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FERGUSON, J. JANUARY 20TH, 1902.

TRIAL.

McGARR v. TOWN OF PRESCOTT.

Highway—Non-repair—Knowledge of by Municipal Corporation—Time—Negligence—Damages.

Action tried at Brockville, brought to recover damages for injuries sustained by plaintiff owing to non-repair of a board sidewalk on Ann street, in the town of Brockville.

J. A. Hutcheson, Brockville, and A. A. Fisher, Brockville, for plaintiff.

J. B. Clarke, K.C., and J. K. Dowsley, Prescott, for defendants.

FERGUSON, J.—That the plaintiff sustained serious injury is not disputed, and it is conceded that she was not guilty of contributory negligence. It is also admitted that she gave defendants the notice respecting injury, and of intended action. . . The sidewalk was four feet wide, the planks running crosswise of the walk. One of the planks, about ten inches wide, was missing, leaving a hole across the walk of between six and eight inches in depth. . . The injuries of plaintiff are severe. There is beyond doubt a very serious injury to the sciatic nerve on the right side; some of the professional witnesses being of the opinion that the plaintiff may never recover, others that she may in time, opinions differing as to the length of time. . . .Though the professional witnesses were not all of the same opinion, I have no doubt that it is shewn that the injury to the nerve was caused by the fall. . . . I find also that the medical treatment was proper. . . . The population of Prescott is shewn by its mayor to be about 3,000. Ann street is on one side of the town, and not very thickly built upon, and the traffic was shewn to be not very great, nor yet very small, when the locality is considered. The accident occurred at 8.30 p.m. on July 7th, 1901. . . From the evidence I think the sidewalk was in a dangerous condition from June 29th, 1901. One witness

said that the sidewalk was old 10 years ago, and it is shewn that the scantlings were, in most places, very rotten. . . I am of opinion that this want of repair existed for such a length of time, that, having regard to all the other circumstances of the case, amongst which are, the population of the town, the fact that the sidewalk was a very old and well worn out one, the situation of the street on which the sidewalk was, the travel upon it, etc., the defendants ought to have known of its state, and should be taken to have had notice of it. The plaintiff sustained the injuries by reason of defendants' negligence, and I assess the damages at $1,500.

Hutcheson & Fisher, Brockville, solicitors for plaintiff.

J. K. Dowsley, Prescott, solicitor for defendants.

FERGUSON, J. JANUARY 20TH, 1902.

TRIAL.

BEAM v. BEATTY.

BUNTING v. BEATTY.

Infant—Contract of, to Indemnify—Voidable not Void—Ratification at Majority—Unliquidated Damages—Interest.

Actions tried at St. Catharines, brought to recover damages upon the defendant's bonds, dated in 1893, indemnifying plaintiffs against the purchase of certain stock in the Colorado River Irrigation Co.

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

C. A. Masten, for defendant.

FERGUSON, J.—*Held*, that the infancy of the defendant at the time of making the bonds rendered them voidable, but not void, and that after becoming of age defendant had ratified them. Judgment in first action for $495 and costs, and in second action for $720, but interest cannot be allowed because the losses suffered by plaintiffs sound in damages.

A. W. Marquis, St. Catharines, solicitor for plaintiffs.

F. C. McBurney, Niagara Falls, solicitor for defendant.

FERGUSON, J. JANUARY 20TH, 1902.

TRIAL.

SHERLOCK v. WALLACE.

Contract—As to Profits on Stock—Evidence of—Deed of Land as Security—Redemption—Stockbroker.

Action brought to compel the reconveyance to plaintiff of certain lands conveyed by him by absolute deed to

defendant as security for any sum which might be found due after the conclusion of certain investments in stocks made by the parties.

FERGUSON, J.—*Held*, that the plaintiff had failed to shew that there was an agreement that the profits, if any, arising upon the stock on hand should go for his benefit.

Crothers & Price, St. Thomas, solicitors for plaintiff.

McCrimmon & Wilson, St. Thomas, solicitors for defendant.

FERGUSON, J. JANUARY 20TH, 1902.

TRIAL.

VANDUSEN v. YOUNG.

Undue Influence—Parent and Child—Conveyance of Land—Without Independent Advice—For Suitable Support of Parent—Absence of Fraud—Good Consideration.

Action brought to set aside an indenture made in 1900, by plaintiff to defendant, to have the registration vacated, and to recover damages for breach of a verbal agreement by defendant to support and maintain plaintiff suitably on the land. The plaintiff is 80 years of age and cannot read or write, and alleges undue influence, and that she acted without independent advice in executing the indenture by which she agreed to devise the land to defendant in consideration of being supported thereon until her death.

FERGUSON, J.—*Held*, that the plaintiff appeared to be a woman of remarkable clearness of mind, with mental faculties unimpaired, that there had been no fraud on the part of her daughter, the defendant, and that the transaction was supported by good consideration and must stand. Action dismissed with costs.

M. M. Brown, Brockville, solicitor for plaintiff.

Hutcheson & Fisher, Brockville, solicitors for defendant.

BRITTON, J. JANUARY 21ST, 1902.

CHAMBERS.

RE SMITH.

Infant—Custody of—As between Parents.

Where an order was made in May, 1899, giving the custody of two children to their mother, the Court refused to

interfere with the terms contained in it, it not being shewn that the children were badly treated or their health jeopardized.

E. F. Blair, Brussels, solicitor for the father.

Garrow & Garrow, Goderich, solicitors for the mother.

BRITTON, J.

JANUARY 21ST, 1902.

CHAMBERS.

RE CORNELL.

Executors and Administrators — Maintenance — Infant — Custody—Advice—Rule 938.

Originating notice under Rule 938.

E. R. Hanning, Preston, solicitor for executor.

W. J. Millican, Galt, solicitor for other parties except infants.

J. Hoskin, K.C., Toronto, official guardian.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

TAWSE v. SEGUIN.

Particulars—Further Particulars—Interpleader Issue.

An appeal from order of MEREDITH, C.J., *ante*, p. 14, was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), and it was held that the order on appeal was right in the main, but that there should be no further particulars as to advances or as to settled account, but only as to credits. Costs of appeal to be in the action.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

RE McINTYRE.

McINTYRE v. LONDON AND WESTERN TRUSTS CO.

Executors and Administrators — Directions as to Distribution of Estate—Setting apart securities to meet annuities—Redemption of annuity—Consent—Rule 938—Jurisdiction under.

Appeal by the London and Western Trusts Company, the executors of the will of Hugh McIntyre, deceased, from an order of BOYD, C., in Chambers (21 C. L. T. Occ. N. 380), giving directions to the executors as to the distribution of the estate among the residuary legatees, and as to providing for the payment of annuities bequeathed by the will. BOYD, C., declared that the parties interested in the residue were entitled to have sums set apart to answer the annuities from time to time, as sufficient

assets are in the hands of the executors, or to have sums applied in the purchase of Government annuities in the same way, from time to time, as shall seem most expedient to the Master if the parties differ.

G. F. Shepley, K.C., for the executors, contended that they had a right to complain that the estate was taken out of their hands, and that the Court should not interfere with the administration by them and practically set aside the will, no impropriety being alleged against them.

A. B. Aylesworth, K.C., for David McIntyre.

M. D. Fraser, London, for Hugh McIntyre.

J. Folinsbee, Strathroy, and D. Urquhart, for other adult parties.

F. W. Harcourt, for infants.

Judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.— . . . It is clear that it is only when both the persons whose estate is liable to pay an annuity, and the annuitant consent, that an annuity may be redeemed out of the estate . . . That was the intention of the Chancellor, he tells me, and if the order provides otherwise, it is wrong, and should be varied. . . In other respects the order is substantially right. After realizing what may be necessary to pay debts, etc., the annuitants are entitled to have only such portion of the estate set apart as may be necessary to secure their annuities: *Re* Parry, 42 Ch D. 570: and the extent of such security is to be determined on the principles laid down in Harbin v. Masterman, [1896] 1 Ch. 351; see, also, Ross v. Hicks, [1891] 3 Ch. 499. The trustees have on hand securities, proper to be held by them as trustees, amply sufficient to secure all annuities, and leave a surplus presently available for distribution among the persons entitled to the residue, and there is no necessity to convert these securities into money. It will suffice to set apart such of these securities, as at 4 per cent. per annum will produce yearly a sum equal to the particular annuity for which the security is set apart. The questions are proper to be decided on a motion under Rule 938: *Re* Medland, Eland v. Medland, 41 Ch. D. at p. 492, decided on the corresponding English Rule. The question in *Re* Parry, *supra*, somewhat similar to this, was raised upon an originating summons. Having outlined the principles upon which the appellants should act, there is no necessity for a reference, and if one is had, its costs must be reserved to be disposed of, after report, by a Judge in Chambers. Order is varied as to costs, and as to redemption of legacies; otherwise

affirmed and appeal dismissed. Costs of appeal out of estate, those of appellants as between solicitor and client.

Stuart, Stuart, & Bucke, London, solicitors for executors.

J. Folinsbee, Strathroy; Fraser & Moore, London; Urquhart & Urquhart, Toronto; Macbeth & McPherson, London; and J. Hoskin, K.C., solicitors for other parties.

Moss, J.A.

JANUARY 21ST, 1902.

CHAMBERS.

RE GIBSON.

Infant—Custody Given to Mother—Pending Action for Alimony—Undertaking to Speed—Access to Infant—Allowed to Father.

Motion by mother, upon return to *Habeas Corpus*, for custody of her infant child 3 years old.

H. J. Wickham, for the mother.

F. C. Cooke, for the father.

JANUARY 21ST, 1902.

DIVISIONAL COURT.

McKENZIE v. McLAUGHLIN.

Discovery — Defamation — Privilege — Mitigation of Damages—Relevancy of Questions on Examination of Plaintiff.

Appeal by plaintiff from order of FERGUSON, J., in Chambers, affirming order of a local Judge at London requiring plaintiff to attend for further examination for discovery and answer questions as to whether he had applied for a reward offered by a township council for killing a dog. Action for slander. The plaintiff alleged that the defendant had spoken of the plaintiff the words "he swore false and could be made jump for perjuring himself"—"he perjured himself and stole money from the township." The defendant did not justify, but denied speaking the words, said that the words, if spoken, did not refer to the plaintiff, set up (5) the circumstances under which certain words (not the same as those charged) were spoken, and (6) pleaded privilege.

The questions related to the reward, and asked whether plaintiff had been paid it, and as to his presence at a meeting of the council, and as to the statements he made at it, and as to the fact of the reward, and as to the times and occasions when the words complained of were spoken.

I. F. Hellmuth, for plaintiff. The questions are not relevant to any of the issues, and when justification is not pleaded cannot be relevant, except as to damages, and as no facts are pleaded in mitigation of damages, the questions are irrelevant and improper.

C. Swabey, for defendant.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.), was delivered by MEREDITH, C.J.—In the view we take it is unnecessary to consider whether, having regard to Rule 488, it is necessary for a defendant to plead the facts on which he intends to rely in mitigation of damages, assuming the question open since Beaton v. Intelligencer Printing Co., 22 A. R. 99, or whether, if it be not necessary to so plead, it is proper to examine for discovery as to matters affecting damages only, unless and until the notice has been given. There being on this record the defence of privilege, it is impossible to say that the questions asked are not relevant. . . . Appeal dismissed with costs.

McEvoy, Pope, & Perrin, London, solicitors for plaintiff.

Meredith & Fisher, London, solicitors for defendant.

FALCONBRIDGE, C.J. JANUARY 21ST, 1902.

TRIAL.

WHITE v. McLAGAN.

Will—Construction—Bequest of Interest to Legatee so long as Unmarried or a Widow—Accumulation during Coverture—Valid Limitation—Condition—"Again."

Action by trustees under the will of Joseph Hancock, deceased, for its construction.

A. Bruce, K.C., for plaintiffs.

S. F. Washington, K.C., for defendant J. McLagan.

W. W. Osborne, Hamilton, for infant defendants.

FALCONBRIDGE, C.J.—The material parts of the will, as far as the purposes of this inquiry are concerned, are as follows (for convenience of reference I have numbered the paragraphs):

And as to all the rest and remainder of my said real and personal estate and effects, and any gifts which may become forfeited as aforesaid, upon trust to sell, convey, realize and convert the same into money with all due diligence, and after the death of my said wife and sister respectively, to sell and convey the said dwelling house, premises and lots devised for their benefit as aforesaid, and to invest the said moneys in first-class real estate mortgage security from time to time at such rate of interest as they may think proper.

1. And to divide the residue of said trust moneys and the interest thereon, and accruing thereon, into thirteen equal shares, and I direct the payment of one of such shares of the said interest annually, upon application for such

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share at Hamilton, to and for each of the following parties, namely: (13) *Jessie Hancock, daughter of my brother, John Hancock; but my will is that the interest payable to the above named female legatees shall be payable to them respectively only so long as they are unmarried, or widows, and that during the coverture of any or all of such female legatees, the interest shall accumulate on her or their shares, while she or they are married, and shall be payable to her or them again, should she or they become a widow or widows, and so on as often as any of such female legatees shall marry and become widows.*

2. And I direct the payment of the said share of interest of William Hancock to be made to his brother, John Hancock, upon condition that he properly cares for and supports and maintains him during his lifetime, and in payment and discharge of his yearly care, support, and maintenance.

3. And in the event of the death of either of the said parties hereinbefore named as legatees, before or after my death, leaving lawful issue, I give and bequeath his or her share to such issue in equal proportions, and if any of such issue are under twenty-one years of age, I authorize and empower my said executors to apply the money to which he or she may be entitled to or for his or her use and benefit as they may think proper, without the intervention of any guardian on his or her behalf.

4. And upon the death of the last survivor of the said legatees, I order and direct the payment of all principal moneys in the hands of my executors, and belonging to my estate, to the lawful issue of each of the said legatees in equal shares, so that the children of each will receive one share in equal proportions.

5. And in the event of the death of any of the said parties without leaving lawful issue, I direct that his or her share of interest shall be paid yearly, and every year, to the said other parties in the manner hereinbefore mentioned, and that his or her share of principal money shall form part of my estate for distribution and payment in the manner hereinbefore mentioned.

Jessie Hancock, mentioned in clause 13 of paragraph 1, on the 22nd November, 1894, married Alexander McLagan, and he died on the 1st January, 1902, leaving the defendant, Jessie McLagan, his widow, him surviving, and the only issue of the said marriage, the defendants, Ellen Campbell McLagan, born in 1895, and Elsie McLagan, born in 1897.

This will came before the learned Chancellor of Ontario for construction, in June, 1888, when he decided that "the bequest to the female legatees providing for the payment of interest on their shares of the fund to them, only so long as they were unmarried or widows, and that during the coverture of any, the interest shall accumulate, etc., is a valid limitation as distinguished from a condition; and is to take effect according to the terms of suspension used in the case of one who is at present, and was at the date of the will, married, and also in the case of one who shall hereafter marry: Heath v. Lewis, 3 De G. M. & G. 956."

The defendant Jessie McLagan received her share of the interest or income from the trust estate up to the date of her marriage, but no sums have been paid to her since that date, and the interest or income which would but for her marriage have been paid to her, has been retained by the plaintiffs, and the amount thereof, with interest which has been received thereon, was, on the 21st day of November, 1901, $1,406.25, and the plaintiffs are ready and willing to pay such sum, but are in doubt as to whom the same is payable to.

The questions now are :

1. As to who is entitled to the accumulations of income in respect of the share of the defendant Jessie McLagan during her marriage, and whether the same are now payable to her.

2. As to whether the defendant Jessie McLagan is entitled from the date of the death of her husband to the share of the income accruing from that date, which would have been payable to her had she never been married.

3. What disposition is to be made by the plaintiffs of the accumulations on the share of the said Jessie McLagan during her marriage, and of the income payable in respect of such share in the future.

As to question 1, I am of opinion that the words "and shall be payable to her or them *again*," exclude the idea that the widow is entitled to the accumulations. The will was not drawn by a layman, but by a lawyer, and if the intention had been that the accumulations should be paid to the widow, such words as "with the accumulations thereon" would have been inserted.

Further, the word "again" indicates being "back in a former position or state; anew; once more as before:" see Murray's new dictionary, *sub verb.*, A. 3, 6; Macaulay's History of England, vol. 2, p. 78, "The principles of the Treaty

of Dover were again the principles of the foreign policy of England."

To declare the defendant Jessie McLagan to be entitled from the death of her husband to the share of the income accruing from that date, is to place her back in her former position had she never married; and this constitutes the affirmative answer to the second question.

As to the third question, the persons who will on the death of Jessie McLagan become entitled to the trust fund under clauses 3 and 4, will become entitled also to the accumulations of income during the period of Jessie McLagan's marriage.

The cases are not of much assistance. They are principally under the Thellusson Act: Crowley v. Crowley, 7 Sim. 427; O'Neil v. Lucas, 2 Keen 316; Harbin v. Masterman, L. R. 12 Eq. 559; [1894] 2 Ch. 184; Wharton v. Masterman, [1895] A. C. 186; Re Travis, Frost v. Greatorex, [1900] 2 Ch. 541.

Costs to all parties, out of the estate.

Bruce, Burton, & Bruce, Hamilton, solicitors for plaintiffs.

Washington & Beasley, Hamilton, solicitors for defendant J. McLagan.

Gibson, Osborne, O'Reilly, & Levy, Hamilton, solicitors for infant defendants.

JANUARY 22ND, 1902.

DIVISIONAL COURT.

BIRKETT v. BREWDER.

Mechanic's Lien—Plant Supplied by Contractor—Forfeited to Owner for Breach of Contract—Lien does not Attach upon—R. S. O. ch. 153, sec. 11 (1).

Appeal by plaintiffs from judgment of Judge of County Court of Carleton dismissing the claim of the plaintiffs to a mechanic's lien upon the works of the Metropolitan Electrical Company of Ottawa in respect of materials furnished by the plaintiffs to Brewder and McNaughton, the contractors. The plaintiffs contended that until the work should be completed, it could not be ascertained whether anything would be due to the contractors upon which the plaintiffs' lien could attach, and, therefore, the right of the lien should not have been determined.

The contract between the Metropolitan Co. and Brewder and McNaughton provided that all machinery and other plant, etc., furnished by the latter, was to become the property of the company until the final completion of the work, and

that if, as provided in the contract, the contractors were dismissed, and the company took the work out of their hands, and completed it, such plant, etc., was to remain the property of the company for the purposes, etc., contained in paragraph 10. The contractors were dismissed, and the company are proceeding with the work, and an action brought by the contractors against the company for damages has been dismissed. The County Judge held that nothing was due to the contractors under the contract; and that the lien of plaintiffs attached only upon the 15 per cent. to be retained under R. S. O. ch. 153, sec. 11, which percentage was not to be computed upon the plant taken possession of by the company.

G. F. Shepley, K.C., for plaintiffs.

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

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by MEREDITH, C.J.—The County Judge was clearly right. . . The language of sec. 11 (1) that the value is to be "calculated on the basis of the price to be paid for the whole contract" can have no possible application to the plant supplied by the contractor to execute the work, and which remains his property (in the absence of special agreement), to be removed by him when the work has been completed. . . . The County Judge was not asked to postpone the trial, so as to await the completion of the work, to see if anything might be due to the contractors . . . and nothing will ever become due to them in any event by reason of the dismissal of their action. Whether or not the judgment in that action is binding on the lienholders, we express no opinion, but this action, in view of the course taken at the trial, ought not to be retried in order to determine the liability of Brewder & Co., because it is almost certain the same result would be reached. Appeal is dismissed with costs.

Christie, Greene, & Greene, solicitors for plaintiffs.

McVeity & Culbert, Code & Burritt, C. Murphy, Latchford, McDougall, & Daly, Code & Beament, all of Ottawa, solicitors for respective defendants.

MEREDITH, J. JANUARY 21ST, 1902.

CHAMBERS.

RE POWELL v. DANCYGER.

Division Court—Prohibition—Transfer of Action to High Court—Lease—Covenant to Leave in Repair—Breach—Damages—Jurisdiction of Division Court.

Motion by defendants for order transferring action from

10th Division Court in county of York into High Court, or for prohibition. Action to recover $26, one month's rent, and $70, the value of two broken glass lights, under a memorandum of letting, in which the defendants agreed to keep and leave the premises in repair.

W. W. Vickers, for defendants.

C. A. Moss, for plaintiffs.

MEREDITH, J.—The Division Court had jurisdiction to award damages not exceeding $100 : see Talbot v. Poole, 15 P. R. 99. The right or title to a corporeal or incorporeal hereditament was not involved. The lease was not denied, nor the right to rent questioned: see Re Moberley v. Collingwood, 25 O. R. 625. The nature of the equitable defence, if any, is not disclosed, but there is nothing to shew that the Division Court has not ample power to consider and give sufficient effect to it, and has not done so: see R. S. O. ch. 60, secs. 73 & 75. Therefore there cannot be prohibition, nor a transfer for want of jurisdiction in respect of the claim: there is nothing to indicate any want or excess of jurisdiction. If, having regard to the future effect of the covenant to repair, a reasonable claim for reformation of the lease had been made before trial, a transfer might well have been ordered. Although set-off, defence, or counterclaim, may involve matter beyond the jurisdiction, yet some relief may be granted in a Division Court, and it is only when ample justice cannot be done, that a transfer is made: secs. 76, 136, R. S. O. ch. 51, sec. 186. Motion is dismissed with costs.

OSLER, J.A.

JANUARY 22ND, 1902.

COURT OF APPEAL—CHAMBERS.

HUTTON v. JUSTIN.

Trustee—Abortive Sale of Trust Property in Parcels—Sale by Tender—Leave to Bid—Discretion of Court—Tennant v. Trenchard, 38 L. J. Ch. 661, L. R. 4 Ch. 537, distinguished.

Motion by plaintiff for leave to appeal from order of a Divisional (22 C. L. T. Occ. N. 23), affirming order of MEREDITH, C.J.

G. F. Shepley, K.C., for plaintiff.

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

OSLER, J.A.—No case has been made out. Whether, when a trust estate has been directed to be sold, the trustee, who is also an incumbrancer, shall be at liberty to bid, is a matter resting in the sound discretion of the Court.

Here, a sale by auction in parcels was had, and failed, and the estate has been now ordered to be put up for sale by tender *en bloc*, and it is contended that without first asking for tenders for parcels, or trying some other way, the trustee should not be at liberty to bid for the estate *en bloc*, if the price named by the Court should not be realized on the sale by tender. The rule has not been so stringently laid down: Tennant v. Trenchard, 38 L. J. Ch. 661, and L. R. 4 Ch. 537, per the Lord Chancellor, at p. 547. In that case the trustee was not to be at liberty to bid until some attempt had been made to sell, and proved to be abortive. Here the ends of justice—of justice to the parties—do not require a more stringent application of the rule; there having been in fact one sufficient attempt to sell in parcels, which has proved abortive, the Courts below have exercised a proper discretion in making the order in question. Motion is dismissed with costs.

BRITTON, J. JANUARY 21ST, 1902.

CHAMBERS.

VALLEAU v. VALLEAU.

Will—Construction—Bequest for Life to the Widow—Articles Passing Under—Use in Specie of Furniture—Income.

Thorpe v. Shillington, 15 Gr. 85, referred to.

Originating notice under Rule 938.

E. Douglas Armour, K.C., for plaintiff.

R. C. Clute, K.C., for defendants.

A. L. Colville, Campbellford, solicitor for plaintiff.

G. Drewry, Brighton, solicitor for defendant.

LOUNT, J. JANUARY 22ND, 1902.

TRIAL.

MASSEY-HARRIS CO. v. ELLIOTT.

Water and Watercourses—Change in Course of Stream by Freshets—Accretion—Reliction—Easement—Riparian Proprietor—Title by Possession.

Interpleader issue directed to try whether at the time the city of Brantford expropriated certain land, that portion in question in the issue was the property of the plaintiffs or defendants, and to determine the proportion in which the $6,100, fixed by the arbitrators under the Municipal Act, as the value of the land, and paid into Court, is divisible among them.

S. C. Smoke and Grayson Smith, for plaintiffs.

W. S. Brewster, K.C., and A. E. Watts, Brantford, for the defendants.

LOUNT, J.—The contention is occasioned by a change in the channel of the Grand River from the old to the new channel. . . . It was conceded that the plaintiffs' property, which is on the north side of the river, had, when patented, for its southern boundary, the northern boundary of the river as it ran through the old channel, from which was reserved by the patent an allowance, for a tow path or road, one chain in width along the bank, and full access to the shore for all vessels, boats, and persons; and, likewise, that the northern boundary of defendants' land as patented was the southern boundary of the river as it then ran through the old channel. . . . Many witnesses were examined on both sides. . . . I find that the portion of the disputed property lying immediately south of the old channel . . . up to 1874, formed part of the property now claimed by defendants. In that year, or possibly 1875, a heavy freshet of water and ice came down the river cutting a new channel, which, after 8 or 10 years, by successive freshets, became as it now is formed. . . . The intervening land reappears every year. . . . The old channel has been only partly filled up. . . . The change of channels has not been due to the gradual eating away of the south bank of the old channel by the current. . . . The plaintiffs have not established any title by accretion to the land in dispute, and the doctrine of accretion does not apply, nor has reliction been shewn, for there has been no recession of waters from the plaintiffs' land; they reappear as soon as the spring freshets pass away. An island suddenly formed, as here, remains the property of the original owner. . . . The plaintiffs had, at the date of expropriation, as riparian proprietors, a title to the middle thread of the old channel, which is not completely closed up. . . . The reservation of a chain for a tow path, being an easement, does not take from plaintiffs their right in the soil to the middle thread of the old channel: Kains v. Turville, 32 U. C. R. 22. . . . The plaintiffs have not shewn "an actual, constant, and visible occupation to the exclusion of the true owners for 10 years:" McConaghy v. Denmark, 4 S. C. R. 632: see also Harris v. Mudie, 7 A. R. 414; Griffith v. Brown, 5 A. R. 303. Cropping the land during the summer is only a new act of trespass: Coffin v. North American Land Co., 21 O. R. 87: and does not make against the owner's constructive possession: Handley v. Archibald, 30 S. C. R. 130. . . . I find for defendants on all grounds,

except as to the middle thread of the old channel in front of their land, 12 chains in length, and therefore plaintiffs should get $100 and defendants $6,000 of the money in Court. Costs to defendants, as they succeed substantially.

Watson, Smoke, & Smith, Toronto, solicitors for plaintiffs.

Brewster, Muirhead, & Heyd, Brantford, and A. E. Watts, Brantford, solicitors for respective defendants.

ROBERTSON, J. JANUARY 22ND, 1902.

TRIAL.

SUTTON v. VILLAGE OF PORT CARLING.

Survey—Re-survey to settle Boundaries—Jurisdiction of Lieutenant-Governor-in-Council to Order—Requisites to Confer—Assessing Cost of re-survey on Owners not Interested.

Re Scott and Peterborough, 26 C. P. 36, applied and followed.

Reg. v. McGugan, 19 C. P. 69, distinguished.

Action brought by certain land-owners to have it declared that certain assessments under by-law No. 48 of defendants are illegal and void, and to quash the by-law, and to enjoin defendants from collecting the several amounts levied against plaintiffs under the by-law. The by-law authorizes the levying of $290.77 to defray the cost of a Government survey of, and planting durable monuments on, certain parts of the Bailey estate, containing 137 acres, divided into 73 lots and parts of lots, to settle the boundaries. The survey was ordered by the Lieutenant-Governor in council at the request of defendants. The defendant Martin is defendants' tax collector.

R. D. Gunn, Orillia, and T. E. Godson, Bracebridge, for plaintiffs.

C. E. Hewson, Barrie, for defendants.

ROBERTSON, J.—There was not sufficient material sent by defendants' council to warrant the general re-survey that has been made. . . . The whole difficulty could have been gotten over by the surveyor establishing the proper line of Bailey street from Joseph street to the Indian River, at a cost of about $40. . . . I find that no one of the plaintiffs, except Harris, is interested in the re-survey, which was not necessary to fix their respective boundaries. . . . The case comes within the principles laid down in Re Scott and Peterborough, 26 C. P. 36. . . . I am of opinion that the re-survey was not authorized, the requirements, as I

have stated, of the statute R. S. O. 1887 ch. 152, sec. 39, now R. S. O. 1897 ch. 181, sec. 15, not having been complied with, so as to give the Lieutenant-Governor in council jurisdiction to authorize the survey; therefore the survey was illegal, and therefore there is no power to pass the by-law to levy its cost. If there was jurisdiction to authorize the re-survey, it could only be at the cost of the owners of lots in each range or block, or part of each range or block, interested, and not on all lot-owners, whether or not they are interested. Neither has sub-sec. 5 of sec. 38 of ch. 152 (sub-sec. 5 of sec. 14 of ch. 181) been followed, no estimate of the cost having been made. . . . Reg. v. McGugan, 19 C. P. 69, is distinguishable. In that case there was a petition and memorial for a survey of the first concession of a township, but in this case no street, range, or block, or parts of them, were particularized, and I adopt the language of Draper, C.J., in the Scott case, *supra*, where he says: "The powers to tax, confided in councils, can only be exercised in the manner specified by the Act," etc. I refer on this point to Cooper v. Welbanks, 14 C. P. 364. The by-law must be quashed, the injunction made perpetual, and the corporation must pay the costs of the action on the High Court scale. There was no necessity for making the defendant Martin a party, and the action is dismissed against him without costs.

R. D. Gunn, Orillia, solicitor for plaintiff.

Hewson & Creswicke, Barrie, solicitors for defendants.

JANUARY 23RD, 1902.

DIVISIONAL COURT.

BARTLETT v. CANADIAN BANK OF COMMERCE.

Discovery—Examination for, of Local Manager of Bank—Subsequent Examination of Teller Refused.

Appeal by plaintiffs from order of LOUNT, J., in Chambers, affirming order of Master in Chambers refusing an application by the plaintiffs for leave to examine for discovery one Fralick, teller in the branch of the Canadian Bank of Commerce at Ayr. The action is brought to recover from the Bank of Commerce and the Dominion Bank the sum of $3,000, the amount of a cheque drawn in favour of plaintiffs by one Thamer upon the Ayr branch of the former bank, and indorsed by plaintiffs and deposited by them in the Dominion Bank at Toronto, who indorsed it to the Bank of Commerce, who sent it to their branch at Ayr, where there was no funds for it. It reached Ayr on May 13th last, and was protested on May 15th, and notice of

dishonour sent to plaintiffs. The Dominion Bank, who had credited the plaintiffs with the amount, afterwards charged it back against the plaintiffs, who base their action on the ground that the notice of dishonour was not in time. The plaintiffs have already examined the agent of the bank at Ayr, and now seek to examine the teller, as an officer of the bank, for discovery.

F. Arnoldi, K.C., for plaintiffs. The teller can alone give the discovery required as to the noting of the cheque. Dawson v. London Street R. W. Co., 18 P. R. 223, shews that the teller is an officer of defendants examinable for discovery.

W. H. Blake, for the defendants the Canadian Bank of Commerce. The discretion exercised below should not be interfered with. The fullest discovery had been afforded to plaintiffs. The teller is not an officer : Ontario Bank v. Shields, 33 C. L. J. 393.

The Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) delivered judgment at the conclusion of the argument, holding that the order below was right; that there was nothing to examine about; and that Ontario Bank v. Shields, *supra*, was well decided. Appeal dismissed with costs.

Arnoldi & Johnston, Toronto, solicitors for plaintiffs.

Blake, Lash, & Cassels, Toronto, solicitors for defendants.

JANUARY 23RD, 1902.

DIVISIONAL COURT.

EVANS v. EVANS.

Will—Executory Devise—Period of Vesting—Attaining Majority and Death of Life Tenant—Double Event Necessary.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., in action for construction of will of John Evans, deceased. The testator died in 1865, leaving a widow and six sons, and three daughter surviving. Walter Evans, a son of the testator, died intestate without issue on November 2nd, 1899, leaving surviving his widow, the plaintiff. Betsy Evans, the testator's widow, died on February 20th, 1901. The testator devised all his real estate to trustees in trust "to permit and allow my wife, Betsy Evans, to have, use, occupy, and enjoy during her natural life said lot 2 in the fourth concession, East Gwillimbury, with dwelling-house, etc., free of rent or charge except taxes, which are to be paid by her, and from and immediately after her decease,

then, upon trust, I give and devise the said lot, with dwelling-house, etc., unto my son, Walter Evans, aged five years, to be enjoyed by him at the age of 21 years, if my said wife shall then be deceased, but if she shall not, then the same to be enjoyed by him when and so soon after he shall have attained the age of 21 years as my said wife shall die; and I hereby direct my trustees and the survivor of them, and his heirs, to release, convey, and assure the same unto my said son Walter Evans, his heirs and assigns, at the time of the death of my said wife; provided that he, my said son Walter, shall then have attained the age of 21 years; but if shall not have attained that age, I direct my said trustees to so release, convey, and assure the said lot to my said son when and so soon as he shall attain the age of 21 years. . . . If any of my other sons "referring to the testator's sons, except David, should die before the time appointed for him or them to receive his or their share or shares, I direct that his or their share or shares shall be equally divided amongst his remaining brothers, except my son David, who is not to receive in any event the share or shares of any of my said sons who may die before receiving his or their share or shares." The Chief Jutice held that the testator meant that Walter should take lot 2 only in the double event of his attaining the age of 21 years and surviving the testator's widow, Betsy.

H. T. Beck, for plaintiff.

J. W. McCullough, for the defendant D. Evans jun., in same interest as plaintiff.

A. H. Marsh, K.C., for other defendants.

The Court was composed of BOYD, C., and FERGUSON, J., both of whom wrote opinions, agreeing in the result.

FERGUSON, J.—The testator fixed a point of time at which his son Walter was to receive a title to the land in question, which was the earliest point of time after he, Walter, should have attained 21 years, and the life tenant, the widow, should be dead. Walter did not survive the widow, and he, therefore, died before the time appointed to receive his share, and the gift in the subsequent clause sprang up upon the death of Walter of its inherent strength, and he had not, and the plaintiff cannot through him have, any vested rights to the land. Judgment below affirmed with costs.