

that the clerk of the township is behind the proceedings. The relator has put the respondent to considerable expense with reference to his claim to be seated. These costs should be paid by the relator. Under the circumstances, a proper exercise of discretion as to costs will be that each party pay his own costs.

The seat to be declared vacant and a new election ordered.

MACMAHON, J.

APRIL 6TH, 1903.

TRIAL.

BIRNEY v. SCARLETT.

Way—Removal of Sand from Streets Laid out in Plans—No Dedication or Acceptance as Highways — Mortgage — Foreclosure — Extinction of Mortgagor's Rights in Streets.

Action for damages for the removal of timber, sand, and gravel from certain streets in the town of Toronto Junction.

Louisa Scarlett died 28th December, 1883, having by her will devised the east half of lot 36 in the 3rd concession from the bay in the township of York, containing 100 acres, to her husband, John A. Scarlett, and her children.

On 26th May, 1887, certain of the devisees executed a quit claim of all their interest in the land to the other devisees. These latter subdivided part of the land into lots, and, as the owners thereof, registered a plan of the subdivision, on 12th April, 1888, as plan 838.

Certain other parts were afterwards subdivided into lots, and a plan thereof was registered by the same persons, as owners, on 26th November, 1889, as plan 969.

All of the lots included in the subdivisions mentioned in plans 838 and 969, and also the remaining portions of the east half of lot 36, were subsequently acquired by John A. Scarlett, Joseph Birney (the plaintiff), and John L. Birney, as tenants in common, and they gave back to the vendors mortgages thereon to secure the greater part of the purchase money, amounting to about \$130,000. The mortgagees covenanted that they would assent to a re-subdivision of the lands, and the mortgagors prepared a plan shewing a re-subdivision of the parts already subdivided, and also a subdivision of the parts not already subdivided, which plan was filed on 12th October, 1890, as plan 1067. Indorsed on the plan was this certificate: "The owners of the property laid out upon this plan, for themselves, their agents, executors, administrators, and assigns, reserve the right to remove all sand, gravel, clay, and timber they may see fit from all roads, streets, lanes,