

The administrator pendente lite is not a necessary party to the suit.

There will be judgment declaring that the late John Alexander McLaren duly executed and published his last will, as set out in the 5th paragraph of the statement of claim, and that the plaintiff, as executor of said last will (a true copy of which was produced at the trial, and marked as exhibit 3), is entitled to propound the same, and to have probate thereof issued to him.

The costs of all the parties, except of the defendants Eliza McIntyre and the Attorney-General, to be paid out of the estate. The plaintiff is entitled to costs as between solicitor and client.

The defendant Eliza McIntyre must bear her own costs. The Crown is only entitled to costs where there is something coming to it out of the estate: *Perkins v. Bradley*, 1 Ha. 219; *Morgan on Costs*, 2nd ed., p. 337.

JULY 12TH, 1902.

DIVISIONAL COURT.

MCINTYRE v. TOWN OF LINDSAY.

Way—Non-repair—Injury to Person—Municipal Corporation—Trench Dug by Gas Company—Consent of Corporation—Liability of Both—Relief Over.

Appeal by plaintiff from judgment of County Court of Victoria dismissing the action as against the town corporation with costs. The action was brought against the town corporation and the Lindsay Gas Company to recover damages for injuries sustained by plaintiff on the night of the 9th October, 1901, by stepping into a deep trench dug by the defendant company along one of the streets of the town. Judgment was entered for plaintiff against the company for \$75 and costs. The company had been authorized by a by-law of the town council to lay down their mains along the streets of the town, they agreeing to indemnify the corporation for all damages to arise therefrom, and to properly protect and warn the public against accidents by lights. At the same time that the gas company had opened a trench at the point in question, the town corporation were laying a granolithic walk, and had erected a barrier round the walk usually used by pedestrians. The plaintiff was turned out of the usual path by this barrier, and slipped in the dark into the ditch and was injured. Neither of the defendants