

Armour, C. J., MacMahon, J.]

[Feb. 12]

KENNEDY v. MACDONELL.

Landlord and tenant—Assignment f. b. o. c.—Acceleration clause—Forfeiture—Election by assignee to retain premises—New lease—Further rent—Payment under protest—Recovery back—R.S.O. c. 174, s. 34—Voluntary payment—Division Court jurisdiction.

Defendant, by lease in writing dated 15th July, 1899, leased certain premises to one S. for the term of one year at a rental of \$60 per month in advance, in which lease was contained a provision that if S. made an assignment for the benefit of creditors, then three months rent in advance should immediately become due and payable and the term should immediately become forfeited and void. On 24th April, 1900, S. made an assignment for the benefit of creditors to the plaintiff, and on the following day the defendant distrained for a balance of \$40 of rent due in advance on 15th March and \$60 the month's rent due in advance on 15th April, and subsequently learning of the assignment threatened to distrain for the further sum of \$120, all of which sums, with solicitor's and bailiff's fees, the plaintiff undertook to pay. Plaintiff subsequently paid these sums and then elected to retain the premises for the unexpired term of the lease. Defendant while admitting the plaintiff's right to retain the premises for the unexpired term insisted that the lease was at an end and that the \$120 was not rent but a penalty, and that plaintiff should pay rent from the date of the assignment and the plaintiff paid \$60, one month's rent, under protest. In an action to recover the \$60 back,

Held, that the effect of R.S.O. c. 174, s. 34, was to place the plaintiff in the same position as S. would have been if the assignment had not been made, the landlord being entitled to the full amount of the rent reserved by the lease but to nothing more, and that the payment of the \$60 was wholly without consideration.

That that payment was not voluntary.

And that the Division Court had no jurisdiction to try the question of the recovery of the \$60 rent. Judgment of the County Court of the County of York reversed.

J. F. Roche, for appeal. *S. C. Smoke*, contra.

Trial of actions. Ferguson, J.]

[Feb. 18.]

TUCKETT-LAWRY v. LAMOREAUX.

Will—Ademption of legacy—Admissibility of evidence.

The testator bequeathed an annuity of \$6,000 to his daughter E., and a like annuity to another daughter. Afterwards he purchased securities producing an income of \$1,200 which he transferred to E., and executed a codicil referring to his having so done, and revoking the legacy to her, and substituting for it an annuity of \$4,800. But afterwards the testator