THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING SEPTEMBER 13TH, 1902.)

VOL. I. TORONTO, SEPTEMBER 18, 1902. NO. 30.

OSLER, J.A. SEPTEMBER 5TH, 1902.

C.A.—CHAMBERS.

RE EQUITABLE SAVINGS, LOAN, AND BUILDING ASSOCIATION.

Appeal—Order under Ontario Winding-up Act—Right of Appeal—Final Order—Practice—Settlement of Appeal Case.

Motion by respondent to quash appeal from order of County Judge of York rescinding order previously made by him under sec. 41 of the Ontario Joint Stock Companies Winding-up Act, R. S. O. ch. 222, for the dissolution of this company. The motion to quash was made on the ground that the appeal case had not been settled in accordance with the practice prescribed in the case of appeals from the High Court. The papers were transmitted to the officer of the Court of Appeal and were printed by the appellant, and a copy thereof with reasons of appeal was delivered to the respondent.

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

C. D. Scott, for appellant.

OSLER, J.A., held that sec. 27 of the Act at present contains the code of procedure in an appeal of this nature. No provision is made in the Consolidated Rules to meet the case. The appellant must proceed with his appeal according to law, i.e., according to what is required by sec. 27. The practice hitherto, when the case has come before a single Judge, has been to send up the original papers and hear the appeal upon them: see In re D. A. Jones, 19 A. R. 63; In re Haggert Co., 20 A. R. 597; Re Cosmopolitan Life Assn., 15 P. R. 185.

The order is a final one, and as the appeal is in fact set down for hearing by the Court of Appeal, and not by a single Judge, the point cannot be disposed of in this forum. Motion, consequently, dismissed. Costs to the appellant.

FALCONBRIDGE, C.J. SEPTEMBER 8TH, 1902.

CHAMBERS.

MERCHANTS BANK OF CANADA v. SUSSEX.

Arrest—Ca. Sa.—Ex Parte Order—Motion to Set aside—Concurrent Writ of Ca. Sa.

Application by defendant for order setting aside ex parte order for issue of writ of ca. sa., on ground of non-disclosure of material facts on the application therefor, and for order setting aside concurrent writ of ca. sa., and the arrest of defendant thereunder, and ordering defendant's discharge from county gaol of county of Lambton, on the ground that the original writ issued upon such order to which the writ under which the arrest was made was concurrent, had expired, and that the concurrent writ had expired before the arrest was made.

J. E. Jones, for defendant.

J. H. Moss, for plaintiffs.

FALCONBRIDGE, C.J., held, that if all the facts as to the arrest had been before the Court, the order of 21st August should still have been made, and that same should not be set aside, and that, as defendant is held under writ issued pursuant to order of 21st August, and not solely under concurrent writ of 16th August, no order should be made on that branch of the motion in the absence of the sheriff. No costs.

SEPTEMBER 8TH, 1902.

DIVISIONAL COURT.

PEOPLE'S BUILDING AND LOAN ASSN. v. STANLEY.

Execution—Motion for Leave to Appeal—Costs of—High Court—Authority to Issue Execution.

An appeal by the defendant from the order of MEREDITH, J., ante 339, 4 O. L. R. 247, was heard by a Divisional Court (FALCONBRIDGE, C.J., STREET, J.).

W. H. Bartram, London, for appellant.

D. W. Saunders, for plaintiffs.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing with the reasons of the Judge in Chambers.

WINCHESTER, Master. SEPTEMBER 9TH, 1902.

CHAMBERS.

METALLIC ROOFING CO. v. LOCAL UNION No. 30, AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

Parties—Unincorporated Voluntary Association—Motion to Strike out Name—Injunction—Trial.

Motion by the defendant association for an order striking their name from the style of cause and dismissing the action against them, on the ground that they are not an incorporated body, nor are they registered under or by virtue of any law in force in Ontario, but are a voluntary association of sheet metal workers, residing and working in Toronto.

The action was brought in connection with a strike of the employees of the plaintiff company, and was for an injunction to restrain the defendants from unlawfully interfering with the plaintiffs' business, and for damages

J. G. O'Donoghue, for applicants.

W. N. Tilley, for plaintiffs.

THE MASTER.—The same objection was raised in Massey-Harris Co. v. Woodward, brought under circumstances similar to those in question herein. In delivering judgment in that action on the 20th March, 1900, Mr. Justice Meredith said:—"A great deal was upon the argument said on the question of the legal status of the union, but that is a matter which can also be better dealt with at the trial, where much more light can be thrown upon the subject. Prima facie the union has some legal existence; a name indicative of such is used by its members; it has a constitution and by-laws; it was formed under a charter of the Iron Moulders' Union of North America, issued under what seems to be the common seal of that body, of which the union in question is apparently a part, and has a full set of company officers. One naturally thinks that the larger body at all events must be incorporated somewhere, or otherwise have some legal existence and capacity (though not yet parties to the action); and it ought not to be difficult to throw a great deal of light upon this question at the trial; very little seems to have been yet afforded, though it seems difficult to perceive anything in the way of making the question plain."

If I may be permitted to state so, the language used by his lordship is similar to that used by me while this motion was being argued, and in ignorance of this judgment, and I have, therefore, no hesitation in adopting his decision.

The motion will, therefore, be refused. Costs to the plaintiffs in the cause.

MACMAHON, J. SEPTEMBER 10TH, 1902.

CHAMBERS.

RE RITZ AND VILLAGE OF NEW HAMBURG.

Parties—Summary Application to Quash Municipal By-law—Countermand—Motion to Add or Substitute New Applicant.

Motion by John F. Katzenmeier for an order allowing him to be added as an applicant upon a pending summary motion to quash by-law number 259 of the village of New Hamburg, or substituting him for Charles Ritz, the original applicant.

On a petition signed by more than two-thirds of the ratepayers, the council of the village was empowered by 2 Edw. VII. ch. 52, to pass a by-law authorizing the municipal corporation of the village to grant a bonus to the New Hamburg Manufacturing Company, not exceeding $10,000, and to issue debentures for an amount not exceeding $10,000, payable during a period not exceeding twenty years.

A by-law was passed by the council in May, 1902, granting the bonus and authorizing the issue of debentures for the sum mentioned and interest thereon.

Ritz, on the 15th August, gave notice of motion to quash the by-law on various grounds appearing in the notice.

On the 26th August Ritz served on the village corporation a notice countermanding the notice of motion to quash; when the countermand was served the time for making a fresh application to quash had expired. (R. S. O. ch. 223, sec. 380.)

Katzenmeier had, on the 22nd August, issued a writ against the corporation of New Hamburg, on which was indorsed a claim for an injunction to restrain the corporation from paying over the $10,000 to the New Hamburg Manufacturing Company, but no motion was made for an interim injunction; and on the present motion his consent to his

name being substituted for that of Charles Ritz, or to his name being added as one of the applicants, was filed.

E. E. A. DuVernet, for Katzenmeier.

A. B. Aylesworth, K.C., for the corporation.

MacMahon, J.—The control of the proceedings to quash the by-law rested with Ritz, and when he served notice of countermand on the village corporation the proceedings on his application came to an end. And what Katzenmeier asks is to have his name substituted as an applicant on the motion to quash, when the original applicant has put an end to the proceeding by his notice of countermand.

The authority relied upon by Mr. DuVernet—McPherson v. Gedge, 4 O. R. 246—does not support his claim to the order. That was an action under the Mechanics' Lien Act, sec. 15 of which provides that suits brought by a lienholder shall be taken to be brought on behalf of all the lienholders of the same class; and the Court held that upon the death of a lienholder who had brought a suit, or his refusal or neglect to proceed, the suit might by leave of the Court be prosecuted by any lienholder of the same class. There the statute gives express power to the Court to allow a lienholder, under certain circumstances, to intervene and become a party to the suit. And the statute (R. S. O. ch. 223, sec. 231), in case of quo warranto proceedings, permits a new relator to intervene and prosecute. So also where a creditor brings an action on behalf of himself and all other creditors to set aside as fraudulent a conveyance made by his debtor, there, in the event of the plaintiff declining to prosecute the action, another creditor would, on application, be allowed by the Court to intervene, on proper terms as to costs, as the action is framed so as to include such other creditor. And had Ritz in his notice of motion to quash alleged that he was acting not only for himself but for all other ratepayers interested in quashing the by-law, if Ritz refused to proceed with the motion, the Court would, on an application by one of the other ratepayers interested, have permitted him to be joined in the notice of motion as one of the class referred to therein.

Katzenmeier does not even allege that he was one of those who induced Ritz to institute the proceedings to quash.

There is no authority to make the order asked for, and the motion must be dismissed with costs.

BOYD, C. SEPTEMBER 12TH, 1902.

CHAMBERS.

RE MURRAY.

Will—Devise of Land to Lessee—Contract by Testator with Lessee to Build House—Performance of Contract by Executor Out of Personalty—Remedy in Damages.

Application (heard at Woodstock) by Neil S. Murray, executor of the will of James Murray, late of the township of West Zorra, for an order under Rule 938 declaring the construction of the will and determining certain questions.

All the questions raised were disposed of at the hearing except as to the liability in respect to the building of a house upon the farm devised to John Robert Murray. The testator in his lifetime made a lease of this farm to his son John Robert Murray for five years from 1st March, 1901, at a yearly rental of $200, payable in October each year, and undertook to build a house on the farm, of certain expressed dimensions, during the first year of the term. There was a provision for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on 19th June, 1902, after the expiry of the first year of the term, but had not built or done anything towards building the house. By his will dated 7th February, 1901, the father devised this farm on certain conditions (not now material) to his son, the lessee; but no reference was made in the will to the lease, which was dated 29th January, 1901, some nine days before the date of the will.

Peter McDonald, for executor.

J. W. Mahon, for John R. Murray.

J. P. Mabee, K.C., for Andrew W. Murray.

A. S. Ball, K.C., for the official guardian.

BOYD, C.—It was argued that the devisee was entitled to have the house built on the land at the expense of the personal estate, and it was counter-argued that at most the devisee as lessee could only get damages for non-performance of the agreement to build. The latter is the better construction. Cooper v. Jarman, L. R. 3 Eq. 98, and In re Day, [1898] 2 Ch. 510, distinguished. The common ground of decision in both these cases is that, as there was an existing contract with work partly performed thereon before the

death, it was the duty of the estate to carry out to completion at the cost of the personalty. Here the marked distinction exists that there was no existing contract in course of performance when the testator died. On the contrary, the contract had been broken; the time for performance had elapsed, and nothing had been done in the way of building. A new liability had arisen against the testator for damages because of his non-performance. The contract to build is very vague and is not per se capable of specific enforcement. Had the father lived, the son, as lessee, could have had no relief for the breach other than damages. His death has not enlarged or changed that remedy; and to that the son as lessee or devisee is confined. If the parties can agree to assess the amount of damages, it will save money, time, and perhaps temper.

Peter McDonald, Woodstock, solicitor for the executor.

J. Hoskin, Toronto, official guardian.

Mabee & Makins, Stratford, solicitors for Andrew W. Murray.

Smith & Mahon, Woodstock, solicitors for John R. Murray.

MacMahon, J. September 12th, 1902.

CHAMBERS.

Re CLARK AND KELLETT.

Landlord and Tenant—Overholding Tenants Act—Right to Terminate Lease—Notice to Quit—Difficult Questions of Law—Refusal of Certiorari.

Motion by W. B. Kellett, the tenant, for an order under sec. 6 of the Overholding Tenants Act, R. S. O. ch. 171, requiring the junior Judge of the County Court of Lambton to send up the proceedings and evidence in this case to the Court, and staying proceedings.

The lessor, Angeline M. Clark, demised a store and premises in Sarnia to Kellett for 5 years from 21st December, 1901, at $540 a year, payable in monthly payments of $45 a month, the lease containing a proviso that "the parties hereto may terminate this lease at any time upon giving three months' notice in writing of his or her intention so to do." On the 16th April, 1902, the lessor gave the lessee notice in writing "to quit and deliver up the store and premises which you now hold of me situate . . . on the 21st July next, provided that your tenancy originally commenced on that day of

the month, or if otherwise then that you quit and deliver up possession of the premises at the expiration of the three months which shall expire next after the time of your being served with this notice." On the 22nd July a written notice was given by the lessor, demanding immediate possession.

J. H. Moss, for the tenant, contended that, as the proviso gave "the parties" the right to terminate the lease, such right existed only in the lessee (Dann v. Spurrier, 3 B. & P. 399, 403), and that the notice was a bald notice to quit, and could only have been given for the termination of the tenancy at the end of a year.

D. L. McCarthy, for the landlord.

MacMahon, J.—If the proviso ended with the words giving "the parties" the right to terminate the lease, it would be ambiguous and would be construed in favour of the lessee; but it also provides that notice may be given "of his or her intention so to do," and so the notice may be given by either party.

The other point is directly covered by Soames v. Nicholson, 71 L. J. K. B. 24, where it was held that in the absence of any express provision in the agreement that a tenancy from year to year was entered into, a three months' notice might be given at any time to determine the agreement. See also Foa on Landlord and Tenant, 2nd ed., p. 485. And, therefore, having regard to the terms of the lease and the rights of the parties thereunder, no difficult questions of law were involved.

Motion dismissed with costs. Stay of writ of possession till 1st October to enable tenant to remove from the premises.

Anglin, K.C. September 12th, 1902.

TRIAL.

McLEAN v. ROBERTSON.

Public Schools—Change of School Site—Adoption by Trustees—Ratepayers' Meeting — Resolution — Minutes — Evidence dehors—Inspector—Arbitration—Award—Injunction—Estoppel — Res Judicata—Reverting to Former Site after Change—Resolution of Ratepayers—Poll—Qualification of Voters—Scrutiny.

Action tried by F. A. Anglin, K.C., sitting for Ferguson, J., without a jury, at Gore Bay.

W. H. Williams, Gore Bay, for plaintiffs.

A. G. Murray, Gore Bay, for defendants.

ANGLIN, K.C.:—The plaintiffs, suing on behalf of themselves and all the other ratepayers of school section 2 of the township of Allan, in the district of Manitoulin, claim a declaration that the legal school site of the section is upon lot 18 in the 9th concession of Allan (known as the "new site"), and relief consequential upon such declaration. The defendants, who were two of the present trustees (sued in that capacity and personally as well) and the public school board of the section, maintained that the legal school site is upon lot 18 in the 7th concession, known as the "old site."

At the annual meeting of ratepayers held in December, 1899, it was determined that a new school building should be erected. At a meeting of the trustees held on the 9th March, 1900, a resolution was passed selecting the "new site" as the school site for the section, and directing the secretary to call a ratepayers' meeting for the 17th March to consider and vote upon the suitability of this site. A ratepayers' meeting was accordingly held on the 17th March. The minutes of this meeting were as follows:—"March 17th, 1900. The following is the minutes of a special meeting of the ratepayers of school section No. 2 in the school house at the hour of 2 o'clock, for the purpose of voting on a site selected by the trustees for the erection of a new school house, said site belonging to W. H. Brett and situated on the south-west corner of lot 18, concession 9. Moved in amendment by Thos. Robertson, seconded by Thos. Wilson, that Neil McLean act as chairman. Lost. Original motion moved by Neil McLean, seconded by Herbert Gilroy, that Ben. Vine be chairman. Carried. Moved in amendment by Thos. Robertson, seconded by Thos. Wilson, that Jas. Wm. Kerr be secretary. Carried. Moved by Neil McLean, seconded by W. H. Brett, that a division of the house be taken on the question. Carried. Moved by Robert Brett, seconded by Neil McLean, that this meeting adjourn. Carried. Benjamin Vine, chairman. Jas. Wm. Kerr, secretary."

It was contended for plaintiffs that the minutes were defective, and parol evidence was given, subject to objection, as to what actually took place at the meeting.

The great weight of the parol testimony, if admissible, was that a motion was made that the "new site" be chosen; that such motion was duly explained both by the mover and by the chairman, and was submitted to and carried by the meeting. The minutes were not read over to the meeting or in any way formally adopted by it as the record of its

transactions. In the absence of any statutory provision declaring the minutes to be the sole evidence competent to prove the transactions at ratepayers' meetings, parol evidence was admissible (Miles v. Bough, 3 Q. B. 845, 872); and the evidence given established the fact that a motion for the selection of the "new site" was carried.

Three of the dissentients prepared a complaint of the proceedings at this meeting to be sent to the inspector under sec. 14, sub-sec. 8, of the Public Schools Act. The evidence does not establish that this complaint reached the inspector within 20 days after the meeting, and the onus of shewing that it did is upon the defendants. The inspector, however, acted under the power conferred by sec. 83, sub-sec. 1, and called a special meeting of ratepayers for the 1st September, at which meeting the majority chose the "old site." The inspector assumed that the necessary conditions then existed to bring into operation sub-sec. 2 of sec. 13, providing for an arbitration. The ratepayers' meeting named one White as arbitrator. The trustees declined to appoint an arbitrator. The inspector and White entered upon an arbitration and published an alleged award in favour of the "old site," White stating that he agreed in all the conclusions arrived at, but declined to join in making an award. The meeting of 1st September was not within sec. 31, and the conditions upon which an arbitration could proceed never existed. Sub-section 2 of sec. 32 applies to an arbitration between trustees and a hostile majority of ratepayers. But here the statutory equivalent of a submission never existed, and to such an objection effect must be given at any time and under any circumstances. In re Cartwright School Trustees, 4 O. L. R. 272, followed. See, also, McGugan v. School Board of Southwold, 17 O. R. 428, 429.

While the inspector was taking the steps above detailed, the board of trustees purchased the "new site" and completed their building. They moved the school furniture into the structure in November, 1900. An attempt to restrain them by injunction had been made in April, but the action did not proceed after a motion for an interim injunction had been refused. The plaintiffs ineffectually sought to found an estoppel upon the dismissal of this motion and the subsequent abandonment of the suit.

At the annual meeting in December, 1900, the friends of the "old site" were in a majority and elected one of their party a trustee. The new board at their first meeting, held in the old school house, resolved to remove the school furniture back to this building, which they did. Three ratepayers then instituted proceedings for a mandamus and injunction

to compel the return of this furniture to the new building. A motion was made before the local Judge, and upon a consent to the motion being finally disposed of by him being given, he adjudged that the "new site" was the legal school site, and the first meeting of the trustees of 1901 illegal, and its resolutions void, because the meeting was held in contravention of the direction of sec. 16, sub-sec. 1, of R. S. O. ch. 292, that the first meeting of the trustees shall be held "at the school house of the section." The board of trustees was not a party to that proceeding. It did not appear that any writ of summons had issued. No order was drawn up or signed. None of the papers purporting to be filed upon the motion were stamped. The estoppel alleged by plaintiffs was therefore not established; and a subsequent proceeding against the secretary, taken before the District Judge as persona designata under sec. 109, also fell short of anything in the nature of an estoppel or res judicata against defendants.

The trustees acquiesced for the time in the view taken by the local Judge, and returned the furniture to the new building, where the school was carried on until the summer of 1901. In April, 1901, however, at a duly convened meeting of trustees, a resolution was passed that the "old site" be selected as the school site for the section, and that a meeting of ratepayers be held on the 20th April to consider such selection. This meeting was held, and the "old site" was adopted by a majority of seven. Before this, the statute of 1901, 1 Edw. VII. ch. 39, became law and is applicable. As to this meeting, (1) although the school site had been fixed by the action of the trustees and ratepayers in March, 1900, and a building erected on the site so fixed, it was competent for the ratepayers, a year later, to revert to the former site. Wallace v. Township of Lobo, 11 O. R. 648, applied. (2) In reverting to the old site there was no bad faith, nor was the doing so capricious, if the Court could be asked to review the action of the ratepayers upon such a ground. (3) There was no ambiguity in the resolution proposed to the meeting. The trustees acted prudently and in the best interests of the section in deferring the actual physical removal until the vacation. (4) It does not come within the scope of the action to declare, nor is there evidence upon which it can be declared, that the return to the old building is unreasonable and dangerous to the health and welfare of the pupils because of its bad condition. (5) Upon an investigation into the qualifications of the persons voting at the meeting, the resolution in favour of reverting to the old site was carried

by a majority of one out of all the duly qualified voters who voted. Quære, whether the vote is subject to scrutiny in this action; but if not, the same result follows upon a greater majority.

Action dismissed. Plaintiffs to pay defendants' costs of the action, including the costs of motions for and to continue an interlocutory injunction, and to pay defendants' costs of the counterclaim.

WINCHESTER, MASTER. SEPTEMBER 12TH, 1902.

CHAMBERS.

REX EX REL. ROSS v. TAYLOR.

Municipal Election—Irregularities—Evidence of—Saving Clause.

An application to set aside the election of the respondent as reeve of Port Dover, because the election was not conducted according to law, in respect of the conduct of the returning officer, the voters' lists, etc. The relator alleged 15 grounds of complaint.

E. E. A. DuVernet and H. A. Tibbetts, Port Dover, for the relator.

S. C. Biggs, K.C., for the respondent and for the returning officer.

THE MASTER (after a careful examination of the evidence with regard to each ground of complaint) :—In my opinion, the irregularities complained of have not in any way interfered with the election of the respondent, which appears to have been regularly conducted. The only objections worthy of special reference are 5, 6, and 7, and the irregularities referred to come within the provisions of sec. 204 of the Municipal Act: Woodward v. Sarsons, L. R. 10 C. P. 733. I therefore refuse the application with costs to be paid by the relator to the respondent. There will be no costs to or against the returning officer.