THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JULY 5TH, 1902.)

VOL. I. TORONTO, JULY 10, 1902. NO. 26.

STREET, J. JUNE 26TH, 1902.

TRIAL.

ALLAN v. REVER.

Dower—Assignment by Infant Devisee—Rights of Executor—Devolution of Estates Act—Assent of Executor subsequent to Action.

Action by widow and infant son of William Allan, deceased, to recover possession of 50 acres of land from a tenant of deceased. William Allan died 3rd August, 1901. By his will he devised 150 acres to his infant son, and made no provision for his widow. He named his son and one Ritchie executors. Ritchie proved the will on the 30th August, 1901. On 14th April, 1902, the son executed a conveyance of 50 acres of the land to his mother for her life, as and for her dower in the whole. On the 20th September, 1900, the deceased had made a lease under seal of the same 50 acres to defendant for five years from 1st March, 1901, under which he claimed title. This action was begun on 1st May, 1902, and after it was begun Ritchie executed a deed poll, declaring that he assented to the devise to the infant, and that it was not necessary to sell the lands for payment of debts or otherwise, and conveying the land to the devisee, and consenting to be added as a party.

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

A. Shaw, K.C., for defendant.

STREET, J.:—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but as soon as her dower is properly assigned she is entitled to claim possession of the land assigned to her in priority to leases created by her husband without her assent during the coverture: Stoughton v. Leigh, 1 Taunt. 402, 410. . . . Under sec. 4 of the Devolution of Estates Act, R. S. O. ch. 127, all estates of inheritance vested in any person shall, on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts. The right to dower, or to compensation in lieu of it, is preserved to

the widow by sub-sec. 2 of sec. 4, but it is at the same time expressly provided by sub-sec. 3 of sec. 11 that the personal representative, without the consent of the widow, may be authorized to convey the land free from the dower. Under sec. 4, I think it is clear that the whole inheritance of the testator vested in the executor, and that he became, upon his appointment, the tenant of the freehold. It was argued that, because, under sec. 13, the estate vested in him by sec. 4 passes automatically away from him to the devisee at the end of the prescribed period (now three years), unless a caution be sooner registered, therefore his estate must be taken to be an estate limited to him for a shorter period than that required to convey a freehold upon him. I cannot agree to this. I think the executor, during the time he holds the estate, holds the whole of the estate which the testator was possessed of when he died (in this case the fee simple); that when the executor sells and conveys land to pay debts, he is transferring an estate which is vested in him, and not merely executing a statutory power to sell land, the title to which is vested in the heir or devisee. . . .Here the devisee had no power to assign dower. . . . At the time this action was begun the widow had no estate in the land. . . . The subsequent assent of the executor cannot relate back to the commencement of the action so as to give her a title then. Action dismissed with costs.

Blake, Lash, & Cassels, Toronto, solicitors for plaintiffs.

Shaw & Shaw, Walkerton, solicitors for defendant.

JUNE 28TH, 1902.

C. A.

LOSSING v. WRIGGLESWORTH.

Defamation—Words Not Defamatory per se—Innuendo—Onus of Proof.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiff for $50 damages and costs upon the findings of the jury in an action for libel and slander.

A certain mare had been replevied from plaintiff by one McNally, who alleged that it had been stolen from him by Humphreys, and sold to plaintiff, who knew it had been stolen. At the trial Lossing swore that he had raised the mare, and that she had never been out of his possession. The action finally resulted in his favour. Before judgment, and between its date and the date of the judgment at the first trial, which had resulted in McNally's favour, Lossing alleges that the defendant stated, falsely and maliciously, as follows, on different occasions:—"I have seen this

mare in Humphreys's possession, and shortly afterwards I saw it in Lossing's possession." "I saw Humphreys have this mare. He tried to trade her to me, and just afterwards I saw her in Lossing's possession." "I know all Lossing's horses; he never raised the mare. I seen Humphreys driving her, and then seen Lossing driving her a few days after." "McNally has two witnesses who were present when Lossing traded and got the mare from Humphreys:"—meaning thereby that plaintiff had committed perjury, and had purchased the mare knowing her to have been stolen.

G. H. Watson, K.C., G. G. Duncan, Norwich, and Neil Sinclair, for appellant.

G. F. Shepley, K.C., and J. C. Makins, Stratford, for plaintiff.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

OSLER, J.A.:—The plaintiff was unable, even plausibly, to contend that the words proved to have been spoken or written, in themselves, in their natural signification, gave rise to a cause of action. Taken literally, and in their primary and obvious meaning, they are perfectly harmless, and they can only be actionable if shewn to have been spoken and written under circumstances which will fairly admit of their bearing a defamatory construction. The duty of the trial Judge in such a case is laid down by Lord Selborne in Capital, &c., Bank v. Henty, 7 App. Cas., at p. 744. The words here written and spoken, being in themselves harmless, and *prima facie* not even spoken of and concerning the plaintiff, it was incumbent upon him to prove facts to shew that they were capable of the meaning ascribed to them by the innuendo. This he has failed to do. Appeal allowed with costs, and action dismissed with costs.

MACMAHON, J. JULY 3RD, 1902.

CHAMBERS.

RE SNYDER.

Life Insurance—Certificate—Change of Beneficiary by Indorsation Referring to Will—Absence of Any Provision in Will—Effect of—R. S. O. ch. 203, sec. 151, sub-secs. 3, 6; sec. 59, sub-sec. 2—1 Edw. VII. ch. 21, sec. 2, sub-sec. 7.

Motion by the executors and trustees under the will of Simon Snyder, and by Minnie Emma Snyder and Alberta Lucinda Snyder, the adult children of the testator, for an order directing payment out of Court to the executors of

insurance moneys paid in by the Ancient Order of United Workmen. On 9th December, 1881, this society issued to the testator a beneficiary certificate for $2,000, payable to his wife Elizabeth Snyder, the beneficiary named in the certificate, on the death of the assured. Elizabeth Snyder died on the 10th March, 1889. The testator married again some years later. On the 16th April, 1895, he indorsed on the certificate a revocation of the direction as to the payment of the insurance, and directed such payment to be made "to my children, as directed by my will." He died on the 22nd March, 1902, having on the previous day made his will, probate of which was granted to the executors now applying. By the terms of the will, the executors are to sell and convert all the estate into money as soon as they may find it profitable so to do; they are to provide a residence for the widow, and to pay her a life annuity of $250; and, subject to such annual payment, "my executors shall divide all the rest and residue of my estate between my children, share and share alike, as follows: one-quarter of the share of each child to be paid to him or her respectively when he or she attains the age of 21 years; another quarter . . when he or she attains the age of 25 years, another quarter . . when he or she attains the age of 30 years; and the balance . . when he or she attains the age of 35 years." The testator left six children: Herbert M. (39); Alfred H. (36); Minnie E. (34); Alberta L. (21); Florence M. and Clayton H. (infants). By the Insurance Act, R. S. O. ch. 203, sec. 151, sub-sec. 6, as amended by 1 Edw. VII., ch. 21, sec. 2, sub-sec. 7:—"If one or more of the beneficiaries die in the lifetime of the assured, and no apportionment or other disposition is subsequently made by the assured, the insurance shall be for the benefit of the surviving beneficiary or beneficiaries in equal shares if more than one; and if all the beneficiaries die in the lifetime of the assured, the insurance shall be for the benefit, in equal shares, of the surviving infant children of the deceased, and if no surviving infant children, then the benefit of the contract and the insurance money shall form part of the estate of the assured." The assured could, on the death of his wife—the sole beneficiary, of the preferred class—under sub-sec. 3 of sec. 151, by instrument in writing attached to or by indorsement on or identifying the said contract by a number or otherwise, have substituted new beneficiaries, of the preferred class, which includes children (sec. 59, sub-sec. 2).

E. E. A. DuVernet, for the applicants.

F. W. Harcourt, for the official guardian.

MacMahon, J.:—The assured could, on the death of his wife—the sole beneficiary of the preferred class—under sub-sec. 3 of sec. 151, "by instrument in writing attached to or by indorsement on or identifying the said contract by number or otherwise . . . substitute new beneficiaries," who must be of the preferred class, which class includes children, grandchildren, and mother of the assured: sec. 159, sub-sec. 2.

Now, the assured, seven years after making the indorsement already referred to on the beneficiary certificate, made his will, by which he directed that the whole of his estate be divided amongst his children—there being both adult and infant children—in equal shares.

Had the assured simply indorsed the certificate making the insurance payable to his children without any reference to his will, the beneficiaries would have been sufficiently designated, as all the children living at the time of his death would have been entitled to share equally in the fund: Mearns v. A. O. U. W., 22 O. R. 34. But the indorsement on the benefit certificate did not effect a complete substitution of new beneficiaries, as the children who were by the terms of the indorsement to receive payment of the fund were such as he should direct by his will. The will—the instrument in writing by which, under the Act, the beneficiary may be designated or ascertained—makes no reference whatever to the benefit certificate (the contract), nor is it attempted to be identified, by number or otherwise in the will, as required by sec. 151, sub-sec. 3, so as to create, under the statute, a substitution of new beneficiaries.

The assured, when he indorsed the beneficiary certificate, may have intended that his infant children should be the new beneficiaries under his will. But, as the amendment to sec. 151, sub-sec. 6, by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 7, by which, in the event of new beneficiaries not being appointed as provided by the Act, the insurance fund would be payable to his infant children, was passed a year prior to the making of the will, he may have considered it unnecessary to deal with the benefit certificate by his will, leaving the infant children to take the fund, under the Act.

Were the applicants—the executors—to succeed on this motion, the result would be that the estate of the assured would get the benefit of this insurance fund, and, as a consequence, the creditors of the assured might be paid out of it. It was in order to prevent this that the Act provides that, where the beneficiary is of the preferred class, the assured shall not divert the benefit "to a person not of

that class, or to the assured himself, or to his estate:" sec. 151, sub-sec. 3.

The motion fails, and it is declared that Alberta Lucinda Snyder, Florence Maude Snyder, and Clayton Henry Snyder, who were at the time of the death of Simon Snyder his infant children, are entitled to the fund created by said benefit certificate and paid into Court, in equal shares, less the sum of $15 to be transferred to the account of the official guardian for his fees on this motion. And Alberta Lucinda Snyder having since the death of her father attained the age of 21 years, it is directed that her share, together with the accrued interest thereon, be paid out of Court to her; and that the shares of the other infants be paid out to them on their respectively reaching the age of 21 years.

The costs of the executors, as between solicitor and client, to be paid out of the testator's estate.

BRITTON, J. JUNE 28TH, 1902.

CHAMBERS.

RE PETTIT.

Dower—Election—Distributive Share of Estate.

Application by the Trusts and Guarantee Co., guardians of the estate of Charles Harold Pettit, a son of William J. Pettit, deceased, under Rule 972, for an order as to the distribution of the proceeds of the real estate of the deceased, and the apportionment of the dower of Rebecca Ellen Pettit, also deceased.

T. R. Atkinson, Simcoe, for applicants.

G. W. Wells, K.C., for administrator *de bonis non* of William J. Pettit's estate.

E. E. A. DuVernet, for administrator of widow's estate.

F. W. Harcourt, for official guardian.

BRITTON, J.:—The widow of the intestate took out letters of administration, and, with the consent of the official guardian, the land was sold, and she joined in the conveyance as administratrix and individually to bar her dower. The purchase money was paid into Court, the administratrix reserving the right to elect as to whether she would receive a distributive share of the estate or her dower in the land. It seems to have been clearly understood that she had a right to dower, and that she was to be paid out of the fund in Court a sum in lieu of dower, unless she elected to take her share.

Subsequently she executed what purports to be a declaration of election, after the recital, in these words:—

"I . . . . have elected and do hereby elect to take the value of my dower in said lands, to be computed upon the principles applicable to life annuities, in lieu of and instead of any other interest I may have in my husband's undisposed of real estate."

She was ill when she made this declaration, and she died on the 8th April, 1901, without fully administering the estate of her husband, and leaving this money in Court. Letters of administration to her estate have been granted to Edgar Burch, and letters *de bonis non* of the estate of William I. Pettit have been taken out by John Stickney. The Trusts and Guarantee Company have letters of guardianship to the infant Charles Harold Pettit.

The question for my determination is, whether the widow, Rebecca Ellen Pettit, was in her lifetime entitled to any part of the proceeds of this land, and, if so, whether a distributive share or the value of her dower.

At the time of the sale of the land and the conveyance of it, and all along after, it was recognized that the widow was entitled to dower in this land, unless she should elect to take a distributive share of the proceeds, under sub-sec. 2, sec. 4, ch. 127, R. S. O. 1897. She did not so elect. The document she signed was not such a "deed or instrument in writing" as is contemplated by that section. On the contrary, instead of electing to take her interest under that section, in her husband's undisposed of real estate, in lieu of all claims to dower, she said she would take the value of her "dower in said lands, to be computed upon the principles applicable to life annuities, in lieu of and instead of any other interest," &c.

The solicitor, in drawing up this instrument for Mrs. Pettit to sign, evidently had in mind ch. 168, sec. 9, R. S. O. 1897, and also, perhaps, sec. 11, sub-sec. 4, of the Act respecting the Devolution of Estates. I think it was the widow's intention—acting upon advice—that she should get, and she was satisfied with it, a gross sum in lieu of dower or in settlement of her dower. She signed the deed with the understanding that she was entitled to, at least, some amount in lieu of dower; that the money was paid into the bank to protect her, as well as the estate; and there is no reason why she should not be entitled to it. She was 46 years of age when the land was sold—and her dower interest, calculated according to the tables, Appendix G., Scribner on Dower, 2nd ed., would be $656.40.

It makes no difference that Mrs. Pettit died soon after this land was sold and the money paid into Court.

The amount must be determined according to tables based on expectancy. It is her expectancy which is to be

valued. See McLaughlin v. McLaughlin, 22 N. J. Eq. 505; Re Rose, 17 P. R. 136; Baker v. Stuart, 25 A. R. 445.

The order should go that the estate of William I. Pettit should be wound up; that out of the money paid into Court the estate of the widow should get $656.40, and interest at rate paid by the bank; and that the infant Charles Harold Pettit is entitled to residue, after payment of debts and costs.

Costs of all parties to this motion out of estate.

MACMAHON, J. JUNE 28TH, 1902.

WEEKLY COURT.

RYERSON v. MURDOCK.

Master and Servant—Contract by Servant Not to Engage in Business—Wrongful Dismissal of Servant—Subsequent Engaging in Same Kind of Business—Not a Breach of Contract.

Motion by plaintiff for an interim injunction to restrain defendant from breach of an agreement with plaintiff that "he will not, in the Province of Ontario, directly or indirectly, either by himself or by or through any person or persons whomsoever, either as owner, agent, or salesman, or otherwise howsoever, engage or be interested in the selling or disposing of the class of goods usually handled by (the plaintiff) for a period of two years from the date." The defendant was managing salesman for the plaintiff for the sale of house furnishings, and made the agreement before entering upon the service. The plaintiff required the defendant to give a bond and pay the premium thereon, and also made a change in the contract which affected the defendant's commission.

W. A. Skeans, for plaintiff.

R. B. Beaumont, for defendant.

MACMAHON, J., held that a master cannot demand the resignation of his employee on an untenable ground, and, when the demand is complied with, use it as an instrument to prevent him earning a livelihood through being employed in the business to which he is accustomed.

Motion dismissed with costs.

FALCONBRIDGE, C.J. JUNE 28TH, 1902.

TRIAL.

HEAL v. SPRAMOTOR CO.

Contract—Breach—Subsequent Letter as to Contract—Satisfaction—Waiver—Evidence.

Second trial of an action to recover $329.28 and interest

for goods sold and delivered and work and labour performed. See ante p. 175.

P. H. Bartlett, London, for plaintiff.

J. C. Judd, London, for defendants.

FALCONBRIDGE, C.J., directed judgment to be entered for plaintiff after 30 days for $309.85, less $150 paid into Court, with costs.

MACMAHON, J. JULY 2ND, 1902.

CHAMBERS.

RE SCADDING.

Will—Legacy—Interest on—Legatee Attaining 21 Years—Mixed Fund.

Application by Mary Ann Scadding and Charlotte Millicent Scadding, under Rule 938, for an order determining the question whether interest is payable on the legacies bequeathed to Frederick M. Scadding (assigned to Mary Ann Scadding) and Charlotte Millicent Scadding, by the will of Charles Scadding, deceased, from the time of their respectively attaining the age of twenty-one. By the will the testator devised and bequeathed all his estate, real and personal, to the executors upon trust to sell and dispose of it and convert it into money (with certain exceptions), and to invest the moneys, and "out of the rents, dividends, and annual proceeds and interest of my said estate I direct that the trustees of this my will shall first deduct and pay unto A. C. . . . $800 annually . . . and shall pay the balance of the said interest, dividends, and annual proceeds unto my wife during the term of her natural life. . . . Upon the decease of my said wife I direct the trustees . . . to divide all my estate amongst my children. . . . Subject to the aforesaid life interest payable to my wife, I give, devise, and bequeath to my grandchildren Frederick Mitchell Scadding and Charlotte Millicent Scadding the sum of one thousand dollars each, to be paid to each on their respectively attaining the age of twenty-one years, and in case my estate is divided before they reach that age, the principal is to be invested, and the interest thereon is to be paid to their mother for them annually, in the discretion of my executors. In case either of my said last mentioned grandchildren shall die before he or she attains the age of twenty-one years, the said sum so bequeathed to the one so dying is to revert to my estate." The testator died on the 19th June, 1892, and his widow on the 10th January, 1902. 1891, and assigned the legacy payable to him under the will Frederick Mitchell Scadding came of age on the 22nd April,

to his mother, Mary Ann Scadding, on the 26th December, 1896. Charlotte Millicent was twenty-one on the 29th December, 1896. A. C. is still alive.

W. Bell, Hamilton, for the legatees.

C. A. Masten, for the executors.

MACMAHON, J.—Although the legacies became vested upon the legatees attaining majority, payment was postponed until the death of the widow, there being no fund out of which to pay until the event happened. The fund is a mixed one; the legacies are general; and the time of payment is fixed by the testator; and in such cases the rule is, that the legacies will carry interest from the arrival of the appointed period. It does not make any difference that the legacies are vested: Williams on Executors, 9th ed., p. 1290; Toomey v. Tracey, 4 O. R. 708; Lord v. Lord, L. R. 2 Ch. at p. 789. Order declaring that the executors should pay out of the estate interest upon the legacies from the dates of the legatees attaining majority. Costs of all parties out of the estate.

OSLER, J.A. JUNE 30TH, 1902.

C. A.—CHAMBERS.

RE PRINCE EDWARD PROVINCIAL ELECTION.

WILLIAMS v. CURRIE.

Parliamentary Election—Recount of Votes—Ballot Paper—Names and Numbers of Candidates—Error of Deputy Returning Officer in Tearing off Number—Number not Material—R. S. O. ch. 9, secs. 2, 69 (2), (3), (4), 106.

Appeal by Williams from the decision of the Judge of the County Court of Prince Edward upon a recount of the ballots cast at the election, under sec. 129 of R. S. O. ch. 9. There were two candidates at the election. Their names and numbers were printed on the ballot papers in ink of different colours, as required by sec. 69 (3) of ch. 9. At 14 polling places in the electoral district the deputy returning officer in detaching the ballot paper from the counterfoil did so in such a manner that the candidates' numbers were left on and as part of the counterfoil, instead of being on and appearing as part of the ballot paper. If the ballot papers in that condition ought to have been rejected, the appellant candidate should have been returned as having the majority of legal votes. Section 69 (2) provides that every ballot paper shall contain the names of the candidates arranged alphabetically in the order of their surnames, and the ballot papers may be according to form 11 in Schedule A to the Act. By sub-sec. 3, the numbers and names of

every candidate shall be distinctly printed in ink of different colours. By sub-sec. 4, it is provided that every ballot paper shall have a counterfoil attached thereto, and every ballot paper and every counterfoil shall specify the name of the electoral district for which it is to be used, and every ballot paper shall have a number printed on the back thereof, and the same number shall be printed on the face of the counterfoil attached thereto. The number mentioned in sub-sec. 3 is, of course, not the number mentioned in sub-sec. 4. The latter is the number which is to be on the face of the counterfoil and the back of the ballot paper for the express purpose of identifying the voter and finding out how he has voted. The former is the number of the candidate on the face of the ballot paper, and is nowhere referred to or mentioned in the Act, except in sub-sec. 3, and then only in connection with colour printing.

S. W. Burns and Eric N. Armour, for appellant.

C. H. Widdifield, Picton, for respondent.

OSLER, J.A.—Sub-sec. 2 is the only section which contains any positive enactment as to what is required to be printed on the face of the ballot paper, aside from its mere form. Nothing more seems necessary than the names of the candidates. For the rest, the ballot papers may be in the form given in the schedule. That is directory; and the form shews a number in a compartment to the left of the candidate's name, indicating the order in which it appears on the paper. This number is not to be regarded as an essential part of the ballot paper. The number might be an aid to an illiterate voter, but in the observance of any positive enactment (apart from colours), the error of the deputy returning officer in tearing off the number, ought not to work the destruction of the ballot, nor should the Act be strained in favour of the illiterate voter. Section 106 goes far enough in that direction. Section 2 is the mandatory clause as to what is to be printed on the face of the ballot, and as it says nothing about the number of the candidate, such number is not a material part of the ballot paper. Appeal dismissed. No order as to costs.

MEREDITH, J. JUNE 30TH, 1902.

CHAMBERS.

PEOPLE'S BUILDING AND LOAN ASSOCIATION v. STANLEY.

Execution—Costs of Application for Leave to Appeal to Court of Appeal—Power to Award Costs—Execution Issued out of High Court—Judicature Act, secs. 77, 119—Rules 3, 818, 1130.

Motion (heard at London) by defendant to set aside

fi. fa. issued by plaintiffs for the costs of an unsuccessful application made by the defendant to a Judge of the Court of Appeal (1 O. W. R. 399) under the order of that Court dismissing the application with costs. The defendant now moved on the grounds that there was no power to make the order for payment of costs, and that there was no right to issue the writ out of the High Court.

W. H. Bartram, London, for defendant.

J. C. Dromgole, London, for plaintiffs.

MEREDITH, J.—By sec. 77 of the Judicature Act the defendant's application to the Court of Appeal for leave to appeal was expressly authorized, and power is given to the Court or a Judge to grant—in certain cases— or to refuse, the leave applied for; and by sec. 119, subject to Rules of Court and to the express provisions of any statute, the costs of and incidental to all proceedings in the Supreme Court of Judicature are in the discretion of the Court or Judge, and the Court or Judge has full power to determine by whom and to what extent such costs shall be paid; and part of Rule 1130 is to the same effect; and under these provisions the statutory power to support the order was given. Under Rule 3, by analogy to the procedure under Rule 818, execution may be rightly issued in the High Court to enforce payment of such costs as those in question, in the manner provided for in the latter Rule. Motion dismissed with costs, fixed at $5. If defendant desires, the execution may be stayed pending an appeal from this order, upon payment to the sheriff of the amount to be levied, including sheriff's fees, etc., to abide the result of the appeal.

MEREDITH, J. JUNE 30TH, 1902.

CHAMBERS.

RE CRAWFORD.

Will—Direction to "Supply Wants" of Widow and that Executors might "Draw upon Such Money" as Testator might Die Possessed of—Sale or Mortgage of Real Estate.

Application (heard at London) by executors of will for opinion of Court. The question was whether the executors were empowered by the will to resort to the testator's real estate in order to supply the "wants" of the widow. The will provided that, if the widow should be in need of more than the income given to her in it, "to supply her wants," the executors might "draw upon such money" as the testator might die possessed of. By a codicil, the executors were empowered to draw upon any of his property to supply those wants.

J. C. Judd, London, for executors.

W. H. Barnum, Dutton, for widow.

J. M. Glenn, K.C., for Dugald Crawford.

MEREDITH, J.:—The testator's first care, in his will and in that codicil, is that the wants of his widow shall be satisfied; and that which remains only is to go to his collateral relatives. The codicil makes it plain that the executors may have recourse to the real estate to satisfy the widow's wants, if need be. The wants of the widow, in case of her needing more than is given to her in the first three clauses of the first paragraph of the will, are to be supplied by the executors by drawing upon the testator's property. In the circumstances of this case, the real estate can be drawn upon only by pledge or sale. The executors have power to so draw upon it, in the circumstances and for the purpose mentioned; this confers upon them implied power, at least, to sell or mortgage for that purpose, in these circumstances. Order declaring the opinion of the Court accordingly. Costs out of the estate; those of the executors as between solicitor and client.

OSLER, J.A. JUNE 30TH, 1902

C. A.—CHAMBERS.

DAVIS v. HORD.

Appeal—Leave—Action for Slander—Costs—Apportionment of.

Motion by defendant for leave to appeal from order of a Divisional Court, ante p. 418.

The same counsel appeared.

OSLER, J.A.—This is not a case in which leave should be granted. There is no good reason why a judgment framed as is the judgment at the trial in this case should not lead to the same result as the former rule. See Sparrow v. Hill, 8 Q. B. D. 479, and Jenkins v. Jackson, [1891] 1 Ch. 89. The practice is right, but it is even more convenient that it should be settled. In every case the trial Judge can shape the judgment so as to express an intention as to the incidence of the costs. Motion refused with costs.

BRITTON, J. JUNE 30TH, 1902.

CHAMBERS.

RE MCMILLAN.

Will—Devise of "Chattels, Money, and Notes"—Mortgage Undisposed of by the Will Passes under the Word "Chattels."

Application by the executors of the will of Isabella McMillan (under Rule 938) as to whether Isabella McMillan

was entitled to a certain mortgage made in favour of John McMillan, or whether John McMillan died intestate in respect to that mortgage. John McMillan was an unmarried man of considerable means, residing in the township of Cornwall. He made his will on the 27th February, 1886, apparently disposing of all his property. At that time he was the owner of two parcels of land. He devised one parcel to one Corbett, and the other to his sisters Mary McMillan and Isabella McMillan. Then followed this clause in the will: "I will and bequeath to my sisters Isabella McMillan and Mary McMillan all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me. I will and bequeath the said chattels, moneys, and notes to the one of said sisters who may survive me." Mary died before the testator. After her death, John, by a codicil dated 14th August, 1892, "erased," as he said, from the will the parcel of land devised to Mary and Isabella, and devised it to Isabella. He made no other change in the will. John McMillan, before the making of the codicil, had sold to another the land previously devised to Corbett, and the mortgage in question is for the unpaid purchase money upon that land.

C. A. Masten, for executors of Isabella McMillan.

W. M. Douglas, K.C., for next of kin of John McMillan.

BRITTON, J., held that the mortgage passed to Isabella, as the sister who survived the testator, under the word "chattels" in the will. Order accordingly. Costs of all parties out of the estate of Isabella McMillan.

MACLENNAN, J.A. JULY 2ND, 1902.

C. A.—CHAMBERS.

RE LENNOX PROVINCIAL ELECTION.

CARSCALLEN v. MADOLE.

Parliamentary Election—Recount of Votes—Ballot Papers not Objected to before Deputy Returning Officers —Form of Ballot Papers—Cross Outside Upper Line—Circular Mark—Marks in Addition to Regular Cross—Words—Initials—Indefinite Marks.

Appeal from a recount of ballots by the Judge of the County Court of Lennox, who found the votes cast for the two candidates, Carscallen and Madole, to be equal. Carscallen appealed in respect of seven ballots, and Madole appealed generally. It was arranged that Carscallen's appeal should first be heard and disposed of, and this judgment deals only with his appeal.

S. H. Blake, K.C., W. D. McPherson, and E. G. Porter, Belleville, for Carscallen.

G. H. Watson, K.C., and Grayson Smith, for Madole.

MACLENNAN, J.A.—It was objected that the County Court Judge was confined in the recount to the consideration of cases in respect of which an objection was made before the deputy returning officer when counting the votes at the close of the poll. I think this objection should be overruled: see secs. 112 (4), 124 (1), and 126 of the Election Act.

The ballot papers used at this election were in the form prescribed by the statute, having two divisions for the names of the candidates separated by a line from left to right, and also having a line above the upper division, and one below the lower division, parallel to the dividing line. Outside of these last-mentioned lines, there is a margin about half an inch wide. Ballot 405 was marked with a cross outside, but near, the upper line or boundary of Carscallen's division, and was rejected. I think that it should be allowed, for the upper line is not essential, and a ballot without an upper line would be good. All that is above the first name may be regarded as a part of the division of the first candidate, and all below the second name as a part of the division of the other candidate. West Elgin Case, 2 E. C. 41, applied. North Bruce Case (1901, per Boyd, C., and Street, J.), unreported, distinguished because of the express directions of sec. 72 of the Dominion Election Act, 63 & 64 Vict. ch. 12, that the cross shall be made in the white space containing the name of the candidate.

Ballot 4032 is marked in the proper place for Madole, but the mark is a circle, not a cross, and not an apparent attempt to make a cross. I think that the vote must be disallowed.

Ballot 4004 is well marked for Carscallen, but was disallowed because of an irregular shapeless pencil mark in Madole's division. This should not have been disallowed, but should be counted for Carscallen, not being a cross or any attempt to make a cross, nor a mark by which the voter could be identified.

Ballot 5288 was also distinctly marked by a cross for Carscallen. It had, however, in Carscallen's division, in the sub-division containing his number, the initials S. A. in small but legible capitals. This was rejected by the County Judge. I have spoken to my brother Osler, and he agrees with me, that any written word or name upon a ballot, presumably written by the voter, ought to

vitiate the vote, as being a means by which he could be identified, and in general other marks ought not to have that effect, and 5288 was properly rejected.

Ballot 2470 was marked by a somewhat irregular cross for Madole. This was rightly allowed.

Ballot 4064 had crosses in the divisions of both candidates. This was properly rejected.

Ballot 5256 was in the same plight. It was contended that there were indications of an intention to obliterate the cross in Madole's division. I think this is not a fair deduction. The ballot was properly rejected.

The result is that ballots 405 and 4004 should be added to Carscallen's poll and 4032 struck off Madole's poll, which gives Carscallen a majority of three.

MACLENNAN, J.A. JULY 2ND, 1902.

C.A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION.

BOYD v. McKAY.

Parliamentary Election—Recount of Votes—Ballot Paper—Distinct Cross—Obliterated Cross—Candidate's Name on Back of Ballot—Perpendicular Line instead of Cross—Horizontal Line instead of Cross—Straight Slanting Line instead of Cross—Words over Initials on Back—Cross on Back—Irregular Pencil Marking on, besides Cross—Evidence of Intention to Make a Cross.

Appeal from a recount of ballots by the junior Judge of the County Court of Grey. The candidates were G. M. Boyd and A. G. McKay, and the County Judge found a majority of five votes for McKay. Both candidates appealed, and the appeal of Boyd was first proceeded with, the appeal of McKay being deferred.

S. H. Blake, K.C., and W. D. McPherson, for Boyd.

G. H. Watson, K.C., W. H. Wright, Owen Sound, and Grayson Smith, for McKay.

MACLENNAN, J.A.—It was objected by Boyd that a junior Judge had no jurisdiction to recount votes. I think that, as it appeared by the certificate that the junior Judge acted with the concurrence and approval of the senior Judge, the jurisdiction of the junior Judge was free from doubt: see secs. 124-131 of the Election Act, and secs. 2 and 14 of the Local Courts Act, R. S. O. ch. 54.

Four ballots (6418, 6241, 6427, and 6429) counted for Boyd at No. 9, St. Vincent, were disallowed by the Judge in consequence of being marked with a cross.

not only in Boyd's division, but also in that of McKay. The Boyd crosses were on the right-hand side of his name, and were distinct and conspicuous. They struck the eye at once. The McKay cross upon three of them is obscure and indistinct, and that on the fourth, while more distinct, is much less conspicuous than the Boyd cross. I think that there was no evidence that the McKay crosses were made after the count at the close of the poll. They were not observed, in the hurry of counting, while the crosses for Boyd, being conspicuous, caused them to be at once counted for him. The same thing exactly occurred on the recount, when the Judge, without observing the two crosses, handed all four ballots, as Boyd ballots, to McKay's agent for examination, and when two of them escaped the notice of the agent also, and were not discovered until a second examination by Boyd's agent. Under these circumstances, there is hardly room even for a suspicion that the marks complained of were made after the counting of the votes. It was argued that the condition in which the ballots were found was very suspicious. There appears to have been two (a) packets furnished to the deputy returning officer with printed blank indorsements thereon. He put the ballots in one, and sealed it; but he filled up the blanks in the other, with all the proper indorsements required by sec. 116 of the Act, instead of upon the first. This seems to have been a mere mistake; and it could not have had any connection with the alleged falsification of the four ballots; which were properly disallowed.

Ballot 1293 (Owen Sound, 5) was marked with a distinct cross for McKay, and an obliterated cross in Boyd's division. This was rightly allowed.

Ballot 719 (Owen Sound, 4A) was marked for McKay but had "McKay" written on the back. This was improperly allowed.

Ballot 861 (Owen Sound, 4A) was marked for McKay with a very distinct cross, and had a very faint cross in Boyd's division. The County Judge allowed it, thinking the faint cross was an impression of the other, made by folding. I think, after careful examination, this is not so, and the vote should have been disallowed.

Ballot 8 (Owen Sound, 1) was marked with a perpendicular line, not an attempt to make a cross. I think this was rightly rejected.

Ballot 595 (Owen Sound, 3) was marked with a horizontal line. I think this was rightly disallowed.

Ballot 1082 (Owen Sound, 4) was marked with a straight slanting line. I think this was properly disallowed.

Ballot 2650 (Owen Sound, 10) was properly marked for McKay, but had the words "objection No. 1 (Boyd)" in pencil on the back, over the initials F. C. I think this was rightly allowed, for the words appeared to have been written by the deputy returning officer.

Ballot 2671 (Owen Sound, 10) was marked with a perpendicular straight line for Boyd. I think this was rightly rejected.

Ballot 3934 (Sydenham, 2) was marked with a line. This was rightly disallowed.

Ballots 8006 (Sarawak, 3), 6406 (St. Vincent, 9), 6816 (Keppel, 3), and 4816 (Meaford, 2) were each marked with a cross on the back. These were rightly disallowed.

Ballot 5912 (St. Vincent, 5) was marked with a distinct cross for Boyd, and an indistinct one for McKay. This was rightly disallowed.

Ballot 5027 (Meaford, 4A) was marked with several tremulous connected marks in McKay's division. This was an evident cross, and rightly allowed.

Ballot 5278 (Meaford, 6A) had a strongly marked cross for McKay, and a thin, faint, upright pencil mark on the upper edge of the ballot paper, in Boyd's division, not indicative of any intention to make a cross. This was rightly allowed for McKay.

Ballot 5289 (Meaford, 6A) was marked with a distinct cross for McKay, and in the same division another slight irregular pencil marking. This was rightly allowed.

Ballot 5298 (Meaford, 6A) was marked with a distinct cross for McKay, and in the same division a series of slight, cloudy, formless pencil markings. This was rightly allowed.

Ballot 6764 (Keppel, 3) was marked with two lines lying very close to each other, but both distinctly visible in Boyd's division. The lines slant from right to left; one is a little shorter than the other. From the top and for a little more than a third of their length, they appear to coincide, and then diverge at a very acute angle. The mark appeared to have been made by two separate strokes of the pencil. Following the opinion of Ritchie, C.J., Strong and Gwynne, JJ., in the Bothwell Case, 8 S. C. R. 696, I think there was evidence of an intention to make a cross, and the vote should have been allowed for Boyd.

The result is, that two of the votes counted for McKay should be disallowed, and one which was disallowed to Boyd should be counted for him, and McKay's majority is, therefore, reduced to two.