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FALCONBRIDGE, C.J. JANUARY 30TH, 1903.

TRIAL.

ADAMS v. COX.

Promissory Notes—Action on—Defences to—Interest of Indorser in Shares Standing in Name of Holder—Termination of Interest—Inducements to Makers of Notes—Agency of Indorser for Holder.

Action upon three promissory notes made by defendants Alice Cox and Evelyn Cox, and indorsed by defendant E. S. Cox, two for $2,100 each and one for $2,722.50.

G. F. Shepley, K.C., and J. J. Maclennan, for plaintiff.

E. F. B. Johnston, K.C., for defendant E. S. Cox.

S. H. Blake, K.C., for defendant Evelyn Cox.

W. Laidlaw, K.C., for defendant Alice Cox.

FALCONBRIDGE, C.J., allowed the amendments proposed at the trial and dealt with the case on the basis of the record thus constituted. The defence which was common to all the defendants was that the real plaintiff (one Walmsley) and the defendant E. S. Cox were and are jointly interested in 1,980 shares of Crow's Nest C. and D. Co. (and in 593 shares increment thereof) and that the present value of the interest of defendant E. S. Cox therein is more than sufficient to pay off the whole amount of the notes in question. It was not material to ascertain the exact relations of Cox and Walmsley in the beginning, for, assuming that the transaction commenced as a partnership one, it was manifest that (the stock falling in the market), Cox being unable or unwilling to bear any share of the heavy burden of carrying it, Walmsley having to put up other securities of his own, and being also pressed by his bank to pay off or materially reduce the indebtedness, Cox's interest, of whatever nature it may have originally been, was finally and definitely closed out.

Cox was in no sense the agent of Walmsley to say or do things improperly to induce the other defendants to sign the notes, if in truth he did say or do any of them. It was immaterial whether Cox or Walmsley first suggested that the wife and daughter should become parties to the note. All the defences failed.

Judgment for plaintiff for amount of the notes with interest and costs.

STREET, J.

JANUARY 26TH, 1903.

CHAMBERS.

RE HUNT.

Will—Daughter of Testatrix Named as Devisee Predeceasing Testatrix—Rights of Husband of Daughter—Tenancy by the Curtesy.

Hannah Hunt by her will directed her estate to be sold, and the proceeds to be divided into four equal shares, one share to be paid to each of her four children, naming them. Susanna Jewell, a daughter, predeceased the testatrix, intestate, leaving a husband and two infant children.

The executors moved under Rule 938 for an order declaring the rights of the husband and children.

F. S. Mearns, for the executors and John Jewell, the husband.

F. W. Harcourt, for the infant children.

R. S. O. ch. 128, sec. 36, Eager v. Furnivall, 17 Ch. D. 115, Johnson v. Johnson, 3 Hare 157, and In re Scott, [1901] 1 K. B. 228, were referred to.

STREET, J., held that the husband of Susanna Jewell was entitled to a one-third interest in the share given to his wife, the infant children taking the remaining two-thirds.

STREET, J.

FEBRUARY 2ND, 1903.

CHAMBERS.

GREER v. POWELL.

Arrest—Motion to Set aside Order for—Judge in Chambers—Motion to Discharge—Order Obtained while Defendant in Custody on Criminal Charge.

Motion by defendant to set aside an order for his arrest, and the arrest, or to discharge him from custody thereunder.

J. H. Moss, for defendant.

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

STREET, J.—'A Judge in Chambers cannot entertain the motion to set aside the order: Damer v. Busby, 5 P. R. 356. The defendant absconded from Ontario to the North-West Territories, and was brought back by persons other than plaintiff, upon a charge of embezzlement, upon which he was convicted and allowed to go on suspended sentence, so far as the criminal charge was concerned. While he was so in custody, plaintiff obtained the order for arrest and lodged it with the sheriff. There was nothing objectionable in the practice followed by plaintiff under these circumstances; he was not bound to wait until the prisoner had been discharged from custody under the criminal charge before applying for an order for arrest under civil process: Ramsden v. Macdonald, 1 W. Bl. 30; Coppin v. Gunnell, 2 Ld. Raym. 1572; Altroffe v. Lunn, 9 B. & C. 395; Rule 1021 (3); Form 135. Upon the merits no ground was shewn for discharging defendant from custody. Motion dismissed with costs.

STREET, J. FEBRUARY 2ND, 1903.

TRIAL.

MURRAY v. SIMPSON.

Trusts and Trustees—'Purchase of Land—Principal and Agent —'Lien for Purchase Money—Purchase for Value without Notice—Damages for Detention of Land.

Action begun on 22nd November, 1901, by the wife of David Murray, against Nelson Simpson and his wife, B. J. Clergue, the Lake Superior Power Company, and the Algoma Central Railway Company, to whom the Lake Superior Power Company had transferred a part of the land in question, 67 acres in the township of Korah, adjoining the town of Sault Ste. Marie, claiming a reconveyance and damages for registering a cloud upon her title, as well as for the detention of the land.

A. B. Aylesworth, K.C., and C. A. Moss, for plaintiff.

W. R. Riddell, K.C., and P. T. Rowland, Sault Ste. Marie, for defendants.

STREET, J. (after setting out the facts and evidence at length):—The position is this. Simpson knew that plaintiff was in effect the beneficial owner of the land, and that W. H. Plummer held the title for her, subject only to the payment of his lien of $264; he paid Plummer the amount of the lien, and took the title in his own name, representing to Plummer that it was part of the arrangement upon a sale which he had made to plaintiff. This statement was untrue in fact, al-

though not wilfully so, and Simpson's position upon his agency to sell at $625 being repudiated, he became a trustee for plaintiff of the title he had so obtained, with a lien for the amount he had paid Plummer. If he had completed the transaction and obtained a conveyance from plaintiff to himself, then, no doubt, he would have ceased to hold the title obtained from Plummer as trustee for her, and would thenceforth have held it as trustee for Clergue; but until the contract was carried out Simpson was, as Clergue knew, acting as agent for Mrs. Murray, and he could not deprive him of that character before the contract was completed, by asking him to take the conveyance of the property in his own name as trustee for him, Clergue; it was only at the completion of the contract, and not while it remained incomplete, that Clergue intended Simpson to become trustee for him of the title acquired under the contract, and, as the contract never was completed, Simpson remained trustee for plaintiff, and never became trustee for Clergue or the other defendants. The defence set up of purchase by Clergue for value without notice cannot be sustained because it is clear that he had actual notice that plaintiff, and not Plummer, was the true owner. The other defendants are not entitled to any better position than that of Clergue.

Judgment declaring that defendants other than Simpson hold the three-fourths interest in the 67 acres in trust for plaintiff, subject to the payment by plaintiff to them of $264, with interest from 1st November, 1899, and that upon payment of that sum they are to reconvey to plaintiff free from any incumbrances created by them or any of them. There will be no damages to plaintiff; she will have back the land, which has largely increased in value since the sale. Defendants to pay plaintiff's costs.

FALCONBRIDGE, C.J. FEBRUARY 2ND, 1903.

TRIAL.

McGREGOR v. McGREGOR.

Partnership—Winding-up—Application of Proceeds of Sale of Partnership Lands—Claim upon Judgment of Foreign Court—Jurisdiction—Amendment—Severance of Partnership Interest—Deed pendente Lite—Notice—Lien—Voluntary Deed Void against Creditors—Dower—Partition.

Action for partition or sale of lands in the city of Windsor.

A. H. Clarke, K.C., for plaintiffs.

E. S. Wigle, Windsor, for defendant Jane McBride.

J. L. Murphy, Windsor, for defendant John McGregor.

J. E. O'Connor, Windsor, for defendant Elizabeth Mc Gregor.

FALCONBRIDGE, C.J.—(1) An undivided half interest in the Windsor real estate is a partnership asset, and on the winding-up of the affairs of the partnership the proceeds thereof are first applicable in discharge of the debts of the firm, and then of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm, i.e., the claims of one partner against the other on an accounting: Lindley on Partnership, 5th ed., p. 352.(2) Therefore it is liable to answer the amount which under the judgments of the Michigan Courts will be payable to Thomas McGregor. (3) For the decree of the Supreme Court of Michigan should be held binding upon these parties in this Court. The parties were all within the jurisdiction of the foreign Court, and as defendant John McGregor invoked and submitted to the jurisdiction of that Court, he has precluded himself from setting up want of jurisdiction: Swazie v. Swazie, 31 O. R. 324; and if any amendment be necessary, it will be granted. (4) The Windsor real estate did not cease to be partnership property on the withdrawal of John McGregor senior, or at the death of Donald McGregor. The evidence does not shew any agreement or other state of facts whereby there was any severance of the partnership interest of John and Thomas in the undivided one-half remaining. (5) The deed to Elizabeth McGregor was given pendente lite, with full notice to her and without consideration, and is bound by the judgment subjecting the conveyance to her to the lien of Thomas McGregor. Being admittedly voluntary and without consideration, it is also fraudulent and void against Thomas McGregor in respect of his lien on the partnership property, and also fraudulent and void against Thomas McGregor and other creditors of John McGregor, in respect of the undivided interest of John McGregor not subject to the lien. Leave to plaintiffs to amend as to these two-twentieths by suing on behalf of themselves and all other creditors of John McGregor. (6) The defendant Elizabeth McGregor is not entitled to dower, because the land is a partnership asset, and because she now holds the property in her own name, the conveyance being still good as between her and her husband. Judgment generally in favour of plaintiffs for partition or sale, with declarations in accordance with the above findings. Defendants John McGregor and Elizabeth McGregor to pay costs of action of plaintiffs and defendant Jane McBride.

MEREDITH, J. FEBRUARY 3RD, 1903.

CHAMBERS.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Life Insurance—Action on Policy—Condition as to Award—Application to Stay Proceedings.

An appeal by defendants from order of Master in Chambers (1 O. W. R. 777), refusing to stay proceedings in an action on a policy of life insurance, notwithstanding a condition in the policy as to an award.

H. Cassels, K.C., for defendants.

S. Alfred Jones, for plaintiff.

MEREDITH, J.—The rule applicable to this case is well settled; the difficulty is in applying it.

The jurisdiction of the Court cannot be ousted as to a cause of action which has arisen; but where no cause of action has arisen there is no jurisdiction.

In the circumstances of this case, if liability to pay has arisen, no words of the parties or either of them can prevent the Court giving relief, but if no liability to pay arises until after award the action is premature.

Less is gained by seeking to follow the reasoning of any one Judge against that of any other, expressed in the case of Scott v. Avery, 5 H. L. Cas. 811, or in any other case, than by looking at what was actually decided in the case, and for the results which, according to binding authority, flow from the decision in Scott v. Avery.

Upon the face of the policy the contract to pay is made subject to the conditions indorsed upon it, as conditions precedent; and in the 15th of such conditions it is provided that the obtaining of an award, as therein provided, shall be a condition precedent to liability to pay any claim under the policy, and to the enforcement of it. In other words, the liability is upon the award and policy, not upon the latter alone. . . .

Caledonia Ins. Co. v. Gilmour, [1893] A. C. 85, and Spurrier v. La Cloche, [1900] A. C. 446, referred to.

Under the Arbitration Act the Court has power to further the plaintiff's claim effectually, if the defendants fail, or unduly delay, to comply with the terms of the contract: but it has no power to compel payment before reference and award, contrary to the contract, upon which the obligation to pay does not arise until after reference and award.

The application is not one made to the discretion of the Court under sec. 6 of the Arbitration Act, but is one based upon a denial of any right of action in the plaintiff.

The logical result is that the action, being premature, ought to be dismissed, but that is not asked for, and can better be done, and all question of costs better dealt with, after the award—having regard, among other things, to the condition requiring legal proceedings to be commenced within one year.

There is no question of fact in dispute; the one question is that which has been considered, a question of law plainly arising upon the policy, and neither party desired to go to trial to have it there considered; it may as well, therefore, be determined upon this summary motion.

There is nothing in the point that the plaintiff is not one of the contracting parties. She is suing upon the policy, and if she can recover at all it must be upon the contract contained in it.

Appeal allowed; and proceedings stayed, and costs reserved, until after award, but with liberty to apply meanwhile if necessary.

MEREDITH, J. FEBRUARY 3RD, 1903.

CHAMBERS.

SMALL v. AMERICAN FEDERATION OF MUSICIANS.

Writ of Summons—Service—Unincorporated Foreign Voluntary Association—International Association—Service upon Executive Officer in Ontario—Conditional Appearance—Question of Incorporation—Pleading—Trial.

Appeal by defendants from order of Master in Chambers, ante 26, dismissing a motion to set aside the writ of summons and service thereof upon one D. A. Carey for defendants.

J. G. O'Donoghue, for defendants.

C. A. Moss, for plaintiff.

MEREDITH, J.—The defendants the American Federation of Musicians were originally sued as an incorporated body; as such an interim injunction was made against them; upon motion to continue that injunction—notice of which was apparently served upon them in the same manner as this writ—they appeared by counsel and shewed cause against it, but an order was made continuing the injunction until the trial; and leave was also given to the plaintiff to proceed against certain members of the "Federation," as representing all; and

the plaintiff's action is now against the "Federation" as a corporate body, or, in the alternative, against the members as an unincorporated body.

The ground of this motion is that the "Federation" is neither a corporate body nor a co-partnership, in effect that they have no legal status and so cannot be served or sued; but the same question must have been raised upon the motion to continue the injunction, and was not given effect to, and is the proper subject of an issue; so that what the Master was asked to do was to hold, without trial, upon a summary application, that no action lies against these defendants.

That he rightly refused to do, leaving the question for trial and adjudication in the ordinary way.

The usual and proper mode of raising, in the common law Courts, such a defence was by plea of nul tiel corporation, and under ordinary circumstances it should now be raised by statement of defence of the same character; though it may be that in some exceptional cases it might be disposed of on summary motion: see Mason v. Holmes, 30 Misc. R. (N. Y.) 19.

In this case the plaintiffs will allege and these defendants deny as a matter of fact that these defendants are a corporate body or have some legal entity. The question does not depend upon the construction of some legislation, or of some writing, but is purely one of fact—whether the "Federation" has actually been incorporated under the laws of this or of some other country. It is far from proof of their nonentity that the person served *believes* they are not incorporated, and has had a telegram to that effect. Much more light is needed upon the question, and that can be best given at the trial.

Cases to which the Master was not referred, quite sustain his ruling: see Williams v. The Commissioners, &c., 11 C. B. 420, and McSherry v. The Commissioners, &c., 45 U. C. R. 240. Tewman v. The Governor, &c., 3 C. P. D. 563, is a peculiar case, and not really in conflict with the others.

Once rid, for the purpose of this motion, of the point that these defendants cannot be served in any way, because they have no legal capacity, the case presents no difficulty. The person served is the proper person to be served. These defendants carry on their business or operations in this Province just the same as elsewhere, and that person is their highest officer in this large district. The service in no way prejudicially affects these defendants' right to contend that they are not subject to any judgment, rather it aids in having the question of the legal capacity or want of legal capacity fairly and rightly determined.

Appeal dismissed; costs to the plaintiff, only, in the action.

MEREDITH, J. FEBRUARY 3RD, 1903.

CHAMBERS.

RE BROWN AND SLATER.

Will—Construction—Devise—Life Estate—Estate Tail—Survivorship—Disentailing Deed not Acted upon—Condition as to Continuing to Bear Testator's Name—Conveyance to Trustee—Title—Vendor and Purchaser.

Motion by Mary Brown, the vendor, under the Vendors and Purchasers Act, for an order declaring that she is the owner in fee simple of the north halves of lots 4 and 5 in the 3rd concession of the township of East Flamborough, and as such entitled and able to make a valid conveyance thereof in fee simple to the purchaser, John Slater; that the disentailing deed and marriage settlement made between Alexander Brown and others and John Sproat on the 8th October, 1870, and registered on the 26th November, 1870, forms no cloud upon Mary Brown's title to the lands; and for such other order as may seem just.

By the will of Alexander Brown, made on the 29th December, 1842, whereof letters probate issued on the 9th October, 1852, the lands in question were devised to the testator's son, also named Alexander Brown, "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever; and in default of a second male heir to their eldest surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life."

The vendor on the 21st January, 1903, made a statutory declaration that she was the eldest and only surviving daughter of Alexander Brown the younger, who died on the 31st July, 1880; that, under the devise in the will of Alexander Brown the elder, she became the owner of the lands in question; that her sisters, Martha Marion Brown, and Eliza Brown, afterwards Sproat, both predeceased their father; that immediately upon his death she (the declarant) entered into possession of the lands in question, and had been in undisputed possession ever since.

It also appeared that Alexander Brown the younger had one son who survived him.

The disentailing deed and marriage settlement above referred to were made at the time of the marriage of Eliza Brown, she being then, as recited, "tenant in tail in remainder immediately expectant upon the decease of the said Alexander Brown, her father."

A subsequent disentailing deed was made on the 31st January, 1877, by Alexander Brown and Mary Brown, the vendor, to a trustee for the benefit of Mary Brown.

A. W. Brown, Hamilton, for vendor.

W. T. Evans, Hamilton, for purchaser.

MEREDITH, J.—The first objection to the vendor's title is that the devisee Alexander Brown took, under the will, an estate tail, and by deed effectually barred the entail.

If that were so, then the vendor would seem to have title by length of possession.

But, in my opinion, that devisee took a life estate only, and the estate tail male is devised to the vendor, she being the only daughter of that devisee, and "his present wife," who survived them. The survivorship is clearly of that devisee and his said wife, not of the testator.

Whether the word "now" refers to the date of the will, or, as more likely, to the time of the testator's death, the recitals in the deeds, the declaration furnished, and the possession of the land since the testator's death, shew that the land in question is that comprised in the devise in question.

It is to be observed that neither that devisee nor any one else seems ever, until after the contract in question was made, to have claimed or supposed that he took more than a life estate, or that the land in question is not that which the testator described as that whereon he "now" resides. The deed in question was executed by that devisee as life tenant, and he is therein recited to be, and is throughout described as, such.

The deed in question was made and registered in the year 1870; there seems to have never been any possession, or claim of any character made, under it; and, being on the face of the registered title deeds ineffectual, it does not stand in the way of the completion of the purchase. It would be different if any claim were being made under it so that the case would be one of selling and buying a lawsuit, as well as the land, if the contract were carried out.

Then as to the objection upon the ground that the devise to the vendor is subject to the provision that she continues to bear the testator's name during her life. There has been no breach of it yet; and it is said that such a condition cannot be attached to an estate in fee simple, and that a tenant in tail by barring the entail and enlarging his estate into a fee simple defeats a condition for taking and using the testator's name: see Jarman on Wills, 5th ed., pp. 890 and 900, and Re Cornwallis, 32 Ch. D. 388; and from one point of view at all events there appears to be a restriction of the

power of alienation quite antagonistic to the quality of an estate in fee simple. The devisee cannot sell, mortgage, lease, or otherwise dispose of the land effectually because up to the last moment of her life her name may be changed. I give effect to the view of the law cited. The devisee is hardly likely at this late day to disregard or to have any occasion for disregarding the testator's wishes in this respect. See Bird v. Johnston, 16 Jur. 976.

Mr. Evans's last point taken upon the argument was that the vendor had conveyed the lands to a trustee and so had not the legal estate. No objection of this character seems to have been previously taken; the grantee seems to be but a bare trustee for the vendor, and I do not understand that there is any objection on her part to procure a conveyance from him to the purchaser; the matter seems one of conveyancing merely, and in regard to which there is no contention between the parties.

Notwithstanding anything that has been urged against it, the vendor has, in my opinion, shewn a good title to the land in question. By agreement between the parties there is to be no order as to costs.

MEREDITH, J. FEBRUARY 3RD, 1903.

CHAMBERS.

RE LLOYD AND PEGG.

Arbitration and Award—Order for Enforcement of Award—Time for Application—Necessity for Order—Construction of Arbitration Act—Objections to Award—Misconduct of Arbitrator—Evidence.

Appeal by plaintiff against an order of the Master in Chambers, made under sec. 13 of the Arbitration Act, giving leave to enforce an award in the same manner as a judgment or order of the Court to the same effect may be enforced.

The grounds of the appeal were: (1) that the application should have been, but was not, made within six weeks after the publication of the award, there having been no extension of the time under special circumstances; (2) that no order was necessary; and (3) that the award was manifestly unjust in these respects, (a) because evidence was taken, in the absence of the appellant, by the arbitrator, and (b) because the award erroneously allowed the respondent $200 in respect of the Winar transaction and $550 in respect of the Sheppard transaction.

A. B. Armstrong, for appellant.

R. L. Johnston, for Lloyd.

MEREDITH, J.—The contention is, that sec. 45 of the Act covers an application of this character—for leave to enforce an award—but that is not so. The section applies to all applications to set aside an award, but not including an appeal against an award, which secs. 14 and 34 provide shall not be made after the expiration of 14 days from the filing of it, except by leave under special circumstances. The omission of a comma at the end of the first line of the section in its last two enactments cannot be permitted to destroy or very largely alter its meaning. All applications—all what applications? The appellants say all applications under the Act; but why read in the last three words? It cannot mean all applications under the Act, for some provided for in it are to be made before award, even before the reference. The next preceding section deals with "any appeal or motion to set aside an award." Plainly "all applications" means all applications of that character. It is not very accurate to say "an appeal to set aside an award;" but in dealing with motions to set aside awards care is taken, perhaps needless care, to exclude, from all applications to set aside an award, an appeal against an award under secs. 14 and 33. To be strictly right from a grammatical point of view the section is to be read as it originally was, or better still thus:—All applications to set aside an award (but not including an appeal against an award) made on a submission, shall be made, etc.

The second contention ends when it is said that the reference was one made out of Court—not in any cause or matter in any Court.

And as to the other grounds; it is not even asserted that the appellant had not due notice of the appointments upon which it is said evidence was taken in his absence, such notice as would justify the arbitrator in proceeding ex parte, and the items in regard to which error is alleged were apparently fully gone into in the evidence taken, and in the arguments of counsel for all parties had, before the arbitrator. These matters were properly the subject of a motion against the award if really considered of any consequence; but no motion has been made against it, and these alleged injustices are put forward only when proceedings to enforce the award became troublesome. They ought not to delay the order now, but a refusal to give any effect to them upon this motion is not to and will not prejudice any other proper use the appellant may be able to make of them.

Appeal dismissed with costs.

MEREDITH, J. FEBRUARY 3RD, 1903.

CHAMBERS.

RE MCNICHOL.

Will—Construction—Life Estate—Remainder—Vested Interests of Remaindermen—Representatives of Remaindermen Dying before Period of Distribution.

Application by the executors of the will of John McNichol under Rule 938 for an order ascertaining the class of legatees amongst whom is to be divided the moiety of proceeds of the sale of the farm of the testator first referred to in the following extract from his will: "In the event of my daughter dying without heirs of her own body, and after the death of both her and her mother, my wife, the farm to be sold, and the proceeds divided, one equal half to be divided among my brothers and sisters, and the other equal half to be willed to whomsoever my beloved wife pleaseth to bequeath it."

The testator died on the 14th November, 1870; his daughter died 10th December, 1888, without heirs of her body, not having been married; and the testator's widow died on the 4th September, 1902.

Seven of the brothers and sisters of the testator survived him, but three of them died before the widow.

W. L. Walsh, Orangeville, for the executors.

W. E. Middleton, for the representatives of Benson McNichol, a deceased brother of the testator, cited Re Harman, [1897] 2 Ch. 39.

F. W. Harcourt, for the infants, referred to Jarman on Wills, 5th ed., pp. 1010-11; Theobold on Wills, 5th ed., p. 277.

MEREDITH, J.—The gift is, in effect, in the events which have happened, to the daughter for life, with remainder, as to the proceeds of one-half of the farm, to the brothers and sisters.

The brothers and sisters living at the testator's death took vested interests, and each became entitled to an equal share in such proceeds, together with other brothers or sister (if any) born before the period of distribution. The estate of any of such brothers or sisters as have died since the testator, is entitled to the deceased's share: see Stanley v. Wise, 2 Camp. 482, and Baldwin v. Rogers, 3 DeG. M. & G. 649.

If any conclusion adverse to the persons who are interested and have not been served with notice of this motion had been reached, no order would have been made without notice to at least some of them.

Order accordingly. Costs out of the fund.

FALCONBRIDGE, C.J. FEBRUARY 3RD, 1903.

TRIAL.

MURPHY v. BRODIE.

Principal and Agent—Purchase of Land by Agent—Account —Mortgage—Release of Surety.

Action for compensation, indemnity, an account, and payment of what is due to plaintiff, in respect of a purchase of land made by plaintiff for defendants.

J. E. O'Connor, Windsor, for plaintiff.

F. E. Hodgins, K.C., for defendant Brodie.

F. D. Davis, Windsor, for defendant Stuart.

FALCONBRIDGE, C.J., held that defendant Brodie had no independent advice, but relied on plaintiff as his solicitor. The full and accurate details of the extraordinary arrangement of the $2,900 mortgage were never disclosed to Brodie, and when the mortgage was executed it was a different one from any mortgage "to secure balance of purchase money" which could have been contemplated. This effects a release of defendant Brodie, who was a surety for Margaret Stuart. Further, there have been subsequent dealings of plaintiff with the matter which would alter Brodie's position and render it impossible for plaintiff, on being paid off by Brodie, to transfer to him the securities to which Brodie would then be entitled. Action as against Brodie dismissed with costs. Judgment for plaintiff against the estate of the late Margaret Stuart for an account. On taking the account the mortgage to McLaughlin to be declared to be a mortgage for $700 only, and the mortgage to plaintiff a mortgage for $500 only. The Master also to take an account of rents and profits received or which should have been received, and of rent due by estate of Margaret Stuart. Plaintiff to convey to defendant executor on payment of amount found due. Further directions and costs of this action reserved until after report.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

REX v. SWANTON.

Municipal Corporations—By-law Governing Hawkers—Conviction—Form of—Imprisonment for Costs—Evidence of Breach of By-law.

Motion to make absolute a rule nisi to quash a conviction of defendant, made by the police magistrate for the town of Paris, for a breach of a town by-law for licensing, regulating,

and governing "hawkers, pedlars, or petty chapmen," passed under sec. 583 (4) of the Municipal Act.

E. E. A. DuVernet, for defendant.

G. H. Watson, K.C., for complainant.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that the conviction was not bad on its face because it directed imprisonment in default of payment of both fine and costs and of sufficient distress, the conviction being in the form prescribed by sec. 707 of the Municipal Act, and the by-law following the words of sec. 702: see Regina v. Johnson, 8 Q. B. 102; Reid v. McWhinnie, 27 U. C. R. at p. 293; R. S. O. ch. 90, sec. 5. Regina v. McMillan (Divisional Court, 12th January, 1901), distinguished. The Court also held that it could not be said that there was no evidence of a breach of the by-law having been committed by defendant. Rule nisi discharged with costs.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

JONES v. LAKEFIELD CEMENT CO.

Conversion—Leave and License—Findings of Trial Judge—Refusal of Appellate Court to Interfere.

Appeal by plaintiff from judgment of BRITTON, J., dismissing the action, which was brought to recover damages for the conversion of a certain derrick and derrick-masts, guy-ropes, etc., taken by defendants from the plaintiff's quarries on Eagle Mount island in Stoney lake. The defendants took the goods to their works at Young's Point, and kept them until after action. They justified by leave and license of plaintiff.

W. R. Smyth, for plaintiff, contended on the evidence that the finding of the trial Judge was wrong.

G. H. Watson, K.C., for defendants, contra.

THE COURT (MEREDITH, C.J., MACLAREN, J.A.), held that it was impossible, with a proper regard to what was due to the findings of a Judge who had seen the witnesses, heard the evidence, and come to his conclusion on conflicting testimony, to interfere with the result that had been reached. Appeal dismissed with costs.

FEBRUARY 3RD, 1903.

DIVISIONAL COURT.

WILCOX v. CALVER.

Covenant—Restraint of Trade—Construction of Covenant—Territorial Limit—"In."

Appeal by defendant from judgment of STREET, J., in favour of plaintiff in an action for damages for breach of a covenant in restraint of trade. The question was whether defendant's covenant, given to plaintiff on the sale of an interest in a hotel in the city of St. Thomas, extended to the premises in which defendant was, at the time the action was brought, carrying on the business of hotel-keeping. By the covenant defendant agreed "not to enter into the business of hotel-keeping, for the period of five years, east of the London and Port Stanley Railway in the city of St. Thomas." The premises in which defendant was carrying on business were upon a half acre of land which did not form part of the city as its limits were fixed by law, but was part of the township of Yarmouth, though entirely cut off from the rest of the township and surrounded on all sides by the city.

E. E. A. DuVernet, for appellant.

Joseph Montgomery and A. Grant, St. Thomas, for plaintiff.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), held that the prohibited district is the area which has for its westerly limit the line of the London and Port Stanley Railway and extends thence easterly to the easterly boundary of the city, and is bounded on its other sides by the boundary lines, on those sides, of that city. The half acre is in the city in the sense in which "in" is used in the covenant, which is the same sense in which one would speak of Pelee island being in lake Erie. Mallan v. May, 13 M. & W. 511, distinguished.

Appeal dismissed with costs.

WINCHESTER, MASTER. FEBRUARY 4TH, 1903.

CHAMBERS.

REX EX REL. WARR v. WALSH.

Municipal Elections—Election of Councillors by Acclamation—Nomination Meeting—Hour for—Disobedience of Statute — Imperative Provision — By-law — Irregularity — Saving Clause.

Motion by relator to set aside the election by acclamation of Edward J. Walsh, Joseph Allen, Thomas Mara, Manton

Treadgold, John Fingland, and Richard Ashley, as councillors for the town of Brampton, upon the ground that the nomination of candidates for councillors was held at 10 o'clock in the forenoon of Monday, 29th December, 1902, for one hour, instead of at noon of the same day.

E. G. Graham, Brampton, for relator.

T. J. Blain, Brampton, for respondents.

THE MASTER held that the Legislature having by sec. 119 of the Municipal Act, expressly fixed the hour of noon for such nominations, the council had no power by by-law or otherwise to alter the hour. The time of holding an election is a matter of substance; the nomination is the commencement of the election. The authority to hold an election at one time will not warrant an election at another time: Am. & Eng. Encyc. of Law, 2nd ed., vol. 10, p. 679; Re East Simcoe Election, 1 Ont. Elec. Cas. 291, 308-322, 336-7. The provision of the statute is not merely directory, but imperative. The holding the election at the wrong hour is not a mere irregularity coming within sec. 204 of the Act, the "saving clause."

Order made setting aside the election and directing the holding of a new election, with costs.

STREET, J. FEBRUARY 4TH, 1903.

CHAMBERS.

RE POLLOCK.

Will—Bequest to Widow during Widowhood—Dower—Election—Acceptance of Benefit—Intestacy—Discretionary Power to Sell—Conversion of Realty into Personalty.

Application by executors and widow of James Pollock, deceased, from an order declaring construction of will. Testator died 29th August, 1898, leaving widow and two infant children. By the will he devised and bequeathed all his real and personal estate as follows: "First, my wife shall have the sole use of all my real estate and personal property . . or so much of the same as shall be necessary for the proper maintenance of herself and my two sons . . . as long as she remains my widow or until my eldest son . . comes of the full age of 21 years, and in the event of my wife ceasing to be my widow, her maintenance shall cease. . . . Second, when my eldest son arrives at the full age of twenty-one years I direct that he shall receive one-third of my real estate and one-half of my personal property or an equivalent value thereof, and that an equal share . . . shall be held in trust by my executors for my executors for my second son . . . until he comes of the full age of 21 years. Third, I further

direct that in the event of either of my sons dying before coming of age the surviving son shall receive the share of his deceased brother. Fourth, . . . my executors shall have the power . . to sell . . my real estate or personal property, and the proceeds shall be invested and held in trust for the use of my heirs as hereinbefore provided, and said proceeds shall be subject to the same conditions as hereinbefore provided."

W. Proudfoot, K.C., for the executors and widow.

F. W. Harcourt, for the infants.

STREET, J., held, following Laidlaw v. Jackes, 22 Gr. 171, 25 Gr. 293, 27 G. R. 101, that the terms of the will are not such as to put the widow to her election, and she is entitled to the benefit of the provisions of the will in her favour and also to her dower. The benefits under the will have come to an end by her marriage, but she is not to be taken to have deprived herself of her right to dower by her having taken them prior to her second marriage. There is an intestacy as to one-third of the real estate, and, subject to the widow's dower, it belongs to the two sons in equal shares absolutely as it was not required apparently for payment of debts. The discretionary power to sell did not effect a conversion of the realty into personalty. Order declaring accordingly. Costs out of the estate.

FEBRUARY 4TH, 1903.

DIVISIONAL COURT.

DEACON v. WEBB.

Payment on Mortgage—Appropriation on Principal though Interest Overdue—Subsequent Attempted Variation.

Appeal by defendant from judgment of County Court of Frontenac, in favour of plaintiff for $304.25 in an action upon the covenant for payment contained in a mortgage deed. The defence was payment.

J. J. Maclennan, for defendant, contended that the plaintiff had made an application of a payment upon principal, instead of, as he might have done, upon overdue interest, and was bound by that appropriation, having notified the defendant of it, and having in this action made her claim upon the basis of that appropriation, citing Fraser v. Locie, 10 Gr. 207; Hooper v. Kay, 1 Q. B. D. 178; Leake on Contracts, 4th ed., p. 652; Addison on Contracts, 9th ed., p. 149.

W. E. Middleton, for plaintiff, contended that it was not a case of appropriation of payments, but a mistake in making

out an account, which the plaintiff could correct at any time before judgment, and that plaintiff was not bound by a mistake made by her solicitor and agent: McGregor v. Gaulin, 4 U. C. R. 378.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), held, distinguishing that case, that the appellant's contention must prevail. It was not open to doubt that the mortgagor when making the payment of $700 was entitled to stipulate that it should go in reduction of the principal money, and that no part of it should be applied upon the interest. The mortgagee might have refused to accept a part payment on these terms, but, if she chose to accept it, she was bound to apply it as the mortgagor directed. The proper inference from the facts was, that the mortgagor did, when making the payment, direct it to be applied in reduction of the principal, and that the mortgagee received it on these terms; or, at any rate, there was an application by the mortgagee's agent of the whole $700 to the principal, and that appropriation, having been communicated to the mortgagor, became binding on the mortgagee, and could not afterwards be changed.

Judgment varied by reducing the amount of recovery to $236.65, with interest on $100 from the date of the writ of summons to the date of the judgment. No costs of appeal.

FEBRUARY 5TH, 1903.

DIVISIONAL COURT.

McLEAN v. ROBERTSON.

Public Schools—Change of School Site—Adoption by Trustees — Ratepayers' Meeting — Resolution—Minutes—Inspector—Arbitration—Resolution of Ratepayers—Poll—Voters.

Appeal by plaintiffs from judgment (1 O. W. R. 578) of F. A. ANGLIN, K.C. (sitting for FERGUSON, J.), dismissing with costs an action by three ratepayers of a school section in Manitoulin Island, on behalf of themselves and all other ratepayers, against two of the trustees as such and as individuals and against the school board to restrain the board from disposing of a school house called the new school house, from erecting a new building on the old school site, and from altering, repairing, or adding to what is called the old school house, and for certain declarations of right as to the validity of resolutions and meetings of the board.

A. B. Aylesworth, K.C., and W. H. Williams, Gore Bay, for plaintiffs.

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

THE COURT (MEREDITH, C.J., MACMAHON, J.), agreed with the judgment of the learned King's Counsel on all the questions raised by the appeal.

Appeal dismissed with costs.

FEBRUARY 5TH, 1903.

DIVISIONAL COURT.

YOUNGSON v. STEWART.

Partnership — Taking Accounts — Charging Partner with Payment — Evidence of Partner in Master's Office — Attempt by him to Contradict his own Statements — Evidence—Books.

Appeal by defendant Hopkins from an order of STREET, J., allowing in part an appeal from the report of the local Master at Hamilton in a partnership action.

S. F. Washington, K.C., and H. H. Robertson, Hamilton, for appellant.

G. Lynch-Staunton, K.C., and T. Hobson, Hamilton, for respondent, defendant Stewart.

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

MEREDITH, J.—This litigation has resolved itself into a contest between the appellant and respondent only.

And, in regard to the second ground of this appeal, the respondent contended in the Master's office that the appellant should be charged with the sum of $100, one-half of an amount paid out of the copartnership moneys to one Lewis; the Master disallowed the claim, but upon appeal it was allowed.

It is now admitted that the sum of $200 was paid to Lewis, and that a moiety of that payment should have been repaid by the appellant.

The claim was denied by the appellant in the Master's office, and thereupon the respondent was examined as a witness for the purpose of proving it, as well as every other matter in dispute between these parties; but, instead of making good the claim, he testified, in effect, that there had been a settlement of accounts between him and the appellant in which the sum in question had been charged against and satisfied by, the latter; his own words are, "a balance of $100 that Hopkins owed on the Lewis account was deducted from the $205.24, and this left $105.24."

No other evidence but that of the appellant in denial of the claim was given upon this item.

But it is now urged by counsel for the respondent that his client erred in his testimony and that the copartnership books and some memoranda upon the back of a blank form of promissory note and of a deposit slip, shew this.

There are two answers, however, to this contention. (1) Although the reference lasted a very long time after the evidence of the respondent was given, and although this is the second appeal since the Master made his report, no attempt of any kind has been at any time made to correct upon oath the alleged mistake. So that there is the oath of the respondent, unretracted in any manner by him, against the assertion of counsel representing him, without even a suggestion from the client of any mistake or of any desire to be released. This to my mind is an abundantly sufficient answer to the contention. But (2) neither the books nor the memoranda in their figures shew any mistake; on the contrary, they may be looked upon as confirming the evidence; though it must be said that the books seem to have been ill kept, and neither they nor the memoranda would, unaided by evidence, demonstrate anything decisive upon this question.

Both, however, do shew that at the time of the settlement the balance in the books to the credit of the appellant was $205.24; and that that sum was reduced to $105.24 by deducting from it the very sum of $100 with which it is now sought to charge the appellant again; and so confirm the respondent's evidence upon the point. The words in pencil on the deposit slip are not verified in any manner, and are not evidence.

That there was a settlement between these two parties in which the $100 was taken into consideration and account cannot be denied; all the evidence and figures shew this, and the respondent has admitted upon oath that such was the fact, and that in that settlement the appellant paid the sum in question; it is quite too much, in the face of all this, to give effect, after the lapse of seven years, to any manipulation of figures, in argument only, with a view to shew that all that was sworn to and all that appears as before mentioned is fallacious; or to give effect to unverified words appearing in a loose memorandum.

The appeal on this ground is allowed; and the Master's finding and report in respect of it will stand.

The other grounds of appeal were disposed of on the argument. Success is divided; there will be no order as to costs.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

NEELY v. PETER.

Water and Watercourses—Injury to Land by Flooding—Claim for Damages—Summary Procedure—Costs of Action—Dam—Tolls—Injunction.

Appeal by plaintiff from judgment of STREET, J. (4 O. L. R. 293, 1 O. W. R. 499), in so far as it was against plaintiff in an action for damages for flooding plaintiff's land, and for an injunction.

O. M. Arnold, Bracebridge, for appellant.

W. L. Haight, Parry Sound, for defendants.

THE COURT (MEREDITH, C.J., FALCONBRIDGE, C.J.), agreed with the judgment below and the reasons for it, but was of opinion that, in addition to the damages which were awarded to him, the plaintiff was entitled to an injunction as against the defendants the Parry Sound River Improvement Company, but the operation of it should be suspended for a year in order to enable these defendants to acquire the right to overflow plaintiff's land under R. S. O. ch. 194, and the judgment should be varied accordingly. No variation as to costs below, and no costs of appeal to either party.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

WOODRUFF v. ECLIPSE OFFICE FURNITURE CO. OF OTTAWA.

Security for Costs—Application for Increased Security after Trial Practically Concluded—No Application at Trial.

Appeal by defendant company from order of BRITTON, J., ante 35, reversing an order of the local Master at Ottawa requiring plaintiff to give increased security for costs of defendant company.

The appeal was heard by BOYD, C., MEREDITH, J.

G. Bell, for appellants.

F. A. Magee, Ottawa, for plaintiff.

BOYD, C.—The action is practically standing for judgment as to the original defendants. As to the new defendants, the only defence open has practically been exhausted in the

case of the original defendants, but as to them the usual order for security for costs has been made against the absent plaintiff. The defendants are all in the same interest, and no further costs in the way of evidence need be incurred by the original defendants unless they insist on all the evidence originally given being given over again.

The Judge who tried the case as against the original defendants is not impressed with the merits of the defence, as he expressed himself at the hearing; so that no harm appears to be done to the original defendants by affirming the order of Britton, J.

MEREDITH, J.—We have conferred with the learned trial Judge as to matters which were left in doubt upon the argument, and he informs us that, upon speaking to the minutes of the order made at the trial, it was agreed, as he understood, that, although an application for security for costs might be made on behalf of the added defendants, there was to be no application for additional security to the original defendants; that the case is one in which, had additional security been sought as a term of giving leave to amend and of postponing the trial or otherwise, he would have unhesitatingly refused it; that the case is one in which the plaintiff is undoubtedly entitled to recover a considerable sum of money either from the original or the added defendants, the latter being largely interested in the former, the question being mainly, if not entirely, whether the incorporated company or its promoters, now large shareholders, are technically answerable for the debt; and that the further trial of the case was directed to be before him.

In these circumstances, the order in question, which was made by Britton, J., after a like conference with the trial Judge, cannot be disturbed; otherwise the Master's order would have been right. Standard Trading Co. v. Seybold, 1 O. W. R. 783.

Appeal dismissed; costs in the cause.

FEBRUARY 6TH, 1903.

DIVISIONAL COURT.

SALE v. WATT.

Costs—Action by Solicitor to Recover—Reference in Action—Costs of Action and Reference.

Appeal by defendants from judgment on further directions pronounced by GARROW, J.A., sitting as a Judge of the

High Court, disposing of the costs in two actions on bills of costs brought by solicitors against their clients. A reference was directed to the local taxing officer at Windsor to tax the bills, and further directions and costs of the action and reference were reversed. The local officer made his report, from which both plaintiffs and defendants appealed. Upon the appeals MEREDITH, J., sent the bills for revision to Mr. Thorn, senior taxing officer at Toronto, and afterwards adopted his report and disposed of the appeals. Upon motion for judgment on further directions GARROW, J.A., gave judgment in terms of the report as varied upon the appeal, and awarded plaintiffs the costs of the action and reference.

The appeal was heard by BOYD, C., MEREDITH, J.

R. U. McPherson, for defendants.

F. A. Anglin, K.C., for plaintiffs.

BOYD, C.—I think the disposal of the costs of reference came up to be dealt with as on further directions by the Judge, and were not subject to the provisions of Rule 1185, which applies to summary proceedings, and not to cases where a writ has been issued and a judgment given in which the costs of action are reserved till after the report of the taxing officer.

This indeed has been already determined in this case upon the appeal to my brother Meredith.

The costs of reference as part of the costs of action have been given to the solicitor by my brother Garrow, and no ground has been pointed out which would justify us in interfering with his discretion.

The costs of that reference should be subject to close scrutiny, as it appears inexplicable why 27 days as alleged should have been occupied in taxing the bills of costs now in question.

In view of this burden to be borne by the client, I would not give costs of this appeal to the solicitors.

MEREDITH, J.—I agree in the result.