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MASTER'S OFFICE.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways—Construction—Municipal Corporations—Extra-territorial Rights—Franchise—Forfeiture—Construction of Statutes—Interest as Damages.

Reference to ascertain the amount due to plaintiffs for mileage and other matters as set out in the judgment.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

J. Bicknell, K.C., for defendants.

THE MASTER—It is not necessary now to make a summary of the cases dealing with the allowance of interest as damages from 7 Wm. IV. ch. 3 to the present time; for the law is well settled that such interest as damages is properly allowable where the original claim is a sum certain, ascertainable by mere arithmetical calculation—as I find it to be in this case. And there are many letters of demand of payment which strengthen the plaintiffs claim and would warrant a jury awarding such interest as damages for nonpayment. The city's claim of interest will, therefore, be allowed.

In the second branch of the reference, which requires me to inquire and report by whom the portion of the railway track on that part of Queen street (or the Lake Shore road) west of Roncesvalles avenue was constructed, and at what time, and what rights of running upon the said track the defendants possess, I find that the said portion of the said railway track was constructed by the defendants shortly prior to the 30th June, 1893; and that the cost of the same remained in the accounts of the defendants as a charge against their expenditures until the 30th April, 1898—or about a month after the trial of this action,—at which date an entry was made in their accounts of $248.50 against the Mimico Electric Railway Company for the cost of putting down the track in question. This action appears to have been commenced on the 5th February, 1897, and was tried on the 28th March,

1898; judgment was pronounced in favour of the plaintiffs on the 2nd September, 1898.

The statute confirming the agreement between the plaintiffs and the defendants respecting the street railway, was passed in 1892, 55 Vict. ch. 99, and declared that the purchasers of the original street railway (now the defendants) were entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the city of Toronto—except . . . that portion of Queen street (Lake Shore road) west of Dufferin street; and also that the purchasers (company) acquired and were entitled to such right and privilege (if any) over the said excepted portion of Queen street . . . as the corporation of the city of Toonto had at the time of the execution of the said agreement (1st September, 1891), power to grant for a surface street railway. Adding a proviso that nothing should limit or interfere with, affect, or prejudice the rights any privileges (if any) of the corporation of the County of York or of the Toronto and Mimico Electric Railway and Light Company (Limited) over the said portion of Queen street (Lake Shore road), as they existed at the time of the passing of the said statute (14th April, 1892).

At that date this portion of the Lake Shore road, which had originally been within the municipal boundaries of the town of Parkdale, was, by the annexation of Parkdale to Toronto in 1889, brought within the municipal boundaries of the city of Toronto.

This York road was constituted a turnpike or macadamized road by 7 Wm. IV. ch. 76) sec. 4 (1837), and was acquired by the united counties of York and Peel in 1864. And by the Act 29 Vict. ch. 69 (1865) it (together with the other York roads) was vested in the county of York. These York roads were originally placed under the control of commissioners, who by the Act 3 Vict. ch. 73, sec. 2, "had power and authority over the several macadamized roads so far as the same has been authorized by any Act of the Legislature."

For all practical purposes of keeping the road in repair and collecting tolls, the corporation of the county of York occupied, as to this Lake Shore road, the same position as the original commissioners, or as an ordinary turnpike roads company would occupy. The municipal jurisdiction of the corporation of the city of Toronto over it as a street or highway was not ousted, though to some extent limited by reason of the toll or turnpike franchise of the county.

It is not only a general principle of municipal law, but is part of the Municipal Act, that the inhabitants of the ter-

ritory shall constitute the municipal corporation; and it is inconsistent with that principle and Act to give to the municipal corporation of a county municipality any municipal jurisdiction over the territory of a city, or any municipal power of interference which might violate the rule of local self-government or in any way create an antagonism in the administration of the municipal law.

The Mimico Railway Act and agreement are set out in the Act 54 Vict. ch. 96 (1891), and provide (clause 5) that the location of the railway on the Lake Shore road shall not be made until the plans shall have been submitted to and approved by the warden, county commissioners, and engineer. And also (clause 9) that the railway shall not be opened to the public, nor put in operation, until the sanction of the warden and commissioners of county property has been previously obtained by enacting a special resolution to that effect, which sanction may be granted upon a certificate of the county engineer declaring that the railway has been constructed in accordance with the prescribed conditions.

As a corollary to the general principle of municipal law above stated, this provision must be read as not ousting the jurisdiction and powers of either the municipal corporation of the city of Toronto, or of its city engineer, as set out in the statute and agreement of 1892, in so far as the same are operative over this Lake Shore road, as one of the city streets or highways, especially in clause 10 of the conditions, which is made part of the Act, and which provides that any additions to the present rails, tracks, and road-bed "shall be done under the supervision of the city engineer," which, I think, were clearly binding on the defendant company.

By the Mimico Railway Act of 1891 (54 Vict. ch. 96) an agreement between the Toronto and Mimico Electric Railway and Light Company (Limited) and the municipal council of the county of York, dated the 23rd December, 1890, was ratified, confirmed, and declared to be valid and binding, and the company were authorized to locate and operate their electric railway along the north side of that portion of the Lake Shore road owned by the county.

Among the provisions in this statutory confirmed agreement was the following: "21. The company, their successors or assigns, shall construct and have open for travel their proposed line of railway or tramway within two years from the first day of January, 1891; and in default thereof, the company, their successors or assigns, shall forfeit all the rights, privileges, and advantages granted by this agreement or acquired thereunder; and all such rights, privileges, and ad-

vantages shall cease and determine, as if this agreement had not been granted, and the consent of the parties of the first part (county of York) had not been had or obtained by the company."

By sec. 2 of this Act the council of the county of York were authorized by resolution to extend the time for beginning or completing the line of railway, or any portion thereof, as set out in the agreement.

The agreement with the above time-limit for constructing and having open the proposed line of railway became part of the statute; and that statutory time-limit expired, and the franchise right lapsed, on or about the 31st December, 1892, at which date the portion of the railway on this Lake Shore road, which was then within the municipal jurisdiction of the city of Toronto, had not been commenced. It had always been territorially separated from the western portions of the Mimico Electric Railway by a crossing of the Grand Trunk Railway. The failure of the Mimico Company to construct their railway track on this portion of the Lake Shore road, before the expiration of the statutory time-limit, brought into full operation the grant of franchise from the city to the defendant company to build the said railway track as a part of their system under the Toronto Railway Act of 1892, and the agreement it validated.

The powers of the county officers mentioned in the Mimico Act and agreement of 1891 must be construed as the powers to be exercised by officers of a turnpike company, and not as the powers of officers of an outside municipal corporation clothed with independent municipal authority within any portion of the territory of the city of Toronto, or which would in any way oust the statutory powers of the city or its engineer or other officer.

But perhaps it is not necessary to pursue this argument further, except as introductory to the consideration of the effect of the annexation of this Lake Shore road and adjoining territory to the city of Toronto in 1891 and 1893. If it were an ordinary highway, its annexation would at once bring it under the municipal jurisdiction of the annexing municipality, and under the statutory supervision of the officers of such annexing municipality.

In this case, however, there is, with the annexation, the additional right in the city by the grant and conveyance of the franchise title in the Lake Shore road from the county of York to the city of Toronto by virtue of the agreement of the 3rd February, 1893, and confirmed by the Act 56 Vict. ch. 85. By those instruments the municipal (if any) and com-

pany powers and title of the county of York, became vested in the municipal corporation of the city of Toronto; and the latter, in addition to their general statutory and special jurisdiction and those of the city engineer, were exercisable over the construction of the railway on this portion of the Lake Shore road.

But prior to these latter instruments granting the franchise title of the county of York to the city of Toronto, the franchise rights of the Mimico Railway Company to construct and have open their railway on this portion of the Lake Shore road, had lapsed, and had become forfeited, on and after the 31st December, 1892.

The condition of forfeiture, which the Legislature annexed to its confirmation of the agreement, is contained in the 21st clause, with a power under sec. 2 of the Act to the county of York to extend it from time to time on certain terms. And it is expressed in clear and unambiguous language, and the railway company, in accepting the grant with the condition of forfeiture, must, therefore, abide by the result, having made no effort to get the authorized extension of time.

The general rule of law as to the forfeiture of franchises is that a forfeiture created by statute is self-executing; while one arising by operation of the common law must be so declared and adjudged by the Courts.

Thus, under a statutory provision making the non-user of a franchise within a limited time void, it was held that the statute was operative and effectual as to the avoidance of the franchise; and that it was not necessary to institute proceedings in a Court at the instance of the state, to have the statutory avoidance declared operative: New York, etc., R. Co. v. Boston, etc., R. Co., 36 Conn. 196.

So where the Legislature made the continued existence of a corporation dependent upon its compliance with the condition of building its road within a certain limited time, adding that if it failed to exercise its powers to do so "this Act and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated," it was held that it had lost its corporate right to construct its road under the Act; and that it was not necessary to have such forfeiture declared in an action brought at the instance of the Attorney-General: Brooklyn Steam, etc., Co. v. City of Brooklyn, 78 N. Y. 524.

I must, therefore, find that this portion of the track on Queen street (Lake Shore road) was constructed by the defendant company as part of their own undertaking, and that their rights of running upon the said track are governed by

and subject to the conditions mentioned in the Act of 1892.

BRITTON, J. MARCH 14TH, 1903.

CHAMBERS.

RE MACKEY.

Administrators Pendente Lite—Investment of Moneys—Trustee Act—Trustee Investment Act.

Motion by J. de St. Denis Lemoine and M. J. Gorman, administrators pendente lite of the estate of William Mackey, deceased, upon notice to the next of kin, for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. The deceased died on 1st December, 1902, leaving an estate of $1,200,000, and appointing the applicants as executors. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors as administrators pendente lite. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged.

M. J. Gorman, K.C., for the applicants, referred to Gallivan v. Evans, 1 B. & B. 191, in which it was held that the position of an administrator pendente lite, with regard to investments, differed from that of an executor or trustee, and that the former could not be held liable for interest on money in his hands pending the litigation.

BRITTON, J., held that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act; and he therefore made the order asked for; costs to be paid out of the estate.

FALCONBRIDGE, C.J. MARCH 16TH, 1903.

CHAMBERS.

RE WEBB.

Will—Construction—Power of Executor to Mortgage Lands Devised.

Motion by Thomas P. Webb, executor of the will of Horatio N. Webb, and administrator with the will annexed to the estate of Elizabeth Ann Webb, for an order declaring the construction of the wills, and for the opinion, advice, or direction of the Court pursuant to sec. 39 of the Act respecting

trustees and executors and the administration of estates, and for the determination of a question arising in the administration of the two estates, as to whether the applicant has power under the wills to mortgage the lands devised by the two wills.

Horatio N. Webb devised his lands to his brothers and sisters equally as joint tenants, to be divided whenever the executor should see fit, but to have and to hold to them, their heirs and assigns forever, and empowered the executor, if he should consider it for the benefit of the devisees to mortgage or sell and dispose of all his estate or any part thereof.

Elizabeth Ann Webb devised all her property to the executor in trust to receive the rents, issues, and profits, or proceeds of sale, thereof, and to devote the same towards the education and maintenance of the children of the testator until majority, and then to divide the same among the children as the executor might judge best.

A. G. Chisholm, London, for applicant.

E. W. M. Flock, London, for the devisees.

FALCONBRIDGE, C.J.,—The question is really academic, for the London and Western Trusts Company, the proposed mortgagees, are not under any obligation to advance the moneys. It is not like an application under the Vendor and Purchaser Act. Even if it were, the rule of the Court is not to force a doubtful title on an unwilling purchaser. There is no power to mortgage under the will of Elizabeth Ann Webb, having regard to the principle laid down by Lord St. Leonards, L.C., in Stroughill v. Anstey, 1 DeG. M. & G. 635. Order accordingly. Costs of all parties out of the estate.

MACLENNAN, J.A., MARCH, 17TH 1903.

C.A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION. BOYD v. MCKAY.

Parliamentary Elections—Controverted Election Petition—Neglect to Leave Copy with Local Registrar—Fatal Irregularity—Taking Petition off Files—Refusal to Extend Time.

Motion by respondent to take the petition off the files or to stay proeeedings for irregularity, and motion by the petitioner to extend the time for leaving a copy of the petition with the local registrar, etc.

The petition against the return of the respondent was filed with the local registrar of the High Coart at Owen Sound in pursuance of the Controverted Elections Act, sec. 10, as amended by 62 Vict. ch. 6, sec. 2, on the 9th February,

1903, the last day allowed for doing so, and was served on the respondent on the 14th February. No copy of the petition was left either with the local registrar or with the registrar of the Court of Appeal, to be sent to the returning officer, as required by Rule 1 (2), nor did the local registrar send a copy of the petition to the returning officer as directed by sec. 12 (1) of the Act, as amended by 62 Vict. ch. 6, sec. 3. The consequence was, that no notice of the filing of the petition was advertised by the returning officer. This omission was not discovered by the respondent until Saturday, 28th February. On Monday, 2nd March, the respondent served notice of his present motion. Upon this the petitioner left a copy of the petition with the local registrar on the 4th March, and the proper advertisment was published by the returning officer on the 6th March. On the 5th March the petitioner served notice of his present motion to extend the time for leaving the copy or to allow the copy left on the preceding day as a sufficient compliance with the statute and Rules.

R. A. Grant, for the respondent, relied upon The Lisgar Case, 20 S. C. R. 1, and The Burrard Case, 31 S. C. R. 459.

I. F. Hellmuth, K.C., for petitioner, contended that, having regard to the amendments of the Act by 62 Vict. ch. 6, and no corresponding amendment having been made of the Rule (1, sub-sec. 2), there was no express obligation on the petitioner to leave a copy with the local registrar, the Rule, as it stands, only directing that with the petition shall also be left a copy thereof for the registrar of the Court of Appeal, etc.

MACLENNAN, J.A.—Reading the Rule and having regard to the amendments, the obligation to leave the copy with the local registrar along with the petition is clear. The Court having jurisdiction in Provincial elections is the Court of Appeal, and the effect of the amendments of the Controverted Act is to make the local registrar of the High Court, so far as election petitions are concerned. local registrar of the Court of Appeal; and when the Rule directs that with the petition there shall be left with the said registrar a copy, etc., that must be held to mean the same officer with whom the petition is to be filed, although the words "of the Court of Appeal" are added to the word "registrar." But, even if Rule 1, sub-sec. 2, could not be held to apply, so as in terms to require a copy, as well as the petition itself, to be left with the local registrar, it would still be clearly obligatory to do so by reason of sec. 113 of the Act, making the English practice and Rules applicable. The Lisgar and Burrard cases, supra, applied and followed. Therefore it was obligatory

upon petitioner to have left a copy along with the petition with the local registrar on the day on which the petition was filed.

Rule 58, which authorizes the Court or a Judge to extend the time appointed for doing any act or taking any proceeding, either before or after the time has elapsed, cannot be applied to aid the petitioner. The requirement which has been neglected is one of great importance, as pointed out in the cases cited, and unless the Court could extend the time for filing the petition, it could not do so for the leaving of the copy, which should be done at the same time. The Rule can not be complied with by leaving a copy not with the petition, but at some other time. And, besides, no good reason or ground was shewn for granting the indulgence under Rule 58. The only excuse was that the petitioner's solicitor had no copy of the Rules and was consequently in ignorance of what ought to have been done.

Respondent's motion granted and petitioner's motion refused, both with costs.

MARCH 18TH, 1903.

ELECTION COURT.

RE EAST MIDDLESEX PROVINCIAL ELECTION. ROSE v. ROUTLEDGE.

Parliamentary Elections—Corrupt Practices—Bribery—Treating—Agency—Evidence.

Controverted election petition.

W. Cassels, K.C., E. Meredith, K.C., W. D. McPherson, and P. H. Bartlett, London, for petitioner.

A. B. Aylesworth, K.C., and J. M. McEvoy, London, for respondent.

THE COURT (MACLENNAN, J.A., and FALCONBRIDGE, C.J.) delivered judgment as follows:—Of the 135 charges contained in the particulars the 1st, 3rd, and 4th were charges against one John McArthur, alleged to have been an agent of the respondent The first was an alleged offer of $3 or $4 to William Griffin, two or three days before the election, to induce him to vote for the respondent. The witnesses in support of the charge were Griffin and his daughter. The charge was denied by McArthur, and there were other circumstances throwing doubt upon Griffin's story. A fortnight before the trial the petitioner's agents placed a man named Prince in Griffin's house, who boarded and lodged there until the trial, and accompanied the two witnesses to the trial. The daughter admitted,

with great reluctance, that Prince's presence was connected with the election, and that the evidence she and her father were to give at the trial was the principal thing spoken of in the house while Prince was there. . . . Such treatment of witnesses by parties interested is sufficient to discredit them. It would not be safe to give effect to the evidence of either Griffin or his daughter against the denial of McArthur and other evidence.

The next charge against McArthur was that he had canvassed one Charles Sagaman on behalf of the respondent and had offered him $3. Sagaman related a conversation in which McArthur asked about his vote, and inquired whether $3 would be of any use to him (Sagaman). In cross-examination he said he did not know whether McArthur was joking or in earnest, and in re-examination that he did not know that he took what McArthur said in earnest. McArthur denied positively that he made the remark about money. We must hold that the charge was not established.

The third charge was of an attempt by McArthur to bribe one Fortner by saying to him he would make it worth his while if he voted for respondent, and that he had some loose change about him. This charge was also denied by McArthur, and Fortner said in cross-examination that there was no offer made. We hold that this charge was not made out.

McArthur canvassed for the respondent, but he was not shewn to have been a delegate to the convention, nor a member of any committee. He was present at a committee meeting at Lambeth, but only as a spectator. There was no evidence of any authorization or recognition of his acts by the respondent. Inasmuch as McArthur was authorized and requested by John McDougall to canvass Griffin, and had canvassed for two or three days in company with J. H. McGregor, including his canvass of Griffin, he was a sub-agent of the respondent in that particular case, if McDougall and McGregor were themselves agents of the respondent.

The respondent was nominated by a convention on the 1st February, and in accepting the nomination he said: "There are three things essential to success; first, a good cause; second, proper organization; third, hard work. The first we have, the second and third will largely depend on you." The convention was of delegates selected by the Liberal Association of the riding. McDougall and McGregor were delegates. We must hold, following the West Simcoe Case, 1 Ont. Elec. Cas. 130, that by the words quoted the respondent constituted every delegate who was present his agent, and became responsible for all that was afterwards

done by them in organization and work for the purpose of the election. McArthur had no authority (sufficient to bind the respondent) to canvass either Sagaman or Fortner, and his agency arose alone from the authority and sanction of McDougall and McGregor, who were delegates to the convention and members of committees, and must be confined to the case of Griffin: Leigh & LeMarchant, 4th ed., pp. 76-8, and cases there cited.

Charge 30 was of a payment of $2 by one John Bell, who was a delegate to the convention, to James Judge to induce him to vote for respondent. The payment was denied by Bell. Judge was an old man, and the evidence shewed that about ten days before the trial he was taken from home by one McFarlane and kept virtually in hiding. Apart from this circumstance, the charge was not established by the evidence, but it would be impossible to trust the evidence of a witness whom the parties producing him were themselves not able to trust.

Charge 25 was a charge of treating a large number of electors assembled at a meeting for the purpose of promoting the election at the Canadian Packing Company's premises near Pottersburg, contrary to sec. 161 of the Ontario Election Act. The respondent requested Daniel McIntyre, who was a delegate to the convention and a member of a committee, to go with him to the company's place to introduce him to the workmen, some of whom were voters. About three o'clock in the afternoon, the workmen, about 50 in number, half of them being voters, were assembled, and the respondent addressed them for a quarter of an hour on behalf of his candidature. After the meeting was over, and the workmen had dispersed, and after the respondent and McIntyre had left the room, McIntyre asked the foreman to tell the men he would leave a drink for them at an inn in the neighborhood. This was not in the respondent's presence nor heard by him. When the men were leaving work about six, the foreman told them what McIntyre had said, and eight or ten of them got a drink at the inn without payment. This charge as laid, of treating a meeting assembled to promote the election, under sec. 161, altogether fails, because the meeting had come to an end and had dispersed before anything had been said about the treating, and the men were not told anything about it until nearly three hours afterwards: North Waterloo Case, 2 Ont. Elec. Cas. 76; Prescott Case, 1 Ont. Elec. Cas. 116, 117. The charge cannot be supported under sec. 162 (1) as one of corrupt treating of individuals in order to be elected. McIntyre's object was to retain the goodwill of the factory people

towards himself as a customer having large dealings there and in treating he followed a previous habit in his intercourse with them, and did not treat for the purpose of affecting the election.

Charge 122 was one of treating a committee meeting at Charles's hotel, Belmont, by bringing into the room for the use of the members of the committee a box of cigars. This was done by Neil McCallum, who was a delegate to the convention; he said he did it at the request of the landlord. No evidence was given to shew by whom payment was made. For want of such evidence, the charge fails, as it is the person at whose expense the refreshment is supplied who alone is guilty of the offence.

It was also charged that there was corrupt treating at the bar after the meeting. Although there was the usual treat in such cases, in which the respondent took part, the evidence failed to shew that there was any corrupt intent on the part of any one.

Charges 70, 71, and 72 were of treating by the respondent or his agents on the 1st February, the day on which he was nominated by the convention. The charges were founded on sec. 162 (2), and were of giving refreshment "extensively or generally or in a miscellaneous manner to electors." The only evidence was that of the respondent himself, who admitted having treated several persons, some of whom might have been electors of East Middlesex; but he denied that his treating had any relation to the election. The mere fact of treating generally or extensively or miscellaneously is prima facie sufficient to constitute a corrupt practice, but only prima facie. The treating must be done corruptly. If it be shewn that it was not in fact so done, it is no offence now any more than it was before the enactment of sec. 162 (2). There may still be innocent treating, though if it be general or extensive or miscellaneous, the onus of showing that it is innocent is thrown upon the respondent. And an antecedent habit of treating must still help to rebut the inference of corrupt intent.

The respondent became a "candidate" within the definition in sec. 2, sub-sec. 8, on the 27th March, by virtue of 1 Edw. VII. ch. 41, sec. 1; but the definition does not prevent treating before the 27th March being an offence. The Act applies to everything done at any time before an election by a person who is afterwards elected: Youghall Case, 3 Ir. C. L. 530, 1 O'M. & H. 293.

Charge 113 was of treating at Chittick's hotel by the respondent and one Vining, his secretary. . . . This and a number of similar charges failed upon the evidence, because

the treating, though established, had no relation to the election.

The petitioner contended that the instances of treating by the respondent and Vining being so many, and the sum spent in that way so considerable, the respondent should be held to have been guilty of extensive or general or miscellaneous treating within sec. 162 (2), and that the prima facie effect had not been rebutted. We do not think so. The respondent is a physician with a large country practice, and therefore constantly on the road. He is also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating. He continued that habit until the writ for the election was issued, on the 22nd April, after which he treated no more. This case is very different from the West Wellington Case, 2 Ont. Elec. Cas. 16, 17-20, where the treating was corrupt. In this case, taken either separately or collectively, no corrupt intent has been shewn in any of the instances of treating proved, either on the part of the respondent or any of his agents.

Petition dismissed with costs.

WINCHESTER, MASTER. MARCH 19TH, 1903.

CHAMBERS.

SCHMUCK v. McINTOSH.

Defamation—Discovery—Examination of Defendant—Information as to Source of Libel—Submission of Question—Rule 455.

Motion by plaintiff for order directing one the defendants in an action for libel to attend for re-examination and give the source of information on which the writing complained of as libellous was based. The plaintiff concluded his examination without first submitting the questions which the defendant refused to answer, as required by Rule 455.

J. E. Jones, for plaintiff.

H. E. Rose, for defendants.

THE MASTER held, following Hennessy v. Wright, 24 Q. B. D. 455, and Hope v. Brash, [1897] 2 Q. B. 188, that the application must be refused. Costs in any event to defendants.

FALCONBRIDGE, C.J. MARCH 19TH, 1903.

TRIAL.

SUTHERLAND-INNES CO. v. SHAVER.

Fire—Negligence in Setting out—Destruction of Neighbour's Property—Cause of—Failure to Prove—Admissions of Defendant——Delay in Bringing Action—Costs.

Action for negligence in setting out fire, alleged to have caused the destruction of buildings on plaintiffs, farm.

A. B. Aylesworth, K.C., and G. B. Douglas, for plaintiffs.

M. Wilson, K.C., and J. G. Kerr, for defendant.

FALCONBRIDGE, C.J.—There is a good deal disclosed in defendant's own evidence at the fire inquest strongly pointing in the direction of negligence on his part in setting out fire as he did on the 23rd October, 1901. And these admissions are not very satisfactorily explained away by his statements on examination for discovery and at the trial.

The case, however, fails to be disposed of on another ground.

The evidence as to the origin of the fire which destroyed the plaintiffs' property is purely circumstantial. It is not the ordinary case where the course of the conflagration can be directly traced from the one man's farm to his neighbour's property, from field to field and from fence to fence.

There were 14 witnessess examined for the plaintiff and 35 for the defence. The statements as to the existence and course of other fires in the vicinity and as to the direction of the wind at different times of the day were as positive and as conflicting as could well be imagined.

If defendant were on his trial for some form of criminal negligence, I should have been obliged either to withdraw the case from the jury or to suggest to them that it would be unsafe to convict.

And assuming that in a civil cause the Court or jury may not be bound to reach the same high degree of moral certainty, I am still unable to say that the plaintiffs, in view of the other possible causes proved or suggested by the evidence, have succeeded in removing the nature of one's belief in the truth of their theory from the domain of strong probability to that of a reasonable moral certainty or conviction.

The fire took place on 23rd October, 1901. There was an inquest, at the instance of an insurance company, held in April, 1902. On 13th August, 1902, plaintiffs' solicitor wrote to defendant threatening suit. The writ was issued on the 4th October, 1902, and the case came on for trial 17 months after the event. If plaintiffs have lost anything in the way of evidence by the delay, that is their fault or misfortune as the case may be. They had before them in April, 1902, the statements of defendant which they now point to as proving negligence.

Those statements, however, seemed to afford justification for the bringing of the action, and, for this and other reasons, in dismissing the action, I make no order as to costs.

OSLER, J.A. MARCH 19TH, 1903.

TRIAL.

KENNAN v. TURNER.

Assessment and Taxes—Tax Sale—Validity of—Burden of Proof—Unoccupied Lands of Non-resident—Notice of Assessment—Collector's Roll—Proof of Arrears—Treasurer's List—Duties of Clerk and Assessor—Omission of Clerk to Furnish Treasurer with Copy of Assessor's Return—Delay in Bringing Action—Leave to Amend Defence.

Action for a declaration that a certain tax sale and conveyance under which defendants claimed title to and were in possession of lot 8 on the west side of Pilgrim street, in the town of Sault Ste. Marie, were illegal and void as against plaintiffs, the rightful owners of the lot.

J. E. Irving, Sault Ste. Marie, for plaintiffs.

W. H. Hearst, Sault Ste. Marie, for defendants.

OSLER, J.A.—The plaintiffs proved a sufficient paper title to the lot. But it was also proved that the defendant Turner was in possession and had erected a valuable building on the lot, claiming title under a sale made by the town treasurer on 7th October, 1898, for arrears of taxes for 1895-97. A deed made in pursuance thereof on 15th November, 1899, registered 12th December, 1899, by the proper officials to the assignee of the tax purchaser, and a subsequent conveyance to the defendant Turner, duly registered, were also proved. The action was not brought till the 23rd April, 1902.

The onus of proof of the invalidity of the tax title, by the form of the record and the nature of the relief sought, rested on plaintiffs.

The plaintiff Kennan paid the taxes for 1893 and 1894. These were the last payments made by him.

The assessment rolls for 1895, 1896, and 1897 were proved, the lot appearing therein to be assessed to the plaintiff Kennan. It appears to have been duly and regularly assessed in that way, although it was not occupied, and Kennan did not reside in the country. He was known to be the owner, and it will be assumed that, as he had notice of the assessment, not only in those years, but in subsequent years, and did not appeal, he had requested his name to be set down on the roll.

It was proved that the taxes imposed in respect of the said assessment were duly entered upon the collector's roll for each of these years; that the collector was unable to collect them, and that they were returned by him uncollected, the reason assigned being "non-resident," to the treasurer of the municipality, in each year, as required by sec. 147 of the

Assessment Act. The clerk at the same time received or retained what I must hold to be a sufficient duplicate of the collector's accounts, though irregular in form, and, as required by the same section, sent notice to the plaintiff and others of the arrears of the taxes which appeared to be due by them for each year respectively. Taxes for the whole period of 3 years next preceding the 1st day of January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day (sec. 152, last clause), the lot in question was liable to be sold for such arrears during the year 1898 (sec. 152).

The treasurer's list of lands in the town of Sault Ste. Marie (including this lot) liable to be sold for taxes during that year was furnished, as required by sec. 152, by him to the clerk on the 31st January, 1898.

The clerk filed the list in his office, and delivered a copy of it to the assessor for 1898, as required by sec. 153. The lot was still, as it had hitherto been, unoccupied; but the plaintiff, though not residing within the municipality, being known to the owner, the assessor notified him that the lot was liable to be sold for arrears of taxes, and made the proper entry thereof in his list; and he returned such list to the clerk with the assessment roll. The clerk filed it in his office for further use. I do not find that the assessor signed the list as required by sec. 153, but he attached to it (printed thereon and signed by him) his certificate, as required by sec. 154 of the Act, of the performance of the duties required of him in respect thereto. The certificate is verified, as the section requires, by the oath of the assessor, indicated sufficiently, I think, though in a rather informal manner, by an underwritten jurat.

The clerk seems to have performed the duty imposed on him by sec. 155, of examining the assessment roll of 1898, when returned by the assessor, and furnishing the town treasurer with a list, called "occupied return," of lands and lots embraced in the treasurer's list furnished to him under sec. 152, which appeared in the resident assessor's roll of 1898 as having become occupied, or insufficiently described, etc. The lot in question was, of course, not in the list so furnished under sec. 155, being shewn, as I have said, by the assessor's return to the treasurer's list to be unoccupied.

The clerk, however, omitted to furnish the county treasurer, as he is required to do by the last clause of sec. 153, with a true copy of the list furnished by the latter under sec. 152, with the assessor's return certified to by the clerk under

the seal of the corporation, which is, in effect, the treasurer's list with the assessor's annotations thereon.

According to the evidence of the treasurer, it had not, until very recently, been the custom in this municipality to do so, because by comparing the duplicate of the list furnished by the treasurer under sec. 152, with the "occupied return" received by him, from the clerk under sec. 155, the treasurer got all the substantial information he would have got from a copy of his own list, with the assessor's notes or remarks thereon, and it was assumed that lands embraced in the treasurer's list, but not found in the "occupied return," would be sold. The subsequent proceedings, the mayor's warrant to the treasurer to sell, the advertisement of the sale, and the sale, all followed in regular order, and were completed by the deed under which the defendants make title, as already mentioned. . . .

The only formidable objection to the tax sale was based on the clerk's omission to do the act required by the last part of sec. 153 of the Assessment Act, viz., to furnish the county treasurer with a true copy of the assessor's return in respect of the lands listed by the treasurer for sale under sec. 152. . . . The taxes for 1895-7 had been regularly and validly imposed and assessed. They were all due and in arrear before the sale in October, 1898, and the taxes for 1895 had been due for the third year, or for the three years, preceding the sale.

Whether the requirement of sec. 153 is of so essential a character as, even conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action comes into operation, I do not decide. It is arguable that it is only intended for evidential purposes. But in this case . . . its omision worked no injury to plaintiffs; who had all the notices and delays to which they were entitled, and in respect to whose land all the conditions essential to a valid tax sale, except the one I have mentioned, if it were one, existed.

In Love v. Webster, 26 O. R. 453, Wildman v. Tait, 32 O. R. 274, Jeffrey v. Heweis, 9 O. R. 364, Dalziel v. Mallory, 17 O. R. 80, McKay v. Crysler, 3 S. C. R. 436, and Whelan v. Ryan, 20 S. C. R. 65, there was no legal or valid assessment of the land afterwards sold, and therefore no taxes in arrear at the time of sale; and in Donovan v. Hogan, 15 A. R. 432, the taxes had been paid before the sale.

The action not having been brought for more than three years after the sale, and more than two years after the deed, defendants should have leave to plead in answer to it the pro-

visions of secs. 208 and 209 of the Assessment Act. The proviso to sec. 2 of 1 Edw. VII. ch. 70 seems to exclude its operation in this case. Upon the defendant making this amendment, action dismissed with costs.

STREET, J. MARCH 20TH, 1903.

CHAMBERS.

BATEMAN v. MAIL PRINTING CO.

Libel—Defence—Fair Report of Proceedings in Court—Discovery—Examination of Officer of Defendants—Malice or Motive.

Motive by plaintiff to commit the manager of the defendant company for refusing to answer certain questions upon his examination for discovery. The action was for libel. The matter complained of was the publication of an item in the defendants' newspaper. The defendants pleaded that it was a fair and accurate report of proceedings in a police court. The questions which the manager refused to answer related to a former action brought by plaintiff against defendants.

W. R. Smyth, for plaintiff, contended that he was entitled to shew malice or malicious motive in the defendants.

J. B. Clarke, K.C., for defendants, contra.

STREET, J., held that the questions should be answered, and made an order requiring the manager to attend and answer, with costs to the plaintiff in any event.

FALCONBRIDGE, C.J. MARCH 20TH, 1903

WEEKLY COURT.

REX EX REL. ZIMMERMAN v. STEELE.

Municipal Corporations—Election of County Councillor—Disqualification—Member of "School Board for which Rates are Levied"—Resignation of School Trustee after Nomination and before Polling—Claim of Relator to Seat—Notice to Electors.

Appeal by relator from order of Deputy Judge of County Court of Welland dismissing the relator's motion in the nature of a quo warranto to void the election of the respondent as councillor for the 3rd county council division of the county of Welland, upon the ground that at the time of the election the respondent was a member of the school board of school section 9 of the township of Humberstone, and was therefore not qualified to be a member of the county council. By 2 Edw. VII., ch. 29, sec. 5, sec. 80 of the Municipal Act was amended by making a member of "a school board for which rates are levied" ineligible as a county councillor. The chief question in this case was, whether the respondent by resigning his membership in the school board after the nomi-

nation and before the polling day had rendered himself eligible as a county councillor. There was no school within the boundaries of this particular section, and no teacher taught within its limits. But the section was organized, with a secretary and treasurer, and the school rates levied on the section and other moneys received by the board under the Act were paid by the board to the board of an adjoining section, which possessed accommodation for the school children living in section 9.

W. M. German, K.C., for relator.

L. C. Raymond, Welland, for respondent.

FALCONBRIDGE, C.J.—The trustees of section 9 come within the terms of the amending Act, for rates were levied in this section at the instance of the school board for the section, and the ultimate destination of the moneys does not affect the point.

Even assuming that sec. 76 of the Municipal Act does not, in view of the interpretation clause (sec. 2, sub-sec. 9), apply in terms to a county council, that section deals with qualification only, while sec. 78 deals with disqualification, and disqualification has relation to the time of the election, and not to the time of the acceptance of office. The day appointed for the nomination is the day of the election, and the disqualification of a candidate has reference to that day. Regina ex rel. Rollo v. Beard, 3 P. R. 357, and Regina ex rel. Adamson v. Boyd, 4 P. R. 204, followed. No objection to the qualification was taken until the day of polling, on which day notices were posted up in 5 out of the 12 polling booths (there being no evidence as to the other 7) containing a warning to the electors not to vote for the respondent. This was not a notice sufficient to entitle the relator to the seat.

Appeal allowed, and order made declaring election of respondent invalid and directing a new election, with costs to relator here and below.

WINCHESTER, MASTER. MARCH 21ST, 1903.

CHAMBERS.

CHAMBRE v. GUNDY.

Writ of Summons—Service out of Jurisdiction—Order Permitting—Motion to Set Aside—Waiver.

Motion by defendant to set aside order allowing issue of writ of summons for service abroad, on the ground that plaintiff had no right of action on the judgment sued on.

A. D. Crooks, for defendant.

A. W. Briggs, for plaintiff.

THE MASTER held that it was too late for defendant to apply, after he had obtained an order discharging the certificate of lis pendens and allowing him to enter a conditional appearance. By entering an appearance and acting under that order, he waived any right that he had to move to set aside the order allowing the issue of the writ. Motion dismissed. Costs in the cause.

WINCHESTER, MASTER. MARCH 21ST, 1903.

CHAMBERS.

CHAMBRE v. GUNDY.

Foreign Judgment—Action on—Motion for Summary Judgment—Defence.

Motion by plaintiff for summary judgment for the amount indorsed on the writ of summons, with interest and costs. Defendant shewed that the judgment sued on was obtained in Manitoba; that he was not then, and for some time before the date of the judgment had not been, a resident of Manitoba; and that he did not appear or submit to the jurisdiction of the Court in Manitoba.

A. W. Briggs, for plaintiff.

A. D. Crooks, for defendant.

THE MASTER held that the defence shewn was one which, if proved, would defeat the action under the various authorities cited in Holmested & Langton, p. 151. Motion refused, with costs to defendant in any event.

WINCHESTER, MASTER. MARCH 21ST, 1903.

CHAMBERS.

McKINNON v. RICHARDSON.

Particulars—Issue Directed to be Tried—Limiting Grounds of Attack on Conveyance—Further Particulars.

Motion by defendant for particulars of an issue directed to be tried.

H. D. Gamble, for defendant.

F. C. Cook, for plaintiff.

THE MASTER.—The defendant has filed an affidavit in which he states that he has no knowledge of the grounds upon which the conveyance in question in the issue is attacked by plaintiff further than as stated on plaintiff's application which resulted in the issue being directed. The plaintiff is not willing to limit himself to these particulars, and on his

examination for discovery refused to give information as to his grounds for attacking the conveyance. An order will go limiting the plaintiff to the grounds set out in his material filed in support of such application and in a case of Collins v. Cleveley, with liberty to furnish further particulars within five days of the day of trial or as the trial Judge may permit. Costs in the issue.

STREET, J. MARCH 21ST, 1903

CHAMBERS.

HOBBS v. ANGLO-CANADIAN CONTRACT SYNDICATE (LIMITED).

Trustees—Money in Bank—Disagreement of Two Trustees—Application by One for Relief by Payment into Court—Refusal of Other to Consent—Costs.

Appeal by plaintiffs from order of Master in Chambers. A sum of money was in the Canadian Bank of Commerce to the joint credit of defendant Lash and J. R. Shaw as trustees. Shaw is both a plaintiff and a defendant in the action. This money was claimed by plaintiffs and also by defendant company. Shaw refused to consent to the request of defendant Lash that the money should be withdrawn from the bank and paid into Court. After this refusal this action was brought. The plaintiffs claimed the money as against defendant company, and prayed that defendants Lash and Shaw might be ordered to pay it to them.

Defendant Lash applied for leave to pay the money into Court, and the Master in Chambers ordered that the trustees should be at liberty to pay the money into Court, and that upon such payment the name of defendant Lash should be struck out of the proceedings, and that he should be relieved from further liability in respect of the fund, and be at liberty to deduct his costs before payment into Court. The plaintiffs appealed from this order.

W. M. Douglas, K.C., for plaintiffs.

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

G. F. Macdonnell, for Shaw.

STREET, J.—If the fund were under the sole control of defendant Lash, the order would have been right; but the fund is lying at the joint credit of himself and his co-trustee in the bank, and his co-trustee has always refused to join in removing it into Court, though without assigning any reason for his refusal. The order should have been refused, because it is an order that cannot be acted on. The money cannot be paid into Court without Shaw's consent to its withdrawal

from the bank. It is not usual to allow orders to go which can do no good, merely because they can do no harm. The order should be set aside; but, as it appears at present that the other parties are somewhat unreasonably insisting upon retaining Lash against his will as a party to proceedings in which he has no interest, the costs of the motion and appeal should be left to be dealt with at the trial.

FALCONBRIDGE, C.J. MARCH 21ST, 1903.

CHAMBERS.

REX EX REL. McLEOD v. BATHURST.

Municipal Elections—County Councillors—Proceeding to Set aside Election for Irregularity — Status of Relator — Acquiescence in Election— Voting for One Respondent.

Appeal by relator from order of Judge of County Court of Stormont, Dundas, and Glengarry, dismissing application to set aside election of respondents as county councillors for those united counties.

I. F. Hellmuth, K.C., for relator.

D. B. Maclennan, K.C., for respondents.

FALCONBRIDGE, C.J.—The objection to the status of the relator is well taken, and the Judge below has correctly distinguished Regina ex rel. Coleman v. O'Hare, 2 P. R. 18. The notices of motion here and below and the elaborate argument based thereon attacked the whole election as invalid by reason of alleged non-compliance with certain formalities which the relator said were imperative and obligatory. It was not alleged (except in the case of Bathurst) that there was anything working personal disqualification of the persons who were declared elected. Therefore, the relator, by voting for Finnan McDonald, who was in the same class with the other respondents, acquiesced in and became a party to the irregularity, and cannot now be heard to complain. The fact that Finnan McDonald, after service of the notice of motion on him, disclaimed office, seems to be nihil ad rem. The matter is to be dealt with on the state of facts existing when these proceedings were launched. Regina ex rel. Pomeroy v. Watson, 1 U. C. L. J. 48, Regina v. Lofthouse, L. R. 1 Q. B. 433, and Regina ex rel. Harrison v. Bradburn, 6 P. R. 308, referred to. Appeal dismissed with costs.

MARCH 21ST, 1903.

DIVISIONAL COURT.

MATTHEWS v. MARSH.

Promissory Note—Renewal—Action on against Accommodation Maker —Defence of Forgery—Alternative Claim on Original Note Previously Given up—Divsion Court—Jurisdiction—Amendment.

Appeal by defendants from a judgment of the 3rd Division Court in the district of Muskoka in favour of plaintiffs upon a promissory note for $130 made by defendant and one McDonald in favour of plaintiffs. It appeared that defendant had made the note for the accommodation of McDonald in favour of plaintiffs, who knew that defendant was a surety only. When it became due, McDonald desired to renew it, and a renewal note was given him by plaintiffs to be signed, which he returned to plaintiffs with signatures to it purporting to be those of himself and defendant. Thereupon plaintiffs gave up to McDonald the original note stamped "paid." McDonald died insolvent. Plaintiffs tried to get the amount of the note from his estate, but failed, and then brought this action against defendant on the renewal note. Defendant swore he did not sign it. After two trials the plaintiffs were allowed to claim in the alternative upon the original note, and a verdict was given by the jury for plaintiffs on the original note.

The appeal was heard by STREET, J., BRITTON, J.

R. D. Gunn, K.C., for defendants.

C. E. Hewson, K.C., for plaintiffs.

STREET, J.—Plaintiffs' claim was within the jurisdiction of the Division Court, and the fact that he made another alternative claim, also within the jurisdiction, did not take it beyond the jurisdiction. The Judge had the right to amend the claim under Rule 4 of the Division Courts. The defendant was admittedly liable originally to plaintiffs upon the original note, and, if they were induced by the fraud of McDonald to give him up that note in exchange for another upon which defendant's signature was forged, plaintiffs' remedy upon the original note remained in equity, even though it may have been cancelled and given up: Irwin v. Freeman, 13 Gr. 465; McIntyre v. McGregor, 21 C. L. T. Occ. N. 75. The jury might well come to the conclusion that this fraud had been committed by McDonald on plaintiffs, and that plaintiffs were therefore entitled to recover upon the original note.

A witness (one McConachie) was entitled to look at his entries or those made under his direction in McDonald's books to refresh his memory, and the entries to which he referred were properly before the Court.

Appeal dismissed, but without costs, because the Judge below was very liberal to plaintiffs in his allowance of costs.

BRITTON, J., gave written reasons for coming to the same conclusion.

MARCH 21ST, 1903.

DIVISIONAL COURT.

HOPE v. PARROTT.

Bills of Sale—Cutting down to Chattel Mortgage—Failure to Renew—Landlord and Tenant—Distress for Rent—New Lease—Change in Tenants—Construction of Lease—Time for Payment of First Gale of Rent.

Appeal by plaintiff from judgment of LOUNT, J., dismissing action brought by the sheriff of Hastings, as assignee for the benefit of creditors of defendants Jacob Gay, George Gay, and Arthur Gay, to have it declared that certain bills of sale made by them were invalid as against plaintiff, and that a certain distress for rent made by defendant Parrott upon the goods of the Gays was improper because no rent was due, and that defendant Parrott might be ordered to pay over to plaintiff as assignee, certain moneys realized by him under the bills of sale and distress for rent.

The appeal was heard by STREET, J., BRITTON, J.

C. A. Masten, for plaintiff.

C. J. Holman, K.C., for defendant.

STREET, J.—The first question is whether the transaction of 8th May, 1899, between Parrott and the Gays, was a loan by Parrott to the Gays or a purchase by him from them. The trial Judge determined that an absolute sale was the real transaction. . . . Parrott did not become the purchaser of any of the property in question, and none of the elements of a sale to and purchase by him are to be found in what took place. The sum that was named in the bill of sale in each case had no relation to the value of the goods. Parrot did not inquire whether the goods being transferred to him were all in existence, nor what their value was. The sum fixed as the price was in one case what Parrott had paid one Andrews to relieve the Gays from the debt for which Andrews was suing them, and in the other case was the debt which they owed him for cattle and horses which he had sold them, and for rent due on their lease. Parrott said he would not take a chattel mortgage, and that he must have an absolute trans-

fer, but that does not alter the nature of the real transaction, which was not a bargain and sale, but a security given for a debt. There was undoubtedly an oral agreement by Parrott, upon the faith of which the bills of sale were made, that the Gays, who owned and were in possession of the goods subject to the charges on them, might redeem them by monthly payments of $50 each, and this cuts down Parrott's interest to that of a mortgagee: Beckett v. Tower Assets Co., [1891] 1 Q. B. 1. The bills of sale, not having been renewed, should be declared void as against the plaintiff, representing the creditors of the Gays.

The remaining question was whether any rent was due to Parrott when he distrained on 27th September, 1901. Parrott claimed $150 as due 3rd February, 1901, under a lease from him to the three defendants the Gays and one John Gay, for three years from 3rd February, 1898. This sum became due on 3rd February, 1901, and it was not paid; but on that day the lease expired and a new lease came into force from Parrott to the three co-defendants, John Gay having moved away. The distress was made more than six months after the expiration of the lease, and one of the tenants from whom the arrears were due had ceased to be in possession. In my opinion the landlord was not within 8 Anne ch. 14, and had no right to distrain for this $150.

Parrott also distrained for $200 due 1st April, 1901, under a lease dated 19th October, 1899, from him to his co-defendants for nine years from 3rd February, 1901. The rent was $400 a year payable as follows: "$200 on the 1st days of November and April in each and every year during the said term, and the last payment of $200 three months before the lease expires." The question was whether the first payment of $200 fell due on 1st November, 1901, or on 1st April, 1901. As $400 was to be paid during each year of the tenancy, that could be carried into effect only by holding that the first payment fell due on 1st April, 1901. Parrott, therefore, had a right to distrain for this $200.

As plaintiff did not entirely succeed, there should be no costs of appeal. Parrott should pay the costs of the action, as plaintiff has substantially succeeded in it. Parrott is entitled to $200 of the proceeds of the goods in plaintiff's hands for the half year's rent under the second lease. Plaintiff may apply this on his costs of the action, and defendant Parrott is to pay the balance of costs, if any.

BRITTON, J., gave reasons in writing for coming to the same conclusion.

MARCH 21ST, 1903.

DIVISIONAL COURT.

SHUTTLEWORTH v. McGILLIVRAY.

Husband and Wife—Gift of Chattles by Husband to Wife during Coverture— Seizure by Subsequent Execution Creditor of Husband in Conjugal Domicil.

Appeal by claimant in an interpleader issue from the judgment of the 1st Division Court in the county of Middlesex in favour of plaintiff, who was an execution creditor of defendant, and had seized under execution three pictures, which were claimed by defendant's wife. It appeared that between the years 1895 and 1898 defendant had purchased with his own money the pictures in question, and handed them to the claimant, his wife, telling her that he gave them to her. One of the pictures was afterwards framed by claimant in a frame given her by her mother. The three pictures were then hung up in the house occupied by the defendant and the claimant, and remained there until they were seized under plaintiff's execution.

The appeal was heard by STREET, J., BRITTON, J.

J. R. Meredith, for claimant.

J. H. Moss, for execution creditor.

STREET, J.—There was an actual present gift and delivery by the husband to the wife, sufficient to have constituted a complete gift and to pass the property as between two persons not husband and wife. Breton v. Woolven, 17 Ch. D. 416, and Shaeffer v. Dumble, 5 O. R. 716, were decided under the law before 1884. By the Act of that year (now R. S. O. ch. 163, sec. 3) a married woman's disability to receive and hold personal as well as real property by direct gift or transfer from her husband, was done away with. The pictures became her property by her husband's act. The subsequent possession was hers, although the house was occupied by her husband and herself: Ramsay v. Margrett, [1894] 2 Q. B. 18; Kelpin v. Rattey, [1892] 1 Q. B. 582. The true construction to be placed on sub-sec. 4 of sec. 5 of the Act, when read with sub-sec. 1 of sec. 3, is to place the wife precisely in the position of a feme sole with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such a purpose in this case.

Appeal allowed with costs, and judgment to be entered for claimant with costs.

BRITTON, J., gave reasons in writing for coming to the same conclusion.