advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of defendant's lands, would not of itself invalidate the sale.

In 1886 the now defendant commenced an action against the present plaintiff and others to set aside the first sheriff's deed, which was dismissed for want of prosecution.

Held, that the defendant was not thereby estopped from setting up the invalidity of the sheriff's sale, for there was no determination of this matter and no final judgment of the Court pronounced on the matters now in issue.

Held, also, that under the circumstances, the defendants could not set up that the proceedings under the expired writ constituted a payment of the execution debt.

Delamere for plaintiff.

Cattanach for defendant.

Div'l Ct.] [June 29.

CARTY *v.* CITY OF LONDON.

Accident—Municipal corporations—Want of repair of street—Contract with street railway company to keep in repair—Liability of corporation—Remedy over against street railway company—Evidence of contributory negligence.

By 36 Vict., c. 99 (O.), the London Street Railway Company was incorporated, by sec. 13 of which the City of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, etc., of the same. By sec. 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, etc., for the conduct of all parties concerned, including the Company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the Street Railway Company, who were to be liable for all damage occasioned to any person by reason of the construction, repair, or operation of the railway or any part thereof, or by reason of the default in repairing the said portions of the streets, and the city should be indemnified by the company for all liability in respect of such damage.

An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by the plaintiff against the City of London therefor. After action was brought, and more than six months after the occurrence of the accident, on the application of the City of London, the Street Railway Company were made party defendants.

Held, that, notwithstanding the said legislation, by-law and agreement, the city was liable under sec. 531 of the Municipal Act, R.S.O., c. 184, to the plaintiff for the damage he had sustained; but that the city was entitled to have a remedy over against the Street Railway Company.

Held, also, following *Anderson* v. *Canadian Pacific Railway Co.*, ante p. 479, that the six months' limitation clause in the Railway Act, did not apply, the question being one of contract.

Osler, Q.C., and *Marsh* for plaintiff.

Meredith, Q.C., for the defendants, the City of London.

Robinson, Q.C., and *Flock* for the defendants, the London Street Railway Company.

Div'l Ct.] [June 29.

SMITH *v.* SMITH.

Will—Life estate—Annuity—Costs—Consolidation of mortgages.

The testator by his will made a provision for his wife as follows: "I give and devise to my beloved wife," etc., "all household goods," etc., for the term of her natural life; and I give and devise to her one bedroom and one parlour of her own choice in the dwelling house wherein I now dwell;" etc., "also the use of the kitchen yard garden; also I give and devise to my said wife her life in the said lot heretofore mentioned, also an annuity of $20 yearly." He then, subject to the above and to the payment of $1,000 to his eldest son, D., and other legacies, devised the lot to his second son, J.

After the testator's death the plaintiff, the widow, and J. lived on the lot, arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J. mortgaged the lot to a building society, and in default proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payment unless the amount of two other