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BOYD, C. FEBRUARY 21ST, 1903.

TRIAL.

HIGHWAY ADVERTISING CO. OF CANADA v. ELLIS.

Company—Promoters—Sale of Patent for Invention to Company—Prior Agreement for Acquisition.

Action to recover $5,000 from the promoters and directors of the plaintiff company upon the ground that that sum was diverted from the assets of the plaintiff company, and to recover another sum of $300.

A. B. Alyesworth, K.C., and J. M. McEvoy, London, for plaintiffs.

G. F. Shepley, K.C., and J. Heighington, for defendants.

BOYD, C.—The success of plaintiffs' case must rest on adequate proof being made of the allegation that defendants, as promoters of the company, obtained a half interest in the patent of invention operated by the company for the sole purpose and with the intention that such interest in the patent should be transferred to the company at a profit, upon its incorporation. The patent was disposed of by the proprietors and taken by the company at a valuation of $50,000, of which $5,000 was to be paid, and was paid in cash, out of the company's money. There is no contradiction of defendant Ellis's version of the matter, and it rests on his recollection and accuracy. It cannot be said that there was not a prior agreement for the acquisition of the patent by these men (now defendants) before the scheme of having a joint stock company was broached. Plaintiffs have failed to make good the essential allegation, and cannot recover on any other ground: Burland v. Earle, [1902] A. C. 99; Re Lady Forest Mine, [1901] 1 Ch. 589. The $300 claim fails on the evidence supported by the conduct of the parties. Action dismissed with costs.

BRITTON, J. FEBRUARY 23RD, 1903.

WEEKLY COURT.

RE DENISON, REX v. CASE.

Mandamus—Police Magistrate—Sentence for Criminal Offence—Personation of Voter—Referendum—Judicial Discretion—Right of Appeal.

Motion by E. J. Ritchie (prosecutor) for a mandamus to compel the police magistrate for the city of Toronto to impose upon Adam S. Case the sentence prescribed by sec. 167 of the Ontario Election Act. On 4th December, 1902, Ritchie was deputy returning officer at polling sub-division No. 45 in ward 6 of the riding of West Toronto, in connection with the Referendum vote, that is to say, the vote taken on the Ontario Liquor Act, 1902. Adam S. Case appeared at that poll and told the poll clerk his name was James Brophy of 142 Dowling Avenue, Toronto. Case refused to take the oath, and was arrested on the warrant of the deputy returning officer for personation. On the 26th December Case was convicted by the police magistrate and fined $50 and costs or six months in gaol at hard labour. The prosecutor's contention was that the magistrate should have imposed the penalty of $400 and imprisonment for one year. There was no suggestion of bad faith or improper motive on the part of the magistrate.

A. Mills and W. E. Raney, for the prosecutor.

J. Haverson, K.C., and T. C. Robinette, K.C., for defendant.

J. W. Curry, K.C., for the magistrate.

BRITTON, J., held that if the magistrate had any discretion as to the sentence, it was a judicial discretion, and mandamus should not be granted. Passing sentence by the Court upon an offender properly convicted is judicial, even where there is only a definite and particular penalty prescribed. Short on Informations, pp. 250, 263, Regina v. Eastern Counties R. W. Co., 10 A. & E. 547, Rex v. Hewes, 3 A. & E. 731, High on Extraordinary Legal Remedies, 3rd ed., sec. 148, Regina v. Justices of Middlesex, 9 A. & E. 540, referred to. This is virtually an appeal. The magistrate has not asked for the opinion of the Court; the Crown is not moving in the matter; the accused is not asking to quash the conviction. Whitehead v. The Queen, 7 Q. B. 582, distinguished. It need not occasion surprise if the police magistrate found some difficulty in dealing with the law. He considered the

case, and in passing sentence acted upon the law as he understood it. If the penalty were changed, the defendant might be deprived of his right of appeal to the Sessions. He might desire to appeal from a sentence to pay $400 and be imprisoned, and there is no power on this application to extend the time for appealing.

Motion refused without costs.

MCMAHON, J. FEBRUARY 23RD, 1903.

TRIAL.

RUPERT v. SISLEY.

Nuisance—Construction of Artificial Ponds—Injury to Neighbour's Property—Evidence of Damage.

Action by Rachael Rupert and Lucinda McQuarrie against Euston Sisley, a physician practising in the village of Maple, who owned lands adjoining the lands of the plaintiffs in that village, for an injunction and damages in respect of injury to plaintiffs' property by the construction of ponds and dams for fish on his premises, which ponds the plaintiffs alleged were a nuisance.

W. Proudfoot, K.C., and W. A. Skeans, for plaintiffs.

E. F. B. Johnston, K. C., and W. Cook, for defendant.

MACMAHON, J., held as to the claim for damages in regard to the alleged noxious smell from the ponds, and the noises said to be caused by bull-frogs, that defendant was not liable, the grievances not being, on the evidence, well founded. As to the claim for dampness in plaintiffs' cellar alleged to be caused by the percolation of water from defendant's ponds, it was also not well founded, the dampness being attributable to the character of the soil. As to the sinking of a floor in plaintiffs' house, it was not caused by dampness arising from the ponds, but was attributable to the decay of the supports. All the other claims failed also. Action dismissed with costs.

WINCHESTER MASTER. FEBRUARY 24TH, 1903.

CHAMBERS.

MARTIN v. MOODY.

Particulars—Motion for—Affidavit—Notice of Reading—Omission of Statement of Date of Filing—Sufficiency of Notice—Particulars of Defence—Contract—Interest—Offers.

Motion by plaintiffs for particulars of paragraphs 2, 3, 4, and 5 of the statement of defence. On 3rd February plain-

tiffs moved to strike out the statement of defence on the ground that paragraphs 2, 3, 4, and 5 were of such a loose and vague character that plaintiffs could not proceed with the trial without a further and better statement of the nature of the defence, etc. In support of that application an affidavit of one of the plaintiffs was duly filed and read. That application was refused. In the notice of the present motion it was stated that the affidavit filed in support of the former motion, giving the date of that motion and the name of the dependent, would be read. Defendant objected that the affidavit could not be read, as the date of filing was not given.

Grayson Smith, for plaintiffs.

W. H Blake, K.C., for defendants.

THE MASTER held that the notice of the intention of reading the affidavit objected to was sufficient, and the affidavit might be read. Mackenzie v. Carter, 12 P. R. 544, distinguished. Clement v. Griffith 1 Coo. P. C. 470, Munro v. Wivenhoe, 4 De G. J. & S. 723, Daniell's Ch. Pr., 6th ed., p. 538, Bloxham v. Metropolitan R. W. Co., 16 W. R. 490, Downing v. Falmouth, 37 Ch. D. 234, 242, and Rule 524, referred to.

The action was brought to recover certain interest on $10,400 under an agreement dated 19th June, 1899, whereby the purchasers therein named (represented by defendants) agreed to deliver to the vendors (represented by plaintiffs) within three years from that date fully paid up shares of the aggregate par or face value of $10,400 in the stock of the company to be formed by the amalgamation of the Hamilton Street Railway Company and certain other companies, and whereby it was also agreed that if the stock should not be assigned by the purchasers to the vendors within twelve months, the purchasers should pay to the vendors half-yearly, from the expiration of twelve months from the date of the agreement, interest at four per cent. per annum on $10,400 until the assignment and transfer should take place. Default having been made, this action was brought. By paragraph 2 of the defence it was alleged that the purchasers frequently offered to carry out the exchange of stocks as provided in the said agreement, and offered to transfer to plaintiffs $10,400 par value, but the plaintiffs refused to make such exchange. The Master held that defendants should be ordered to give particulars of this paragraph, limited to the date or dates of the offer or offers, whether orally or in writing, and by whom made, and the act or acts of plaintiffs by which they refused to make such exchange, and whether

such refusal was oral or in writing, with dates and names of persons. As to the 3rd paragraph, particulars should be delivered of dates on which the intimation was made to plaintiffs, and whether orally or in writing, and by whom made. As to the 4th paragraph, the real intention of the agreement was sufficiently set out in the 3rd paragraph. As to the 5th paragraph, the particulars ordered of the 2nd paragraph would cover what was asked.

Order accordingly. Costs in the cause.

WINCHESTER, MASTER. FEBRUARY 26TH, 1903.

CHAMBERS.

HAMILTON v. MUTUAL RESERVE FUND LIFE ASSN.

Writ of Summons—Service out of Jurisdiction—Application for Order for Leave to Issue Writ—Affidavit—Requirements of—Intituling—Service of Writ and Statement of Claim—Time for Appearance and Defence—Christmas Vacation—Irregular Judgment—Setting Aside.

Application by defendants for an order setting aside a judgment entered against defendants on 19th January, 1901, for default of appearance, and a writ of execution issued thereon, and extending time for entering appearance, and setting aside service of the writ of summons for irregularity. Notice of the writ of summons was served on defendants out of the jurisdiction.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiffs.

THE MASTER held that the affidavit read in support of plaintiffs' application for the order to permit the issue of the writ and service of notice of it out of the jurisdiction did not comply with the requirements of Rule 163, in that it did not shew that in the belief of the deponent the applicant had a right to the relief claimed. Perkins v. Mississippi S. S. Co., 10 P. R. 198, referred to. Also, that the affidavit should have been intituled "In the matter of an intended action between," etc. The objection to the affidavit was well taken, but the defects could have been remedied upon the present application by plaintiffs supplying the information omitted; but, as the judgment was prematurely signed, there was no object in allowing plaintiffs an opportunity to remedy the defects.

The order allowing the service limited the time for entering appearance and delivering defence to 15 days, inclusive of the day of service. The notice of the writ and the statement of claim were served on defendants at their head office in New York on 27th December, 1902—in vacation. Judgment was signed on 19th January, 1903. The judgment recited that defendants had not appeared and had not delivered any statement of defence, and adjudged that plaintiffs recover $2,033.33 and costs to be taxed. These costs were taxed at $47.46, which indicated that the costs respecting the statement of claim were allowed. The period from the 27th December to the 6th January was not to be reckoned in the time allowed for delivering a statement of defence, and the order did not provide that it should be so reckoned. Thompson v. Howson, 16 P. R. 1, distinguished.

The judgment was therefore signed too soon.

Order made setting aside writ of summons and all subsequent proceedings with costs.

MEREDITH, C.J.

FEBRUARY 27TH, 1903.

TRIAL.

McAVITY v. JAMES MORRISON BRASS MFG. CO.

Patent for Invention—Trade Mark used in Connection with—License —Agreement—Construction—Declaration of Rights—Specific Performance—Injunction—Misconduct Disentitling Party to Equitable Relief.

The plaintiffs, the Hancock Inspirator Company, a manufacturing company having its head office at the city of New York, and T. McAvity & Sons, brass manufacturers carrying on business at the city of St. John, New Brunswick, sued the defendant company, brass manufacturers carrying on business at Toronto, in respect of two specific trade marks owned by plaintiff company, registered on 24th March, 1880, one consisting of the word "Inspirator" and the other of the words "Hancock Inspirator," as applied to the sale of injectors, and in respect of two patents of invention for improvements in injectors, of which the plaintiff company were the assignees. One of these patents (7011) was held to have become void under the provisions of sec. 28 of the Patent Act of 1872: Mitchell v. Hancock Inspirator Co., 2 Ex. C. R. 539. On 16th May, 1901, an agreement was entered into between plaintiff company and plaintiffs T. McAvity &

Sons, by which plaintiff company granted to T. McAvity & Sons (subject to the right of revocation) the exclusive license to manufacture at their factory in St. John and to sell within the Dominion of Canada, and for use only within the Dominion, "inspirators containing and embodying the inventions and improvements and any and all substantial and material parts of the same which are shewn and described in the said letters patent (No. 44062) for the term of the said letters patent and for any extension thereof which may be granted." The plaintiffs T. McAvity & Sons, under the authority of their license, had been for some time manufacturing inspirators for use on locomotive boilers which were called and known to the trade as "Hancock locomotive inspirators," and a considerable and valuable market had been obtained for them under that name.

The plaintiffs complained that the defendants were selling, and representing that they had the sole right to manufacture and sell, Hancock locomotive inspirators, and plaintiffs claimed a declaration that T. McAvity & Sons were the only persons entitled to manufacture and sell the Hancock locomotive inspirators in Canada, an injunction restraining defendants from manufacturing, selling, or representing that they had the right to manufacture and sell, the articles in question, and damages.

The defendants justified under an agreement made between plaintiff company and one James Morrison, whose business defendants succeeded to in the early part of 1893. This agreement was dated 10th March, 1886, and was entered into after it had been decided that patent No. 7011 was null and void, and in consequence of that decision. By this agreement it was provided that from and after the date of it, Morrison should have the sole right in the Dominion of Canada to the use of the trade marks belonging to plaintiff company known as the "Hancock inspirator" and "inspirator," such trade marks to be used by Morrison only in connection with the sale of inspirators which shall be manufactured by him as described in the letters patent No. 7011 of the Dominion of Canada granted to John T. Hancock on 24th January, 1877, and subsequently extended by patent to No. 13958 and No. 13979.

L. G. McCarthy, K.C., and A. M. Stewart, for plaintiffs.

G. H. Watson, K.C., and Grayson Smith, for defendants.

MEREDITH, C.J. (after stating the facts at length):—It is not, in my opinion, open to question that the right of Morrison under the agreement to use plaintiff company's trade

marks is limited to the use of them as applied to a device manufactured in accordance with the specifications annexed to letters patent No. 7011, and that no right is conferred upon him of using them in connection with or as applied to anything else, and therefore no right of using them in connection with the device for which the letters patent No. 44062 were granted.

It is not material to inquire, if that inquiry were open to defendant company in this action, whether patent No. 44062 was or is a valid patent, or whether it has not been rendered null and void by breech or non-observance of any of the provisions of the Patent Act. Granting that it is open to any one, and therefore to defendants, to manufacture or sell the device for which that patent was obtained, it is clearly, I think, not open to them to use plaintiff company's trade marks in connection with or to apply them to the article which they may so manufacture or sell.

Nor is it, I think, open to defendants to raise in this action any question as to the validity of patent No. 44062. Plaintiffs' claim does not rest upon that patent, nor is the question of its validity material to the disposition of their claim.

If plaintiffs were suing for an infringement of the patent, such a defence would or might be open, but the right to impeach the patent . . . can be enforced only by scire facias or in the Exchequer Court.

The agreement between Morrison and plaintiff company also provided that " in the event of the parties of the first part (plaintiff company) obtaining within the Dominion of Canada any letters patent for improvement in inspirators, they will give to the said party of the second part (Morrison) the first opportunity of entering into arrangements with them for the sale and exclusive manufacture, use, and sale of the said patented inventions within the Dominion of Canada."

* * * * * * * * *

This provision is so indefinite and incomplete that specific performance of it is out of the question: Huff v. Shepard, 58 Mo. 242; Fogg v. Price. 145 Mass. 513, and cases there cited.

It was further argued that the conduct of plaintiff company had been such as in any case to disentitle them to an injunction. . . . In view of all the circumstances, the defendants have not, I think, made a case which would, on the principles upon which a court of equity acts in granting equitable relief, justify me in refusing to grant the relief which plaintiffs seek and which is necessary to be given to

prevent their property rights being seriously affected by acts of defendant company done without justification or lawful excuse.

Upon the whole case, I am of opinion that plaintiffs are entitled to the relief claimed, except the declaration which is asked as to the rights of plaintiffs T. AcAvity & Sons, which, it seems to me, is not necessary or proper to be made; and that the injunction should be in such terms as not to interfere with any right which defendants may have to use plaintiff company's trade marks in connection with the sale in Canada of inspirators manufactured by them as described in letters patent No. 7011, or with their representing that they are entitled to the rights (limited to inspirators so made and to them only) which were granted by plaintiff company to Morrison by the agreement of 10th March, 1886.

No attack is made by plaintiffs in the pleadings upon the right of defendants, as assignees of Morrison to do what Morrison was by the agreement of 10th March, 1886, licensed to do, and I have, therefore, not considered whether or not the license to Morrison was assignable; nor, in the view I have taken, have I found it necessary to consider other questions otherwise of more or less importance which were discussed upon the argument.

The plaintiffs are entitled to their costs.

FEBRUARY 28TH, 1903.

DIVISIONAL COURT.

JACKSON v. McLAUGHLIN.

Appeal—Refusal to Reverse Findings of Court below on Weight of Evidence—Correction of Manifest Error.

Appeal by defendant from judgment of County Court of Essex in favour of plaintiff for $181.50, claimed as and for wages due from defendant to plaintiff.

The appeal was heard by STREET, J., and BRITTON, J.

R. U. McPherson, for defendant.

J. H. Rodd, Windsor, for plaintiff.

STREET, J.—The evidence was of the most conflicting character, and we have not in coming to a conclusion upon the appeal before us the aid of knowing the reasons upon which the learned Judge proceeded. We can only assume

that he did not believe the evidence given on the part of defendant, and that he did believe that of plaintiff and his witness. The question is one entirely of fact, which depended upon the degree of credit to be attached to the conflicting statements of the witnesses. . . . My brother Britton, however, points out what appears to have been an error of the learned Judge. . . . This should be corrected. In other respects the appeal must be dismissed, and the appellant should pay the costs.

BRITTON, J., delivered a written opinion in which he agreed in dismissing the appeal, but pointed out that the plaintiff had been allowed for two weeks' wages at $6 a week in excess of what his actual claim was, and that the judgment should be reduced by $12.

FEBRUARY 28TH, 1903.

DIVISIONAL COURT.

WHITESELL v. REECE.

Tenant for Life—Waste—Cutting Timber—Remaindermen—Injunction—Payments by Tenant for Life on Mortgage Given to Secure Annuity—Subrogation.

Appeal by defendants from judgment of FALCONBRIDGE, C.J. (1 O. W. R. 516) in favour of plaintiffs for a perpetual injunction, $400 damages, and costs, in an action by the persons entitled under the will of G. Scealey, deceased, to an estate in remainder in certain lands in the towhship of Bayham, against the life tenant and the purchaser from her, to restrain waste by cutting timber, etc. The testator died on 13th May, 1894, seised in fee of the land, subject to a mortgage made by him on 2nd December, 1886, to trustees for his wife to secure to her an annuity for her life of $200. At the time of the testator's death he was living apart from his wife, and she was about 75 years of age. She was still living at the time of this appeal. Since the testator's death the defendant Reece had paid the annuity to the widow. On 14th March, 1902, defendant Reece sold to defendant Payne, for $140, certain timber on the land, to be taken off in two years, and Payne cut down and removed a quantity of timber. He alleged that he purchased in good faith, believing his co-defendant had a right to sell. The defendant Reece set up that having paid eight instalments of the annuity, she was entitled to be subrogated to the rights of the mortgagee in

respect thereof against the land, and, being so subrogated, the land was an insufficient security for her claim against it, and she had a right to cut down the timber; and further that the timber was cut down for the purpose of clearing the land for cultivation, and no waste was committed.

J. A. Robinson, St. Thomas, for defendants.

D. J. Donahue, K.C. for plaintiffs.

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

STREET, J.—I think Yates v. Yates, 28 Beav. 637, is not distinguishable in principle from the present case. There it was held that the periodical payments of an annuity charged on land by the testator in favour of his widow should be apportioned between the value of the life estate and the value of the reversion. . . . Re Muffett, Jones v. Mason, 39 Ch. D. 534. We have not before us a basis upon which to work this calculation out exactly, for the purpose of ascertaining the share of the debt for which defendant Reece is entitled to a charge. . . . Taking the value of the land at the testator's death at $2,500, which is the value placed on it by many witnesses, the security for the sums paid by defendant Reece beyond her proportinate share cannot be said to be inadequate so as to entitle her to cut down the timber, under the authority of Brethour v. Brooke, 23 O. R. 658. I find no reason therefore, to dissent from the conclusion at which the Chief Justice arrived as to the liability of defendant Reece for the acts complained of. I quite concur in the finding that these acts were not done for the purpose of clearing the land for cultivation, and the result of them has been undoubtedly greatly to diminish the value of the property. The amount found payable in respect of the damage is not excessive. . . . Instead of the payment into Court of $400 to remain there during the life of defendant Reece, she receiving the interest meantime, she should at once pay to plaintiffs the present value of that sum, viz., $180, and judgment varied to that extent. Any rights defendant Reece may have to recover the sums, if any, which she has paid upon the annuity beyond her due proportion must be enforced in another action. They form no defence to the claim of plaintiffs here, and no relief by way of counterclaim in respect of them has been sought.

Appeal dismissed with costs.

CHAMBERS.

REX EX REL. McCALLUM v. McKIMM.

Municipal Elections—Controverted Election—Application in Nature of Quo Warranto—Practice—Affidavit—Irregularity—Waiver—Notice of Motion—Personal Service—Disqualification of Member of Council—Member of School Board—Statute—Construction—Costs.

Summary application in the nature of a quo warranto to set aside the election of George Frederick McKimm as mayor of the town of Smith's Falls, upon the ground that he, at the time of the election, was disqualified by reason of his being a member of the public school board of that town, being "a public school board for which rates are levied."

The motion was made returnable on the 16th February, but was on that day adjourned at respondent's request till the 20th February, no objections being specifically mentioned, but "reserving all objections, technical and otherwise—affidavits in answer to be served on 18th inst.—to-day being the last day for proceeding, the 20th instant to be treated as the last day as far as the objections above reserved are concerned." On the 18th February the respondent's solicitor served the relator's solicitor with copies of affidavits in answer.

Upon the application coming on for hearing on the 20th February, G. H. Watson, K.C., for the respondent, objected that no affidavit had been filed by the relator in support of the application for a fiat to serve the notice of motion, inasmuch as the paper filed purporting to be an affidavit did not contain the words "make oath and say;" also that the notice of motion had not been properly served. In support of the first objection he cited Allen v. Taylor, L. R. 10 Eq. 52; Phillips v. Prentice, 2 Hare 542; and Re Newton, 2 De G. F. & J. 3.

J. H. Moss, for the relator.

The motion was also argued upon the merits.

THE MASTER.—It is true that in the cases cited by Mr. Watson affidavits without the words "make oath and say" were not admitted until resworn after being altered. In the first mentioned case James, V.-C., held that the affidavit must be altered and resworn unless the other side waived the objection. It was, however, held in In re Torkington, L. R. 9 Ch. 298, that an affidavit, omitting by mistake the words "severally make oath and say," having been filed, it was too late

to object to it. See also Regina ex rel. Bland v. Fogg, 6 U. C. L. J. 44, 45; Regina ex rel. Linton v. Jackson, 2 C. L. Ch. 26. . . . It is clear from the above cases that the affidavit in question is only irregular, and not invalid, as was contended. It was the duty of the respondent . . . to move to set aside the proceedings in consequence of such irregularity, and that within a reasonable time, under Rule 311. . . . A "fresh step" was taken by the respondent in making and serving his affidavits on the merits before taking the objection. I do not refer to the asking of an enlargement without mentioning the objection. The Rules of Court have been applied to proceedings to set aside a municipal election: Rex ex rel. Roberts v. Ponsford, 3 O. L. R. 410, 1 O. W. R. 223, 286. In any case I would, if necessary, give the relator the privilege of remedying the effect nunc pro tunc, but I do not think that is required under the circumstances.

With reference to the service of the notice of motion, the relator has filed an affidavit of personal service on the respondent. The respondent states that the clerk of the relator came into his office while he was engaged in some work and laid an envelope upon the counter in the office some distance from him, without calling his attention to the envelope or speaking to him in any way, and immediately thereafter left the office. In the course of about half an hour, seeing the envelope lying on the counter, the respondent picked it up without knowing its contents, and found that it contained the notice of this motion and fiat. This affidavit is corroborated by the affidavit of a clerk who was present. . . . These affidavits shew conclusively that the respondent personally received the papers in question on the date mentioned in the affidavit of service, and that has been held to be a sufficient service: Williams v. Pigott, 5 Dowl. 320; Woodside v. Toronto Street R. W. Co., 2 Ch. Ch. 24; Keachie v. Buchanan, ib. 42.

As to the merits, the affidavits of the relator and respondent both shew that the respondent was on the day of nomination for mayor a member of the school board of the town of Smith's Falls, for which he was elected mayor. He thus falls within the provision of 2 Edw. VII. ch. 29, sec. 5 (O., which amends sec. 80 of the Municipal Act by making it provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation. . . . It was argued that the saving clause in the amending Act, namely, "but this amendment shall not apply so as to disqualify any person

elected prior to the passing of the Act," relieved the respondent from the disqualification, as he had been elected trustee, or a member of the school board, prior to the passing of the Act. In my opinion, this contention cannot be sustained. The statute is dealing with members of municipal councils mentioned in sec. 80 of the Municipal Act elected prior to the passing of the Act of 1902, and their disqualification, and not the election of members of school boards. As to the time of the disqualification, I would refer to Regina ex rel. Rollo v Beard, 6 U. C. L. J. N. S. 126.

I therefore hold that the election of the respondent . . . must be set aside and a new election had. For the reasons mentioned at the end of the judgment in Regina ex rel. Rollo v. Beard, the respondent must be unseated with costs.

FEBRUARY 27TH, 1903.

DIVISIONAL COURT.

RUSSELL v. EDDY.

Costs—Third Party—Dismissal of Action—Plaintiff Ordered to Pay Costs—Rule 214—Discretion—Appeal.

Appeal by plaintiff from judgment of MEREDITH, J., dismissing the action, and directing that plaintiff should pay the costs of a third party brought in by defendant, as well as defendant's costs.

W. H. Blake, K.C., for defendant, contended that defendant should in any event pay the costs of the third party.

T. E. Godson, Bracebridge, for defendant, contra.

The appeal was dismissed as to the merits at the argument. Judgment was reserved as to the question of costs.

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

MEREDITH, C. J.—It was contended that the trial Judge had no power under the Rules to order a plaintiff whose action is dismissed to pay the costs of a third party, and in support of this contention Tomlinson v. Northern R. W. Co., 11 P. R. 419, 526, and Williams v. South Eastern R. W. Co., 26 W. R. 352, were cited.

Since these cases were decided a new Rule on the subject has been adopted in this Province. It was passed on the 23rd June, 1894, and is now Rule 214, and is the same as the English Order 16, r. 54, which was passed probably in consequence of the decision in Witham v. Vane, 32 W. R. 617, and came into force on the 24th October, 1883: Snow's Annual Practice, 1903, p. 203.

Rule 214 clearly, I think, gives power to the Court to order a plaintiff whose action is dismissed to pay the costs of the third party as well as of the defendant, and, if this be so, the matter is one of discretion, and there is no appeal unless by leave of the Judge, and his leave has apparently not been asked, and has not been obtained.

Tomlinson v. Northern R. W. Co. is therefore now useful only as a guide to the Judge in the exercise of his discretion.

Appeal dismissed with costs.

FEBRUARY, 28TH, 1903.

DIVISIONAL COURT.

HIXON v. WILD.

Mortgage — Covenant against Incumbrances — Breach — Damages — Measure of—Costs—Payment into Court.

Action for damages for breach of covenant against incumbrances contained in a mortgage deed made by defendant to plaintiff. The trial Judge found for the defendant. The plaintiff appealed to a Divisional Court, which reversed the judgment and directed a reference to the Master in Ordinary to assess the plaintiff's damages. The Master assessed these damages at $2,064, being the amount of a mortgage (and interest) made by defendant in favour of Ann McKenzie, which was the incumbrance constituting the breach of the covenant.

The defendant appealed to a Divisional Court from the Master's report, and the plaintiff moved the same Court for judgment on further directions and costs.

R. McKay, for defendant.

A. O'Heir, Hamilton, for plaintiff.

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

MACMAHON, J.—We are concluded as to the damages by McGillivray v. Mimico Real Estate Security Co., 28 O. R. 265. The defendant's appeal will, therefore, be dismissed.

There will be judgment for plaintiff for the amount found due by the report, together with subsequent interest and the costs of the action, and of the appeal from the judgment of the trial Judge, and of this appeal and of this motion for judgment, to be added to plaintiff's claim. But the amount at which the damages were assessed will not be paid to plaintiff, but into Court subject to further order, or, at his option, defendant may pay off and discharge the mortgage to Ann McKenzie. This direction was consented to by counsel for plaintiff.