THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING MAY 24TH, 1902.)

VOL. I. TORONTO, MAY 29, 1902. NO. 20.

MAY 16TH, 1902.

C. A.

CANADA ATLANTIC R. W. CO. v. CITY OF OTTAWA.

Railways—Right to Cross Streets—Permission of Railway Committee of Privy Council—Necessity for Expropriation Proceedings.

An appeal by the defendants from the judgment of BOYD, C., 2 O. L. R. 336.

A. B. Aylesworth, K.C., and Taylor McVeity, Ottawa, for appellants.

F. H. Chrysler, K.C., for plaintiffs.

THE COURT (OSLER, MACLENNAN, MOSS, JJ.A.) dismissed the appeal with costs, following their recent decision in Montreal and Ottawa R. W. Co. v. City of Ottawa, *ante* 349.

Taylor McVeity, solicitor for appellants.

Crysler & Bethune, Ottawa, solicitors for respondents.

MACLENNAN, J.A. MAY 16TH, 1902.

C. A.—CHAMBERS.

CENTAUR CYCLE CO v. HILL.

Execution—Leave to Issue Notwithstanding Appeal—Special Circumstances—Rule 827 (2).

Motion by plaintiffs for leave to issue execution upon the judgment of BOYD, C., *ante* p. 229, notwithstanding the

pendency of the appeal. The defendant Love had paid into Court, $200 as security for the costs of the appeal.

W. E. Middleton, for plaintiffs.

C. W. Kerr, for defendant Hill.

W. E. Raney, for defendant Love.

MACLENNAN, J.A., held, after some hesitation, and with some reluctance, that the plaintiffs were entitled to leave to issue execution. They had a judgment for $2,500 for goods, of which the defendants had received the benefit. They were dealing with the defendants on terms of security for their account, and the security had turned out to be wholly illusory. The financial position of defendants was now found to be weak, one of them having given up business for that reason, and the other having been obliged to borrow two considerable sums upon mortgage of his stock in trade to enable him to carry on his business. Under these circumstances, the case was one for the exercise of the power given by Rule 827 (2) of ordering that execution be not stayed pending the appeal. The appellants might, however, have the execution stayed upon giving security, to the satisfaction of a Judge, for the judgment debt and costs. Costs of motion to be costs in the appeal.

ROBERTSON, J. MAY 15TH, 1902.

CHAMBERS.

McLAUGHLIN v. McLAUGHLIN.

Costs—Partition Proceeding—Taxed Costs—Special Circumstances.

An application by the plaintiffs for an order allowing taxed costs instead of the usual commission in a summary proceeding for partition or sale of land, upon the ground that an unusual amount of time and trouble had necessarily been expended by the plaintiffs' solicitor in the proceedings.

J. G. O'Donoghue, for plaintiffs.

F. W. Harcourt, for infant defendants.

E. J. B. Duncan, for adult defendants.

ROBERTSON, J.—I have carefully considered this matter, and, in my judgment, it is an exceptional case, and the plaintiffs' solicitor should be allowed his costs according to the tariff, instead of commission under Rule 146.

MAY 19TH, 1902.

DIVISIONAL COURT.

Re SNURE AND DAVIS.

Landlord and Tenant—Overholding Tenants Act, R. S. O. ch. 171—Breach of Covenant in Lease—Chattel Mortgage made by Mother of Tenant—"Wrongful" Refusal to Go Out of Possession—"Clearly"—Upon Certiorari, the Court can Look only at the Proceedings and Evidence Below.

Motion by Loyal Davis and Elizabeth Davis to set aside an order made by the Judge of the County Court of Lincoln, on the 18th January last, purporting to be made under the Overholding Tenants Act, adjudging that Jacob E. Snure, the landlord, was entitled to the possession of the lands in question, and permitting a writ of possession to issue to put the landlord in possession as against the applicants, the tenants. The applicants contended that their lease had not expired or been determined at the time these proceedings were taken; that nothing was done by the tenants which entitled the landlord to declare a forfeiture of the lease; that there was a bona fide matter of dispute between the parties, and the Judge should not have determined the matter summarily, but should have dismissed the case and left the landlord to his remedy by an ordinary action at law. The landlord distrained for rent by virtue of an acceleration clause to be enforced if the tenants gave a chattel mortgage. The goods on the demised premises were seized and sold under a chattel mortgage made by the mother of one of the tenants.

G. Kerr, for the tenants.

T. Mulvey, for the landlord.

THE COURT (BOYD, C., MEREDITH., C.J.) held that the order should be set aside.

BOYD, C.—Under the Overholding Tenants Act two things must concur to justify the summary interference of the Judge: (1) the tenant must wrongfully refuse to go out of possession, and (2) it must appear to the Judge that the case is clearly one coming under the purview of the Act. The two adverbs ("wrongfully" and "clearly") seem to be used emphatically, and on a consideration of the evidence and proceedings returned, neither requirement is adequately met by the applicant, the landlord. The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, and no such breach as was relied on has in fact taken place.

MEREDITH, C.J.—It is only the proceedings and evidence before the Judge sent up pursuant to a writ of *certiorari* at which we may look for the purpose of determining

what is to be decided by the Court under sec. 6 of the Overholding Tenants Act, R. S. O. ch. 171. There is nothing in that evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord claimed the right to re-enter. The chattel mortgage, the making of which the landlord relied on as having been a breach of that provision, was not made by Davis, but by his mother, who was a stranger to the lease, and the goods embraced in it were her goods, and not his. There was, therefore, but one gale of rent due, that which was payable according to the terms of the lease on the 1st November, 1901, and that having been satisfied by the distress which was made, the landlord had no right to put an end to the lease and to re-enter. Order set aside with costs here and below to be paid by the landlord, and, if necessary, sheriff to be ordered to restore the tenants to their possession.

J. E. Varley, St. Catharines, solicitor for tenant.

M. J. McCarron, St. Catharines, solicitor for landlord.

BRITTON, J. MAY 19TH, 1902.

TRIAL.

McRAE v. S. J. WILSON CO.

Contract—Breach—Damages—Time—Essence of—Waiver.

Action for an account and for damages for breach of contract for purchase by defendants of lumber, tried without a jury at Pembroke.

R. C. McNab, Renfrew, and W. Barclay Craig, Renfrew, for plaintiff.

W. R. Riddell, K.C., and W. H. Irving, for defendants.

BRITTON, J., held that plaintiff was not entitled to recover from defendants the loss by the sale to Cameron & Co. Time was not of the essence. There was a waiver of any time originally agreed on; the contract was treated as subsisting on 18th December, 1899, and after that plaintiff sold without notice to defendants. He also held, that upon the account plaintiff should recover $434, that is, $84 over and above the amount paid into Court by defendants. Judgment for plaintiff for $84 and order for payment out of money in Court, with the general costs of the action. The plaintiff to get no costs as to his claim for damages, and to pay defendants' costs, if any, specially incurred on that branch of the case.

MAY 22ND, 1902.

DIVISIONAL COURT.

BATZOLD v. UPPER.

Evidence—Corroboration—R. S. O. ch. 73, sec. 10—Action against Administrator.

Appeal by plaintiff from the judgment of the County Court of Elgin.

Shirley Denison, for plaintiff.

W. A. Wilson, St. Thomas, for defendant.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The action is brought by the plaintiff, Elizabeth Batzold, a widow, to recover from the defendant, who is the widow and administratrix of one Upper, a sum of $300 alleged to have been intrusted to Upper in his lifetime for investment for the plaintiff.

The action was tried before Hughes, Co. J., and a jury at St. Thomas. The plaintiff swore that she had handed the money in question to the deceased for investment, telling him that it was money which her husband had directed her to lay aside for the benefit of two of her daughters for their education. The only corroboration to her evidence was the statement of Violet Batzold, one of the two daughters in question, who swore that she had heard her mother counting out $20 bills to Upper, and had heard Upper say that she would get a larger interest than if she paid it into the bank, and that she could have the money back when she wanted it.

The defendant moved for a nonsuit on the ground that there was no corroboration. The learned Judge left the following questions to the jury:

1. Did Mrs. Batzold pay or hand over any money to Mr. Upper? The answer was, "Yes."

2. How much money, if any? Answer, "$300."

3. Was it handed to Mr. Upper to invest for her daughters, including Violet Batzold? Answer, "Yes."

The 4th question is of no importance here. The 5th question was: "For what purpose was the money handed to Mr. Upper, if it was not for the benefit of the daughters? Answer, "For no other purpose."

The Judge, having reserved the defendant's motion for a nonsuit, considered that and the plaintiff's motion for

judgment on the findings of the jury together, and gave judgment dismissing the action with costs, upon the ground that Violet Batzold was an interested party, and that her evidence was, therefore, no corroboration of that of the plaintiff, her mother; and further, upon the ground that upon the findings of the jury the plaintiff had no interest in the money after handing it over to Upper to invest for her daughters, who thereafter became entitled to it.

The defendant in her pleadings in this action has merely denied the receipt by the deceased of the money claimed by the plaintiff; she has not set up any *jus tertii*, nor was any suggestion made from beginning to end of the trial that the plaintiff was not entitled to recover the money if the jury found that she had handed it to the deceased. The questions fought out were: 1st. Did the plaintiff hand the money to the deceased? 2nd. If she did, was the witness Violet Batzold interested in it as a cestui que trust? The latter question was considered because of the possible bearing it might have upon the sufficiency of the corroboration of the plaintiff's evidence. The questions submitted to the jury must be read in the light of the evidence and the contentions raised at the trial. The 3rd and 5th questions must, therefore, be construed as intended merely to raise the question whether the daughters were interested in the money as cestuis que trust, and the answers to them as affirming that they were, for there was no evidence that the plaintiff had intended to part with her legal title to the money, and the jury were not asked to consider that question at all, nor was it raised either upon the pleadings or otherwise. We must take it, however, that, in the opinion of the jury, the plaintiff was a trustee of the money for the benefit of her two daughters, of whom Violet Batzold, the witness, was one, and the question is, whether the plaintiff's evidence was sufficiently corroborated as required by the statute by the evidence of Violet Batzold. In point of substance, I think there can be no doubt that the facts sworn to by her were sufficient corroboration. She says she heard her mother counting out money to Upper, and that Upper said "it was all right, she could get it any time she wanted it," and "that she would get a larger interest on the money than if she paid it into the bank." These statements were consistent only with the story told by the plaintiff of the matter, and were entirely inconsistent with the suggested explanation that the plaintiff was merely paying Upper the rent she owed him. The jury were at liberty to refuse to believe them if they thought proper, but they were properly charged that the plaintiff was not entitled to a verdict without corroboration, and they have found in her favour, so it must be assumed that they believed Violet Batzold's story.

The only question remaining to be determined, therefore, is, whether Violet Batzold's evidence for any reason should be held to be insufficient corroboration of that of the plaintiff, because of the fact that she was a cestui que trust of the money in question.

R. S. O. ch. 73, sec. 10, applied to the present case, means that Mrs. Batzold cannot obtain a verdict on her own evidence unless she has been corroborated by some other material evidence. The evidence of Violet Batzold was, in my opinion, material evidence corroborating that of the plaintiff, and there is nothing in the Act which would justify a Judge in declining to submit it to the jury as corroboration. Her interest in the result might well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration.

In my opinion, the appeal must be allowed with costs, and the judgment of the Court below must be set aside, and a verdict entered for the plaintiff for $300 with interest at five per cent. from 13th August, 1899, and costs.

J. A. Robinson, St. Thomas, solicitor for plaintiff.

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

MAY 22ND, 1902.

DIVISIONAL COURT.

LLOYD v. WALKER.

Assessment and Taxes—"Owner"—Agreement to Purchase from Mortgagee Pending Foreclosure—Possession—Name not on Roll, nor Person Assessed—R. S. O. ch. 224, sec. 135, sub-sec. (1), cl. 3—Lease—Estoppel.

Appeal by defendant from judgment of County Court of York in action brought to restrain defendant, the tax collector for the township of Whitchurch, from selling, under a distress warrant for arrears of taxes upon a certain farm lot in that township, a quantity of building material, cedar posts, etc., found thereon, and admitted to be the property of the plaintiff. One Pegg, the owner of the farm lot, mortgaged it, in 1895, to the Independent Order of Foresters, and in July, 1899, the mortgagees in possession made an agreement to sell to plaintiff, upon certain terms, as soon as they had completed pending foreclosure proceedings. In the meantime, the plaintiff was to have possession, manage

the property, etc., make sales subject to approval of mortgagees, and to render them accounts. Pending the foreclosure proceedings the plaintiff joined with the mortgagees in making a lease of a portion of the lot to one Kerr. The plaintiff was not assessed for the property, and the taxes were not charged against him by name in the collector's roll.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

S. B. Woods, for defendant.

J. J. Warren, for plaintiff.

STREET, J.—In my opinion, it is clear from the provisions of this agreement that the plaintiff's rights as purchaser were not to take effect *in praesenti*, nor until the foreclosure should be completed, and were to be dependent upon the happening of that event. Until that time arrived he was to pay no part of the purchase money, and was to manage the property as the mortgagees' servant during his good behaviour only. No other construction can be placed upon the agreement consistently with the obvious intention of the parties that the mortgagees should proceed to foreclose their mortgage, preparatory to carrying their agreement into effect; for, if the agreement had provided for an immediate acquisition by the now plaintiff Lloyd of the mortgagees' rights, they could not have prosecuted the foreclosure proceedings in their own name. It is only upon the construction, which I think is the proper one, upon the terms of the agreement, that the mortgagees were to remain owners of the mortgage until the completion of the foreclosure, and were then to convey to the plaintiff, that the proceedings for foreclosure can be treated as regular: Scott v. Benedict, 9 C. L. T. Occ. N. 181.

As the plaintiff had no estate in the land, and no possession of it save as agent for the mortgagees, and was only to become entitled to an estate in it upon the happening of an uncertain future event, he cannot, in my judgment, be held to be the "owner" of it, upon even the most liberal construction of that word, and the action was, therefore, properly dismissed.

I have not failed to notice that the plaintiff joined with the mortgagees, pending the foreclosure proceedings, in a lease, to one Kerr, of the premises. That circumstance, however, does not seem to affect the question, when the terms of the lease are considered. The lease is expressly made dependent upon the continuance of the rights of the mortgages, and is to terminate if the mortgagor should

redeem. The plaintiff in the present action is properly made a party to it, because under the agreement between him and the mortgagees it would be improper for them to enter into such a lease without his express authority.

FALCONBRIDGE, C.J:—I concur.

BRITTON, J.:—I think a mortgagee in possession would be an "owner" whose goods would be liable to seizure for taxes.

A person who goes into possession under an absolute agreement with the owner of the equity of redemption, or with the mortgagee, to purchase, would, in my opinion, be an "owner" within the meaning, and for the purposes of, cl. 3 of sub-sec. (1) of sec. 135 of the Assessment Act, R. S. O. ch. 224.

Appeal dismissed with costs; BRITTON, J., diss.

J. J. Warren, Toronto, solicitor for plaintiff.

T. Herbert Lennox, Toronto, solicitor for defendant.

BOYD, C. MAY 19TH, 1902.

WEEKLY COURT.

Re C. P. R. CO. AND CITY OF TORONTO

Landlord and Tenant—Agreement for Lease—Covenants—Taxes—Local Improvement Rate—Re-entry—Repair—Interest—Exemption—R. S. O. ch. 224, sec. 7, sub-sec. 7.

Appeal by the company from the report of Mr. Cartwright, an official referee, upon a reference to him to settle the terms of a lease of lands by the city corporation to the company.

E. D. Armour, K.C., and Angus MacMurchy, for the company.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the corporation.

BOYD, C.:—As to the covenant to pay taxes, the company, having possession of the property under lease from the city "for successive terms of 50 years each during all time to come," are for all practical purposes, and within the meaning of the Assessment Act, the owners, and as such liable for taxes without recourse to the owner in fee. But, apart

from this, while held as property of the city, this place was not subject to taxation, yet when occupied by a tenant or lessee the exemption is removed and the property so circumstanced becomes taxable: R. S. O. ch. 224, sec. 7, sub-sec. 7.

The incidence of such taxation plainly falls upon the tenant or lessee, and not upon the city. It is strictly a tenant's tax, or tax payable by the tenant, and not in any event payable by the landlord as between him and the tenant. Whether the leasehold property held by the city in fee and occupied by the company as tenants is to be considered as land exempt from taxation, and only the interest of the tenant assessable in respect of his beneficial occupation, or whether it be that the tax is imposed on the land in respect of the occupation by the tenant of the municipality, either way the person to pay the taxes is the tenant, and not the landlord. There is no liability on this landlord to pay in respect of the occupation of this tenant, and if this position be correct, sec. 26 has no application, for that applies to taxes which can legally be recovered from the owner and no other. These are payable by the tenant, and cannot be deducted from the rent or recovered from any other source by the tenant, who is alone liable. As to the special agreement validated by statute, by its very terms it is not self-contained (so to speak). It contemplates and provides for the execution of a lease to carry out the contract. In itself it is silent on the matter of taxes, and to insert a proviso or covenant for the payment of taxes by the occupant or tenant of the city property is not repugnant to anything contained or expresed or even implied in that validated agreement.

Appeal dismissed upon the ground relating to covenant to pay taxes inserted in lease in question, but covenant should be inserted as to all works agreed to be performed and provided by the city in the validated agreement; in respect of this no local improvement rate should be levied upon the property. Appeal allowed as to the insertion of a covenant to repair in the lease in question, and it should be struck out. The covenant as to re-entry should be limited to non-payment of rent, and report varied accordingly. Appeal as to interest on gales of rent in arrear allowed, and report varied accordingly. In other respects appeal dismissed. Costs of appeal to be taxed and paid to the city corporation, less one-fifth to be deducted as representing the points on which the company succeeded.

MacMurchy, Denison, & Henderson, Toronto, solicitors for the company.

T. Caswell, Toronto, solicitor for the corporation.

ROBERTSON, J. MAY 22ND, 1902.

WEEKLY COURT.

CLARRY v. BRODIE.

Injunction—Undertaking to Speed Trial—Breach of.

Motion by defendants to dissolve an injunction for alleged breach of undertaking to speed the trial.

S. C. Smoke, for defendants.

H. S. Osler, for plaintiff.

ROBERTSON, J.:—I think the plaintiff has not quite satisfactorily accounted for the delay, as the case was due to be entered for trial immediately after the 17th February; and if it had been reached in 3 weeks thereafter would be due to be entered on the peremptory list. But defendant could have so entered it, as well as plaintiff; and when called, if plaintiff was not then ready, the trial would be put off on cause being shewn to the satisfaction of the trial Judge. So that I think, on the whole, there is no case made out, on the grounds alleged, to warrant me in dissolving the injunction; and I am obliged to dismiss the motion, but, under the circumstances, only with costs in the cause to the successful party.

MAY 19TH, 1902.

DIVISIONAL COURT.

RE CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Public School—School Site—Change of—Meeting of Ratepayers—Invalid Arbitration and Award—Mandamus—59 Vict. ch. 70, sec. 31, sub-sec. 3 (O.)

Appeal by the trustees from an order of FALCONBRIDGE, C.J., dismissing their motion for a mandamus to the township corporation requiring them to pass a by-law for the issue of debentures for $1,000 for the purpose of the purchase of a school site and the erection of a school house thereon, and to issue the debentures as they should be required by the appellants. All steps necessary to entitle the appellants to require the by-law to be passed and the debentures to be issued were regularly and properly taken, unless the proceedings to change the school site were adopted in contravention of the provisions of sec. 31, sub-sec. 3, of the Public

Schools Act, 59 Vict. ch. 70, because of an award made on 24th February, 1899, determining that no change should be made in the site, which, if a valid award, according to the provisions of the sub-section, was to be binding for at least five years after its date.

W. R. Riddell, K.C., for appellants. This award is invalid. It is void because, according to sec. 31, sub-sec. 2, it is only after the trustees have decided upon a change of site, and thereafter at the meeting of the ratepayers of the section called pursuant to sub-sec. 1, a difference is found to exist between a majority of the ratepayers present at the meeting and the trustees as to the suitability of the site selected by the trustees, that an arbitration is to take place, and because the trustees did not, before the special meeting of the ratepayers in 1899, make any selection of a site. It also appears that the majority of the ratepayers voted in favour of a change of site, and that the question was submitted to and dealt with by the ratepayers without any selection of site having been first made by the trustees.

H. F. Hunter, Bowmanville, for respondents.

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

MEREDITH, C.J.:—After the best consideration I have been able to give to the matter, and reading the section in the light of the history and course of the legislation on the subject with which it deals, it appears to me that "the selection of a site for a new school house" means a selection of a site for a school house in a newly established school section, and probably also the selection of a site for an additional school house, if that is thought to be necessary to be provided. The mode of doing this which is prescribed is, first, the selection of the school site by the trustees, then, the calling of a special meeting of the ratepayers of the section to consider the site selected, when, if the majority of the ratepayers present at the meeting approve of the selection made, the site is adopted, but, if a majority of the ratepayers differ from the trustees as to the suitability of the site selected, an arbitration takes place, and the arbitrators are authorized to make and publish an award upon the matter submitted to them; and that the other case provided for, "the change of site for an existing school house," is where a site has once been chosen and a school house has been provided, but it is thought by the trustees to be desirable that that site should be abandoned and a new site chosen on which the school house of the section is to stand, and that

in that case the trustees are empowered to agree upon a change of site, but it cannot be made without the consent of a majority of the ratepayers present at a special meeting called for the purpose of considering the site selected by the trustees, unless where the majority of the ratepayers present at the meeting differ from the trustees as to the suitability of the site selected by the trustees, the result of the arbitration provided for is an award in favour of the decision come to by the trustees.

If this be so, a determination of the trustees not to change the site, but to erect a new school house on the existing site, is not within the section.

It was at one time expressly provided that, if the ratepayers did not assent to a change of site proposed by the trustees, the change could not be made, but the more recent legislation modified this provision so that the change may be made though the majority of the ratepayers are opposed to it, if the result of the arbitration is a determination in favour of the view of the trustees.

In every one of the forms in which the subject of the selection of a site for a new school house or the change of site is dealt with, provision is made for a decision being first come to by the trustees, and I find nowhere in any legislation on the subject, including the section (59 Vict. ch. 70, sec. 31) under consideration, any ground for the view that the ratepayers may initiate proceedings for either purpose. Their intervention is to take place after, and only after, the trustees have come to a decision, and, subject to the provision as to the effect of the award of the arbitrators, it is to control the action which the trustees have determined upon and to prevent effect being given to the decision of the trustees if it is opposed to their (i.e., the ratepayers') view as to what ought to be done.

This distinction is not one of mere form, but of substance, and the provision as to the meeting of the ratepayers is, in effect, the application of the principle of the referendum, with a provision for arbitration if the vote of the ratepayers is in the negative on the proposition submitted to their vote.

I am of opinion, for the reasons I have given, that the position taken by the appellants that the arbitration and award set up by the respondents were unauthorized and nugatory, is well taken.

The learned Chief Justice was of the opinion that, the award being on the face of it a valid award, it was not proper to determine the questions raised as to it on the motion of the appellants for a mandamus.

I am, with respect, unable to agree with that view. I do not see in what way the validity of the award is to be determined unless it be on the application for the mandamus. The award having been made, as I think, without jurisdiction, it is not necessary that it should be set aside; it was mere waste paper, and the only objection taken, or that could be taken, to the application made by the appellants to the respondents to pass the by-law, therefore, falls to the ground.

I would allow the appeal, discharge the order of the learned Chief Justice, and substitute for it an order for the issue of the mandamus as asked, with costs.

Simpson & Blair, Bowmanville, solicitors for the applicants.

H. F. Hunter, Bowmanville, solicitor for the respondents.