The
Ontario Weekly Notes

VOL. VI. TORONTO, MAY 15, 1914. No. 10.

APPELLATE DIVISION.

MAY 5TH, 1914.

RE ROCQUE.

Will—Construction—Residuary Bequest—Division of Residue among three Children and one Grandchild—One of the Children Dead at Date of Will, but Leaving Children—Right of Children to Parent's Share—Wills Act, 1910, *sec.* 37—*Costs.*

Appeal by William Hague and others, the children of Catharine A. Hague, a daughter of Margaret Jane Rocque, the testatrix, from the judgment of MIDDLETON, J., ante 36, construing the will of the testatrix, and declaring an intestacy as to one-fourth of the residuary estate, bequeathed to Catharine A. Hague, who had died before the execution of the will, leaving surviving her issue living at the death of the testatrix and now before the Court.

Section 37 of the Wills Act, 10 Edw. VII. ch. 57, provides: "Where any person, being a child or other issue of the testator, to whom any real estate or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will."

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. D. McPherson, K.C., for the appellants.

E. T. Coatsworth, for the executors.

J. R. Meredith, for the infants.

THE COURT allowed the appeal, holding that the appellants were entitled to their deceased's mother's share under the above-quoted section of the Wills Act. It made no difference that the death of Catharine A. Hague occurred before that of the testatrix. The Court consulted the learned Judge, and it appeared that the section had not been brought to his attention and was not present to his mind at the time of giving judgment. The learned Judge agreed that the judgment could not stand, but should be reversed.

As the judgment had been pronounced per incuriam, and there was no real contest made by the respondents, costs of all parties were given out of the fund in controversy.

MAY 7TH, 1914.

GEORGE WHITE & SONS CO. LIMITED v. HOBBS.

Sale of Goods—Action for Price of Engine Sold—Defects—Oral Representation of Agent of Vendor—Provisions of Written Agreement—Notice of Defects—Imputed Knowledge of Contents of Written Agreement.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 659.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

T. N. Phelan, for the appellant.

I. F. Hellmuth, K.C., for the plaintiffs, respondents.

THE COURT affirmed the judgment, with a modification, the terms of which are to be agreed upon by counsel or settled by one of the Judges. Costs to be paid by the appellant.

MAY 7TH, 1914.

GNAM v. McNEIL.

Contract—Settlement of Action—Intervention of Stranger—Promise to Pay Costs—Withdrawal of Action—Performance of Promise—Failure to Prove Promise to Pay Damages—Statute of Frauds.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 223.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and LEITCH, JJ.

H. H. Dewart, K.C., and D. S. McMillan, for the appellant.

D. L. McCarthy, K.C., and T. L. Monahan, for the defendant, the respondent.

THE COURT dismissed the appeal, with costs if asked for.

HIGH COURT DIVISION.

LATCHFORD, J. MAY 4TH, 1914.

RE MITCHELL.

Will—Construction—Codicils—Annuities, whether Payable out of Income or Corpus.

Motion by the widow of Thomas Mitchell, deceased, for an order determining the question whether, under his will and two codicils, certain annuities were to be paid out of the income or the corpus of his estate.

G. C. Thomson, for the widow.

J. G. Farmer, K.C., for the executors and the representative of a class of persons interested.

J. R. Meredith, for the Official Guardian.

G. M. Willoughby, for the Inspector of Prisons and Public Charities.

LATCHFORD, J.:—The corpus consists of realty, $2,900, and personalty, $8,626.25. The testator's widow is to have by the will the benefit and use of all the real and personal estate during her lifetime, "provided she pays all taxes rates interest on incumbrances and keeps the property in at least as good a state of repair at death." There is, however, a subsequent devise in fee of a parcel of land, valued at $300, to a brother of the testator. On the death of his wife, there is a gift over of the "property" to relatives of the testator.

By the first codicil—omitting what is not material—the interest only on a certain mortgage is bequeathed to his wife, and, when the principal is paid, it is to be reinvested, and upon the wife's death is to pass into the residue of the estate. An annuity for life of $100 a year, "to be paid from my estate," is given to a half-sister.

By the second codicil three annuities are given—two of $25 a year for ten years, and a third of $50 a year for ten years, should the person benefited so long live. In none of these latter cases is any direction given as to what the annuities shall be paid from.

There are also in this codicil legacies of personal belongings, about which no question arises, except that they are excluded from the bequest to Mrs. Mitchell of the benefit and use to which she may put the personalty.

As to the bequest in the will, the intention of the testator is plainly that his wife shall have the use for life of all the estate of the testator, subject only to the one provision as to the payment of taxes and the maintenance of the buildings on the realty in good repair. What is so bequeathed to her cannot be charged with any of the annuities, unless an intention so to charge it can be deduced from the will or codicils. No such intention appears. To charge any annuity upon the mortgage would be to diminish the income from it. A charge upon the remainder of the personal estate, to the benefit and use of all of which Mrs. Mitchell is entitled for life, would limit beyond the terms of the will the "benefit and use" expressly granted to her. Only the real property, in which the widow has a life interest, remains, and it is out of this alone, in my opinion, that the annuities can be paid.

Costs of all parties out of the estate.

MEREDITH, C.J.C.P., IN CHAMBERS. MAY 5TH, 1914.

REX v. TITCHMARSH.

Criminal Law—Conviction—Motion to Quash—Practice—Writ of Certiorari—Rules of Supreme Court of Ontario Made in 1908—Criminal Code, sec. 576—Authority to Make Rules—Judicature Act, sec. 63—"Magistrate"—"Justices of the Peace"—Interpretation Act, secs. 29(m), (r), 34 (15)—Criminal Code, sec. 2(18)—Powers of Provincial Legislature—Criminal Procedure—Power to Regulate Practice in Certiorari—Power to Abolish Writ—Refusal of Motion for Certiorari—Leave to Appeal.

Motion by the defendant, ex parte, for a writ of certiorari to remove a criminal conviction into the Supreme Court of Ontario, with a view to having it quashed.

J. B. Mackenzie, for the applicant.

MEREDITH, C.J.C.P.:—Mr. Mackenzie's unflagging industry, in his searches for such purposes, has discovered two matters which, he contends, shew that there has been a serious flaw in the practice prevailing in this Province upon applications to quash convictions for crimes; and, as a consequence of his discoveries, he asks for a reversion to the older practice which prevailed for so many years before, and until, the adoption of the present practice, in the year 1908, under Rules of Court framed, in the first instance, by Mabee, J.

His points are: that no Court, such as that authorised, in sec. 576 of the Criminal Code, to make Rules respecting the practice in criminal matters, in this Province, now exists; and, therefore, that the Rules made, at the time I have mentioned, have ceased to have any effect; and that sec. 63 of the Judicature Act is not applicable to this case, because it deals with convictions made by a "magistrate" only, whilst the conviction in question was made by "Justices of the Peace;" and this point is persisted in, notwithstanding the meaning given to the word "magistrate" in the Interpretation Act, sec. 29 (m) and (r), and in the Interpretation Act, sec. 34 (15), because there is an interpretation of the word "Justice" contained in the Criminal Code, under which the conviction in question was made, and that interpretation, whilst it includes a "Police Magistrate," does not include "magistrates" generally: sec. 2 (18).

These contentions seemed and still seem to me to have no weight; but another point forced itself upon me during the argument, a point which seemed to me to be of sufficient weight to require further consideration before disposing of the application.

Regarding the points made by Mr. Mackenzie, it may not be at all necessary, for any general purpose, to repeat that which was said respecting them during the argument; but, so that the applicant may be under no misapprehension respecting them, I shall do so.

If the Rules of 1908 were well made, why should they fall, even if there were no Court now competent to make any such Rules? There seem to be but two provisions contained in them that might be affected by such a state of affairs, if it really existed: the first is the Rule numbered 1284, which provides that the motion to quash shall be made to a Judge of the High Court of Justice for Ontario, sitting in Chambers; and the other—Rule numbered 1287—is that which gives a right of appeal, by leave, to a "Divisional Court."

There is no reason why the Rules, as far as they are applicable, should not be applied by any Court, in the Province, having power to quash convictions. Why should they cease to have force and effect any more than the Act itself should?

But it is quite erroneous to say that no such body, or that no such Court, now exists: the same body and the same Court exist, with the exception of the "Divisional Court," and they have existed all along, entitled to exercise and exercising the same powers, and performing the same duties: the name has been, in some respects, changed, and the manner of performing such duties, and exercising such powers, has been in some respects varied; but nothing more.

If, however, Mr. Mackenzie were quite right in his contentions, that quite a new Court had come into being, and that there are no Rules, or practice, applicable to it, why should not such Court adopt as its practice the procedure embodied in the Mabee Rules? Until some binding legislation, or Rules, should be enacted, the Court, having jurisdiction to quash, could, and would, necessarily, be obliged to lay down some mode of procedure. See Robinson v. Bland, 1 W. Bl. 264.

Upon the other point, there was no need of any deep study of the meaning of the word "magistrate;" nor of the exercise of any ingenuity in a vain endeavour to overcome the plain words of the interpretation enactments; because, obviously, the

provisions of the Judicature Act cannot apply to this case. Being a provincial enactment, it can have no effect on procedure in criminal matters; which a motion to quash a conviction of a crime must be; because such procedure comes within the exclusive legislative power of the Parliament of Canada, and is excluded from the legislative power of Provincial Legislatures: the British North America Act, 1867, sec. 91, sub-sec. 27; and sec. 92, sub-sec. 14.

So that Mr. Mackenzie's points seem to me to be, obviously, quite ineffectual.

But I still have some trouble with the question whether there was any power to make the Rules of 1908.

They were made, in so far as they were to be applicable to criminal matters, under the section of the Criminal Code, now numbered 576, which conferred all such power as was intended to be exercised in making the Rules in these words: " . . . may . . . make Rules of Court; . . .,—(6) for regulating in criminal matters the pleadings, practice and procedure in the Court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail, and costs . . . and (c) generally for regulating the duties of the officers of the Court and every other matter deemed expedient for the better attaining the ends of justice and carrying the provisions of the law into effect . . ."

The general words of the section are, I think, restricted by these words, covering the very subject in question; and, having regard especially to the words, "including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto," I find it difficult to get out of my mind the doubt whether there was power to do more than regulate the practice in certiorari proceedings—the doubt whether there was power to abolish the certiorari altogether, and substitute another proceeding for it.

Abolition, as well as prohibition, is quite incompatible with regulation: you cannot regulate that which you have destroyed, or even prohibited. This is obvious; the one question is: Do these Rules abolish "certiorari"?; and that depends upon the question: what is certiorari?

What certiorari is, is not in any sense uncertain. Every one at all familiar with the practice of the Courts of Law knows that certiorari is, in such Courts, a writ; a writ issued out of a Court of law, having power to grant it, in the name of the Sovereign and tested by the Chief Justice, by virtue of that

Court's superintending authority over all Courts of inferior criminal jurisdiction in the Province, for the purpose of a supervision of any of their proceedings which may be investigated in such Superior Court. Except in cases in which legislation has provided for an appeal, the writ of certiorari is the only mode by which a revision of proceedings on summary convictions can be had in a higher Court.

Therefore, to abolish the writ of certiorari is to abolish "certiorari;" and, having regard to the well-known, the unmistakable, meaning of the word, under a practice that has continued for hundreds of years, there can be no manner of doubt that Parliament, in making use of the word "certiorari," intended it to carry that plain meaning: that is made doubly certain by the use of the other technical words associated with it, "habeas corpus," "mandamus," "quo warranto."

No reasonable person, having a knowledge of the subject, would contend that power given to regulate the practice on the subject of writs of habeas corpus in criminal cases, conferred power to abolish the writ altogether; and yet, if there was power to do away with the writ of certiorari, there was, equally, power to abolish the writ of habeas corpus and the other writs named in the legislation; quite too great a power to be acted upon if there were, at the most, even only a doubt as to the power; quite too much power to assume on doubtful language. Though I am strongly in favour of abolishing all writs, and all other unnecessary proceedings, and have long advocated it, that cannot rightly be done, in such a case as this, without clear legislative authority.

Parliament has not said, unrestrictedly, that the Provincial Court may create a practice in all criminal matters, nor that it may change the practice altogether; its language is quite restrictive in dealing with this particular subject; the Court may only regulate the practice in "certiorari"; that is, the familiar, long-continued practice under the writ of certiorari; it may not expressly even regulate the practice on motion to quash convictions, but only in certiorari.

But the applicant has not relied upon this ground, and may not desire to do so, and as, ever since the making of the Rules, the Courts have acted upon them, the better way to deal with this motion is to dismiss it, and give leave, under these Rules, to the applicant, to appeal; an appeal which, if taken, will also answer the purpose of determining whether there is any Court to which an appeal can be made now.

I have delayed disposing of this application so as to learn whether the question I have last dealt with was discussed at the time of the making of the Rules; and am now informed that it was, and that the view then entertained was, that the Rules are intra vires; but, of course, that does not bind any one; the appellant is entitled, if he desires to do so, to have the point judicially determined.

The application is refused; and leave to appeal is given.

MEREDITH, C.J.C.P. MAY 5TH, 1914.

*RE INTERNATIONAL ELECTRIC CO. LIMITED.

McMAHON'S CASE.

Company — Winding-up — Contributories — Executors of Deceased Person—Liability for Unpaid Shares—Evidence that Deceased was a Shareholder—Onus—Application for Shares —Notice of Allotment—Conduct—Meetings of Shareholders and Directors—Minutes—Entries in Books—Ontario Companies Act, sec. 121—*Winding-up Act, sec.* 144—*Repudiation of Liability—Compromise of Liability—Validity.*

Appeal by the liquidators of the company from the finding of a Referee, in a winding-up proceeding, that one McMahon, deceased, was not at the time of his death the holder of unpaid-for shares in the company, for the payment of which the respondents, his executors, were liable.

F. Arnoldi, K.C., for the appellants.

T. G. Meredith, K.C., for the respondents.

MEREDITH, C.J.C.P.:— . . . The appellants allege that McMahon, at the time of his death, was the holder of 50 unpaid shares of the capital stock of this company, and so his estate is liable to them for $1,250, the shares having been issued, and taken up, at $25 each. The defences raised by the respondents are: (1) a denial that McMahon ever was a shareholder of the company; (2) an allegation that, if he ever were, he became a shareholder under such circumstances as render the trans-

*To be reported in the Ontario Law Reports.

action invalid; and (3) an allegation that, in any case, a compromise of all claims of the company against him, in respect of any ownership of shares, was made in good faith by him with the company, many years ago, by which all such claims were satisfied and discharged.

The learned Referee against whose judgment this appeal is brought found in favour of the appellants on the first ground of defence; but against them on the second; and does not seem to have considered the third.

In dealing with the evidence, the Referee had no advantage over any Court that may have to deal with it now, because the evidence was not taken before him; it was all taken by his predecessor in office, who died after the argument of the case before him and before being able to give judgment in it. The point, whether the present Referee had power to consider the case, without taking the evidence again, was raised before him, but was not renewed here; and, as I understand them, both parties now desire that the case be finally disposed of on the evidence as it stands. . . . The onus of proof of liability is on the appellants, and they must satisfy it just as fully as the company would be bound to do if suing for calls upon its stock.

The appellants must prove that McMahon was a shareholder of the company; that is the first step towards recovery from his estate. Have they done so?

Subscriptions for stock in this company were taken upon a regular form of application for shares. A "broker" was employed to solicit subscription, and was paid a large commission on all subscriptions procured by him.

It is alleged by the appellants that McMahon subscribed for, and was allotted, 50 shares of the stock in the regular and usual manner; but there is no direct evidence of any subscription by him; if his estate be held liable it can be only on circumstantial evidence. The "broker" proved that he solicited McMahon, but was unable to say that he ever subscribed for, or promised to subscribe for, any of the stock; it would have been in the broker's interests to have proved a subscription. No application or other writing purporting to be a subscription or request for or agreement to take any stock in McMahon's name is produced.

The circumstances relied upon as proving that he was a shareholder are: (1) the existence at one time of an application purporting to have been McMahon's; (2) the sending to him by post of notice of the allotment to him of 50 shares; and (3) his conduct at a meeting of the directors of the company, and also

at a meeting of its shareholders, as recorded in minutes of such meetings.

Much reliance was placed also upon entries in the books of the company, including the minute books. But I am unable to perceive how the books of the company can be considered legal evidence against the respondents. How can they be such evidence any more than entries in McMahon's books would be evidence against the appellants? I mean, of course, in such a case as this. Entries in private books may, of course, in proper instances, be used to refresh memories, but are not, in themselves, evidence, in such a case as this.

The Ontario Companies Act, under which, I understand, this company was incorporated, provides (sec. 121) that certain books, which the Act declares shall be kept, shall be prima facie evidence in any action or proceeding "against the corporation or against any shareholder or member;" but how can McMahon be held to have been a shareholder so as to admit such evidence against him until he is otherwise proved to have been a shareholder? The books are evidence against the company and those who comprise the company; that is reasonable; but it would be most unreasonable to use the books of the company against any one alleged to be a member of it until such membership should be proved.

The Winding-up Act, under which, properly or improperly, these proceedings are being taken, provides (sec. 144) that, "as between contributories of the company," its books shall be prima facie evidence; but this matter is not one between contributories; it is, as I have said, one between a creditor of the company and persons proceeded against as shareholders of the company; the contributories take no part or lot in it; it is a roundabout way of doing that which might directly be done under the creditor's writ of execution. And I have more than once said that no application for a winding-up order would ever be granted by me when sought for the sole purpose of enforcing a single creditor's claim in a case where such claims could be as well enforced in the ordinary method.

Upon the evidence adduced, reasonable men might find that the company at one time had an application for shares purporting to have been signed by McMahon on one of its usual forms; so too they might find that it had not. But there is no evidence whatever that any such application was signed by, or that the signature to it was in the handwriting of, McMahon; the direct

evidence, even of him most likely to have known if McMahon ever signed such a paper, points to the contrary. . . .

Those connected with the company . . . falsely represented in bold print upon the company's prospectus that McMahon was president of the company, and thereby, if the evidence is believed, induced some persons to take stock who otherwise would not have done so.

Reasonable men might find also, upon the evidence, that notice of the allotment of 50 shares of the company's stock to McMahon had been posted, addressed to him; but there is no assertion that it was registered, and so was not good notice under the provisions of the Ontario Companies Act, sec. 140, if McMahon were a shareholder. But, even if it could be found that McMahon received the notice, it would afford little, if any, circumstantial evidence that he was a shareholder, because not only was there no evidence of actual acquiescence in the allotment, but, soon after the time when the notice is said to have been sent, McMahon was active and strong in repudiation of any connection with the company: it may possibly have been such a notice that gave cause for this activity.

The great weight of the evidence is in favour of his having repudiated the setting down of him as a shareholder, as well as the setting down and advertising of him as president of the company. . . .

The learned Refereee seems to me to have erred, in dealing with this question, in two respects: (1) in substantially accepting the entries in the company's books as evidence, in themselves, against the respondent; and (2) in holding McMahon bound by the words of the company's resolution in the settlement with him as if they were his own, and not only holding him so bound but also bound by such conclusions as the Referee thought flowed logically from them. . . . The Referee was led finally to his conclusion against the respondents on the short ground that "the man who paid a smaller sum in full of his subscription must have been a subscriber." But in the next sentence the Referee declares that McMahon "certainly repudiated his liability;" and there is no suggestion that he repudiated liability on any ground but the one that he was not a subscriber. The ground upon which the Referee has held that he was not liable does not seem to have occurred to any one until it was raised in these proceedings.

As I have pointed out, the words of the resolution relied upon by the Referee . . . are not McMahon's, but are those of the

company seeking to fasten upon him the liability which he "repudiated." . . .

McMahon's statement was, according to the witnesses, that he was not liable, but that, to help those who asserted that they had ben misled by the unauthorised use of his name, he would contribute towards the fund that was being raised with a view to satisfying every one. Why should not the company be as much bound by his words, and by all logical deductions from them, as he by theirs?

But, even if one were so unreasonable as to be unwilling to accept anything but a literal interpretation of the resolution of the company as absolutely binding upon McMahon, was the Referee justified in thinking that they must mean a payment in respect of the subscription for 50 shares made before the meeting? Assuredly he was not. McMahon, according to the Referee, repudiated any such liability; and, according to the great weight of the evidence, denied that he was either shareholder or president of the company. The compromise made provided, in effect, that he should subscribe for 10 shares of the stock of the company, which he should pay for at the nominal value of $25 each, and that he should pay an additional $70; both of which he did. In these circumstances why should the words "his subscription" be attributed to the "subscription" he "repudiated," and not to the one he then made for the 10 shares? I am quite unable to find any substantial reason why they should not be read as applicable to the only subscription McMahon is proved to have made. . . .

If McMahon had lived long enough to be a witness on his own behalf—had, before his death, as such a witness, denied ever subscribing for, or accepting, the shares in question, could any judicial officer have hesitated, for a moment, in holding that his estate is not liable? If he should be found to have been liable, I could not but think that death had won the appellants' case. The observation of one of the Lords Justices in the case of Hill v. Wilson, L.R. 8 Ch. 888—though doubtless going too far—as well as the case itself, are of assistance in dealing with any case in which death has disabled a person from testifying on his own behalf.

On this first question involved in this appeal, I can come to no other conclusion than that the appellants have not satisfied the onus of proof, upon them, that McMahon was a subscriber for the 50 shares.

And, treating the entries in the books of the company as

legal evidence against the respondent, I would also unhesitatingly reach the same conclusion. . . .

[Reference to In re Barangah Oil Refining Co., Arnot's Case, 36 Ch.D. 702.]

It is true that it would appear from the evidence that much less was said by McMahon against setting him down as a shareholder than against setting him out as president; but that was only natural; one would not expect anything else. The gravest feature of the case was in the complaint of subscribers that McMahon's name lured them into the company to their loss. Attention would be centred upon that. . . .

I do not stop to consider whether I should or should not agree with the Referee on the ground upon which he held that the respondents are not liable, because it does not seem to me to be needful to go as far as he went, in this respect, in order to defeat the appellants' claim, if subscription for the shares had been proved.

There was a real contest, waged in good faith, between the company and McMahon, as to whether he was liable or not as a shareholder of 50 shares of the company. At a meeting of the company, called for the purpose of considering all such matters, a compromise, made in good faith on both sides, was reached, and a settlement effected, which had been, entirely, carried out years before the winding-up order in this matter was made. Assuredly such a settlement is valid, and cannot now be ripped up by a creditor of the company or by any one else. In Lord Belhaven's Case, 3 De G.J. & S. 41, and in Dixon v. Evans, L.R. 5 H.L. 606, persons who were admittedly shareholders were relieved under a compromise: in such a case as this, necessarily, there must be power to compromise or otherwise release a claim such as this, for, if not, relief would be obtained in an action, whether brought by the company or the alleged shareholder; and the law could hardly compel a company to litigate even a claim in which it was obvious that it must fail. There is no question of reducing the capital stock of the company; the stock remains; there was no question of subscription for it beyond the 10 shares.

The appeal must be dismissed with costs.

KELLY, J. MAY 8TH, 1914.

RE CARR.

Will—Construction—Devise of Farm to Trustees—Trust for Payment of Income or Portion thereof for Maintenance and Education of Daughter during Minority and after Majority to Pay whole Income to Daughter during Lifetime—Right of Daughter to Accumulations of Rentals during Minority—Interest on Accumulations.

Application by Alice Marcella Carr for an order determining certain questions arising upon the construction of the will of Stephen Carr, deceased.

H. A. Ward, K.C., for the applicant.
H. S. White, for Catherine A. A. Carr.
W. F. Kerr, for Annie Grandy.
H. H. Chisholm, for the executors.

KELLY, J.:—On the argument, the question as to the widow's rights in respect of the dwelling-house which the testator contemplated purchasing was abandoned.

The next question is, whether the deceased's daughter Catherine Agnes Alexandria Carr, who has now attained her majority, is or is not entitled to the accumulated rentals of the farm in the township of Hope referred to in clause 6 of the will. The answer to that question must clearly be that she is not entitled to the rents which had accumulated prior to her attaining majority and which had not been paid to her or for her benefit. The testator's direction is, that the trustees, to whom the farm is devised in trust, are "to pay the net income" (of this farm) "or so much of said net income as my trustees may deem necessary for such purposes to my said wife for the support maintenance and education of my said daughter during her minority" and "to pay such net income to my said daughter from the time she attains the age of 21 years for and during her natural life for her own use and benefit absolutely." Not only is there no direction or provision for payment to the daughter at any time of the income accumulated during her minority, but there is found later on in the will an express direction that on her death the trustees are to stand seized of the trust estate "lands moneys investments and all accumulated or unused in-

come'' in trust for other persons there designated. The intention of the testator is thus clearly indicated.

The next question submitted (which was added at the time of the argument) is, whether this daughter is or is not entitled to the accumulations from the moneys referred to in paragraph 5 of the will. The answer to this question must be the same as that to the previous one.

The third inquiry is, whether the daughter, if found not entitled to the accumulations of rent, is entitled (a) to the accumulated interest on such accumulations of rent up to the time of her coming of age, and (b) to the interest on such accumulations after her coming of age. My opinion is, that she is not entitled to the accumulated interest on the accumulations of rent up to the time of her coming of age, but that she is entitled to income from all such accumulations from the time she attained her majority. This is in accordance with the authorities as I have found them, and is not opposed to what is a reasonable view of the matter.

The costs of the parties are properly payable out of the capital of the estate.

FALCONBRIDGE, C.J.K.B. MAY 8TH, 1914.

*McDONALD v. BOARD OF TRUSTEES OF SCHOOL SECTION 14 LANCASTER.

Schools—Separate School—Trustees of Rural Section—Engagement of Unqualified Teacher—Teaching of French in School—Action for Injunction—Jurisdiction—Separate Schools Act, sec. 80—Domestic Forum—Minister of Education—Parties—Regulations of Department of Education—Language "Prevailing" in School Section—Trustees not Acting in Good Faith—Damages—Costs.

Action for an injunction to restrain the defendants the trustees from employing the defendant Leontine Sénecal as teacher of the school in section 14 and from paying her salary, on the ground that she was not properly qualified under the regulations of the Department of Education, and to restrain the defendants from permitting the French language to be taught in the school.

*To be reported in the Ontario Law Reports.

At the trial, there was evidence both ways as to whether the English or French language prevailed in the section.

The defendants asserted that they had acted in good faith.

The defendants also raised the point that the Court had no jurisdiction; that, under the statutes applicable, the Minister of Education was made the sole arbiter of the issues arising in the action.

J. A. Chisholm and F. T. Costello, for the plaintiff.

J. A. Macintosh and D. Danis, for the defendants.

FALCONBRIDGE, C.J.K.B.:—At the close of the argument I am reported to have said: "I am going to reserve judgment in this case for the purpose of looking into the legal objections that have been raised, particularly into the question of jurisdiction. If I were to dispose of the case to-day, I would hold, first, that the engagement of Miss Sénecal was quite illegal; she had not the necessary qualification, and what qualification she had, had not been validated by the Minister or the Department. I should hold, in the second place, without any hesitation, that the use and teaching of the French language in that section, as at present carried on, are also unauthorised; but I shall reserve the whole case for the purpose of considering the legal matters which have been raised, particularly with reference to the question of costs, with which, of course, the good faith or want of good faith of the trustees has much to do."

The above is practically a judgment on the merits. I have now examined the legal points most ingeniously presented by Mr. MacIntosh.

1. I am clearly of opinion that sec. 80 of the Separate Schools Act, 3 & 4 Geo. V. ch. 71, is not applicable to this case, and therefore does not create a domestic forum for the disposal of it.

2. I am further of the opinion that this action is properly constituted, and that there is no necessity for either the Attorney-General or the Minister of Education being made a party.

3. Having regard to the course taken by the defendants, it does not seem to be necessary to pronounce on the meaning of the word "prevail"—whether it means "gain the mastery, predominate," or whether it means only "exist or be current." Probably it is the former.

The conduct of the defendants in disregarding and defying the rulings and remonstrances of the Department and its officers can be described only as recalcitrant and recusant. If they

are, as they claim and as they seem to be, ignorant men, they ought to have sought competent legal advice; and, having failed so to do, they cannot claim to have acted in good faith.

The rulings of the Department appear to me to have been entirely according to law. This finding is, of course, involved in my pronouncement at the close of the case.

I think that the teacher Leontine Sénecal was a necessary or at least a proper party to the action.

The injunction will go as prayed against all the defendants with $5 damages and costs of suit personally against the defendants other than Mlle. Sénecal.

FULFORD v. FULFORD—LENNOX, J.—MAY 5.

Husband and Wife — Alimony — Desertion — Adultery — Amount of Alimony—Judgment—Registration against Land.] —An action for alimony, tried at Ottawa. The plaintiff and defendant were married on the 31st August, 1886, and lived together till the 15th December, 1908, when the defendant deserted the plaintiff without justification or excuse, as the learned Judge finds. There were eight children of the marriage, of whom several are infants, living with their mother. There is land in Ottawa standing in the name of the defendant, worth $2,000. The plaintiff by her industry contributed to the payment for this property. The defendant is capable of earning $600 to $800 a year. He is living in adultery with another woman. Judgment for payment of alimony by the defendant to the plaintiff at the rate of $450 a year, counting from the 16th January, 1914, payable in equal instalments half-yearly, and for the plaintiff's costs of action, and a certificate of judgment will be registered against the land standing in the name of the defendant. E. J. Daly, for the plaintiff. The defendant was not represented.

MCLARTY v. HAVLIN—KELLY, J.—MAY 8.

Promissory Note—Action against Makers of Joint and Several Note—Denial of Signatures—Allegations of Fraud—Findings of Fact of Trial Judge—Effect of one or more Alleged Makers being Relieved.]—The plaintiff, as the holder of a promissory

note for $1,400, dated the 4th December, 1911, brought this action against fourteen defendants alleged to be the makers thereof. The action was discontinued as against the defendant Havlin; and judgment upon default of appearance was signed against the defendants Murphy and Whitely. The note purported to be signed by all the defendants, and ran, "Six months after date we, jointly and severally, promise to pay," etc. The eleven defendants against whom the action came down for trial denied that they signed the note at all or said that their signatures were obtained through the fraud and misrepresentation of the defendant Havlin, and that they never intended to sign and had no knowledge that they signed a promissory note. The defendant Lacey repudiated his signature when he first had notice of the note being due, and continued to do so. At the trial, he swore that he did not sign the note nor authorise any person to sign for him, and he absolutely repudiated the signature. No direct evidence was given that he did sign; and the learned Judge was unable to find that he did sign. As to the remaining ten defendants, the learned Judge found on the evidence that they signed the note with full knowledge of what it was. It was contended that, if any of the defendants were to be relieved from liability, the action must fail against the others as well; but the learned Judge said that he was unable to adopt that view in the case of a joint and several promissory note. Action dismissed as against the defendant Lacey with costs. Judgment for the plaintiff against the other ten defendants with costs. L. F. Heyd, K.C., for the plaintiff. R. G. Smythe, for the defendant Walters. G. F. Rooney, for the defendant Lacey. T. N. Phelan, for the other defendants.