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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 8TH, 1919.

*SHILSON v. NORTHERN ONTARIO LIGHT AND POWER CO. LIMITED.

Negligence—Injury to Infant by Electric Shock upon Premises of Power Company—Evidence—Nonsuit—Appeal.

Appeal by the plaintiff from the judgment of MASTEN, J., ante 39.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

A. G. Slaght, for the appellant.
R. S. Robertson, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MAY 8TH, 1919.

DANFORTH GLEBE ESTATES LIMITED v. W. HARRIS & CO. LIMITED.

Appeal—Appellate Court Equally Divided upon one Branch of Case—Rehearing before another Court—Settlement of Judgment.

The judgment of the Divisional Court, the reasons for which are noted ante 41, was, as finally settled by the Court, as follows:—

(a) As against all the plaintiffs except the land company and Orford, the appeal of the defendants is dismissed with costs.

* This case and all others so marked to be reported in the Ontario Law Reports.

(b) The plaintiffs the land company and Orford are entitled to a declaration that, unless the deed to the land company from the Synod is a defence, the defendants have no defence against them.

(c) As the Court is not unanimous but equally divided in respect of the land company and Orford, this part of the case should be reheard before a Court of five Judges, and it is suggested that the Court should be composed of Judges other than those who heard the appeal in the first instance.

FIRST DIVISIONAL COURT. MAY 8TH, 1919.

*HOLLAND v. TOWN OF WALKERVILLE.

Municipal Corporations—Negligence—Injury to Building in Town by Water Flowing into Alley—Cause of Flow—Construction of Pavements and of Buildings Adjoining Alley—Excavation Made in Soil of Street by Owner of Injured Building—Authority for.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 15 O.W.N. 268.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellant.

John Sale, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. MAY 9TH, 1919.

JANISSE v. CURRY.

Trusts and Trustees—Disposition of Fund in Court Representing Surplus Proceeds of Mortgage Sale—Account—Settlement—Rights of Wife and Children of Settlor—Declaration—Costs.

Appeal by the defendant Charles A. Janisse from the judgment of MIDDLETON, J., 15 O.W.N. 301.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

H. L. Barnes, for the appellant.

R. L. Brackin, for the plaintiff, respondent.

THE COURT varied the judgment: by striking out the declaration as to the right of the plaintiff to the fund in Court; by directing payment to the plaintiff of the amount of the instalments to which she was entitled since 1908, with interest at 5 per cent. per annum; and by directing that the residue of the fund remain in Court, subject to further order. The judgment is to contain a declaration in the terms of the memorandum of the 10th June, 1907; but there is to be no declaration as to the rights of the parties to the residue of the fund after these trusts cease. Costs of the Official Guardian to be paid out of the fund. No other costs.

HIGH COURT DIVISION.

CLUTE, J. MAY 7TH, 1919.

*McPHERSON v. GILES.

Landlord and Tenant—Lease of Farm—Action by Landlord for Breaches of Covenants—Failure of Claims for Want of Repair and Bad Husbandry—Claim for Breach of Covenant "not to Cut down Timber"—Expansion by Short Forms of Leases Act, R.S.O. 1914 ch. 116, sched. B., col. 2—Exception—"Firewood"—Deliberate Destruction of Sugar Bush—Depreciation of Value of Reversion—Damages—Forfeiture—Relief against—Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 20—Terms—Right of Renewal of Lease—Injunction—Judicature Act, sec. 17—Costs.

Action by landlord against tenant for damages for breach of covenants in a lease.

The action was tried without a jury at Welland.

L. B. Spencer, for the plaintiff.

J. S. Davis, for the defendant.

CLUTE, J., in a written judgment, said that the lease was dated the 23rd July, 1917; the lease was of a farm for 2 years, with right of renewal for 3 years more; and the first complaint was that the house upon the farm was injured and damaged and not kept in repair, but that complaint was not pressed. The second claim was for breach of the covenant to work the farm in a husbandlike manner, the plaintiff alleging that the ploughing was not 6 inches deep, as required by the lease. As to this, the learned Judge said that a small quantity of land was not in fact ploughed 6 inches deep, but the evidence did not satisfy him that there was any injury to the reversion. These two claims should be dismissed.

The third claim was for breach of the covenant "not to cut down timber." The lease purported to be made under the Short Forms of Leases Act, R.S.O. 1914 ch. 116, and by the Act (sched. B., col. 2) that covenant is expanded into: "And also will not at any time during the said term hew, fell, cut down or destroy, or cause or knowingly permit or suffer to be hewn, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs or firewood, or for the purposes of clearing as herein set forth." The exception includes "repairs" or "firewood" or "clearing," and the words "herein set forth" evidently have reference to the exception.

Reference to Craies' Statute Law, 2nd ed., pp. 198, 549; In re Cambrian R.W. Co. (1868), L.R. 3 Ch. 297; Stephenson v. Taylor (1861), 1 B. & S. 101, 106; Duke of Devonshire v. O'Connor (1890), 24 Q.B.D. 468, 478.

The defendant did in fact cut down, in the centre of the bush, 51 trees, 48 of which were timber trees; and he thus committed waste, unless protected under the exception. He cut these trees for firewood. The plaintiff never gave the defendant leave to cut the timber, but simply obtained leave for himself to take some wood off the place for his own use. The cutting was reckless and negligent, and depreciated the value of the reversion at the expiration of the lease by at least $350.

The defendant could not justify his acts under the exception in the covenant. There was other timber upon the farm suitable for firewood, and the defendant's act in cutting from the middle of a sugar bush appeared to be wilfully destructive.

Reference to Drake v. Wigle (1874), 24 U.C.C.P. 405, and Campbell v. Shields (1879), 44 U.C.R. 449.

In any case more timber was cut than was necessary for fire-

wood; some of the trees lay upon the ground and were not used at all: see McMullen v. Vannatto (1894), 24 O.R. 625.

Although an injunction was not asked for in the plaintiff's pleadings, it was asked for at the trial, and, under sec. 17 of the Judicature Act, should be granted, restraining the defendant from cutting standing green trees or timber for firewood within that portion of the uncleared land set apart for a sugar bush.

Under the Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 20, relief against forfeiture may be given. There should be judgment declaring a forfeiture, but awarding relief against the forfeiture, upon payment by the defendant of $350, less $30 allowed the defendant for the removal by the plaintiff of a garage from the farm, and the costs of the action. In default of payment on or before the 10th day prior to the expiry of the two years, the forfeiture will take place, and will include in it the defendant's right to a renewal of the lease. The judgment will contain an injunction restraining the defendant from a like breach in the future.

The plaintiff should have costs on the County Court scale without set-off to the defendant, except in respect of the issues as to the breach of the covenants to repair and for good husbandry; the extra costs of these issues to be set off against the plaintiff's costs.

CLUTE, J. MAY 7TH, 1919.

MUNDIER v. ROBINSON.

Judgment—Division Court Judgment Entered by Default against Husband and Wife in Action upon two Money-demands—Wife Liable upon one only—Return of Nulla Bona to Fi. Fa. Goods—Execution Issued against Lands—Sale by Sheriff of Wife's Land—Action to Set aside Sale and Judgment—Absence of Fraudulent Intent—Abuse of Procedure of Court—Wife's Liability for Debt of Husband—Understanding of Transaction—Influence of Husband—Irregularity—Neglect of Wife to Defend Division Court Action or Move against Judgment in Division Court—Costs.

Action to set aside a sheriff's sale of a house and lot in the city of Niagara Falls and to set aside a Division Court judgment obtained by the defendant Robinson upon which the execution under which the sale purported to be made was issued.

The action was tried without a jury at Welland.

J. C. M. Macbeth, for the plaintiffs.

T. D. Cowper, for the defendants.

CLUTE, J., in a written judgment, said that the house and lot were the property of the plaintiff Emma Mundier, the wife of the plaintiff Mark Mundier. The plaintiff Emma owed the defendant Robinson $47 and interest on a certain promissory note, and the plaintiff Mark owed Robinson $41.40 on an open account. The defendant Robinson sued the husband and wife in one action in a Division Court upon the note and the account. They were personally served, and on the 4th March, 1916, judgment was entered against both of them by default for $89.15 for debt and $5.08 for costs. Execution against the goods of both was placed in the bailiff's hands, and on the 2nd August, 1916, he made a return of nulla bona. On the 17th August, 1916, Robinson caused a writ of fi. fa. lands to be issued on the judgment, directed to the Sheriff of Welland, who on the 30th October, 1917, sold the house and lot of the plaintiff Emma to the defendant Robinson for $126. The property was incumbered to the amount of nearly $1,400. On the 11th June, 1918, Robinson sold his interest in the property (subject to the incumbrances) to the defendant Henderson for $150 and taxes.

The learned Judge found that the property was worth at the time of the sale about $1,800; that the wife was responsible for the note only, and the husband was responsible for the account; and that obtaining a judgment for the two sums against both husband and wife was a misuse of the Court procedure; but Robinson's conduct did not shew an intent to defraud, and the wife, if she had defended the action, could have established that she was not liable for the amount of the account.

The learned Judge also found that the plaintiff Emma was liable for the promissory note sued upon, though it was made for the debt of her husband; she understood perfectly well what she was doing; and the case did not fall within Bank of Montreal v. Stuart, [1911] A.C. 120.

The evidence satisfactorily shewed that there were not sufficient chattels upon which the amount of the judgment could have been realised. The action of the sheriff in making the sale was not unreasonable or illegal.

The defendant Robinson, before he sold to Henderson, offered to reconvey the land upon being paid the amount of his judgment and costs; and Henderson afterwards offered to reconvey upon being paid the amount which he had paid to Robinson, plus payments made by him upon the mortgage and for taxes.

The joining by Robinson of the wife with the husband and obtaining judgment for the amount of the note, for which she was liable, and the amount of the account, for which she was not liable, was not such an abuse of the procedure of the Court as to render the judgment void. While what was done was irregu-

lar, and in that sense illegal, it was not done fraudulently, and was an irregularity which could have been corrected by the present plaintiffs bringing before the Court the proper evidence, or moving in the Division Court to set aside the default judgment: see McVicar v. McLaughlin (1895), 16 P.R. 450, 454; Bank of Upper Canada v. Vanvochis (1859), 2 P.R. 382.

The cases relied upon by the plaintiffs' counsel—Anlaby v. Prætorius (1888), 20 Q.B.D. 764, 768; Hughes v. Justin, [1894] 1 Q.B. 667; Crane & Sons v. Wallis, [1915] 2 I.R. 411—had no application. No doubt, a judgment may be set aside for irregularity; but where in the lower Court the party complaining does not avail himself of the practice of that Court, he cannot afterwards come to a higher Court for relief.

This was not a case in which the Court should interfere at this stage to set aside the whole proceedings and the sheriff's sale; but, owing to the conduct of the defendant Robinson, he should not be awarded costs against the plaintiffs. A common defence was put in by both defendants, and the defence was really conducted by Robinson. If Henderson was put to any costs in the action additional to those incurred by Robinson, they should be paid by Robinson.

Action dismissed without costs.

MIDDLETON, J., IN CHAMBERS. MAY 7TH, 1919.

SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Execution—Judgment for Costs Recovered by Plaintiff against Defendants—Death of Plaintiff after Judgment—Præcipe Order Continuing Action in Name of Executrix as Plaintiff—Issue, by Plaintiff by Revivor, of Execution for Costs—Probate of Will not yet Granted to Executrix—Stay of Proceedings in Action until Contest in Surrogate Court at an End—Rules 301, 566—Defendants Discharged from Liability upon Payment of Taxed Costs into Court.

Appeal by the defendants from an order of the Local Judge at Fort Frances refusing to set aside an order to proceed, issued upon præcipe on the 7th April, 1919.

R. T. Harding, for the defendants.

G. R. Munnoch, for the plaintiff by revivor.

MIDDLETON, J., in a written judgment, said that the action was brought to recover damages alleged to have been sustained by the flooding of the plaintiff's land occasioned by certain works constructed by the defendants. The judgment of the trial Judge, as varied by the Appellate Division, directed a reference to fix the amount of the damages sustained, and the payment of costs, up to and including the judgment, forthwith after taxation. See 44 O.L.R. 43, 53.

After the pronouncement of this judgment, the plaintiff died, and Jeanette Smith applied, in the proper Surrogate Court, for probate of the plaintiff's will, in which she was named executrix. Probate had not been granted, but, on the 7th April, 1919, a præcipe order issued under the provisions of Rule 301, upon the application of Jeanette Smith, as executrix of the plaintiff, giving her leave to continue the action.

The costs of the action had been taxed and allowed at the sum of $1,295.

Jeanette Smith, as executrix, on the 19th April, issued a writ of fi. fa. for these costs, and placed it in the hands of the sheriff for execution. In the meantime a motion had been made by the defendants to set aside and discharge the order, on the ground that its issue was irregular because the plaintiff by revivor had not obtained letters probate, and that she was unable to give a discharge to the defendants for the costs of the action.

Upon the argument of the appeal, there was a misconception as to the meaning and the inter-relation of Rules 301 and 566. Under Rule 301, where there is a transmission of interest by reason of death, an order to continue the action may be obtained on præcipe; and the operation of this Rule is not confined to the case of death before judgment, but extends to all cases in which it is necessary to continue the action: e.g., for the purpose of prosecuting a reference which has been ordered: Chambers v. Kitchen (1894-5), 16 P.R. 219, 17 P.R. 3. The præcipe order was rightly obtained upon the allegation of the executrix of her title. She was not required to produce or shew to the Court the letters probate. She derived her title, not from the probate, but from the will itself. When it is necessary for an executrix to prove her representative title, this can only be done by the production of letters probate granted by the proper Surrogate Court. Upon this motion, it being shewn that there is a contest still pending in the Surrogate Court as to the granting of probate there, the proper course is to stay the further proceedings in the action until that contest is at an end. This stay should not be affected by the making of a substantive order, but by a withholding of judgment until the Surrogate Court shall have finally determined the question which it alone has jurisdiction to resolve.

Rule 566, on the other hand, deals with the right of a person, other than the judgment creditor, to issue an execution. The mere prosecution of an action is a comparatively simple and innocuous thing, and there is no reason why a person alleging title should not be at liberty to issue a formal order permitting continuation of the action, but the case is far different where it is sought to issue an execution—there a præcipe order is not sufficient. On the death of the judgment creditor, his executor cannot issue an execution without leave being granted. The mere præcipe order under Rule 301 is not sufficient to answer the requirements of Rule 566.

Upon the hearing of this motion, it was arranged that the defendants should pay the taxed costs into Court, and should thereupon be discharged from liability. Having this in view, the proper disposition of this motion is to direct that no order shall issue until the contest in the Surrogate Court is at an end. If Jeanette Smith obtains probate, then, upon production of the probate, an order may issue directing payment out of Court of the money paid into Court to her and affirming the order to proceed. If she fails to obtain probate, the learned Judge may be spoken to again.

No costs should be awarded to either party upon either the motion to set aside the præcipe order or this appeal.

ROSE, J., IN CHAMBERS. MAY 7TH, 1919.

TOWN OF BLIND RIVER v. WHITE FALLS LUMBER CO. LIMITED.

Attachment of Debts—Moneys Alleged to be Due to Judgment Debtor by Insurance Company, Garnishee—Destruction by Fire of Building on Mortgaged Premises—Claim by Mortgagee (Judgment Creditor) to Insurance Moneys—Adverse Claim of Bank under Assignment from Judgment Debtor—Claims Based upon Agreements with or Representations by Insurance Company—Attaching Order and Subsequent Order Directing Payment into Court and trial of Issue Set aside—Rule 590.

Appeal by the Imperial Bank of Canada, claimant, from orders of the Local Judge at Sault Ste. Marie, attaching moneys said to be due from the Century Fire Insurance Company Limited, the garnishee, to the White Falls Lumber Company Limited, judgment debtor of the Corporation of the Town of Blind River, and directing that such moneys should be paid into Court and that

an issue should be tried between the bank as plaintiff and the town corporation as defendant, to determine the ownership of the moneys.

J. W. Bain, K.C., for the bank.
W. E. Raney, K.C., for the town corporation.
E. G. Long, for the garnishee.

Rose, J., in a written judgment, said that the town corporation held a mortgage from the lumber company, and a policy of fire insurance was issued by the insurance company to the lumber company, loss if any payable to the town corporation as its interest might appear. The town corporation sued upon the mortgage, and on the 19th March, 1917, obtained final judgment. When the policy expired on the 14th August, 1917, a new one was written for the same amount, but the loss was not expressed to be payable to the mortgagee. This last mentioned policy was in force when a fire occurred on the 15th May, 1918, and the insurers admit liability for $1,813.37.

On the day after the fire, the lumber company assigned to the bank the moneys payable or to become payable under the policy; and it is sworn that notice of the assignment was forthwith given by the bank to the insurance company.

The town corporation said: (1) that, although not so expressed on the face of the policy, the real agreement between the town corporation, the lumber company, and the insurers, was that the loss, if any, under the policy, should be payable to the town corporation as mortgagee, as its interest might appear; and, therefore, that the lumber company had nothing to assign to the bank; and (2) that, even if the money payable under the policy was payable to and assignable by the assured, the insurance company was, nevertheless, liable to the town corporation for a similar amount, in virtue of an agreement made between the town corporation and the insurance company, or because of representations made by the insurance company to the town corporation.

The bank said: (1) that the agreement between the town corporation and the assured was as it appeared to be upon the face of the policy; and, therefore, that the assignment was good; and (2) that, if the insurance company was not bound to pay the insurance moneys to the bank, it was, nevertheless, liable to the bank for a similar amount, because of a representation made by the issue of the policy, in the form in which it was issued, and acted upon by the bank.

The right to the original order depended upon the ability of the town to shew by affidavit that, at the time of the application, January, 1919, the insurance company was indebted to the lumber

company: Rule 590; and it was so sworn in the affidavit filed in support of the motion. But the case, as developed by the materials now on file, and by the arguments, was that the insurance company was not at that time indebted to the lumber company, but to the town corporation, if the town corporation's contention was correct, or to the bank, if the bank's contention was entitled to prevail. The town corporation's own claim, as now presented, was thus destructive of the case made upon the application for the attaching order; and, upon that ground, the attaching order and the order directing the issue, which depended upon it, must be set aside. This was sufficient to dispose of the appeal, but it was to be noted that the orders appealed against would probably be ineffective to produce a speedy determination of all the questions raised. For instance, if it was determined that the policy moneys were payable to the town, the bank would still be free to press, as against the insurance company, the claim based upon estoppel. Similarly, if the policy moneys were found to be payable to the bank, the town would be free to press, as against the insurers, the second of its alternative claims. Naturally, the insurance company did not wish to pay the money into Court, unless by so doing it would obtain a discharge of all liability; and it did not seem quite fair that it should be asked to do so. It seemed, then, that giving effect to what appeared to be the strict legal view, and leaving the parties free to present such issues as they might desire, in such manner as seemed to them to be best, was what it would be well to do as a matter of discretion, if there was room for the exercise of discretion upon an application for such an order.

The orders appealed from should be set aside, and the town corporation should pay the costs of the bank and of the insurance company, both of the motions before the Local Judge and of the appeal.

LENNOX, J. MAY 9TH, 1919.

HATTON v. CITY OF PETERBOROUGH.

Municipal Corporations—By-law Authorising Construction of Sewer—Illegality—Powers of Council—Extra-territorial Operation—Benefit of Suburban Area—Public Policy—Public Health Act—Local Improvement Act—Notice of Intention to Pass By-law—Insufficiency—Mala Fides—Ulterior Purpose—Ultra Vires.

George W. Hatton made a summary application for an order quashing by-law No. 2125 of the City of Peterborough; and on

the 20th March, 1919, an order was made by LOGIE, J., directing the trial of an issue between the applicant as plaintiff and the city corporation as defendants, the question to be tried being whether the by-law, which was passed on the 2nd December, 1918, by the city council, and intituled "A By-law to authorise the Construction of a Sewer on the Street herein named as a Local Improvement under the Local Improvement Act," should be quashed.

The issue was tried by LENNOX, J., without a jury, at Peterborough.

R. R. Hall and J. F. P. Birnie, for the plaintiff.

Daniel O'Connell and C. R. Widdifield, for the defendants.

LENNOX, J., in a written judgment, said that the by-law recited a recommendation of the Local Board of Health for the construction of a sewer on McDonnell avenue, in the city, and that it was necessary in the public interest, on sanitary grounds, as a local improvement. After reviewing the evidence, and referring to decided cases, the learned Judge said:—

Assuming honesty and good faith, by-law No. 2125 is ultra vires and illegal as:—

(1) Extra-territorial in scope, purpose, and operation, and purporting, and intended, to extend to and include lands, purposes, and objects outside the municipality, and over which the council had no jurisdiction or control.

(2) Illegal as contrary to public policy, and authorising and directing the execution of works and carrying out operations, including the disposal of the sewage, in a manner prohibited by the Public Health Act.

(3) As founded on fundamental misconception and error of law, and based upon an illegal, unenforceable, fictitious, and illusory consideration and as an enactment for an unauthorised purpose.

(4) And it is a vicious enactment, a perversion of the provisions of the Local Improvement Act, in that it imposes a special or local tax upon a few, which ought to be imposed on the ratepayers of the city generally, if justifiable at all.

(5) And because the notice of intention to pass the by-law was not sufficiently published, and was not a sufficient or proper notice under the terms of the Act.

(6) And, upon the facts disclosed in evidence, the by-law was not passed in good faith, or in the public interest, or to safeguard the health of the residents of Peterborough, or, bona fide, as a local improvement by-law, but on the contrary was passed to serve an ulterior purpose, and to meet the wishes and serve the

interests of the owners of Mount St. Joseph (an institution situated outside the limits of the city).

The by-law must be quashed with costs, including costs of the motion, to be paid by the municipal corporation.

ROSE, J. MAY 10TH, 1919.

LAING v. TORONTO GENERAL TRUSTS CORPORATION.

Parties—Action by Settlor against Trustees to Set aside Trust-deed—Application by Trustees for Addition as Defendant of Representative of Unborn Issue—Rule 134—Appointment of Representative—Rule 77.

This was an action by a settlor to set aside a trust-deed. The trustees, who were the sole defendants, moved to add as a defendant some one to represent the unborn issue of the plaintiff, who, under the trust-deed, would take the property after the death of the settlor, in default of appointment by the settlor.

The motion was heard in the Weekly Court, Toronto.

E. G. Long, for the defendants.

William Proudfoot, K.C., for the plaintiff.

ROSE, J., in a written judgment, said that the authorities were not uniform as to the cases in which a defendant ought to be added against the will of the plaintiff. It seemed to be the general rule that the plaintiff ought not to be compelled to sue any one whom he did not want to sue, and that if, after it has been pointed out to him that his action as framed may be defective for want of parties, he chooses to go on and run the risk of failure upon that ground, he ought to be allowed to do so; but, notwithstanding that general rule, the Court does frequently, at the instance of a defendant, exercise the power, given by Rule 134, to add as a defendant a person whose presence is thought to be necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action. See the statement by Jessel, M.R., in Werderman v. Société Générale d'Electricité (1881), 19 Ch. D. 246, at p. 251.

In this particular case it did not seem fair to the defendants that, even if technically the action was properly constituted, the defendants should be compelled to assume alone the burden of supporting the trust-instrument; it seemed reasonably sure that, at some stage of the action, the order for which the defendants

now asked would be made; and it was a proper case for the exercise, at this stage, of the power given by the Rule.

The estate was a large one; the matter of expense, upon which counsel for the plaintiff laid stress, was relatively unimportant; and, besides that, the expense would not be greatly increased, if at all, by the making of the order.

There should be an order adding the unborn issue, and an order under Rule 77 appointing the Official Guardian to represent such issue. The costs of the present application should be costs in the cause.

LENNOX, J. MAY 10TH, 1919.

KRUG v. TOWNSHIP OF ALBEMARLE.

Municipal Corporations—Issue of Debenture to Raise Money for Public School Purposes—By-law—Rate of Interest Fixed at 5 per cent.—Money Secured by Debenture Payable in Annual Instalments of Principal and Interest Lumped together—Mistake in Computing Amount—Action by Personal Representatives of Purchaser of Debenture—Reformation of By-law and Debenture—Limitations Act.

Action by the executors of Henry Krug, deceased, to whom a debenture was issued by the defendants in 1907, for the rectification of by-law No. 413 of the defendants by striking out the figures $118.33\frac{1}{3}$, wherever they occurred in the by-law, and substituting $130.10, and otherwise amending the by-law so as to provide for payment of interest at 5 per cent. per annum upon money to be raised by the issue of a debenture or debentures under the by-law, and for rectification similarly of the debenture issued pursuant to the by-law, and for judgment for $390.63 and interest.

The action was tried without a jury at Walkerton.

J. C. Moore, for the plaintiffs.

David Robertson, K.C., for the defendants.

LENNOX, J., in a written judgment, said that in September, 1907, the Trustees of School Section No. 2 in the Township of Albemarle, in pursuance of the Public Schools Act then in force—1 Edw. VII. ch. 39, sec. 74, as amended by 2 Edw. VII. ch. 40, sec. 6, and 6 Edw. VII. ch. 53, sec. 41—made a requisition on the township council for the issue of debentures for $2,000 required for the purposes of a school-site and erection of a school-house, and by-law 413 was passed and one debenture issued for the purpose of raising the $2,000. The by-law provided: (2) "That . . .

one debenture . . . for the sum of $2,000 be issued . . . payable in 30 years from the 1st . . . December, 1907, with interest at the rate of 5 per cent. per annum payable as hereinbefore stated." The words "as hereinbefore stated" referred not to the amount of principal or interest to be paid, but to the special place designated for payment, on presentation of the coupons "at the office of the Treasurer of the Township of Albemarle." The debenture issued provided for payment of $2,000 at the Treasurer's office, by annual instalments of $118.33⅓, "which includes principal and *interest averaged* at 5 per cent. per annum so that the whole amount of principal and interest will be paid at the expiration of 30 years;" and attached to the debentures were 30 coupons for $118.33⅓ each.

The plaintiffs alleged mutual mistake of fact; that the annual payments should have been $130.10; and that the deficiency at the time the action was begun amounted to $390.63.

The learned Judge said that the council acted in good faith and intended to provide for the payment of interest at 5 per cent. By "interest averaged" the draftsman meant interest on the average of principal money. The annual payment should have been $130.10, as contended by the plaintiffs. There was nothing to justify a claim for compound interest, and no claim was set up.

The Limitations Act did not apply.

There was mutual error and a right to reformation. As a matter of construction, a contract was expressed in both the by-law and debenture for payment of interest at 5 per cent. on the actual amounts of principal money from year to year unpaid. "Interest averaged" was meaningless surplusage and to be rejected.

There should be judgment for the plaintiffs with costs; the precise form of the judgment will be settled hereafter.

There was a motion for judgment, the costs of which were left to be disposed of by the trial Judge. No costs of that motion should be allowed.

CONGRAM v. GRIFFIN—LENNOX, J.—MAY 9.

Assault—Provocation—Evidence—Damages.]—The plaintiff and defendant lived upon adjoining farms. The action was for damages for assault. It was tried at Walkerton without a jury. LENNOX, J., in a written judgment, said that there was very great disparity between the two accounts of the affair as given by the parties. They were respectable men; and, if the action had to be determined on the evidence of the parties to the action alone, there would be difficulty in deciding which story ought to

be accepted. But, taking the other evidence into account, there was a decided preponderance in favour of the plaintiff. The evidence of the plaintiff's daughter was reliable, and should be accepted as giving a substantially accurate account of what occurred. It was strengthened and corroborated by the plaintiff's wife and son and by Cecil Congram. The learned Judge was satisfied that the defendant was the aggressor throughout, and that the injuries complained of were occasioned by his acts. Both men acted very foolishly, the plaintiff acted improperly, but not illegally, at the beginning. He was quite too eager to make a mountain out of a very little thing—the temporary trespass of cattle upon unenclosed land—too prompt in serving notice; far more dominating and exacting than he should have been. This did not relieve the defendant from responsibility for his attack upon the plaintiff, and the very serious injuries he inflicted, but it justified an assessment of the damages at a somewhat lower sum than would otherwise be right. The plaintiff had shewn an actual financial loss of $385.50, and, a frail and somewhat helpless man at the best, he will be somewhat less capable for the remainder of his life in consequence of the injuries he received on the 14th May, 1918. The defendant was physically capable of occasioning the injuries and he occasioned them. There should be judgment for the plaintiff for $500 damages, with County Court costs, and no set-off. O. E. Klein and J. C. Moore, for the plaintiff. R. Vanstone, for the defendant.