Dunn v. Bryan, 7 Ir. R. Eq. 152, that when once a particular wood is ascertained to be timber it assumes the denomination of timber at twenty years' growth.

In Whitty v. Dillon, 2 F. & F. 67, it is said that only trees six inches in diameter or two feet in girth appear to be reckoned or considered as timber.

All trees of any kind which were saplings at the time of the sale in 1871 from Kent to Casselman, but which subsequently became timber, did not pass to the purchaser. And the trees which are only suitable for firewood, and which now form the principal wood on the property, could not be cut or removed by the defendant. In this country the pine, oak, cedar, whitewood, basswood, and ash, which in August, 1871, was twenty years old, the defendant would be entitled to cut, and may be removed within six months from the 1st day of November next.

There will be judgment for the plaintiff as to all the trees on the land suitable for cordwood, and for all spruce and tamarac, and for such of the pine, oak, cedar, whitewood, basswood, and ash as was not at the date named (1871) twenty years old. And there will be an injunction restraining the defendant from cutting or removing such named trees.

There will be a reference to a special referee, to be agreed upon by the parties, and, if not agreed upon, to be named by me, to ascertain what, if any, of the trees suitable for cordwood, or any pine, oak, cedar, whitewood, basswood, or ash,

which was not in August, 1871, twenty years old, or any spruce or tamarac, has been cut on the said premises by the defendant, and the value of such timber.

And the defendant may have a reference, at his own risk as to costs, as to what, if any, of the trees now standing on the said land were twenty years old, and therefore "timber," in August, 1871.

Further directions and costs reserved until after the report of the referee.

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OSLER, J.A. SEPTEMBER 28TH, 1903.

C.A.—CHAMBERS.

## ALLEN v. CROZIER.

*Appeal—Leave—Security for Costs — Discretion — Peculiar Circumstances—Solicitor.*

Motion by defendant for leave to appeal from order of a Divisional Court (ante 736) affirming order of STREET, J., in Chambers, reversing order of Master in Chambers (ante 485), and setting aside a præcipe order for security for costs.

J. W. McCullough, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

OSLER, J.A.—I think that this diversion from the main channel of the litigation should go no further. It seems to me at least probable that the Court of Appeal would hold that it was open to the Courts below in their discretion to say that, under the peculiar circumstances, plaintiff ought not to be ordered to give security.

Defendant was plaintiff's solicitor when, as it is said, both the transactions to be investigated in this action occurred. One of these is an assignment of rents, absolute in form, but which, it seems clear—indeed it is not denied—cannot be sustained to that extent, and defendant has received under it and has in hand a considerable sum for which he must account to the plaintiff, as he says he is ready to do. Another relates to an assignment to defendant of certain Division Court judgments against plaintiff. These, it is said, defendant purchased while acting as plaintiff's solicitor, and can hold only to the extent of the sum he paid for them. It is true that this is to be determined in the action, but the circumstances under which the judgments were so acquired are such as might well be thought by the Court below to invite inquiry which a solicitor and officer of the Court ought not to

be allowed to impede by requiring his former client to give security for costs. Re Carroll, 2 Ch. Ch. 305, may be referred to.

Motion dismissed. Costs in the cause.

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STREET, J. SEPTEMBER 29TH, 1903.

TRIAL.

## HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

*Life Insurance — Surrender of Policy — Inducement — Misstatements of Agent—Release—Subsequent Repudiation —Fraud—Trial of Preliminary Issue in Action on Policy.*

Trial of a preliminary issue in an action by the personal representatives of Robert D. Hamilton, deceased, upon a certificate or policy assuring $2,000 upon the life of the deceased.

J. P. Mabee, K.C., for plaintiffs.

W. Cassels, K.C., and Shirley Denison, for defendants.

STREET, J.—The insurance was effected on the 20th March, 1888, and the deceased died on the 19th July, 1902. In July, 1901, the policy was alleged to have lapsed for non-payment of a premium, but the deceased applied to have it reinstated in accordance with a condition contained in it; he was instructed to go to Dr. D. B. Fraser and submit to a medical examination, and answer in writing the questions contained in a printed form supplied to him. This he did, and he was informed that his policy had been reinstated, and subsequent premiums were accepted by the defendants upon his policy. In March, 1902, he applied to the defendants under another clause, called "the total disability clause," in his policy, for the immediate payment of $1,000 on account of the sum insured. No decision upon this application was communicated to the deceased, but on 6th May, 1902, D. E. Cameron, a general claim agent of the company, instructed by the head office, called at the house of the deceased, and remained with him for some two or three hours, at the end of which time the deceased received from Cameron a draft on the company for $500, in full of all his claims under the policy, and executed a release under seal which Cameron had already prepared, and he delivered the policy up to Cameron, who took it away. Within half an hour Cameron returned with Mr. McPherson, a solicitor and notary public, to whom the deceased in answer to questions stated that he knew he was releasing his policy of $2,000, in consideration of the payment of $500, and he added that he was glad to get rid of the company; that they

had been doubling up their rates on him, and had treated him badly. The deceased then acknowledged his execution of the release in the presence of Mr. McPherson as a notary public. The plaintiff's daughter, who lived with him and who had for a number of years written his letters for him, and assisted him by her advice in occasional matters of business, was present during his interview with Cameron; she told her father not to sign the release without having the advice of Mr. Mabee, and she endeavoured to get Cameron to leave the matter open until the next day so that they might think it over and obtain advice, but he said the offer was only open for that day, and that he must leave by the afternoon train.

I think it is plain that the lever used by Cameron to obtain the settlement was an assertion that the reinstatement of the policy had been obtained by a misstatement in one of the answers contained in the application for reinstatement; and that this misstatement rendered the policy void. The reason given by the deceased to Cameron and his daughter for insisting upon signing the release and closing the matter at once, was, that it would be wiser to take the $500 rather than run the risk of a law suit. The next morning Miss Hamilton, the daughter of the deceased, with her father's consent, went to Mr. Mabee and consulted him upon the subject. The result was that Mr. Mabee at once returned the $500 draft to the defendants, and informed them that the deceased, having been induced to execute the release by misrepresentations as to his position and rights, repudiated it and insisted upon his rights under the policy. Some correspondence took place, during which the deceased died on 19th July, 1902. Proofs of his death were put in, and the plaintiffs demanded payment of the amount of the policy. The defendants insisted that the release was valid and refused to pay the claim. This action having been brought, the defendants denied their liability upon the policy apart entirely from the release, and they also set up the release as a bar. An order was obtained by the defendants for the trial of the issue as to the release before the trial of the other issue, and the issue as to the release was tried before me at Stratford on 22nd September, 1903, without a jury.

The deceased was a retired farmer, and was about 71 years of age at the time he executed the release in question; he was suffering at the time from a disease which he alleged totally disabled him from attending to any business, and he died within three months. If the policy had been validly reinstated in July, 1901, then it would plainly have been unwise for the deceased to accept $500 in full of his policy at his age and in his state of health. On the other hand, if the

policy had never been validly reinstated, the $500 paid the deceased was so much clear gain.

The important question for the deceased to determine in deciding upon Cameron's offer, was his real position under the policy. Was it valid or not? Cameron said it was not by reason of a misstatement which had been made in the application for reinstatement. Neither the deceased nor his daughter was competent to determine the question of law involved in this statement, and the daughter wisely asked for time to enable her to obtain advice. Cameron declined to hold the offer open, and the deceased insisted upon executing the release, fearing that otherwise he should get nothing except through the means of a law suit, which he feared to enter upon.

I think the main reason why the deceased accepted the settlement was the positive assertion of Cameron that the policy was already void and that the deceased had no legal claims under it, and that the defendants were only giving him the $500 because they would rather pay that sum than go to law. The defendants had not written to the deceased before Cameron went to him, and he was entirely taken by surprise; he was effectually prevented from taking legal advice by the refusal of Cameron to leave the matter open until the next day, and he was overborne for the time by the assertion of Cameron that the policy was already void.

The question of the real effect of the misstatement made by the deceased in his application for reinstatement, was not argued before me, and it could not of course be determined upon this issue. It is sufficient to say, however, that it has been pleaded by the defendants in the present action as a defence entirely apart from the release, and that it is by no means clear that it affords a defence to an action on the policy. Cameron asserted absolutely that the policy was void; he and the deceased were not on equal terms; the deceased had no sufficient advice and protection; he was old and infirm, and one of Cameron's objects plainly was to prevent him from having legal advice; as soon as he obtained legal advice, which was the next morning, he repudiated the release and returned the draft.

In my opinion, the release cannot stand, and this issue should be found in favour of the plaintiffs. The costs I leave to be dealt with by the Judge before whom the other issues are tried.

MACMAHON, J. SEPTEMBER 30TH, 1903.

WEEKLY COURT.

## UNIVERSITY OF TRINITY COLLEGE v. MACKLEM.

*Injunction—Interim Order—Absence of Irreparable Injury—Dissolution—Convenience—University Federation.*

Motion by plaintiffs for an order continuing an interim injunction.

The action was brought in the name of the University of Trinity College as plaintiffs, along with William Nattress, a graduate, the Rev. Thomas W. Powell, a student, and the Rev. John Langtry, a graduate and a member of Convocation and of the Corporation of Trinity College, suing on behalf of themselves and all other students, graduates, and members of convocation, against the Revd. Thomas Clark Street Macklem, John Austin Worrell, Edward Martin, the Corporation of Trinity College, and the Bishops of Toronto, Huron, Ottawa, Niagara, Algoma, and Ontario, as defendants.

On the 15th September the plaintiffs obtained an ex parte injunction restraining the first three named defendants from presenting to the council or corporation of Trinity College for adoption the report made by them on the project of federation with the University of Toronto, and restraining the defendants the Bishops from sanctioning or permitting or from joining in any negotiations or sanction of federation.

The motion to continue this injunction was heard on the 29th September.

F. Arnoldi, K.C., and E. D. Armour, K.C., for plaintiffs.

C. H. Ritchie, K.C., and J. A. Worrell, K.C., for defendants.

MACMAHON, J.—I think the interim injunction granted by Mr. Justice Ferguson must be dissolved.

I express no opinion as to the merits of the case. But the plaintiffs have not shewn that any irreparable injury, or in fact that any injury whatever, will be suffered by them entitling them to a continuation of the injunction.

Trinity College will be open until the contemplated federation of the college with Toronto University, which cannot take place until 1904, and until then there will be no change whatever in the curriculum.

The plaintiffs will not be affected in any way by any further proceedings taken, or any agreements entered into between Trinity College and the University of Toronto towards

carrying out the contemplated scheme of federation, if what is contemplated proves to be invalid.

On the other hand, irreparable injury may result to the defendants, should the conditional subscriptions to the extent of $130,000 made towards the funds of the college, be withdrawn, which would probably be the result should the injunction be continued.

The defendants are to facilitate the plaintiffs in proceeding to trial at the present non-jury sittings, and are to take short notice of trial.

The costs of the injunction motion to be costs in the cause unless the trial Judge otherwise orders.

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FALCONBRIDGE, C.J. SEPTEMBER 30TH, 1903.

WEEKLY COURT.

## RE DONALDSON, GIBSON v. DONALDSON.

*Executors and Administrators — Charging Administratrix with Loss to Estate—Chattels—Contract for Sale of Land —Statute of Frauds.*

Appeal by defendant Henrietta Donaldson, administratrix, from Master's report in an administration matter.

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

I. F. Hellmuth, K.C., for plaintiff.

FALCONBRIDGE, C.J.—As to the $25 charged for chattels (complained of in paragraph 10 of the notice of appeal), the Master did not err in charging that amount, the administratrix having sworn that Arthur Traver offered $25 for the chattels in question.

As to the charge of $1,025 and interest, on the ground of wilful neglect and default in the sale of the 80 acres to Arthur Traver, the Master's findings of fact are fully borne out by the evidence. Knowledge of what was going on by way of negotiation between Arthur Traver and proposed purchasers from him is traced to the administratrix before she had made any binding contract with him sufficient to have prevented her from carrying out the sale to a youth under 21, of little or no apparent means, and who was her own nephew. An executor is not bound to plead the Statute of Limitations, but no such liberty has been extended with reference to the Statute of Frauds: Field v. White, 29 Ch. D. 358.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. OCTOBER 1ST, 1903.

CHAMBERS.

## ONTARIO BANK v. STEWART.

*Jury Notice—Motion to Strike Out—Equitable Issues Raised by Defendant.*

Motion by plaintiffs to strike out a jury notice. The action was brought to recover $1,450, the amount of two promissory notes. The defendant counterclaimed to have the notes sued on delivered up and to restain the plaintiffs from making any use of them. The defendant served the jury notice which plaintiffs moved to strike out for irregularity because the issues to be tried were equitable.

C. A. Moss, for plaintiffs.

Grayson Smith, for defendant.

THE MASTER held that the statement of claim clearly and beyond question raised none but legal issues, and a defendant who raises equitable issues does not thereby debar himself and the plaintiff from giving a jury notice. Sawyer v. Robertson, 19 P. R. 172, Bingham v. Warner, 10 P. R. 621, Toogood v. Hindmarsh, 17 P. R. 451, McMahon v. Lavery, 12 P. R. 62, Temperance Colonization Society v. Evans, 12 P. R. 48, and Conmee v. Canadian Pacific R. W. Co., 12 A. R. 744, referred to. Motion to strike out jury notice dismissed. Costs in the cause.

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FALCONBRIDGE, C.J. OCTOBER 1ST, 1903.

WEEKLY COURT.

## ONTARIO POWER CO. v. WHATTLER.

*Partition—Reference—Right to Sale of Whole Property — Partition of Part and Sale of Part.*

Appeal by defendants Whattler and Hewson from the report of a local Master. The order of reference authorized a partition of part and sale of the remainder of the lands in question.

C. A. Masten, for appellants.

W. Cassels, K.C., for plaintiffs.

FALCONBRIDGE, C.J.—Defendants may have a sale or partition of the 6 1-2 acres to be vested in them, if they choose. In the absence of evidence to the contrary, the aliquot share of the plaintiffs set apart by the report is manifestly the least

in value (as being farthest from the highway and having no access thereto), excluding the fact that plaintiffs may want that portion for their works. The last mentioned fact does not seem to furnish a sufficient reason for ordering a sale of the whole property. Hobson v. Sherwood, 4 Beav. 184, referred to. Appeal dismissed with costs.

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CARTWRIGHT, MASTER. OCTOBER 2ND, 1903.

CHAMBERS.

## McDONALD v. PARK.

*Venue—Change of—Substantial Grounds—Preponderance of Convenience—Cause of Action—Residence of Parties—Witnesses—Expense—Increased Security for Costs.*

Motion by defendants to change the venue from Toronto to Chatham.

The action was brought to set aside a will, dated 27th November, 1902, and establish a prior will of the plaintiff's mother, who died in the city of Chatham on the 16th December, 1902. The plaintiff and one defendant, Frederick McDonald, resided in the State of Wisconsin. The other defendants all resided at Chatham, except one, the plaintiff's father, as to whose place of residence there was a dispute.

W. E. Middleton, for defendants other than George McDonald and infants.

C. A. Moss, for defendant George McDonald.

Casey Wood, for plaintiff.

THE MASTER, after a reference to Campbell v. Doherty, 18 P. R. at p. 245, proceeded:—The main object of this action is to set aside the probate of the second will. This must be done and finally determined before any attempt to establish the earlier will: see R. S. O. 1897 ch. 59, sec. 21.

It would seem reasonably certain that most, if not all, of the material facts bearing on this first question will be proved, if capable of proof, by the evidence of witnesses in Chatham or the neighbourhood, such as the 5 or 6 persons who were in attendance on the testatrix on 27th November, 1902, and present at the execution of her will made on that day.

The defendant, Mrs. Park, states in her depositions that, besides these, there are many other persons to be called for the defence who are residents of Chatham, and states the class of evidence they are expected to give. The plaintiff's

affidavit is silent on this point. [Reference to Burke v. McInerney, 38 C. L. J. 444, as referred to in article by Mr. Alexander MacGregor.]

The onus is on the plaintiff to set aside the letters probate of the second will. To do this, he must, one would imagine, have to call a considerable number of witnesses, in view of the statements in Mrs. Park's depositions; and by the very nature of the case these persons must be residents of Chatham. . . .

The present case is not within the letter of Rule 529 (b). Yet I think that this provision may properly be applied to a case that comes within its spirit. [Reference to Edsall v. Wray, 19 P. R. 245; Betram v. Persley, ante 264.]

The whole cause of action arose in Chatham. By the necessity of the case nearly all the material witnesses on both sides will be found there. It is in Chatham that most of the parties reside. The plaintiff and the defendant, Frederick McDonald, must pass through or by Chatham to reach Toronto, and the father is as near to Chatham, if not actually resident there, as he is to Toronto. Toronto is 179 miles distant from Chatham. The return fare is $8.85. So that a considerable sum would be required to bring even 12 witnesses from Chatham to Toronto and keep them here for two or three days. . . . To bring any considerable number here would require at least $200. . . . The trial is likely to be lengthy.

Another ground for the change is that of general convenience. If this action had originated in the usual way, it would have begun in the Surrogate Court at Chatham. Even if removed into the High Court, it would have been tried there. And it is there that all necessary and material evidence, whether oral or documentary, would be sought in the first instance. . . I think that "substantial grounds" have been shewn to justify the change as being in the interests of all parties, whether litigants or witnesses. A trial at Chatham will be a great saving to all concerned, and at the same time it will facilitate a determination of the issue involved according to the very right and justice of the case, by making it easier to have all material evidence available at the trial with the least possible expense to all parties, and the least possible inconvenience to the witnesses.

The order will go as asked. Costs in the cause.

I think it well to add that plaintiff has given security for costs. If the venue were to remain in Toronto, it would be a question for the parties to consider whether additional security might not properly be ordered, for the reasons given

in Burnside v. Eaton, ante 412, and Dever v. Fairweather, ante 389, and cases there cited. But, if the venue is changed to Chatham, there will be much less ground for such an application.

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STREET, J. OCTOBER 3RD, 1903.

TRIAL.

## DALTON v. WILLIAMS.

*Will—Construction—Effect of Codicil—Effect of Decrees in Former Suit—Annuities—Setting apart whole Estate to Answer—Gift over—Practical Revocation of Legacies—Payment of Arrears of Annuities—Interest—Reference—Costs.*

Action by the present trustees under the will of Sophia Dalton, deceased, for the construction of her will dated 4th May, 1854, and a codicil to it dated in April, 1856. The testatrix died on the 14th June, 1859.

The will was as follows:—

"I wish all the property which I shall own at the time of my death to be converted into money at the discretion of my executors. . . . I hereby give, devise, and bequeath everything real and personal which I shall have at my death to my said executors and their heirs as joint tenants, and I desire them to pay thereout the following legacies: to my daughter Harriet, £500; to my daughter Mary, £500; to my son William, £400; to my son Robert, £400; to Henry Dalton . . . £200; to my son Thomas, £50; to my daughter Emma, £150; to my son William . . . £100 as trustee for his son Thomas. . . . And I give to my son Robert Gladstone Dalton £250 in order that he may invest it for the benefit of his sister Sophia for her separate use independent of and free from the control of her husband . . . during her lifetime, and at her death I desire the capital to go as she may by will . . . direct. And I give the further sum of £200 to my son Robert Gladstone Dalton in order that he may invest it for the benefit of Harriet Dalton, the wife of my son Thomas Dalton, for her separate use . . . that Robert may pay her the income therefrom . . . during her life, and at her death the capital shall go as she shall by her will . . . direct. And I direct that my executors shall invest the further sum of £1,000 for the benefit of my daughters Harriet and Mary equally, for their separate use, free from the control of their husbands should they marry, as follows: I desire it to be so invested as to produce an income which shall be paid equally to each of them

for her separate use, free from the control of her husband should she marry, during their respective lives. And upon the death of either of them her share shall go to her children equally if she shall marry and leave children, and if at her death she shall not leave any child then the capital shall be equally divided among her brothers and sisters or their children. If my property shall not prove sufficient to pay all the above sums, then the legacies to my daughters Mary and Harriet and the £1,000 above directed to be invested for their benefit shall be first paid in full, and all the other legacies shall then be paid ratably. If there shall be a surplus of property after providing for all the above sums, then such surplus shall be equally divided among my children, Sophia, William, Robert, Emma, Harriet, and Mary equally. My desire is that the trustees above named shall not in any case be answerable for the failure of any fund in which the moneys may be invested by them, or for any loss whatever which shall not arise from their wilful and wrongful act or default. . . ."

The codicil was as follows:

"It is my intention to build upon the two acres held in trust by Robert for myself for life and for my daughters Harriet and Mary in fee after my death, and in case of my death before the completion of the house, I desire that it may be completed and furnished. . . . And I wish that after my death my executors shall invest enough of my property for Harriet and Mary to make an income of £100 a year to each of them during their lives. Should either of them die without issue before the other, the survivor is then to have the whole income or £200 a year. In case of the death of either of them leaving issue, they are to have the power of leaving by will, whether their husbands be alive or not; upon their death without issue, or without a will if they have issue, the property out of which the income is derived shall go to their brothers and sisters or their issue. This is meant instead of all that is in my said daughters' favour in my will, and is a revocation thereof. My son William I wish to have £500, to be paid to him by my executors. What is here is to stand prior to everything in my said will."

On 1st February, 1875, the executors named in the will filed a bill in Chancery and asked for an interpretation of the will and a declaration of the rights of the persons interested in the estate. The bill set forth that the estate had come to their hands consisting for the most part of unproductive lots in Toronto, which they had been unable to sell until shortly before the filing of the bill; that they had been unable to pay the annuities to Harriet and Mary under the

codicil in full, and that they were largely in arrear; that they had paid a part of the legacy to William, and that the rest was unpaid. A decree was pronounced in this suit on 16th June, 1875, the material portions of which, for the purpose of the present action, were, 1st, a declaration that the legacy of £500 to William contained in the codicil, and the sum necessary to be set apart to provide for the payment of the annuities to Mary and Harriet, were of equal priority, and should abate proportionately in the event of a deficiency of assets; that in the event of a deficiency the said legacy and annuities were to be the first charges on the corpus of the estate, real and personal, the said William Dalton being entitled to $2,000 and interest from a year after the death of the testatrix, less any payment to which had been made on account; and the said Mary and Harriet to the annual sum of $400 each, and the survivor of them to the annual sum of $800, payable during their lives and the life of the survivor, without interest, and that they are entitled as against all the legatees other than the said William to receive the income of the said estate for the satisfaction of the said legacies and the arrears thereof remaining unpaid, to be settled by the Master, without interest, but the said Mary and Harriet are not entitled to be paid the amount of the said annuities or the arrears thereof out of the corpus of the said estate, but only to the extent of the income derived therefrom.

There was a reference to the Master to take the necessary accounts for determining and working out the rights of the parties touching the matters in question as declared in the decree, and further directions were reserved.

At the time this decree was pronounced the sales of land had amounted in all to $13,425.89; the greater part of the remainder of the land was not sold until after 1st July, 1882. When the estate was finally disposed of, it left a capital sum of about $28,000, consisting of mortgages and securities on hand. The annuitant, Mary Dalton, became Mary McMichael, and died on 12th February, 1880, without issue; the annuitant Harriet Dalton never married, and died 27th July, 1902. No report was made under the decree of 16th June, 1875, until 28th October, 1889. By the report then made it was found that the capital of the estate was $28,100.27; that all the lands and personalty had been realized and the debts paid; that at the death of Mary McMichael her annuity was in arrear $4,889.57, and that at 1st June, 1889, the annuity payable to Harriet Dalton was in arrear $5,008.49, and that the legacy to William had been paid in full, and that none of the other legacies had been paid. A decree on further directions was made on 22nd September, 1890, by which it

was declared that the executors were to be at liberty to apply the whole estate from time to time in payment of the annuity of $800 to Hariet Dalton and in or towards satisfaction of the whole of the arrears of the annuities to her and Mary McMichael, deceased, before distributing any part of the corpus of the estate to or among residuary legatees. Since the making of the decree on further directions the trustees have applied the whole income of the estate in payment of the annuity of $800 to Harriet Dalton until her death, and in payment of the arrears due to her and to the estate of Mary McMichael, deceased, and at the present time the arrears unpaid are as follows:—To the estate of Harriet Dalton, $2,457.16; to the estate of Mary McMichael, $1,043.61.

The present action is brought to determine the rights of all parties to the trust fund, which is said to amount to $25,730, of which the greater part is upon mortgage security, the remainder being represented by houses which have fallen into the hands of the trustees for unpaid mortgage moneys.

The action was tried before Street, J., without a jury, on the 28th September, 1903.

D. T. Symons, for plaintiffs.

R. C. Clute, K.C., for defendant Edith J. Williams.

A. H. Marsh, K.C., and H. G. Kingstone, for representatives of annuitants.

H. Cassels, K.C., for those claiming as residuary legatees under codicil other than Emma Wilson.

R. S. Cassels, for those claiming as residuary legatees under codicil and as legatees under will other than Emma Wilson.

W. D. Gwynne, for Edward H. Dalton, claiming as residuary devisee under a codicil.

Shirley Denison, for defendant Emma Wilson, the sole surviving beneficiary.

STREET, J., held that the effect of the decrees in the former suit in Chancery was to set apart the whole estate as the fund to secure the payment of the annuities to the daughters of the testatrix, Mary McMichael and Harriet Dalton. The effect of these decrees and the action taken by the trustees in obedience to them must stand, and the necessary result is to make the whole estate pass under the codicil and to leave nothing for the will to take effect upon. The effect of the codicil, in the event which has happened, of both daughters having died without issue, is that the gift over takes effect,

and the whole corpus of the fund passes to the brothers and sisters of the survivor living at her death, and to the issue per stirpes of any brother or sister who may have died before that date and subsequent to the death of the testatrix, leaving issue. The issue of a deceased brother or sister take by way of substitution the share their father or mother would have taken if living. The gift over is subject, however, to a question as to the payment of the balance of the arrears of the annuity. Held, as to this, that the representatives of the annuitants are entitled to be paid the arrears of their respective annuities out of the fund composed of corpus and accrued income, and the balance of the fund is to be distributed amongst the brothers and sisters or their issue, as above. The representatives of the annuitants are not entitled to interest. Plaintiffs are entitled to a reference to the Master to pass their accounts and fix their remuneration. Costs of all parties of originating notice (served before this action was begun) and of this action to the hearing to be paid out of the estate, those of plaintiffs to be taxed as between solicitor and client. Costs in the Master's office of all parties to be limited to $100, besides disbursements, and to be distributed like commission.