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STREET, J. OCTOBER 26th, 1903.

CHAMBERS.

RE FOSTER

Will—Construction—Devises of Land—Charge of Debts—Mortgage Debts—Apportionment—Valuation—Costs.

Further evidence was adduced and further argument heard in this matter after the judgment reported ante 212.

The same counsel appeared.

STREET, J.—Referring to my judgment in this matter of last March, evidence has now been adduced fixing the value of the west quarter of lot 35 in the 3rd concession R. F. Nepean at $3,100 and that of the north half of lot 34 in the same concession at $5,000.

The last mentioned lot is, however, subject to a mortgage of $700 or $800 in addition to the subsequent charge of $2,700 upon both lots. Under the authorities the amount of the mortgage with which the north half of 34 is solely chargeable should be deducted from the $5,000 at which the land is valued, for the purpose of computing the proportion which that lot should bear of the $2,700 mortgage, and the other debts, if any, of the testator. The total amount of the $2,700 mortgage and the other debts, if any, are to be divided between the two parcels in the proportion of 3,100 to 5,000, minus the amount of the $700 or $800 mortgage.

It was argued that there should be a further deduction from the $5,000 of the value of the rights given to the sisters of the devisee by the testator and charged upon the north half of 34 by the will. I cannot find any authority for this contention, and it seems contrary to principle. The theory of Locke-King's Act is, that the testator intended to give to the devisee only his equity of redemption in the land devised. Any charges which the testator creates by his will are charges upon the equity of redemption devised, and must be taken to

have been intended by the testator as sums which the devisee taking the equity of redemption must pay out of it.

Most of the adult parties have signed a consent that, for the purpose of estimating the proportion of the $2,700 mortgage which the north half of 34 should bear, its value is to be taken at $3,000. This may well hold good as far as the adults consenting to it are concerned, but the interests of the infants must be calculated upon the basis I have indicated.

The costs of the proceedings since my former judgment, including the argument on the 19th instant, should be dealt with as part of the costs dealt with in my former judgment.

CARTWRIGHT, MASTER. OCTOBER 19TH, 1903.
FERGUSON, J. OCTOBER 26TH, 1903.

CHAMBERS.

STOCK v. DRESDEN SUGAR CO.

Security for Costs—Plaintiff out of Jurisdiction—Assets in Hands of Defendant—Admissions—Letter ante Litem.

Motion by plaintiff to set aside an order for security for costs.

The plaintiff was employed by the defendants for something over a year at a salary of $5,000, payable in monthly instalments at the end of each month. He was paid to the end of March, 1903, and sued for $1,103.90, which he claimed as due to the 19th June, 1903, and interest.

The plaintiff resided out of the jurisdiction.

D. L. McCarthy, for plaintiff.

George Wilkie, for defendants.

THE MASTER.—The plaintiff relies on a letter dated 18th June, 1903, written by Davidson, president of the defendant company. The purport of the letter is that plaintiff had spent much time away on his own account, and therefore (says the writer) "it would not be right to expect our company to pay you your wages when you were off on your own business and pleasure." A little further on the writer says: "When I was in Dresden I instructed Mr. Elsey (the company's manager) to figure up the time and also made out a cheque for the balance due you on account of the contract, deducting only for such time as you were away from Dresden on your own business and pleasure. Mr. Elsey still has that cheque and also a receipt for you to sign, which will be delivered to you on application to Mr. Elsey." After a certain

amount of repetition of the foregoing, the letter concludes as follows:—"If you desire to get the matter settled up, you can call on Mr. Elsey and get the cheque in question and sign the receipt, and thereby get the matter cleaned up."

The foregoing seems to be an unqualified admission of a "balance due" the plaintiff, which the other affidavits shew to be over $400. Mr. McCarthy relies on this as bringing the case within the principle of Dufty v. Donovan, 14 P. R. 159, and Thibaudeau v. Herbert, 16 P. R. 420. The letter was written on the 18th June last, and the plaintiff's solicitor positively asserts in his affidavit that the writer made the same admission in July. The solicitor has not been cross-examined. And Mr. Davidson and Mr. Elsey are not very positive in their denial of the admissions alleged to have been made by them, while the letter itself is not stated to be without prejudice. Had anything of that sort appeared, it would have been a different matter. . . .

I think there is prima facie a sufficient admission of a substantial liability to the plaintiff. The letter of the 18th June was written "ante litem motum," and is of great weight on that account. . . .

After consideration of the whole material, I think the order for security should be set aside. The costs of this motion to be costs in the cause.

The defendants appealed.

The same counsel appeared.

FERGUSON, J., affirmed the Master's order.

MACMAHON, J. OCTOBER 26TH, 1903.

WEEKLY COURT.

RE WATEROUS AND CITY OF BRANTFORD.

Municipal Corporations—By-law—Closing Highway—Private Interests—Notice—Publication—Compensation to Person Injured.

Motion by Julius E. Waterous for an order quashing by-law No. 770 of the corporation of the city of Brantford, authorizing the diversion of Jex street in that city, on the grounds: (1) That the by-law was passed not to subserve the interests of the public, but those of the Waterous Engine Works Company. (2) That the passing of the by-law was not a bona fide exercise of the powers of the corporation. (3) That the effect of the by-law was to cause damage and injury to the applicant, for the benefit of the company, and to discriminate against the company. (4) That the closing of the

street would exclude the applicant from ingress and egress to and from his lands, and the corporation had no power to close it without compensation and without providing some other convenient road or way of access, which they had not done. (5) That no sufficient written or printed notices of the intended by-law had been, before the passing, posted up for one month in six of the most public places in the immediate neighbourhood of the street, or published weekly for four successive weeks, as required by the statute in that behalf.

The by-law recited that public notice had been duly given of the intention of the council to pass the by-law; that it had been made to appear to the council that it was the intention of the Waterous Company to erect additional shops upon lots 11 and 12 in the Hulbert Flats, on the north side of Jex street and fronting on Market street, and that the present shops of the company extended to the south side of Jex street fronting Market street; that Jex street was only 33 feet wide and would be difficult and expensive to maintain in a fit state for traffic, and would be rendered inconvenient and unsafe for public travel by the erection of shops on both sides, and by the traffic which would have to be conducted across the street between the shops; that the Waterous Company had offered to accept a conveyance from the city corporation of the portion of Jex street which was to be closed, and to pay therefor a sum sufficient to reimburse the corporation for all expenditure incurred in diverting Jex street, so that it should run on the northerly side of the shops to be erected, and in placing the new street in the same condition as the present street, thereby involving no expenditure on the part of the city corporation; and that it was expedient to accept the offer of the company and to divert Jex street as described.

The by-law then enacted that that portion of Jex street commencing at the easterly limit of Market street and running easterly 230 feet be closed up as a public highway, and that parts of lots 11 and 12 in Hulbert Flats, particularly described in the by-law by metes and bounds and running east from Market street 264 feet by 33 feet in width, and then south to the north side of Jex street, 79 feet, 6 inches, to Jex street, by a width of 33 feet, was opened up as a public highway to be added to Jex street in lieu of the portion closed.

G. F. Shepley, K.C., and W. S. Brewster, K.C., for applicant.

W. T. Henderson, Brantford, for city corporation.

MACMAHON, J. (after stating the facts and the effect of the affidavits at length).—There is no doubt that the by-law closing up Jex street was passed at the instance of the Waterous Engine Works Company to enable the company to acquire it for the purpose of its business. And the affidavits filed by the repondents, stating that the closing of Jex street and diverting it will be in the interest of the city, no doubt refer to the benefits likely to result from the addition proposed to be made by the company to the manufacturing interests of the city. In the letter of Mr. Watts (solicitor for the company) it is not suggested that it would be expensive to maintain Jex street in a fit state of repair if the company were to build on the north side of that street, although that is alleged in the third recital of the by-law. The Waterous Company had its shops on the south side of Jex street, and the applicant has nail works on the north side of the same street; and there is no pretence that by reason of these two factories being on opposite sides of the street it has been difficult and expensive to maintain.

The request to the city council to close Jex street came from the Waterous Company as being solely interested in having it closed and conveyed to the company, offering, if the city did that, to give the requisite land for a street in substitution therefor.

It appears to me, therefore, that Jex street was being closed by the by-law for the benefit of that private corporation, and not in the interest of the public: In re Morton and City of St Thomas, 6 A. R. 323; Pells v. Boswell, 8 O. R. 681.

Notice was given of the intention of the council to consider the by-law on the 17th August, and it is sworn that the by-law was published in the "Expositor" newspaper at Brantford on the 15th, 22nd, and 29th July, and the 5th August, 1903. And there is a declaration filed shewing that six notices were put up on the 15th July, 1903, in the most public places in the vicinity of such portions of Jex street as were intended to be closed and such portions of lots 11 and 12 Hulbert Flats as it was intended to open. The statute was, therefore, fully complied with.

Compensation to the applicant need not be provided for in the by-law: In re McArthur and Township of Southwold, 3 A. R. 295; In re Vashon and Township of East Hawkesbury, 30 C. P. 194.

The by-law must be quashed with costs.

OCTOBER 26TH, 1903.

C.A.

REX v. MENARD.

Criminal Law—Thefts—Evidence of Former Offence—Acquittal—Judge's Charge.

Motion on behalf of the prisoner under sec. 744 of the Criminal Code for leave to appeal. She was tried before MACMAHON, J., and a jury at the Ottawa Assizes on the 19th September, 1903, on a charge of having stolen a sum of money from the person of one Felix Lalonde on the 11th August, 1903, and was convicted. At the trial counsel for the prisoner objected that the learned Judge erred in permitting evidence to be given that the prisoner had on the 8th August stolen a sum of money from the same Felix Lalonde.

The trial Judge refused to state a special case, and so this motion was made.

E. Mahon, Ottawa, for the prisoner.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—It appears that earlier during the same assize the prisoner was tried on a charge of stealing $16 from Lalonde on the 8th August. The defence was that the prosecutor lent the money to the prisoner, who was to repay it on the 11th August, and the prisoner was acquitted. At the second trial counsel for the Crown questioned Lalonde concerning what had taken place on the 8th August. It was necessary and proper to refer to that occasion in order to draw from Lalonde an explanation of his being in the prisoner's house on the 11th August. But it was not necessary to go further than to shew that his reason for going there was to receive back the money the prisoner had obtained from him on the 8th. There was no occasion for entering into the details further than to elicit testimony to that effect, and the Crown might properly have rested when it was shewn that it was arranged that Lalonde was to return on the 11th August. In the end the learned Judge put a stop to further questioning on the point, and he then pointed out that the jury at the former trial had found that the first transaction was a loan repayable on the 11th. And in charging the jury the learned Judge repeated that the other jury properly came to the conclusion that on the 8th the money was lent by Lalonde to the prisoner, and that she had agreed to return it on the 11th. The minds of the jury were thus freed from

any possible misapprehension as to the nature of the transaction on the 8th, and its real bearing on the occurrences of the 11th was explained. The prisoner admitted that Lalonde was to come to her house on the 11th August in order to receive payment of the $16, but her defence was that he did not come and was not there at all on that day. This was the real issue which the jury had to determine, and it was fairly and properly presented to them by the learned Judge.

On the whole case we think that there was no miscarriage, and that we ought to refuse the application.

OCTOBER 26TH, 1903.

C.A.

REX v. BULLOCK.

Criminal Law—Evidence—Trial of Same Prisoners on Several Charges—Trial before Judge without Jury—Prejudice to Prisoners—Evidence—Cases not Kept Distinct.

Appeal by Bullock and Stevens, the prisoners, from convictions by the Judge of the County Court of Waterloo, in the County Judge's Criminal Court, on two separate charges of receiving stolen goods knowing them to have been stolen. The prisoners were acquitted on a third charge, of housebreaking and stealing.

The first charge was of having on the 9th November, 1902, received tobacco stolen from one James Johns. The second charge was of having on 23rd October, 1902, received three razors stolen from one Leonard A. Macdonald. And the third charge was of having on the 23rd October broken and entered the shop of Thomas Hamilton and stolen a quantity of ginger ale and lemon sour soda.

The trial took place on the 27th December. The accusations or indictments on which the prisoners were brought before the Judge were of breaking and entering the shops of the respective persons mentioned with intent to steal, but with the consent of the Judge the further charge of receiving was added in the first two cases.

After stating the evidence in the first case, that is, the tobacco case, the learned Judge made the following statement: "I find in my note book that at the close of the case for the Crown it is noted that I dismissed the charge of shopbreaking as charged in the first count, and found a prima facie case for receiving stolen tobacco, as charged in the second count, made out. The case was then adjourned to 30th December at 10 a.m. to let in evidence for the defence. This evidence consisted chiefly of evidence of relations and friends

of accused as to their character and habits, and shewed that they used tobacco. Evidence for defence made no change on my mind. I still found both prisoners guilty of receiving stolen goods knowing them to have been stolen. I remanded the prisoners for sentence until after the trial of the next case."

The case stated that the second charge, that of receiving razors, was tried on the 27th December also, whereupon, upon the same day, the Judge made up his mind to find both prisoners not guilty of shopbreaking, but guilty of receiving the stolen property knowing it to have been stolen, though he did not so express himself in open court at the time, and he remanded both prisoners for judgment and sentence.

On the 30th December both prisoners were tried on the third charge and acquitted.

On the 31st December the Judge sentenced both prisoners to 23 months' imprisonment on the first charge, and to the same term of imprisonment on the second charge, the second sentence to run concurrently with the first. These sentences were not passed until after the trial and dismissal of the prisoners on the third charge.

The Judge added to his certificate: "I came to my finding in the first case before hearing the second case, and I am not conscious that I was biassed in coming to my conclusion on the second case through the knowledge acquired in the hearing of the first and third cases." He also stated that no objection was taken by counsel to the adjournment or to his remanding the prisoner for judgment and sentence until all the cases were tried.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, and Maclaren, JJ.A.

George F. Kelleher, for the prisoners, contended that the convictions were illegal because the Judge had mixed up the trial of the several cases in a manner calculated to prejudice the prisoners, and relied on Hamilton v. Walker, [1892] 2 Q. B. 25, 67 L. T. 200, 56 J. P. 583.

J. R. Cartwright, K.C., for the Crown.

Maclennan, J.A.—Hamilton v. Walker was a case in which the evidence in support of two different charges was necessarily nearly altogether the same. Here, however, the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and the principal witness was the same in all three or at all events in the first two.

There is some confusion in the Judge's statement. He appears to have heard the case for the prosecution only in the first case on the 27th, and postponed the defence until the 30th, and apparently he completed the trial of the second case on the 27th. It may be that this is an inaccuracy, and that the defence in both cases was heard on the 30th. But, however this may be, I think the case is not governed by Hamilton v. Walker, but rather by the later case of Regina v. Fry, 19 Cox C. C. 135, 78 L. T. 717. . . . I think we ought to accept the statement of the Judge that he came to his finding in the first case before hearing the second case, and that he is not conscious that he was biased in coming to his conclusion in the second case through the knowledge acquired in the hearing of the first and third cases. I think, too, as said by the Court in the Fry case, it was easy for the Judge to keep the cases distinct, having regard to the differences of time, place, and circumstances between them.

It seems proper to call attention to the observations of Wills, J., in delivering the judgment of the Court in that case as to the caution which ought to be observed in such cases (78 L. T. 717). . . .

Appeal dismissed.

OSLER, J.A., gave reasons in writing for the same conclusion, and referred to Regina v. Sing, 5 Can. Crim. Cas. 156, Regina v. McBerney, 3 Can. Crim. Cas. 339, and Regina v. Justices of Staffordshire, 23 J. P. 486, in addition to the cases cited above.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 26TH, 1903.

C.A.

REX v. HARRON.

Criminal Law—Resisting Bailiff—Distress for Rent—Necessity for Proof of Rent in Arrear—Lawful Distress—Rescue before Impounding.

Crown case reserved. The prisoners were charged for that they did resist and wilfully obstruct Michael Dillon, bailiff of the 7th Division Court in the county of Kent, in the execution of a lawful distress warrant against the goods of the prisoner John Harron. This was found to have been done by locking Dillon in the barn and rescuing from him animals under seizure by locking the gates and preventing his removal from the said premises of the animals under distress. The prisoner John Harron was tenant of certain

lands of one Graham under a written demise. A warrant in the usual form from Graham to Dillon was proved, authorizing him to distrain for arrears of rent alleged to be due and owing under the lease; and the alleged offence consisted in the resistance to the distress and rescue of animals taken in the name of a distress under this warrant as above stated. There was no evidence that the distress had been impounded.

For the prisoners it was contended that in order to prove an offence under sec. 144 (2b) of the Code it was necessary for the Crown to shew that the rent was due and in arrear, or at least that the evidence tendered by the prisoners to prove that there was no rent in arrear at the time of the distress should have been admitted. The Judge ruled that proof that rent was due was foreign to the case, and that the warrant was conclusive as to the rent being due; if it was not due, the prisoners had their civil remedy.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, and Maclaren, JJ.A.

J. H. Moss, for prisoners.

J. R. Cartwright, K.C., for the Crown.

Osler, J.A.—I am of opinion that the learned Judge's ruling was wrong on both points, and that the questions submitted should be answered in favour of the prisoners.

Section 144 (2b) of the Code enacts that "every one is guilty of an offence . . . who resists or wilfully obstructs any person in the lawful execution of any process against any land or goods, or in making any lawful distress or seizure.

The last branch of the sub-section is that under which, if at all, the indictment must be maintained, as a distress warrant for rent is not "process," the very definition of such a distress being a taking without legal process. It is of the essence of the statutory offence that the distress resisted should have been a lawful distress, and therefore, as the commission of an offence must be established against the accused before he can be convicted, it necessarily devolves upon the prosecution to prove the existence of all the ingredients which go to make it up, one of which, in the case of such a charge as the present, is the legality of the distress. If no rent is due and in arrear, it goes without saying that the distress is illegal, whatever may be the civil remedy open to the tenant. It seems, therefore, almost needless to say more than that, within the very words of the Act, if a lawful distress is not proved, the Crown has not established the commission of the offence mentioned in the sub-section. The whole

section draws a clear distinction between obstructing or resisting public and peace officers in the execution of their duties, or persons acting in the lawful execution of process, and a distress or seizure by a private person such as a landlord or his bailiff or agent.

It has always been lawful for a tenant, before the goods seized under a distress warrant have been impounded, to resist their seizure, or to rescue them if there was no rent due: Bevil's Case, Co. Rep. part IV., 11a; Gilbert on Distress, 4th ed. (1823), p. 61; Bradby on Distress, 2nd ed. (1828), pp. 193, 195; Am. & Eng. Encyc. of Law, 2nd ed., vol. 9, p. 656, and cases there cited; Rex v. Bradshaw, 7 C. & P. 233, 236; Regina v. Brennan, 6 Cox C. C. 387; Russell on Crimes, vol. 1, p. 411.

The conviction must be quashed and the prisoners discharged. It is not a case for granting a new trial.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

OCTOBER 26TH, 1903.

C.A.

REX v. CARLISLE.

Constitutional Law—Ontario Liquor Act, 1902—Intra Vires—Conditional operation—Proclamation of Lieutenant-Governor—Delegation of Legislative Power— Sec. 91 *of Act—Prevention and Punishment of Corrupt Practices—Appointment of Judges to try Offenders—Delegation—Trial by Jury—Conviction for Personation —Sentence— Penalty — Imprisonment —Jurisdiction — Place of Trial—Intituling of Conviction—Name of Informant—Date of Trial—Costs— Taxation—Warrant of Commitment.*

An appeal by the prisoner from an order of BRITTON, J., dismissing a motion for discharge upon the return of a writ of habeas corpus.

The prisoner was charged with the offence of personation in connection with the vote taken under the Liquor Act, 1902, on the 4th December, 1902. The act charged was the applying to a deputy returning officer, at a polling place in the city of Toronto, for a ballot paper in the name of a person other than himself.

He was summoned at the instance of the County Crown Attorney for the county of York, and appeared before the Judge of the County Court of Ontario, who had been designated by the President of the High Court of Justice, under sec. 91 of the Liquor Act, 1902, to conduct the trial of the prisoner and

other persons accused of having committed offences in the city of Toronto. At the opening of the trial counsel for the prisoner objected that the Judge had not, either by virtue of the Liquor Act or in consequence of any proceedings had thereunder, acquired jurisdiction to try and convict the prisoner. The objection being overruled, the trial proceeded, and the Judge having heard the evidence found and adjudged that the prisoner had committed and was guilty of the corrupt practice of personation. He thereupon ordered and adjudged that the prisoner pay to the County Crown Attorney for the county of York the sum of $400, the money penalty mentioned in sec. 167 (2) of the Ontario Election Act, and also the costs of the prosecution, which he directed to be taxed by one of the taxing officers of the High Court of Justice. He further directed that if the said sum of $400 and the amount of the costs so to be taxed were not paid within thirty days from the 19th February, 1903, the prisoner should be imprisoned in the common gaol of the county of York for three months without hard labour, unless the said sum and costs were sooner paid. And he also adjudged that the prisoner for his said offence be imprisoned in the common gaol of the county of York without hard labour for the term of one year.

Under a warrant dated the 20th February, 1903, addressed to the sheriff of the county of York and others and to the keeper of the common gaol of the county, and directing the commitment of the prisoner, he was taken to and confined in the county gaol. The warrant recited that the time appointed by the order of the Judge for the payment of the said several sums of money had elapsed and that the prisoner had not paid the same or any part thereof, but had made default. This was a manifestly erroneous statement, for the thirty days for payment only commenced to run from the 19th February, and the amount of the costs had not even been ascertained or settled by taxation or otherwise.

The application for the prisoner's discharge was based on numerous exceptions to the proceedings. Included in them were objections to the validity of the Liquor Act, 1902, and in consequence thereof the Court directed notice of the argument to be given to the Attorney-General for the Dominion, who, however, intimated that he did not desire to be heard.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

W. J. Tremeear, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

MOSS, C.J.O.—The exceptions taken to the validity of the Act may be shortly stated as follows: (1) The coming into effect of any part of the Act is made dependent upon the result of the vote directed to be taken. (2) In any event the coming into force of the second part of the Act is made dependent upon the result of the vote, and in both or either of these cases there has been an improper delegation by the Legislature of its power of enacting laws, to a body incapable of exercising the functions of proclaiming a law on its behalf; and, finally, the Legislature does not possess the power assumed to be exercised in sec. 91 of the Act of 1902 of appointing a tribunal to exercise the jurisdiction of a Court or of a delegating to the President to the High Court the power to designate such a tribunal.

The Act received the assent of the Lieutenant-Governor on the 17th March, 1902. That the subject-matter is one with regard to which the Legislature is competent to enact a law or laws, must be taken to be definitely settled by the judgment of the Judicial Committee in Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348, and Attorney-General for Manitoba v. Manitoba Licenseholders' Association, [1902] A. C. 73. The question is, did the Legislature in enacting the Act in its present form exceed, or fail to properly exercise, its powers?

The Act is in two parts. In part I. it is enacted that "there shall be submitted to the vote of the electors hereinafter declared entitled to vote thereon the following question: 'Are you in favour of bringing into force the Liquor Act, 1902?' (2) The voting shall take place upon the said question in all the electoral districts in the Province on the 4th day of December in the year 1902, being the first Thursday in the said month."

Then follow elaborate provisions concerning the qualification of voters, the appointment of returning officers, the opening and holding of the polls and the taking of the vote, the preservation of peace, the maintenance of secrecy, the prevention of corrupt practices, the return of results, and the final summing up of the votes. Then it is enacted (sec. 104) that in case it appears from the summary that a majority of the votes on the said question are in the affirmative and that the number of votes on the question in the affirmative exceeds one-half of the number of votes to be ascertained as specified, the Lieutenant-Governor shall issue his proclamation declaring part II. of the Act to be in force on, from, and after the 1st day of May, 1904, and part II. shall come into force and take effect on, from, and after the said date accordingly.

Now, while the effect of these provisions is that until the issue of a proclamation by the Lieutenant-Governor, which he can only issue upon the happening of a certain event, the coming into force and taking effect of part II. is suspended, there is nothing in them or in any other provision of the Act that we can discover to suspend the operation of the rest of the Act or to render its coming into force conditional upon any future act or event. Except as provided in sec. 104, there is no later date for the commencement of the Act or any part of it, and as regards part I. the provision of the Interpretation Act, sec. 6 (2), that the date of the assent shall be the date of the commencement, governs. All the provisions of part I. have, therefore, been in force since 17th March, 1902, and, as regards it, the aid of a vote of the electors or the issue of a proclamation was not required to bring it into force. All the provisions for the submission of the question and the ascertainment of the result of the voting, upon which depended the question whether the other part of the Act should come into force, became operative upon assent to the Act. The assent given applies to every part of the Act, but the taking effect of a part is made conditional upon the happening of some subsequent event.

Legislation which provides a law but leaves the time and manner of its taking effect to be determined by the vote of the electors, is not a delegation of legislative power to them. The subject-matter being, as before pointed out, within the competence of the Legislature, it has provided the whole legislation, and what remains partakes in no sense of the nature of legislation. It is only necessary to quote the language of Sir Montague E. Smith, in delivering the opinion of the Judicial Committee in Russell v. The Queen, 7 App. Cas. 829, at p. 835. . . .

There is no substantial distinction between these cases and the present. By the legislation which was under discussion in The Queen v. Burah, 3 App. Cas. 889, much larger powers were left to be exercised by the Governor and much wider discretion was vested in him than are here conferred upon the electors. But their Lordships rejected the argument that there was a delegation of legislative functions, observing (p. 906): "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers or on the exercise of a limited discretion intrusted by the Legislature to persons in whom it places confidence, is no

uncommon thing; and in many circumstances it may be highly convenient."

In City of Fredericton v. The Queen, 3 S. C. R. 505, Ritchie, C.J. of Canada (to whose opinion reference is made by Sir Montague E. Smith in Russell v. The Queen), adopts the statement in Cooley on Limitations, 4th ed., p. 142, that "it is not always essential that a legislative act should be a complete statute which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event." This statement of the doctrine covers the present case.

There remains the objection that the Legislature has exceeded its powers in sec. 91 of the Act.

This section is directed to the prevention and punishment of corrupt practices during the taking of the vote, and makes provision for the trial and punishment of offenders, and as, besides the question of ultra vires, other questions are raised with regard to its construction, operation, and effect, it is proper to quote at length the portions on which the questions turn.

By sub-sec. (1) it is declared that all the provisions of the Ontario Election Act and amendments thereto relating to the prevention and punishment of corrupt practices and other illegal acts at elections, and contained in secs 159 to 170 inclusive, and in secs. 181 to 186 inclusive, and in secs. 190 to 196 inclusive, of the said Act and amendments thereto, shall mutatis mutandis apply to the taking of the vote. Sub-section (2) provides that the penalties imposed for a contravention of any of the provisions mentioned in the preceding subsection, and thereby incorporated in this part, or for a contravention of any other provisions of this part, shall be recovered in the same manner as penalties for the like offences are recoverable under the Ontario Election Act, and the procedure therein shall be the same as nearly as may be as they (sic) would have been had the offence been committed at the election of a member to serve in the Legislative Assembly.

Sub-section (3): It shall be the duty of every County Crown attorney and of every District Crown attorney, upon receiving information that any offence has been committed under this Act, to take proceedings for the prosecution of the offender and the recovery of penalties by this Act imposed.

Sub-section (4): In case a county or district Crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting under this part, he

shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a County or District Court, of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as in the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto.

It is upon this last sub-section that the objection now under consideration chiefly turns. It is argued that the Legislature has therein assumed the power of the appointment of Judges. But there is no appointment of any person to the judicial office. There is not even the creation of a judicial office to which any person not holding the position of Judge of a County or District Court could be appointed.

Section 188 of the Ontario Election Act, which is incorporated in the Liquor Act, 1902, and made to apply mutatis mutandis to proceedings under it, provides a mode of trial of persons accused of offences thereunder, by the Judges or a Judge upon the rota or by a Judge of the High Court holding a sittings of the Court for the trial of civil or criminal causes. Instead of putting the trials of offenders under the Liquor Act, 1902, upon these Judges, sec. 91 imposes the duty upon persons holding the office of Judge of County or District Courts.

The Judge to be designated may not try cases arising in his own county or district. But there is nothing in the Act saying that he shall not conduct in his own county or district the trial of the cases for which he is designated.

Sub-section 2 of sec. 188 provides that the summons may be issued or returnable at any place in this Province, and so far as appears there is no reason why a summons against a person who committed an offence under the Liquor Act, 1902, in one county or district, might not be made returnable in another county or district. In the same way the Judge by whom the summons is issued may exercise jurisdiction at the place where the summons is returnable. The Legislature having the power to make laws regarding the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both of civil and criminal jurisdiction, has deemed it proper to create a special tribunal for the trial of offences under the Liquor Act. The Judges exercise jurisdiction under this statutory commission, acting just as the election Judges act, outside of and distinct from the jurisdiction they exercise in their respective Courts. And the Legislature did not exceed its powers when, by sec. 91, it provided for the substitution of County or District Judges to conduct the trials of offenders under the Act,

and enabled them to exercise jurisdiction outside of their county or district.

The remark of Hagarty, C.J., in Re Wilson v. McGuire, 2 O. R. 118, at p. 124, is in point.

The manner of designation, ie, by the President of the High Court, is on the whole convenient, and involves no delegation of appointment to office, any more than would be the giving power of assigning to the Judges of the High Court their circuits or sittings in Court.

It was objected that, assuming the Judge to be well appointed, he had no power to deprive the prisoner of his right of trial by jury. But a person charged with having committed a corrupt practice or illegal act under the provisions of the Ontario Election Act cannot demand a jury as of right. By sub-sec. (4) of sec. 188, upon the return of the summons the Judge is required to investigate and dispose of the case in a summary manner, and he is given wide powers of adjournment from time to time and from place to place, altogether inconsistent with the notion of a trial by jury. It is true that sub-sec. (2) of sec. 169 provides for punishment in case of trial by jury, but these are in cases where the Election Court orders the person charged to be prosecuted before some other Court. These provisions do not seem to apply to trials under sec. 188.

It is also objected that the order of conviction is bad on a number of grounds. The most important is that the Judge has sentenced the prisoner to one year's imprisonment in addition to the payment of a penalty of $400 and costs, whereas under sec. 91 the Judge's jurisdiction is limited to the imposition of the pecuniary penalty. It is argued that subsecs. (2) and (3) of sec. 91 only provide for the punishment of persons accused by the infliction of a pecuniary penalty, and not by imprisonment, and that the jurisdiction of the Judges appointed and designated under sub-sec. (4) is confined to the conduct of the trial for the recovery of the pecuniary penalty. But a reference to some of the provisions of the Ontario Election Act which are incorporated in the Liquor Act will shew that the provisions of sub-secs. (2) and (3) of sec. 91, so far from being restrictions upon, are amplifications of, them. By sec. 167, a person found guilty of personation as therein defined shall incur a penalty of $400, and shall also on conviction be imprisoned for a term of one year with or without hard labour. The punishment being thus prescribed, the procedure is found in sec. 188. By subsec. (7) the Judge, being satisfied that the person charged has committed the offence, shall adjudge that the said person

has committed the corrupt practice or illegal act, and shall order him to pay to the person at whose instance the summons was issued the amount of the money penalty. Sub-section (2) of sec. 91 of the Liquor Act refers to the money penalties here spoken of, when it provides that the penalties shall be recovered in the same manner as penalties for the like offence are recoverable under the Ontario Election Act. Provision is made for such recovery by sub-secs. (13), (14), and (16) of sec. 188, and by secs. 195 and 196. Sub-section (10) of sec. 188 provides that if any punishment in addition to or instead of a money penalty is by law assigned to the commission of any offence of which such person has been found guilty, the Judges shall sentence the person so found guilty to undergo such punishment, and shall give all necessary directions in respect thereto. The punishment of imprisonment is thus made to follow upon the adjudication of guilt, and is brought into play by the direction in sub-sec. (4) of sec. 91 of the Liquor Act, that the procedure on the trial shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act.

Therefore, while sub-sec. (2) deals with the recovery of the money penalties, sub-sec. (4) covers the case of punishment by imprisonment, and confers the jurisdiction to award it. And sub-sec (3) makes it the duty of the county Crown attorneys and district Crown attorneys to become the prosecutors and to take proceedings for the prosecution of the offender, involving the punishment by imprisonment, and also for the recovery of the money penalties by one or other of the modes prescribed for the recovery of such penalties.

The objection that the order of conviction does not shew on its face where the trial was held, and therefore does not shew jurisdiction, is disposed of by what has already been said as to the jurisdiction. The jurisdiction is to try at any place in Ontario, and it appears that the trial was held under the Act. The order shews that the offence was committed at the city of Toronto, and the prisoner is sentenced to be imprisoned in the common gaol of the county of York at the city of Toronto.

The fact that the order is intituled in the High Court of Justice is immaterial, and that objection fails. The objection that it does not shew the name of the informer also fails. The county Crown attorney of the county of York is clearly shewn to be the prosecutor. So as to the date, the trial proceeded on the day the order bears date, and a date seems to be material only when the time for conviction is limited by statute, and it is necessary that the date of the

conviction should bring it within that time when compared with the date alleged for the offence: Paley, 7th ed., p. 230.

The objection to the form of the detainer has no force.

The next objection is that, while the prisoner is ordered to pay the costs, they are not ascertained or fixed or stated in the order. But this question does not arise at the present time. The prisoner is in custody under an order for his imprisonment for one year. In addition to this, he is ordered to pay a penalty of $400 and costs within thirty days, and in default to imprisonment for three months, unless sooner paid. But in an order such as this is, the part relating to the payment of the costs is readily separable from the other part, and the order stands good as regards the imprisonment for one year. As remarked by Street, J., in Rex v. Forster, 2 O. W. R. 312, there is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. At the expiration of that period, the question of the prisoner's further detention will arise, and it may then prove difficult for the Crown to shew any warrant for it. No authority has been shewn to justify the reference to one of the taxing officers, to tax or ascertain the amount of the costs. The ordinary rule is that the convicting justice should fix and insert the amount in the order, and the direction in sub-sec. (15) of sec. 188 of the Ontario Election Act that the costs shall be included with the penalty in the same order, points to that being the proper practice in this case.

This also disposes for the present of the objection that the warrant of commitment erroneously states that the time for payment of the penalty and costs had expired.

These are the objections appearing to have any substance, and they fail to support the application for the prisoner's release. The appeal must be dismissed and the prisoner remanded to custody. But the order to be drawn up will reserve to the prisoner the right to apply again for his discharge at the expiration of the year's imprisonment.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A., dissented.

CARTWRIGHT, MASTER. OCTOBER 27TH, 1903.

CHAMBERS.

HISCOCK v. McMILLAN.

Costs—Dismissal of Action for Seduction—Death of Plaintiff's Daughter—Discretion—Dismissal without Costs.

This action was brought by a father and daughter as joint plaintiffs for the alleged seduction of the daughter by the

defendant. The daughter was in very bad health and could not attend for examination for discovery. On application her name as a plaintiff was struck out, and an order was made for her examination de bene esse as a witness on her father's behalf. Before her examination could be taken, she died on the 8th instant.

The plaintiff thereupon wrote on the 13th instant to the defendant's solicitor that he thought it better to drop the action.

No arrangement was reached by the solicitors, and on the 21st instant a motion was made by the plaintiff for leave to discontinue the action without costs. This was argued along with a motion by the defendant to dismiss for want of prosecution.

F. J. Roche, for plaintiff.

E. H. Cleaver, Burlington, for defendant.

THE MASTER.—. . . Under all the facts of this case, it does not seem that the plaintiff's offer to have the action dismissed without costs is unreasonable. If this cannot be done, I would have to make the usual order allowing the plaintiff to go to trial at the next sittings at Milton. The plaintiff's counsel on the argument stated that there was some other evidence which they might have to give if the defendant forced on a trial. I cannot think that the interests of the defendant will be in any way advanced by this. In the circumstances of this case I think that justice will be done by dismissing the action without costs (including costs of these motions).

The defendant has denied the charges made against him on oath and has not been examined for discovery. So he has all the vindication he could obtain if the action went down to trial.

I refer to sec. 72 of the Judicature Act, and Snelling v. Pulling, 29 Ch. D. 85, as shewing that I have discretion as to the costs.

MACLAREN, J.A. OCTOBER 27TH, 1903.

CHAMBERS.

ATKINSON v. PLIMPTON.

Writ of Summons—Service out of Jurisdiction—Order Permitting—Motion to Set Aside—Action for Price of Goods Sold—Sale by Sample—Return of Goods—Copyright—Discretion as to Forum.

Appeal by defendants from order of Master in Chambers, ante 827, dismissing motion by defendants to set aside an

order allowing plaintiffs to issue a writ of summons for service on defendants at Liverpool, England, the writ issued pursuant thereto, the service thereof, and all subsequent proceedings.

J. T. Small, for defendants.

W. E. Middleton, for plaintiffs.

MACLAREN, J.A.—. . . It is urged that the contract was a sale by sample; that defendants had a right to inspect the goods on their arrival at Liverpool; and that the breach of contract, if any, was in defendants' refusal to accept at Liverpool. When ordering the goods defendants directed them to be shipped by Leyland line steamer from Boston, they paying freight. I can find nothing in the contract to take this case out of the general rule, that the property would pass to the purchaser on the delivery of the goods on board the vessel at Boston, and that an action would thereupon lie for goods sold and delivered. [Atkinson v. Bell, 8 B. & C. 277, Philpotts v. Evans, 5 M. & W. 475, and Scott v. Melady, 27 A. R. 193, distinguished.] The purchasers were, no doubt, entitled to inspect the goods before accepting. But even in case of a sale by sample, prima facie the place of delivery is the place for inspection: Perkins v. Bell, [1893] 1 Q. B. at p. 197. There is nothing in the contract in this case to dislodge this presumption. . . .

The affidavit on which the order for service was granted sufficiently disclosed the facts to comply with Rule 163, although it did not shew that defendants refused to receive the goods at Liverpool, but shipped them back to plaintiffs at Toronto, and that they were lying there at the time the affidavit was made, nor the facts regarding the English copyright of one of the pictures sold, and that the defendants had paid for all the goods which they retained.

The Master properly exercised his discretion in favour of an Ontario action. [Lopes v. Chavarri, W. N. 1901, p. 115, distinguished.]

Appeal dismissed with costs to plaintiffs in any event.

FALCONBRIDGE, C.J. OCTOBER 27TH, 1903.

TRIAL.

SINCLAIR v. McNEIL.

Ejectment—Trust—Statute of Frauds—Title by Possession—Costs.

Action of ejectment tried at Goderich.

W. Proudfoot, K.C., and G. F. Blair, Brussels, for plaintiff.

J. P. Mabee, K.C., for defendant.

FALCONBRIDGE, C.J.—Plaintiff has failed to establish the trust set up in the statement of claim, and even if there were evidence to support it, the Statute of Frauds would be an answer. Nor has plaintiff succeeded in proving the charges of fraud. Nor has she established title in John McNeil by length of possession. The defendant has the paper title, and it has not been successfully impugned. The non-production by defendant until the eve of the trial of certain important documents is not very satisfactorily explained; therefore no costs.

Action dismissed without costs.

CARTWRIGHT, MASTER. OCTOBER 28TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Pleading—Defence—Action Brought in Name of Company—Questioning Right to Use Name—Practice—Motion to Stay Proceedings.

After an order made in this case on the 14th October, 1903 (similar to that in the case of Saskatchewan Land and Homestead Co. v. Leadley, ante 850) the defendant amended his statement of defence by striking out paragraphs 9, 10, 11 and 13, and by adding 16 new paragraphs.

The plaintiffs moved to strike out the added paragraphs as being a repetition of those previously struck out.

J. J. Maclennan, for plaintiffs.

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

THE MASTER.— . . . The new paragraphs are only an amplification of those which defendant submitted to have struck out. They go very fully into the details of the alleged irregularities and illegal acts of those who are bringing this action, and ask a declaration that the proceedings of 14th July were illegal and void. I am still of opinion that, so far as this action is concerned, the cases cited on the previous motion apply.

[Reference to Austin Mining Co. v. Gemmell 10 O. R. 696; Weaymouth v. Town of Barrie, 15 P. R. 95; and Barrie Public School Board v. Town of Barrie, 19 P. R. 33.]

The paragraphs complained of should be struck out with costs to plaintiffs in any event.

CARTWRIGHT, MASTER. OCTOBER 28TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO v. LEADLEY.

Pleading—Defence and Counterclaim—Action Brought in Name of Company—Illegal Proceedings—Directors.

The defendants other than John T. Moore submitted to the order reported ante 850. Defendant John T. Moore amended his defence by striking out the 9th paragraph and adding 16 others. By para. 9 he set out that on 30th June last he was, and still is, a shareholder in the said company. Para. 10 stated his appointment on 30th March, 1898, as director. Then para. 11 took up the proceedings in June last, and after setting them all out very fully and alleging numerous irregular and illegal acts on the part of those who were the substantial plaintiffs, asked on behalf of himself and other shareholders in the same interest, by way of counterclaim, a declaration that the whole proceedings of 14th July, 1903, were illegal and void, including the election of directors.

Plaintiffs moved to strike out the new paragraphs, on the grounds that by the former order the matter was res judicata, and that this was not a proper ground of counterclaim and was embarrasing.

J. J. Maclennan, for plaintiffs.

W. H. Blake, K.C., for defendant John T. Moore.

THE MASTER.— . . . The amendments conclude by asking the Court to set aside the pretended election of directors in July last. This involves the question of who are shareholders and who compose the company. Such relief may properly be asked by any shareholder feeling himself aggrieved. In the present action it cannot at this stage be said to be improperly set up by way of counterclaim. The action seeks to have certain transactions between the company and the mortgagees set aside, and that the company be allowed to redeem. It may be that the company as such may be quite willing to ratify these proceedings and to cure any defects in them. This would leave it open to any dissatisfied shareholder to bring his action to open the matter. But it might be a substantial ground of defence that the company, acting through a majority of the shareholders, had confirmed the impeached release of the equity of redemption, and that the minority, however dissatisfied, must submit to anything

that was within the powers of the company and not fraudulent. See Earle v. Burland, [1902] A. C. 83, and cases there cited. . . . It is enough to say that a possible ground of defence is thereby indicated, of which defendants cannot be now summarily deprived. . . . McAvity v. Morrison, 1 O. W. R. 632.

Motion dismissed. Costs to defendant John T. Moore in the cause.

STREET, J. OCTOBER 30TH, 1903.

CHAMBERS.

RE REID.

Gift—Donatio Mortis Causa — Evidence—Corroboration—Interested Witness—Intention—Gift of Bank Pass Book.

Motion by executors of Henry Reid for payment of money out of Court. The deceased, an Irishman by birth, lived for many years in Ontario, and accumulated by day labour about $1,500, which lay at his credit in the savings bank department of the Standard Bank of Canada at Harriston, Ontario. He was unmarried, and early in 1901 he went to Ireland to see his relatives there. Before doing so he had made a will dividing his money equally amongst certain cousins in Ireland. He stayed in Ireland with his cousin George Armstrong, a married man, from May until November, when he went to stay with his cousin John Armstrong, George's brother, also a married man, who lived a few miles from George. On 30th December, 1901, he was taken very ill at John's house, and a physician was called in who told him he had only a few hours to live and should settle his affairs at once. The doctor then left. In the house at the time with Henry Reid were only John Armstrong and his wife and their young children. John and his wife said that after the doctor left Reid told the wife to bring him his coat, and that upon her doing so he took from the pocket of it the saving bank book of the Standard Bank, in which his deposits were shewn, and handed it to her husband, telling him at the same time that he was giving him the money mentioned in it. Thereupon one of the children was sent out for Owen McCabe, the nearest neighbour, a farmer, who came in, and who said that the book was again formally delivered to John Armstrong by Reid in his presence, and that of Mrs. John Armstrong, with the statement that with this book John could draw the money it represented from any bank in Ireland. The same afternoon John went to the

nearest bank, where the banker explained that a cheque or order upon the bank at Harrison was necessary, and drew up a form of cheque, which John took back to the house. By this time Reid was worse and unable to sign his name. The

his

cheque was produced with the name Henry x Reid written

mark

in the hand of a daughter of John, and with the signatures of Owen McCabe and Mrs. John Armstrong as witnesses. It was admitted that McCabe was not present when the mark was put to it, and that he did not write his name as a witness till the next day. Reid died before seven o'clock upon the same evening. Probate of Reid's will was granted in Ontario on 17th April, 1902, and the executors claimed the money from the bank. It was also claimed by John Armstrong, and the bank paid it into Court. Upon the motion for payment out, evidence was taken upon commission in Ireland.

A. Spotton, Harriston, for the executors.

W. H. Blake, K.C., for John Armstrong.

STREET, J.—The bank pass book contained a printed condition that no part of the deposit could be withdrawn without production of the pass book. The existence of this condition made the delivery of the book, with the intention of passing the money mentioned in it, a valid donatio mortis causa of the money: Brown v. Toronto General Trusts Corporation, 32 O. R. 319; In re Western, [1902] 1 Ch. 680. Upon the evidence I come to the conclusion, though with some hesitation, that a gift was intended. Any evidence which is believed and is corroborated so as to comply with sec. 10 of the Evidence Act may be acted on by the Court: Re Farman, 58 L. T. 12; Carnahan v. McGuire, 15 Moo. P. C. 215; Brown v. Toronto General Trusts Corporation, 32 O. R. 319. Under this rule the evidence of Owen McCabe and the wife of the claimant was sufficient corroboration, although a will in favour of John witnessed by them would have failed to take effect because of the disqualification of the wife as a sufficient witness to a bequest to her husband. It seems to me it would be better to require as high a decree of evidence to prove a donatio mortis causa as to prove a will.

Order made for payment of the costs of all parties out of the fund, those of the executors as between solicitor and client, and for payment of the balance to John Armstrong.

BRITTON, J. OCTOBER 30TH, 1903.

TRIAL.

FENDAL v. WILSON.

Executors and Administrators—Claim of Widow of Intestate to Share in Estate—Notice Disputing—Action by Widow to Establish Marriage—Declaratory Judgment—Administration.

Action by Harriet Fendal against the administrator of the estate of David Fendal, deceased, to establish her marriage with David Fendal and for a declaration that she is entitled as widow to a portion of his estate.

David Fendal died at Brantford on the 12th December, 1902, intestate. The defendant obtained letters of administration. The plaintiff gave notice that she was Fendal's widow. Defendant refused to recognize her as such, and caused a formal notice to be served upon plaintiff disputing her claim. The notice purported to be given under R. S. O. 1897 ch. 129, sec. 35. The plaintiff was not a creditor. She made no claim otherwise than as widow, and shortly after the receipt of the notice she brought this action. Defendant in his statement of defence disputed the marriage. At the trial plaintiff proved that she was duly married to the deceased at Brantford on the 14th January, 1877, and that she and the deceased lived together at Brantford as husband and wife. Defendant made no attempt to controvert this evidence, but he stated that a person, whom he named, had asserted that David Fendal on 14th January, 1877, had a former wife who was then living. No proof was adduced.

W. C. Livingston, Brantford, for plaintiff.

E. Sweet, Brantford, for defendant, argued that plaintiff should have paid no attention to defendant's notice, but should have waited, and after the expiration of a year taken proceedings for administration.

BRITTON, J.—It does not appear that defendant would not, at the expiration of a year as well as now, dispute plaintiff's marriage, and it is not open to defendant now to say that plaintiff should not have acted upon the notice formally given. This action cannot bar the rights of any persons not parties, if such rights exist; but, without prejudice to these, plaintiff is entitled as against defendant as administrator to a declaration that she is the lawful widow of the

deceased. She is entitled to compel defendant, after the expiration of one year from the death of David Fendal, to proceed to administer the estate and make the proper distribution thereof. If any proceedings are taken against defendant in regard to the estate of David Fendal, the defendant should give notice to plaintiff. Plaintiff is entitled to costs of the action out of the estate as against the defendant as administrator.

CARTWRIGHT, MASTER. OCTOBER 31ST, 1903.

CHAMBERS.

TAYLOR v. TAYLOR.

Writ of Summons—Substituted Service—Motion by Person Served to Set Aside—Status of Applicant—Costs.

An order was made for substituted service of the writ of summons on a solicitor, who, on being served, moved to set aside the service.

W. J. Elliott, for the applicant.

H. D. Gamble, for plaintiff, objected that the applicant had no locus standi.

THE MASTER.—Mr. Elliott relied on The Pomeranian, 4 P. D. 195, and Young v. Dominion Construction Co., 19 P. R. 139. A consideration of the matter leads me to the conclusion that the objection must be sustained. The case in 4 P. D. seems to have been decided on the merits, and no objection was made that the applicants had no status. The report of the case in 19 P. R. is misleading. The original papers have been sent to me, and from these it appears that the motion was made on behalf of the defendants and not of the solicitors. It may be that the application in the Pomeranian was made in the same way.

[Reference to Heaslip v. Heaslip, unreported; Martin v. Martin, 3 B. & Ad. 937; McDonald v. Crombie, 2 O. R. 243, at p. 246.]

While it may still be open to defendant hereafter to move against the order in question and any proceedings founded thereon, I do not think that the applicant is entitled to do so, when he expressly negatives any professional relationship with the defendant. . . .

As the application was apparently justified by the incorrect report in 19 P. R., I consider that justice will be done by dismissing the motion without costs.

OCTOBER 31ST, 1903.

DIVISIONAL COURT.

STANDARD LIFE ASSURANCE CO. v. VILLAGE OF TWEED.

Summary Judgment—Defence to Action—Municipal Debentures—By-law—No Provision for Payment of Principal—Remedial Status.

Appeal by defendants from order of FERGUSON, J., ante 747, allowing an appeal from an order of the Master in Chambers, ante 731, and giving leave to plaintiffs to enter summary judgment against defendants for the principal due upon certain debentures issued by defendants and purchased by plaintiffs.

S. A. Mills and C. W. Craig, Tweed, for defendants.

A. Bruce, K.C., and D. L. McCarthy, for plaintiffs.

The judgment of the Court (BOYD, C., MACMAHON, J., TEETZEL, J.) was delivered by

BOYD, C.—The village of Tweed raised $5,000 to assist a local enterprise, and secured it by five debentures for $1,000 each issued on 9th August, 1892, and payable at the end of ten years, with interest meanwhile half-yearly. All the interest had been punctually paid, and the time has elapsed for payment of the principal, which fell due on 25th March, 1902. The by-law makes no provision for the payment of the principal of these debentures, and, unless the transaction has been validated by the Legislature, there exists no legal right to sue for the principal money on these debentures, which have no higher binding force than the by-law.

The statute 44 Vict. ch. 24, sec. 27, which was carried into the Consolidated Municipal Act of 1883 as sec. 400, provides for validating any debentures theretofore issued under any by-law where the interest on such debentures and the principal of such thereof (if any) as shall heretofore have fallen due has been heretofore paid for the period of two years or more.

In the revision of 1887 the provision was (apparently improvidently) limited to debentures issued prior to July, 1883 (R. S. O. 1887 ch. 184, sec. 408), and the like limitation was carried forward into the next decennial revision, R. S. O. 1897 ch. 223, sec. 432.

On 27th June, 1903, this section was repealed and a new provision substituted in these words: "Where in the case of any by-law heretofore or hereafter passed the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-laws and the debentures issued thereunder remaining unpaid shall be valid and binding," etc.: 3 Edw. VII. ch. 18, sec. 93; ch. 19, sec. 432.

It is to be borne in mind that municipal debentures are broadly of two classes: (1) in which the principal money is to be paid at the end of a fixed period, with interest payable in the interval; and (2) in which the principal is payable by annual instalments with proportionate interest: Municipal Act, R. S. O. 1897 ch. 223, secs. 384, 386.

The principle enunciated in the curative enactment appears to be that one payment of interest will validate the debentures in respect of which it is paid, and one payment of principal will validate the series in respect of which it is paid. It cannot be said that the original section of 1881 is happily or even lucidly expressed, and it has not been made plainer in the course of subsequent legislation. Yet I think the present section yields the net result I have endeavored to indicate, and with such sufficient clearness as may justify the Court in so expounding it. . . .

Appeal dismissed with costs.

OCTOBER 31ST, 1903.

DIVISIONAL COURT.

PRESTON v. JOURNAL PRINTING CO. OF OTTAWA.

Libel—Justification—Qualified Privilege—Answer to Public Statement—Judge's Charge—Findings of Jury—Perverse Verdict.

Motion by plaintiff to set aside verdict and judgment for defendants in an action for libel tried before MEREDITH, J., and a jury at Ottawa, and for a new trial, upon the

ground that the verdict was perverse. The plaintiff, being under cross-examination before a special committee of the Senate, was asked whether one John Rochester, his uncle and the father of John E. Rochester, had not, in an action tried at Cobourg several years previously, brought by plaintiff against one Trayes, sworn that he would not believe the plaintiff on oath. Plaintiff answered that John E. Rochester had so sworn, and he then proceeded to account for Rochester's having so sworn by stating that there had been a family feud between the Rochester branch of the family and plaintiff's branch, arising out of a law suit, tried at Ottawa, in which plaintiff's father was plaintiff, and John E. Rochester had some interest on the other side, and in which plaintiff's father had been successful; that 15 years later plaintiff himself had an action against one Trayes, which was tried at Cobourg before Galt, C.J., and in which John E. Rochester had sworn that he would not believe plaintiff on oath; that Galt, C.J., himself took Rochester in hand and after examining him for a few minutes told him that if he did not leave the court house in one minute he would instruct the County Crown Attorney to prosecute him for perjury; and that when John E. Rochester was on his death-bed he sent plaintiff a message asking forgiveness. The letter published by defendants of which plaintiff complained was written by John Rochester in reply to these statements. In it he referred to the evidence given by plaintiff before the Senate committee, which had been published a day or two before in the newspapers, and asked to be allowed to give a little evidence in regard to plaintiff. He said that plaintiff's father had lost and not gained the Ottawa law suit, and insinuated that plaintiff had made a wilful misstatement in regard to that matter. He further referred to the fact that plaintiff's father had been collector of the city of Ottawa and had improperly used funds of the city, and that the law suit in question had some connection with that. He denied that Galt, C.J., had threatened John E. Rochester with prosecution for perjury, suggested that plaintiff's statement to that effect was wilfully untrue, and said that if the Judge made such a statement, which was denied, it would most likely have been addressed to plaintiff or plaintiff's father. He characterized the statement that John E. Rochester on his death-bed had asked plaintiff's forgiveness as an unqualified falsehood; said that the statement would appear ridiculous to all who knew that the deceased invariably referred to plaintiff as "a polished scoundrel" and "an infamous rogue;" and he wound up by asking defendants to publish his denial of the

false evidence given before the Senate committee by plaintiff, whom he described as "this charlatan." Part of the cross-examination of plaintiff for discovery was read by defendants. Plaintiff there stated that the Senate committee in question was investigating certain charges made by one Cook that he had been offered a Senatorship if he would pay the party in power a considerable sum of money, and that in the course of Cook's evidence before the committee he stated that plaintiff was one of the persons who had conveyed the offer to him. It appeared from the evidence that there had been two or three lawsuits at Ottawa in which plaintiff's father was concerned, and that he had succeeded in one of them, to which the late John E. Rochester was not a party, and had failed in another, the parties to which were plaintiff's father and John E. Rochester. There was conflicting evidence as to what had taken place at the Cobourg trial, and there was no evidence to support plaintiff's assertion that John E. Rochester had asked his forgiveness. The trial Judge advised the jury to lay the two statements side by side, that is, the evidence given by plaintiff before the Senate committee, and the letter published by defendants, and to take all the circumstances into their consideration, and if they were not able to say that the statements in the letter were true, then to consider whether they were a fair answer by John Rochester in defence of John E. Rochester's memory; that, if they considered the statements in the letter were a fair answer to what was said by plaintiff before the committee, their verdict should be for defendants; if they found the libel proved, they should find for plaintiff. He explained to them fully what constituted a libel. The charge was not objected to, and the jury found for defendants.

F. A. Anglin, K.C., for plaintiff, argued that the letter published by defendants was clearly libellous, and the jury were bound to find it so; that the defence of justification failed, and there was no case of privilege made out, so that the defence of fair comment also failed.

G. F. Henderson, Ottawa, for defendants.

The Court (STREET, J., BRITTON, J.) held that if the circumstances were not such as to raise the question of privilege, the plaintiff should not have allowed the case to go to the jury without objection upon the Judge's charge, which clearly treated the case as one of qualified privilege: Wills v. Carman, 17 O. R. 223; Parsons v. Queen Ins. Co., 43 U. C. R. 271; Macdonnell v. Robinson, 12 A. R. 270. It must be assumed in favour of defendants that the jury did as they were directed by the Judge, that is, laid plaintiff's evidence

before the committee beside the letter of John Rochester, and came to the conclusion that the letter was a fair answer in defence of John E. Rochester's memory to plaintiff's statements. The finding of the jury upon the point which both parties appeared to have regarded as decisive of their rights, must be treated as final, there being no suggestion that the point in question was unfairly submitted to them.

Motion dismissed without costs.