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STREET J. NOVEMBER 2ND, 1903.

CHAMBERS.

GRAHAM v. BOURQUE.

Chose in Action—Assignment of—Scope—Money to Become Payable "in Respect of the Contract"—Compensation for Breach of Provision Implied in Contract—Attachment of Debts.

Joseph Bourque, one of the judgment debtors, made a contract with the corporation of the city of Ottawa for the construction of a drain in Ottawa; he then entered into arrangements with the Bank of Ottawa to borrow the money for carrying on the work. As part of the security for the advances to be made to him he assigned to the bank "all and every sum or sums of money now due or to become due and payable to me by the corporation of the city of Ottawa in respect of a certain contract existing between myself and the said corporation for the construction of section 3 of the main drain in the said city of Ottawa." By the same instrument he appointed the bank his attorneys to recover the same and to give releases therefor. While Bourque was proceeding with his work under the contract he found himself hindered and put to additional expense by the fact that the corporation continued to send water down certain existing street drains of theirs, which water found its way into the works of Bourque under his contract owing to defects in the drains through which the water was sent down. The money required from and advanced by the bank to Bourque for the purpose of completing his contract work was largely increased because of the expense of getting rid of this water and the damage and inconvenience caused by it. Bourque brought an action against the corporation to recover the additional cost occasioned by this

water as damages, and obtained a judgment for $2,810.50. The judgment creditor attached this judgment debt, and the bank claimed the money under the assignment. The Judge of the County Court of Carleton, before whom the garnishee proceedings were had, held that the debt did not pass to the bank under the assignment, and ordered payment to be made by the corporation, the garnishees, to the judgment creditor. The bank appealed.

W. E. Middleton, for the bank.

J. H. Moss, for the judgment creditor.

STREET, J.—In my opinion the Bank of Ottawa are entitled under the assignment from Bourque to receive from the city the moneys in dispute here. The language of the assignment extends to all moneys which may become payable "in respect of the contract." The contract between Bourque and the city gave rise to a duty or to an implied contract, no matter which, binding the city to do nothing to impede Bourque in the execution of the work and to a liability to compensate him if they should do anything to impede him. If this had been set forth in the contract, it is clear that the compensation would have passed to the bank under the assignment; but the same duty on the part of the bank to pay, and the same right to the contractor to receive, compensation, although not set forth in express language in the contract, arise out of the mere fact that such a contract has been made; and therefore the compensation should be held to be moneys payable "in respect of the contract."

Appeal allowed with costs to the bank here and below.

MEREDITH, C.J. NOVEMBER 2ND, 1903.

WEEKLY COURT.

RE SOMBRA PUBLIC SCHOOL SECTION 26.

Public Schools—Selection of School Site—Difference Between Trustees and Ratepayers—Power of Arbitrators as to Selection—Award—Setting Aside—Reference Back.

Application by the trustees of public school section No. 26 of the township of Sombra to set aside an award of arbitrators appointed under the provisions of sec. 34 of the Public Schools Act (1 Edw. VII. ch. 39), in consequence of a difference of opinion between the trustees and the ratepayers as to the suitability of the site which the trustees had selected for the school house of the section, which had been recently formed.

W. E. Middleton, for the applicants.

W. R. Riddell, K.C., and A. B. Carscallen, Wallaceburg, for the respondents.

MEREDITH, C.J.—The main question argued was as to the power of the arbitrators to fix as the site any other place than that selected by the trustees, the contention of the applicants being that their only jurisdiction was to determine whether or not the site selected by the trustees was a suitable one.

I have reluctantly come to the conclusion that this contention is well founded.

It is no doubt the duty of rural school trustees to provide adequate accommodation for two-thirds of the children between the ages of five and sixteen years resident in the section (sec. 65 (3)), and to purchase or rent school sites or premises and to build school houses (sec. 65 (4)); and they may select a site for a new school house, but, according to the provisions of sub-sec. 1 of sec. 34, no site may be adopted, "except in the manner hereinafter provided," without the consent of the majority of the ratepayers present at a special meeting, which the trustees are required to call for the purpose of considering the site selected by them.

In case of a difference between the trustees and the majority of the ratepayers as to the suitability of the site selected by the trustees, provision is made by sub-sec. 2 of sec. 34 for an arbitration and award upon the matter submitted to the arbitrators.

Beyond this bald statement there is no provision as to what is to be the scope of the reference; but it appears to me that what is meant by the expression "the matter submitted" must be the question of the suitability of the site selected by the trustees. There is nothing in the language used to indicate that it was intended to confer upon the arbitators power to fix the site, though the site determined on by them differed from that selected by the trustees. The scheme of the Act seems to be that the trustees must initiate the proceedings which are to result in the adoption of the site, by selecting what they deem to be a suitable one, but that they may not adopt it as the site without the consent of the ratepayers, unless, upon a difference and consequent reference to arbitration in manner provided by sec. 34 (2), an award has been made approving of the site which the trustees have selected.

If there were no provision for arbitration, it is clear that the site selected by the trustees may not be adopted by them without the consent of the majority of the special meeting, and all that the Legislature has done, as it appears to me, is to provide that where that consent cannot be obtained there may be substituted for it the approval of the arbitrators.

I should have much preferred to have come to a different conclusion, for it is obvious, I think, that the construction

which I have felt myself compelled to place upon the statute may make it very difficult where, as in this case, there is a bitter conflict between the trustees and the majority of the ratepayers, to reach a conclusion which will enable the trustees to perform their statutory duty of providing adequate school accommodation for the children of the section; for if, as I think, it was the duty of the arbitrators in this case, having come, as I assume they did, to the conclusion that the site selected by the trustees was not a suitable one, to have confined their award to so determining, it will be impossible to reach the point of adopting a site until the trustees and the majority of the ratepayers are of one mind, or the arbitrators appointed have reached the conclusion that some site selected by the trustees is a suitable one.

Having come to this conclusion, it is unnecessary to deal with the other questions argued in support of the application.

The result is that the award must be set aside, but without costs, unless the respondents desire that the matters referred should be remitted to the arbitrators in order that they may make an award approving or disapproving of the site selected by the trustees, with a declaration as to the powers of the arbitrators under the reference, in accordance with the opinion I have expressed. If the respondents so elect, such an order may go, without costs to either party, unless the appellants desire to be heard on this point, and if they desire to be heard no order will issue until further argument has been had.

MEREDITH, C.J. NOVEMBER 2ND, 1903.

WEEKLY COURT.

RE ARTHUR AND MINTO UNION SCHOOL SECTION 17.

Public Schools—Formation of Union School Section—Award—Appointment of Arbitrators—Township Councils—By-law or Resolution—Description of Lots—Reference to Petition—Municipal Clerk as Arbitrator—Necessity for Unanimous Award—Time for Publishing Award—Uncertainty as to Surplus Moneys—Reference back to Arbitrators.

An application by the trustees of public school sections numbers 12 and 12 in the township of Minto to set aside an award made on the 25th May, 1903, by David Clapp and George Cushing, providing for the formation under the authority of sec. 46 of the Public Schools Act (1 Edw. VII. ch. 39) of a new union school section, to be called union school

section No. 17 in the townships of Arthur and Minto, and to consist of certain named lots in the two townships.

W. Kingston, K.C., for the applicants.

A. Spotton, Harriston, for the respondents.

MEREDITH, C.J.—The first objection taken to the award is that the respective township councils should have appointed their arbitrators by proper by-laws, and that the by-laws should have set out the parcels of land "to be arbitrated on," and that this was not done.

The municipal council of the township of Arthur appointed an arbitrator by a formal by-law, signed by its reeve and clerk and under the corporate seal of the municipality, and in this respect the appointment is unobjectionable. The instrument by which the council of Minto appointed an arbitrator is in form a resolution, but it is under the corporate seal of the municipality and signed by the reeve and clerk, and is, I think, quite sufficient to constitute a valid appointment of an arbitrator.

Both the by-law and the resolution refer to the petitions which had been presented to the respective councils for the formation of the union section, and are not, even if, had no such reference been made, they would have been defective, open to the objection taken to them.

It was not, in my opinion, necessary to set out a description of the lots referred to in the petition, it was quite sufficient if the petition upon which the council was proceeding, was referred to so as to identify, and that was done.

The next objection is that each of the municipal councils appointed its clerk as arbitrator.

Whatever inconveniences, if any, may arise from the appointment of the clerk of the municipality as an arbitrator, I see nothing to prevent its being done or to disqualify him. Section 46 forbids the appointment of a member of the council, and had it been intended that the council should not be at liberty to appoint its clerk, the Legislature would no doubt have so provided; nor is the fact that it is made the duty of the clerk to notify the inspector of the appointment of the arbitrator, incompatible with his being himself the arbitrator. . . .

The fourth objection is that the award was not a unanimous one.

This objection is also, in my opinion, not well founded. The provisions of the section guarding against the possibility of the number of arbitrators being an even one, was introduced to prevent the arbitration proving abortive owing to an equal division of opinion, and indicates clearly, I think, that it was not intended that unanimity should be required.

The arbitrators in this case were moreover, in my opinion, appointed to fulfil a public duty, and unanimity was not therefore required: Russell on Awards, 7th ed., p. 216.

The sixth objection fails also. The award was made and published within three months after the arbitrators entered on the reference.

There remains to be considered the fifth objection, which is that the award is "uncertain as to the surplus moneys."

This objection is, I think, well founded. In dealing with the matters provided for by sub-sec. 8, the arbitrators have awarded that certain named percentages of any surplus moneys on hand on the 31st December next shall be paid by the trustees of school sections 7 and 11 of Arthur and by the trustees of school sections 12 and 13 of Minto to the trustees of the union section, and that the owners of certain lots in Arthur shall have refunded to them by section 7 of Arthur any sum which they have paid within the last five years, or should afterwards be required to pay for debenture indebtedness for the erection of a school house in that section.

The award in these respects is uncertain and therefore invalid, but the case is one in which I should not, I think, set aside the award, but should remit the matters referred to the arbitrators in order that what is wrong may be set right, and it will be well for the arbitrators, in reconsidering the matters referred, to make more clear what they mean by directing "the said several sums to be in full of all claims and demands which said union school section No. 17 may have against the said respective school sections in respect of school premises, equipment, and moneys on hand or other manner."

Following, as this provision does, the direction to which I have referred, that section No. 7 of Arthur is to refund certain moneys to the landowners mentioned in the award, its meaning is obscure, though probably what is referred to in the provision I have quoted is the payments which the four school sections are required to make to the union section.

There will be no costs to either party of the motion or of the reference back.

MACMAHON, J. NOVEMBER 2ND, 1903.

TRIAL.

CITY OF TORONTO v. MALLON.

Landlord and Tenant—Action for Rent—Agreement for Lease—Refusal to Sign Lease—Taking Possession—Possession Referable to Agreement—Use and Occupation.

Action by the city corporation to recover money as rent for certain butchers' stalls in a new market erected by plaintiffs.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

F. A. Anglin, K.C., for defendants.

MACMAHON, J.—. . . At the time stalls 2, 72, and 74 were knocked down by the auctioneer to defendants, they had left with their agent a marked cheque payable to the order or the city treasurer, which was intended to be a deposit equal to the first month's rent. That cheque was delivered to the city treasurer; but on the following day Mr. Mallon wrote to the mayor stating that he was not aware at the time of the sale that any favouritism was being shewn in the sale of the stalls in the market by any one tenant over another, but that, having since the sale ascertained that there was favouritism, he had for that reason decided not to take the stalls which had been knocked down to him; but that he had given instructions to the bank not to honour the cheque.

If the matter had ended there, of course this action must have failed, as there was no present demise. However, defendants took possession of stalls 2 and 72 on the 15th November, and continued to occupy them, and must be held to have taken possession under the agreement signed on the day of sale. . .

The contract signed by defendant Mallon after the sale for stall number 2 is on a printed form prepared by the city, and reads: "Toronto, August 27th, 1902. I have to-day agreed to lease from the city of Toronto stall No. 2 in new St. Lawrence market for one year from 1st November, 1902, at monthly rent of $94, and agree to execute lease according to printed conditions of leasing when notified by city solicitor. John Mallon, per F.S."

The contracts for stalls 72 and 74 are the same except as to the rent; that for 72 being $45 and for 74 being $16 a month.

Specific performance would not be decreed, as the agreements for leases are each only for a year, and there were only

five months for each of the terms to run when the action was brought, and the time had actually expired when the case came on for trial in the County Court. In Glasse v. Woolgar, 41 Sol. J. 573, Chitty, L.J., said: "No one ever heard of granting specific performance even for a year." See also De-Brassac v. Martin, 41 W. R. 1020; Lever v. Kotter, [1901] 1 Ch. 547; and Mara v. Fitzgerald, 19 Gr. 52.

The defendants having on the 15th November taken possession of the two stalls, it must be assumed, as already stated, that they entered and took possession as of right under the agreement to accept leases, and not as wrongdoers or wilful trespassers. Now, long prior to the defendants taking possession, the Davies company had been carrying on business in the stalls leased by them, and it was the alleged suppression by Alderman Lamb of the offer that had been made by the Davies company for these stalls south of the gangway, which the defendants regarded as favouritism shewn to that company, and because of that belief that they wrote the letter of the 28th August repudiating the contracts to lease signed by them. The defendants first repudiate the contracts they had signed because of the alleged suppression of a fact which they say amounted to a misrepresentation regarding the property on which they were bidding, and after nearly three months from such repudiation they take possession of two of the stalls for which they signed contracts, and their so doing must be taken as a waiver of their objection on the ground of favouritism. As said by Lord Cottenham in Vigers v. Pike, 8 Cl. & F. at p. 650: "In a case depending on alleged misrepresentation of value, there cannot be a more effective bar to the plaintiff than by shewing that he was from the beginning cognizant of all the matters complained of, or after full information of them continued to deal with the property."

Had the defendants before taking possession of stalls number 2 and 72 communicated with any officer of the corporation having authority to bind the city, and arranged that their taking possession was not to be considered as being under the contract, their position would have been very different from what it now is; but they were in possession for three months before communicating with the city treasurer, and they must, as I have already said, be considered as having waived any objection and to have taken possession under the agreements they had signed, and, as the city did not object, it will be assumed they occupied the stalls with the assent of the city.

Although specific performance must, for the reasons stated,

be refused, the plaintiffs have a right, where the devise is not by deed, under 11 Geo. II. ch. 19, sec. 14, to recover for use and occupation, and may use any agreement (not being by deed) whenever a certain rent is reserved, as evidence for the question of damages to be recovered: Elliott v. Rogers, 4 Esp. 59; Woodfall (15th ed.), 568.

The city allowed the defendants two months' rent from 15th November for the removal of their ice boxes, so that there would be due the city rent from the 15th January, 1903, as follows:

Three months' rent for stall 2, from 15th January to 15th April, at $94	$282 00
Three months' rent for stall 72, at $45	135 00
Credit	$417 00
By amount of cheque	$200 00
Balance	$217 00

There will be judgment for the plaintiffs for this sum with costs.

I find that a fair rental for stalls 2 and 72 would be $25 a month each, so that, if it is found I am wrong in the assessment of the damages, a court of appeal can set it right.

NOVEMBER 2ND, 1903.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Increase in Amount—Costs Thrown Away by Postponement of Trial—Postponement Caused by Defendants' Amendment—Responsibility for Increase in Costs.

Appeal by defendants J. A. Seybold and J. R. Booth from order of OSLER, J.A., ante 878, reversing order of a local Master requiring plaintiffs to give additional security for costs.

C. J. R. Bethune, Ottawa, for appellants.

John T. C. Thompson, Ottawa, for plaintiffs.

THE COURT (STREET, J., BRITTON, J.) affirmed the order and dismissed the appeal with costs.

NOVEMBER 2ND, 1903.

DIVISIONAL COURT.

COOK v. DODDS.

Promissory Note—Statute of Limitations—Acknowledgment—Payments by Executor de son Tort—Joint Note—Death of One Maker—Remedy against Estate—Bills of Exchange Act—Trustee Act—Provision as to Joint Contractors.

Appeal by defendants from judgment of 2nd Division Court in County of Huron in favour of plaintiff.

The defendants were sued as executors of Peter Dodds, deceased, to recover the amount of a promissory note for $200, dated 10th January, 1891, made by deceased and one Thomas Dodds, payable, with interest at 7 per cent., to the plaintiff one year after date.

At the trial plaintiff gave evidence of acts done by defendant Ellen Dodds sufficient to charge her as executrix de son tort of the deceased, and also proved that she had made payments of interest on the note within six years before action.

Unless the payments of interest made by her operated to save plaintiff's right of action, the right to recover on the note was admittedly varied by the Statute of Limitations.

W. E. Middleton, for appellants, relied on the Limitations Act, and also contended that, inasmuch as the promissory note was a joint one, and the other maker had survived Peter Dodds, there was no right of action against the estate of the latter.

W. Proudfoot, K.C., for plaintiff.

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

MEREDITH, C.J.—It is, I think, not open to doubt that a payment or acknowledgment by an executor de son tort cannot be relied on to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased.

The principle upon which a part payment has been held to give a new starting point for the running of the statute is, that it is an acknowledgment from which the law raises the implication of a promise to pay the residue of it, and the rule is therefore quite inapplicable, as it seems to me, to

a payment by an executor de son tort; such an executor is treated as an executor only for the purpose of fixing liability upon him, and his acts are good against the lawful representative of the deceased only where they are lawful and such as the new representative was bound to perform in the due course of administration :Graysbrook v. Fox, Plowd, 282; Buckley v. Barber, 6 Ex. at p. 183. And even where letters of administration have been subsequently granted to him, the previous acts of an executor de son tort to the predjuice of the estate are not made good by the subsequent administration: Morgan v. Thomas, 8 Ex. 302.

Grant v. McDonald, 8 Gr. at p. 475, and Haselden v. Whitesides, 2 Strobbart L. 353, are in accordance with this view.

But, granting this, it does not follow necessarily that plaintiff was not entitled to recover. Neither the rights of a lawful representative of the deceased nor those of the persons beneficially entitled to the estate of the deceased are in question. All that plaintiff is seeking is that the executrix de son tort be made answerable to her to the extent of the goods of the deceased which have come to her hands. . .

Where the defendant pleads ne unques executor, and that plea is found against him, and . . . it will be found against him though it is shewn that he is but an executor de son tort, it appears to me that it is not open to him for the purpose of preventing a payment made by him, which, if it had been made by the lawful personal representative, would have prevented the Statute of Limitations from operating to bar plaintiff's claim, to rely upon his having been a wrongdoer and not the true personal representative; in other words, that, as between him and plaintiff, as respects the payments made by him and their effect, he must be treated as the true representative of the deceased. If the creditor may for the recovery of his debt proceed against him as the true personal representative of the deceased, in order to reach the personal estate of the deceased which has come to his hands, why may he not for the same purpose treat him as the true representative in making the payment on account of his claim against the deceased?

As I have already pointed out, in Grant v. McDonald, and in the South Carolina case, the true representative was sought to be made liable, and in the latter case Withers, J., who delivered the judgment of the Court, pointed out that their decision had nothing to do with actions instituted against executors de son tort as such.

The result of giving effect to the contention of the appellants would be an injustice to the plaintiff, who no doubt refrained from bringing her action within the six years because of the payments which were made to her by one who assumed to be and whom she was entitled to treat as the executrix of the estate of the deceased, and I see no reason why the payments made by the defendant Ellen Dodds should not as against her, and for the purpose of enabling the plaintiff to reach the goods of the deceased which have come to her hands, be treated as having been made by the legal personal representative of the deceased,—the character which the defendant Ellen Dodds assumed, and, as the plaintiff had the right to think, rightly assumed.

The objection based upon the promissory note being a joint one is not, in my opinion, entitled to prevail. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains,—whether that of a joint or joint and several liability. These consequences, in my opinion, fall to be determined according to the law of the Province in which the liability is sought to be enforced, and, inasmuch as in this Province the common law rule as to joint contracts has been superseded by statutory enactment, R. S. O. ch. 126, sec. 15, the provisions of the latter are to govern in determining the right of the respondent to sue in this Province. . . .

Upon the whole, I am of opinion that the judgment should be varied by adding after the words "goods and chattels of the deceased" the words "in her hands to be administered," and by substituting for the word "defendant" before the word "proper," the words "defendant Ellen Dodds," dismissing the action as against the defendant Thomas Dodds; and with that variation should be affirmed and the appeal dismissed without costs.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1903.

CHAMBERS.

GURNEY FOUNDRY CO. v. EMMETT.

Evidence—Cross-examination of Officer of Company—Parties—Refusal to Attend—Remedy—Motion—Forum.

Motion by defendants to dismiss action for default of an officer of plaintiffs to make production and attend to conclude

his cross-examination on an affidavit filed on a pending motion for an injunction.

J. G. O'Donoghue, for defendants.

E. E. A. DuVernet, for plaintiffs, contended that defendants' remedy, if any, was under Rule 454, and that the motion should be to the Court: Badgerow v. Grand Trunk R. W. Co., 13 P. R. 132; Central Press Assn. v. American Press Assn., ib. 353.

THE MASTER allowed the objection and dismissed the motion with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. NOVEMBER 3RD, 1903.

CHAMBERS.

ROBERTS v. CAUGHELL.

Mortgage—Foreclosure—Final Order after Abortive Sale—New Day—Rule 393—Time for Redemption.

After the decision in this case ante 799, F. E. Hodgins, K.C., for plaintiff, moved for a new day and in default foreclosure.

E. Meek, for defendant, contended that this was not a case for foreclosure, and no benefit would accrue therefrom to plaintiff. In any case he asked for three months' indulgence as in Scarlett v. Birney, 15 P. R. 283, and cases there cited.

THE MASTER.—Plaintiff relied on Rule 393 as limiting the time to one month. I think this construction must be put on it, otherwise it would be useless and unmeaning. If the Court is of opinion that it still leaves Scarlett v. Birney as an authority, it must be left to the Court to say so.

I also think that no weight is to be given to the argument against any foreclosure. If it will be of no use to plaintiff, it is for him to say so.

The order must go fixing the 4th December as the new day, and in default foreclosure. It may be that Rule 393 does not prevent an application for a further extension. That remains, perhaps, for future consideration in a proper case.

NOVEMBER 3RD, 1903.

DIVISIONAL COURT.

DUPRAT v. DANIEL.

Lease—Action to Set Aside—Improvidence—Lack of Independent Advice—Lease Executed on Sunday.

Action by plaintiff from judgment of FERGUSON, J. (1 O. W. R. 561) dismissing with costs an action brought by plaintiff to set aside a lease made by her and her deceased brother for their lives and the life of the survivor of them to defendant. Plaintiff and her brother were entitled for their joint lives and the life of the survivor of them to 50 acres of land, and they made a lease to defendant for the term of their ownership, reserving certain rooms in the house for their own use, and defendant agreeing by way of rent to supply them with proper board, doctor's attendance, and the use of a horse and buggy when required A sum of $12 per month was to be paid the lessee for the board of Calixte Dupont, the brother. He died a few days after the lease was executed, and plaintiff was his legal representative. The plaintiff alleged that the lease was improvident; that plaintiff in making it had no independent advice; and that it was executed on Sunday. No power of revocation was reserved to the lessors, but there was the usual proviso for re-entry in case the tenant should fail in his duties.

A. B. Aylesworth, K.C., for plaintiff.

M. Wilson, K.C., for defendant.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held, upon the evidence, that the conclusion arrived at by the trial Judge upon the questions of improvidence and lack of independent advice should not be interfered with. Also, that there was a parol agreement and part performance of it before the actual execution of the lease, which was on Sunday. But in any event this was not a sale or purchase or a contract for the sale or purchase of real property; it was a lease of real property, and not within the terms of sec. 9 of R. S. O. ch. 246. See Lai v. Stall, 6 U. C. R. 506.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. NOVEMBER 4TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Writ of Summons—Order Permitting Service out of Jurisdiction—Motion to Set aside for Irregularity—Affidavit—British Subject—Right to Relief Claimed—Omission to Verify Part of Claim—Neglect to State Grounds of Irregularity—Rule 362.

Motion by defendant to set aside order for service of writ of summons out of jurisdiction, on grounds of irregularity.

C. B. Nasmith, for defendant.

G. H. Kilmer, for plaintiffs.

THE MASTER.—The main grounds of objection were as follows:—

(1) Affidavit of solicitor stated that he was informed and believed that defendant was a British subject, but gave no grounds, as required by Rule 518.

This objection is disposed of by Fowler v. Barton, 20 Ch. D. 240, 245; Dickson v. Law, [1895] 2 Ch. 65. The defendant does not attempt to deny the fact.

(2) Affidavit of solicitor does not state "that in the belief of the deponent the applicant has a right to the relief claimed," as required by Rule 163.

The affidavit, however, does state belief "that the plaintiffs have a right to be allowed to serve the writ in said proposed action upon the defendant, and that they have a good cause of action."

In my opinion, this is a substantial compliance with the Rule. Even if not, the language of North, J., in Dickson v. Law, supra, seems very applicable.

The mortgages in respect of which plaintiffs are seeking relief are mentioned in the indorsement on the writ, though not referred to in the memorandum of account made an exhibit on the motion for the order.

The only point on which I entertain any doubt is whether the affidavit was sufficient as referring only to one mortgage, when the indorsement on the writ refers to three . . . Defendant was not being misled in any way.

In order to avoid any question, I allow an affidavit to be filed more specifically referring to them. The motion will then be dismissed, and costs will be in the cause.

I think it well to note that Mr. Kilmer took a preliminary objection that Rule 362 had not been complied with. . . .

I do not find either in the notice of motion or affidavit filed any mention of any "irregularity complained of and the several objections intended to be insisted on" (see Rule 362). Had the objection been pressed (or if still desired to be pressed), it must prevail, and the motion be dismissed with costs. Those who complain of irregularities are bound to be strictly regular.

The plaintiffs can elect which order they will take.

BOYD, C. NOVEMBER 4TH, 1903.

WEEKLY COURT.

BURDETT v. FADER.

Injunction—Attempt to Restrain Defendant from Disposing of Property—Status of Plaintiff—Verdict for Damages—Judgment not Entered.

Motion by plaintiff to continue an interim injunction granted by the local Judge at Peterborough restraining defendant from disposing of certain shares in the Traders' Screwless Door Knobs Company so as to defeat plaintiff's claim against defendant. In this action plaintiff had recovered a verdict against defendant for $700 for libel, but the entry of judgment had been stayed, and an appeal was pending.

D. O'Connell, Peterborough, for plaintiff.

R. D. Gunn, K.C., for defendant, contended that plaintiff was not a creditor and not entitled to an injunction.

BOYD, C.—Plaintiff obtained the injunction ex parte upon an affidavit alleging that defendant intended to sell his stock to defraud the plaintiff and to leave the country with the proceeds. Plaintiff is not yet a creditor, much less a judgment creditor. Plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of the stock by the defendant till the action is finally determined. There

is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing, and the status of creditor not established, it is not the course of the Court to interfere quia timet, and restrain defendant from dealing with his property, until the rights of the litigants are ascertained. See Parker on Frauds on Creditors, p. 211; Holmested and Langton's Jud. Act, p. 80; Newton v. Newton, 11 P. D. 11, 13; Campbell v. Campbell, 29 Gr. 252, 254. Injunction not continued; costs to be disposed of when the action is determined.

NOVEMBER 4TH, 1903.

DIVISIONAL COURT.

RE CONFEDERATION LIFE ASSOCIATION AND CLARKSON.

Will—Executors—Power to Sell Lands—Power to Exchange—Vendor and Purchaser.

Motion (referred by agreement to a Divisional Court) under the Vendors and Purchasers Act in respect of an objection taken to the title by the purchaser. The question arose upon the will of Elizabeth Trolley, dated 6th June, 1881, by which she devised her real estate to be equally divided between her children when the youngest attained 21, with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales."

C. P. Smith, for vendors.

M. H. Ludwig, for purchaser.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that under this power the executors had no authority to exchange the lands of the testatrix for other lands. Philps v. Harris, 101 U. S. Sup. Ct. 370, and Winters v. McKinstry, 1 Man. L. R. 296, referred to.

CARTWRIGHT, MASTER. NOVEMBER 5TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Solicitor—Authority to Bring Action in Name of Company—Determination of Question—Dismissal of Action—Adding Shareholders as Parties.

Motion in each of these actions to dismiss it with costs on the ground that the solicitor who began the action had no authority to use the name of the plaintiff company, or in the alternative that all shareholders on whose behalf or for whose benefit the solicitor purported to bring the same be added as parties plaintiff.

A. J. Russell Snow, for defendants the Moores.

J. W. St. John, for defendants the Leadleys.

W. N. Ferguson, for plaintiff.

THE MASTER.—The second alternative cannot be extended to the action against Moore, because it can only be brought by the company itself.

As to both actions, I do not think it necessary to add anything to what I have said previously as to the facts. (See 2 O. W. R. pp. 745, 850.)

I think these are motions which should have been made by defendants at the outset. On the argument it was noted by me at the time that it was agreed by counsel that the proper course was to have this question of authority of solicitor determined by a duly constituted meeting of the company itself, and I think an examination of the authorities previously referred to shew that this is the proper course.

I therefore order: (1) that the action against Moore separately be stayed until this is done; (2) that the other action be stayed in the same way, unless plaintiffs will consent to an order being made as in Murphy v. International Wrecking Co., 12 P. R. 423.

The costs will be costs in the cause.

TEETZEL, J. NOVEMBER 5TH, 1903.

CHAMBERS.

RE INNIS.

Will—Construction — Charitable Gift — Condition— Gift over—Interest.

Motion by executors under the wills of Helen Innis, and James Innis for an order declaring the construction of the will of Helen Innis, particularly clause 5, which reads as follows: "I give and bequeath the residue of my estate, consisting of cash in the bank, mortgages, stocks, and shares in different companies, and whatever other securities there may be, with interest thereon, to my husband James Innis, less the sums already mentioned in my will. It is my desire that of this residue be set apart the sum of $5,000 for the promotion of some religious, philanthropic, or charitable object, which shall bear his name. The condition of this bequest is that he set apart a like sum of his own money for a like object, and in the event of him not doing so, then he to have the use of the $5,000 along with the rest of my estate, with the interest thereof, during his life, and at his death what remains of my estate to be equally divided between my sisters and brothers, Mrs. Jane Alexander, Mrs. Isabella Stephen, James Gerard, and James Innes McIntosh, the nephew of my husband, and in the event of their death to their lawful heirs." James Innes survived his wife about four years, but did not set apart a like sum of $5,000 for the promotion of any religious, etc , object.

C. L. Dunbar, Guelph, for executors and legatee McIntosh.

E. D. Armour, K.C., for the other legatees under the will of Helen Innes.

R. L. McKinnon, Guelph, for legatees under the will of James Innis.

TEETZEL, J., held that James Innis was entitled only to the life enjoyment of the residuary estate, and upon his death the corpus belongs to the four legatees named; that all interest accumulated since the death of the testatrix not expended by James Innis belongs to his estate. Theobald on Wills, 5th ed., p. 430, Brocklebank v. Johnson, 20 Beav. 205. Briggs v. Penny, 3 DeG. & Sm. 525, Am. & Eng. Encyc. of Law, 1st ed., vol. 29, p. 369, referred to. Order accordingly. Costs of all parties out of the Helen Innis estate.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Railway — Mortgage on Undertaking — Bonds — Interest Coupons — Arrears — Real Property Limitation Act — Application of.

Appeal by defendants Blackstock and Weddell from a certificate of a local Master shewing his finding that defendant S. J. Ritchie is entitled to more than six years' arrears of interest on bonds as against the lands of defendant railway company.

G. T. Blackstock, K. C., and T. P. Galt for appellants.

J. H. Moss, for defendant Ritchie.

D. L. McCarthy, for plaintiffs.

BOYD, C.— The provisions of R. S. O. 1897, ch. 133, secs. 17 and 24, are not applicable to the case of coupons for the payment of interest on railway mortgage bonds which are secured by mortgage deeds of trust. The land contemplated by the statute is a very different thing from the railway undertaking upon which the interest is secured. That undertaking is an integral, indivisible property consisting of land, chattels, and franchises, which for the satisfaction of creditors or bondholders must be dealt with or sold in its entirety: Redfield v. Corporation of Wickham, 13 App. Cas. 467, 476-7. The remedy sought is not by way of action or distress as specified in sec. 17, but is claimed under special provisions which pertain to this railway. Default has been made in the payment of the principal money of the bonds, and the plaintiffs as trustees have proceeded under the 3rd provision of the statutory mortgage to enforce payment of the principal and interest unpaid thereon. All the bondholders are subject to and bound by the terms of this instrument, and the proceeding is for the common benefit of all. The very trust which is to be observed in the case of default is that the trustees are to take possession by a receiver, which has been done, and then to proceed to realize by sale, as has been determined in this case. The extended directions given in the 2nd provision of the mortgage, when default has been made in payment of the interest, provide for the payment of all due and unpaid upon the bonds. That is also the necessary import of the 3rd provision, and it is repugnant to any idea that only six years' interest

is to be recovered on the coupons. These are in effect documents under seal; the bond under seal covenants for the payment of the coupons, and they partake of the nature of a specialty, and are good for at least 20 years: The City v. Lamson, 9 Wall. 477; City of Lexington v. Butler, 14 Wall. 282, 297. It would be incongruous to find that the coupons are statute-barred as to the realty part of the undertaking and yet exigible as to the personalty part. The security cannot be thus divided.

Appeal dismissed with costs.

BOYD, C. NOVEMBER 5TH, 1903.

WEEKLY COURT.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public Schools—Purchase of Site and erection of School Building—Funds Provided by Council—Proceeds of old Site and Building—Title to Land Purchased—Expropriation—Agreement with Tenant for Life.

Motion by plaintiff to continue injunction granted by local Judge at St Catharines restraining defendants the corporation of the village of Grimsby from paying over to defendant school board $12,500 for the purchase of a school site and the erection of a school building thereon, and restraining defendant school board from proceeding with the purchase of a site known as the Kerr property, and restraining defendant Lysit from proceeding with any work in connection with his contract with the board for the erection of a school building, and restraining defendant Vandyke, as chairman of the building committee of the board, from authorizing any further work in connection with the contract.

A. H. Marsh, K.C., and C. H. Pettit, Grimsby, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

BOYD, C.—In my opinion the injunction should not be continued. Smith v. Fort William, 24 O. R. 372, decides that school trustees should not undertake to build in excess of funds provided by the council, and that as a salutary rule which need not be invaded in this case. The school board are not restricted to the debentures voted by the council under sec. 76 of the Public Schools Act, 1901, but may also turn in the

other moneys they have under control in the shape of rent and the proceeds of the old school house and site. By the figures submitted there is a considerable margin between the contemplated outlay as tendered for and the funds available under the contract or in the hands of defendants. It is not necessary to exceed what is thus provided, and defendants swear they will keep the work within what they have means to pay for. The Court should not lightly disturb the united action of the council and the school board in proceeding to establish a new school suitable for the needs of the municipality. The objection that there is not a good title to the new site should not prevail. There is power to expropriate, and, apart from that, the agreement for sale and possession has been made with the tenant for life, and that is one that controls the remainderman under the provisions of the School Act, sec. 39: Young v. Midland R. W. Co., 22 S. C. R. 190.

Injunction dissolved and costs reserved till the hearing or further order.

BRITTON, J. NOVEMBER 6TH, 1903

CHAMBERS.

RE TOMLINSON v. HUNTER.

Division Court—Jurisdiction — Attachment of Debts — Surplus in Hands of Bailiff of Chattel Mortgagee after Seizure and Sale—Attachment by Mortgagee—Prohibition.

Motion by defendant for prohibition to the 1st Division Court in the county of Carleton. Plaintiff held a chattel mortgage dated 6th January, 1903, for $1,105.31 made by defendant, payable on 31st March, 1903. Default was made in payment, and on 6th April plaintiff authorized one McDermott as bailiff to seize and sell the chattels covered by the mortgage. This was done, and enough was realized to satisfy the mortgage and all costs, and leave a surplus of $81.84 in the bailiff's hands. The plaintiff alleged that defendant was indebted to him for rent and upon other claims outside of the chattel mortgage, and on 30th April he began this action in the Division Court against defendant for the amount of the debt and against the bailiff as garnishee to get the $81.84.

W. H. Barry, Ottawa, for defendant, contended that this money in the hands of the garnishee, upon the undisputed facts, was not a debt, and so the Division Court had no jurisdiction to award it against the garnishee.

W. Wyld, Ottawa, and John Hodgins, Ottawa, for plaintiff.

BRITTON, J.—The question of debt or no debt was one for the determination of the Judge in the inferior Court. The money in the hands of the garnishee is a surplus which, by the terms of the chattel mortgage, is to be paid to defendant, and is money for which, if not paid over, defendant could maintain an action. No doubt, plaintiff would be responsible to defendant for this surplus, as the garnishee was plaintiff's bailiff; but even so, it is the money of defendant and can be attached. Evans v. Wright, 2 H. & N. 527, distinguished. Davenport v. McChesney, 86 N. Y. App. 242, referred to. As the garnishee has not paid over the money to plaintiff (for payment to defendant), and as defendant has taken no steps against either plaintiff or garnishee for an account, defendant could have an action against the garnishee, and if so, the claim is a debt and can be attached under sec. 179 of the Division Courts Act. See cases cited in Bicknell & Seager, 2nd ed., pp. 321, 322.

Motion refused with costs.

NOVEMBER 6TH, 1903.

DIVISIONAL COURT.

OTTAWA ELECTRIC CO. v. BIRKS.

Contract—Supply of Electrical Energy—Implied Contract to Take whole Supply—Breach—Construction.

Appeal by defendants from judgment of County Court of Carleton in favour of plaintiffs and cross-appeal by plaintiffs to increase the damages awarded. Action to recover damages for an alleged breach by the defendants of a contract between the parties of 22nd May, 1901, for the supply by plaintiffs of electrical energy to the premises in Ottawa in which defendants carried on their business. The agreement provided that it should remain in force for one year, and thereafter from year to year until terminated by either party giving to the other ten days' notice in writing previous to the expiration of the then current year. The breach alleged was that the defendants, on 6th September, 1902, and while the contract was subsisting, cut the connection between the electric wiring of their premises and the line of the plaintiffs by which the electric energy was supplied, and thereby prevented the plaintiffs thereafter supplying electrical energy to the premises, and refused to accept electrical energy from plaintiffs, and had since taken it from another company.

Glyn Osler, Ottawa, for defendants.

G. F. Henderson, Ottawa, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that defendants did not agree to do more than to pay according to the schedule of rates indorsed on the back of the agreement for the electrical energy supplied by plaintiffs, which was to be determined prima facie by the register of the meter or indicator used for measuring the quantity supplied, unless the price of the quantity supplied in the year, after adding meter rent and deducting the discount allowed, should be less than $12, in which case the obligation of the defendants was to pay $12 for the supply of the year. There was no agreement on the part of defendants to use and pay for the whole or any part of the supply which plaintiffs undertook to furnish, but only to pay for so much of it as should be used by defendants as shewn by the meter, unless at the contract rates the amount payable for what was used should be less than $12, and in that case the agreement of the defendants was to pay $12. A term not expressed in the contract ought not to be implied unless there arises, from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied: Hamblyn v. Wood, [1891] 2 Q. B. 488. Looking at the contract in a reasonable and business way, there is no necessary implication that both parties contemplated an undertaking by defendants that, if they used electricity for lighting their premises, they would take their whole supply from plaintiffs, or even that they would take their supply to the extent of what should be used by 125 incandescent lamps of 16 candle-power.

Appeal allowed with costs and action dismissed with costs. Cross-appeal dismissed without costs.