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MOSS, J.A. JULY 5TH, 1902.

C. A.—CHAMBERS.

RE CARTWRIGHT SCHOOL TRUSTEES AND TOWNSHIP OF CARTWRIGHT.

Appeal—Leave—Award—Construction of Obscurely Phrased Section of Public Schools Act—Matter of Public Interest.

Motion by the township corporation for leave to appeal from the order of a Divisional Court (ante 387) allowing an appeal from an order of a Judge in Chambers and granting a mandamus to the corporation requiring them to pass a by-law for the issue of debentures for $1,000 for the purpose of the purchase of a school site and the erection of a school-house.

A. B. Aylesworth, K.C., for motion.

W. R. Riddell, K.C., for school trustees.

MOSS, J.A.:—The circumstance of the first order having been made in Chambers, and the additional fact that the applicants for leave to appeal to this Court were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the motion had been heard in the first instance by a Judge sitting in Court, are material factors—when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised. An important question is raised as to the true construction of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed upon the legislative provisions in question by the Divisional Court are presented. Questions relating to the validity or invalidity, or binding effect or otherwise, of an award purporting to be made in

pursuance of these provisions are also involved, and the matter is of some public interest. Order made, giving leave to appeal upon the usual terms. Costs in the appeal.

MACMAHON, J. JULY 5TH, 1902.

CHAMBERS.

SMITH v. MASON.

Will—Legatees—Period of Vesting and Distribution the Same—Realty and Personalty—Sale—Direction to Trustees to Sell and Divide Proceeds.

Motion by William Murdoch, one of the devisees under the will of John Smith, deceased, for an order determining the following questions arising under the will:—(1) As to the division of the estate into nine portions, in pursuance of the will, for the purpose of administration. (2) As to the payment over by the present trustees to the adult grandchildren of John Smith of their shares of the estate, or such portion thereof as has now been got in. (3) As to payments directed under clause 12 of the judgment of 30th May last. The will is dated 11th December, 1880, and appoints the defendants James Mason, Charles Smith, and Harrison B. Forbes, executors and trustees. Forbes having left the Province, Emile C. Boeckh was appointed a trustee in his place in July, 1888. The estate amounts to $300,000, and it is asked that $270,000 be distributed, in nine shares, amongst those entitled under the will.

E. F. B. Johnston, K.C., for the applicant.

W. M. Boultbee, for plaintiffs.

H. T. Kelly, for James Mason and Charles Smith.

D. O. Cameron, for Neil J. Smith.

F. Denton, K.C., for John C. Smith.

H. T. Kelly, for all the other adult defendants.

F. W. Harcourt, for the Boeckh infants.

W. Davidson, for all the other infants.

MACMAHON, J.:—The shares of the children in the personal estate became vested on the death of the widow. The trustees are directed to divide the trust moneys (which would include the capital sum invested for the benefit of the widow) and the personal estate amongst the children. After the division, "the share" of each of the children is directed to be invested for his or her benefit. So that the time of vesting and period of distribution is the same. The realty is directed to be sold, and the moneys arising from the sale

divided equally amongst the children in the same way and subject to the same trusts and declarations as the personal estate. The period of vesting is the same, i.e., on the death of the widow. See McDonell v. McDonell, 24 O. R. 468; Kirby v. Bangs, 27 A. R. 61. There being an express direction to the trustees to divide the trust moneys arising out of the sale and conversion of the personal property and real estate among the children in equal shares on the death of the widow, and that direction not having been carried out, it is the duty of the Court to direct the distribution to be made now. All the testator's estate has been got in and converted, except a balance due on the claim against the Cooper & Smith partnership estate, which balance is partly secured by a mortgage on a house and land in the city of Toronto.

Order accordingly. Costs out of estate.

ROBERTSON, J. JUNE 28TH, 1902.

TRIAL.

GREISMAN v. FINE.

Title to Land—Registered Title—Appurtenance.

Action to recover possession of about 175 square feet of land, part of the premises known as street No. 80 on the west side of Chestnut street, in the city of Toronto. The defendant pleaded the Statute of Limitations, but did not offer any evidence under it, and the question was one of paper title only.

N. F. Paterson, K.C., for plaintiff.

R. G. Smyth, for defendant.

ROBERTSON, J., held that the title is clearly in the plaintiff except as to the rights acquired by defendant to continue as an "appurtenant" to his premises the occupation of the small piece on which his kitchen is erected. Judgment accordingly for the plaintiff with costs.

MACMAHON, J. JUNE 26TH, 1902.

TRIAL.

JOYCE v. JOYCE.

Partition—Sale—Verbal Agreement to Sell Interest in Land—Statute of Frauds—Part Performance—Acquiescence—Arbitration or Valuation—Notice.

Action for partition or sale of certain land.

J. E. Farewell, K.C., and W. H. Harris, Port Perry, for plaintiff.

N. F. Paterson, K.C., and S. S. Sharpe, Uxbridge, for defendant.

MacMahon, J.:—The plaintiff had a perfect right to recede from any verbal offer she made to the defendant, her brother, to accept $50 for her share of the land. . . . There was no reference to arbitration. The plaintiff was not aware until after the so-called arbitration that the arbitrators had met to consider the matter. She was not represented by her brother John, and, although John received notice of the arbitrators meeting, he did not appear on her behalf, and she did not receive any notice. . . . As an award or as a valuation what was done would not bind her. There is no writing to satisfy the Statute of Frauds, and the plaintiff has not acquiesced in the possession by the defendant of the land and in his making certain improvements, some of which were absolutely necessary, and they are not such acts of part performance as take the case out of the statute. See remarks of Sir James Wigram in Dale v. Hamilton, 5 Hare 381, quoted in Maddison v. Alderson, 8 App. Cas. at p. 479.

Usual judgment for sale. Reference to Master at Whitby, &c.

Falconbridge, C.J. July 10th, 1902.

TRIAL.

MANN v. CITY OF ST. THOMAS.

Municipal Corporation—Sidewalk—Repair—Gross Negligence.

Action by James Mann to recover $1,000 damages for injuries (dislocation of shoulder) received on the 11th January, 1902, by a fall upon an icy sidewalk at the corner of Talbot street and Woodworth avenue, in the city of St. Thomas. The plaintiff charged that the defendants were guilty of gross negligence in allowing the sidewalk to be out of repair.

J. A. Robinson, St. Thomas, for plaintiff.

W. B. Doherty, St. Thomas, for defendants.

Falconbridge, C.J., held that, having regard to the place where the accident happened, the state of the weather, and the other surrounding circumstances, there is not that "gross negligence" which must exist to fasten liability on defendants. See Ince v. City of Toronto, 27 A. R. 410, 31

S. C. R. 323. There was a very much stronger case against defendants in McQuillan v. Town of St. Mary's, 31 O. R. 401. If the finding were for the plaintiff, the damages would not be sufficient to carry costs on the High Court scale. Action dismissed without costs.

JULY 7TH, 1902.

DIVISIONAL COURT.

WILDER v. WOLF.

Attachment of Debts—Division Court—Cheque—Payment Stopped—Garnishee—Payment into Court.

Appeal by primary creditor from judgment in 10th Division Court in the County of York dismissing his claim against the garnishee and ordering payment to the claimant of the money in Court. The action was brought by Wilder against Wolf to recover $150 advanced by three cheques of $50 each. The evidence shewed that the amount had been advanced in part payment of a car load of junk to be delivered by Wolf to Wilder, and that Wolf, having received the money, instead of delivering the car load to Wilder, sold it to Mehr (garnishee). Mehr bought in good faith, and gave his cheque for $205 in payment to Wolf, the cheque being drawn on the Bank of Ottawa in Toronto. Wolf took it to the Canadian Bank of Commerce at Orangeville, and had it cashed there, upon Taylor (claimant) guaranteeing payment by his indorsement. Before the cheque was presented at the Bank of Ottawa in Toronto, the present action had been brought, and Mehr had been served with garnishee proceedings; he at once stopped payment of the cheque, and it was refused by the Bank of Ottawa, and was duly protested for non-payment. Mehr paid the amount of it into Court. The bank at Orangeville called upon Taylor, and he paid the amount to the bank, and now claimed the money in Court to recoup himself. Wolf denied that he owed Wilder the amount claimed, and swore that the three cheques for $150 were to be applied upon a running account between him and Wilder. The Judge in the Division Court (MORSON, Jun. J.) gave judgment for Wilder against Wolf for the $150 and costs, and dismissed Wilder's claim against Mehr, and ordered payment of the money in Court to Taylor.

E. E. A. DuVernet, for Wilder.

L. V. McBrady, K.C., for Mehr.

A. A. Hughson, Orangeville, for Taylor.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.:—Justice is done to all parties by the judgment appealed against, and it should be upheld. If the money in Court were to be paid out to Wilder, Mehr would be liable to pay it over again to Taylor; while, if the judgment stands, the cheque in the hands of Taylor will be satisfied by the payment out of Court to him of the money which Mehr paid in. Nothing stands in the way of this but the conclusion usually to be drawn from the fact of payment into Court by a garnishee of the amount claimed from him—that he admits his indebtedness. Here, however, all the facts and all the parties are before the Court, and it is plain that justice has been done to all without infringing any rule of law. Appeal dismissed with costs.

ROBERTSON, J. JUNE 28TH, 1902.

TRIAL.

CENTRAL CANADA LOAN AND SAVINGS CO. v. PORTER.

Title to Land—Registered Title—Real Property Limitation Act.

Action to recover two acres (worth less than $200) of the east half of lot 7 in the 6th concession of the township of Manvers. Defence on the paper title and under the Real Property Limitation Act.

D. W. Dumble, Peterborough, for plaintiffs.

R. E. Wood, Peterborough, and E. B. Stone, Peterborough, for defendant.

ROBERTSON, J., found all the issues in favour of plaintiffs. Judgment for plaintiffs for possession, with costs on the County Court scale. No set-off of costs to defendant.

FALCONBRIDGE, C.J. JULY 11TH, 1902.

ABBOTT v. GUSTIN.

Sale of Land—Specific Performance—Possession.

Action by Oliver Abbott, a farmer of Colchester South, against Robert Gustin, another farmer of the same township, and the executors of the will of the late William McCain, to recover possession of land which the defendant Gustin, as alleged, agreed to sell to plaintiff, he himself having agreed to buy it from the other defendants, and for specific performance and an injunction and damages.

J. P. Mabee, K.C., and W. A. Smith, Kingsville, for plaintiff.

A. H. Clarke, K.C., for defendant Gustin.

M. K. Cowan, K.C., for defendants the executors

FALCONBRIDGE, C.J., found all the facts in favour of plaintiff, and gave judgment as prayed by the statement of claim, with $25 damages.

W. A Smith, Kingsville, solicitor for plaintiff.

Clarke, Cowan, Bartlett, & Bartlett, Windsor, solicitors for defendant Gustin.

M. K. Cowan, Windsor, solicitor for defendants the executors.

MACLENNAN, J.A. JULY 10TH, 1902.

C. A.—CHAMBERS.

RE NORTH GREY PROVINCIAL ELECTION.

McKAY v. BOYD.

Parliamentary Election—Notice of Appeal from Recount—Signature by Solicitor—Election Act, sec. 129 (1)—Cross-appeal after Majority Declared upon Appeal—Sec. 129 (5)—Re-opening Original Appeal.

After the disposition of Boyd's appeal, ante p. 474, McKay proposed to submit his cross-appeal from the recount.

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

S. H. Blake, K.C., E. E. A. DuVernet, and Eric N. Armour, for Boyd.

MACLENNAN, J.A.:—After I had disposed of the appeal of Mr. Boyd, which left Mr. McKay still with a majority of two, Mr. Watson, counsel for Mr. McKay, claimed the right of proceeding with his appeal. This was opposed by Mr. Blake on two grounds: first, that Mr. McKay's notice of appeal was not signed by himself personally, but by his solicitors on his behalf; and secondly, because, Mr. McKay having a majority, the further proceeding with his appeal could not alter the result, and was useless.

The first objection was rested on the language of sec. 129 (1) of the Election Act, which authorizes the candidate to appeal by giving a notice in writing, without expressly authorizing the notice to be given by an agent or solicitor; while it expressly authorizes the notice to be served upon the solicitor of the other candidate. I overruled the objection, thinking it of no weight whatever.

I also overruled the other objection, thinking that the right of appeal from the recount of the County Judge was clearly given to either candidate by sec. 129 (1), irrespective of which of them had a majority; and that by sec. 129 (5) the Judge is required to recount "the ballots or such of them as are the subject of appeal," and to certify his decision. It seemed to me, also, that, having regard to the provisions of sec. 172, a successful candidate ought to have the right to have the full tale of his lawful majority established by a recount.

On proceeding with Mr. McKay's appeal, I allowed the same in respect of four ballots, disallowing it in respect of a number of others. At this stage, counsel for Mr. Boyd claimed the right to object to certain other ballots, not previously objected to. Mr. Watson resisted this, on the ground that Boyd's appeal had been closed and disposed of. I held, however, that the appeals on both sides were still open, neither of them having been limited to particular ballots, for the reasons already mentioned. On the part of Mr. Boyd, five further ballots were then objected to, of which only one was allowed.

The result of both appeals, therefore, is that each candidate has succeeded in respect of four ballots, and the majority remains as it was found by the learned County Judge, a majority of five for McKay. I think there should be no costs to either appellant.

BRITTON, J. JUNE 27TH, 1902.

CHAMBERS.

RE PARKS AND LAKE ERIE AND DETROIT RIVER R. W. CO.

RE MCALPINE AND LAKE ERIE AND DETROIT RIVER R. W. CO.

Costs—Arbitration under Railway Act—Taxation by Judge.

Motion by land-owners for order confirming taxation of costs of arbitration, and for payment by the railway company of the balance of the amounts awarded and costs.

T. W. Crothers, St. Thomas, for the land-owners.

H. E. Rose, for the company.

BRITTON, J.:—The costs not having been taxed by "the Judge," as the statute requires, and the company protesting against the taxation by a local officer of the Court, who was (upon an ex parte application) directed by the Judge to tax

them, I have gone carefully over the costs, and I tax them in the McAlpine case at $1,007.37, and in the Parks case at $358.77, and I make an order for payment, as asked by the land-owners.

Crothers & Price, St. Thomas, solicitors for the land-owners.

J. H. Coburn, Walkerville, solicitor for the company.

JUNE 28TH, 1902.

C. A.

TOWNSHIP OF GLOUCESTER v. CANADA ATLANTIC R. W. CO.

Way—Road Allowance—Obstruction—Railways—Fences — Municipal Corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction—Removal of Obstruction—Jurisdiction.

Appeal by defendants from judgment of LOUNT, J. (3 O. L. R. 85) upon a stated case as to the right of the plaintiffs to open an original road allowance, across which the defendants' railway runs.

F. H. Chrysler, K.C., for defendants.

G. F. Henderson, Ottawa, for plaintiffs.

THE COURT (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) dismissed the appeal with costs, agreeing with the reasons given by LOUNT, J.

JUNE 28TH, 1902.

C. A.

DOIDGE v. DOMINION COUNCIL OF THE ROYAL TEMPLARS OF TEMPERANCE.

Insurance—Benevolent Society—Disability Benefit Certificate—Proof of Age of Beneficiary—Waiver by Society—Surrender of Certificate—Domestic Forum—Right to Ignore—Amendment of Constitution and By-laws.

Appeal by defendants from judgment of MACMAHON, J., in favour of plaintiff for $243, in action to recover $1,000 on a disability benefit certificate, issued to plaintiff by defendants in 1896, in substitution for one issued when he became a member in 1884. The plaintiff alleged that he became 70 years of age on the 9th September, 1900, and that, under the terms of the certificate, he, on that date, was entitled to be paid $1,000. The trial Judge found that the plaintiff was not compelled to wait until the year 1914, but that,

having attained the age of 70 years, he was entitled to recover, without the production or surrender of his certificate; that defendants had waived their right to have proofs of age furnished by plaintiff, and the condition requiring him to sign the certificate; that the plaintiff accepted a cheque for a small sum only on account of the $1,000; that he was not compelled to appeal to the domestic forum of the defendants; and that alterations or amendments in their constitution and by-laws since the certificate could not have the effect of reducing the amount to which plaintiff was entitled, which was $243, with interest from the 8th October, 1900, without prejudice to defendants' right to recover any sums which since action have become, or may hereafter become due to them in respect of the certificate.

G. H. Watson, K.C., and Z. Gallagher, for the appellants, defendants.

S. F. Washington, K.C., for the plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) dismissed the appeal with costs, and affirmed the judgment, except as to the amount recovered, which was reduced to $108, with interest from 8th October, 1900, less $27 received on account.

JUNE 28TH, 1902.

C. A.

HOPKIN v. HAMILTON ELECTRIC LIGHT AND CATARACT POWER CO.

Company—Electric Light Company—Nuisance—Vibration Caused by Company's Machinery—Adjoining Property—Injunction—Damages—R. S. O. 1897 ch. 200; ch. 207, secs. 9, 10, 13-20,

Appeal by defendants from judgment of STREET, J. (2 O. L. R. 240), in favour of plaintiff in action to restrain defendants from continuing a nuisance, and for damages.

G. Lynch-Staunton, K.C., and W. W. Osborne, Hamilton, for appellants.

D'Arcy Tate, Hamilton, for plaintiff.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, JJ.A.) dismissed the appeal with costs, agreeing with the reasons of STREET, J.

MACLENNAN, J.A. JULY 4TH, 1902.

C.A.—CHAMBERS.

RE MUSKOKA PROVINCIAL ELECTION.

MAHAFFY v. BRIDGLAND.

Parliamentary Election—Recount of Ballots—Irregular Marking—Initials of Deputy Returning Officer.

Appeals by both candidates from the decision of the Judge of the District Court of Muskoka upon a recount of the votes cast at the election.

C. A. Masten and Eric N. Armour, for Mahaffy.

R. A. Grant, for Bridgland.

MACLENNAN, J.A.:—On Mahaffy's appeal, I disallow all the objections to the Judge's rulings except two. Two ballots, numbered 5081 and 7971, were marked for Bridgland with a straight line only, and were allowed for him. I think they should have been rejected.

On Bridgland's appeal, two ballots, numbers 1761 and 6987, were marked with a cross, the one upon, and the other above, the upper line. These were rejected. I think they should have been counted for Bridgland. No. 5067, marked with a straight line and allowed for Mahaffy, should be disallowed. No. 26, disallowed by the Judge, should be allowed for Bridgland—a cross made by three or four strokes of the pencil.

The Judge disallowed all the votes at No. 17 Wood and Medora, on the ground that the deputy returning officer, whose name was Henry Cully Guy, initialled all the ballots at his poll "H. G.," instead of "H. C. G." The Judge also disallowed all the votes at poll 18 Wood and Medora, on the ground that the deputy returning officer, William D. McNaughton, indorsed the ballots with the initial "McN.," instead of with the full initials of his name.

I am of opinion that—the sole purpose of requiring the deputy returning officer to indorse his name or initials upon the ballot being to secure the identification of the ballot brought back by the voter as that which was delivered out to him—the initials used by both these officers were sufficient. The Legislature has shewn its intention, when everything else is found to be regular, not to require great exactness in the matter of the name or initials, by enacting that where the number of ballots which were used is found to be correct, the total absence of name or initials on some of them should not be ground for rejection: sec. 112 (2). There

was no suggestion that the number of ballots found at these polls was not correct, and, that being so, I do not think it would have been right to disallow the votes if none of them had been initialled. However that may be, I think they were sufficiently initialled within the meaning of the statute.

A ballot, No. 3438, at Wood and Medora 17, which had a small pencil marking thereon, which might be taken for the letter "c," was allowed by the deputy returning officer, and I am unable to say he was wrong in allowing it for Bridgland.

Both parties have been partly successful in the appeal. I think it is not a case for costs.

STREET, J. JULY 9TH, 1902.

TRIAL.

GILLETT v. LUMSDEN.

Trade Mark—"Cream Yeast"—Protection—Acquisition of Right by User—Abandonment—Injunction.

Action to restrain defendants from infringing a trade mark registered in 1877 as "Gillett's Cream Dry Hop Yeast," and the sale of goods under the name "Jersey Cream Yeast" as calculated to deceive purchasers, and lead them to believe that they were purchasing the plaintiff's yeast.

C. A. Masten and J. H. Spence, for plaintiff.

F. C. Cooke, for defendants.

STREET, J.:—I am of opinion that the words "cream yeast" are not the proper subject of a trade mark, being common words of description: Partlo v. Todd, 14 A. R. 444, 452; Provident Chemical Works v. Canada Chemical Co., 2 O. L. R. 182, 185.

The plaintiff must, therefore, fail upon the branch of his case which depends upon his ownership of the registered trade mark. I think, however, that he is entitled to succeed upon the ground that his yeast had long ago acquired a reputation in the market under the name of "cream yeast," and that name is his property as against other persons seeking to use it for the purpose of selling other goods of the same character: Kerly on Trade Marks, 2nd ed., p. 475. The evidence that he had not for some years before 1901 sold many boxes of the article does not shew an abandonment of the right to use the name in connection with the goods, for he has always been prepared to furnish it in the

few cases between the end of 1894 and the beginning of 1901 when it was asked for: Kerly on Trade Marks, 2nd ed., p. 346.

There should, therefore, be a declaration that the defendants, by using the word "cream," as applied to their yeast, have infringed the plaintiff's rights, and a judgment for a perpetual injunction restraining them from doing so; and the defendants must pay the costs of the action.

MacMahon, J. July 10th, 1902.

TRIAL.

STEWART v. WALKER.

Will—Proof of Copy when Original not Produced—Loss or Destruction of Original—Revocation—Evidence—Action to Establish Will—Parties—Administrator Pendente Lite.

Action to establish the will of the late John A. McLaren, of Perth, who died in January, 1902

The deceased was illegitimate, and after his death a will said to have been made by him four years before could not be found, and no original testamentary document could be found or produced, and it was alleged by the Attorney-General for the Province of Ontario, and by a sister of the deceased, the defendant Eliza McIntyre, that McLaren died intestate, and that, by reason of his illegitimacy, all his property escheated to the Crown, and a declaration was accordingly claimed by the Attorney-General as to the vesting of the property in the Crown.

The plaintiff was a nephew of Mr. McLaren, and it was shewn that he was and had been for many years the especial favourite of Mr. McLaren. The plaintiff alleged that four years ago a will had been drawn for Mr. McLaren, under his instructions, by which certain bequests were made to the defendants, being his brothers and sisters, and to Mr. Walker, who was his confidential bookkeeper, and to Miss Hamilton, and that, after such specific bequests, the whole of the residue of the estate was by the will given to the plaintiff. A copy of the will was made at the time of the execution of the original, and this copy was produced at the trial of the action. It was contended by the Attorney-General and by the defendant Eliza McIntyre, who was a sister, that the will referred to had been revoked, and that another will had been made; and a large amount of evidence was given at the trial on the question of revocation or intention to revoke the will which was made in plaintiff's favour.

G. H. Watson, K.C., for plaintiff.

S. H. Blake, K.C., E. G. Malloch, K.C., A. C. Shaw, Perth, and J. M. Balderson, Perth, for the defendants Walker, Barbara Stewart, and the Cleveland Stewarts.

W. R. Riddell, K.C., for defendant Minnie Hamilton.

J. Lorn McDougall, Ottawa, for defendant Eliza McIntyre.

G. F. Shepley, K.C., A. B. Aylesworth, K.C., and J. A. Allan, Perth, for the Attorney-General.

MacMahon, J. (after an exhaustive review of the evidence and reference to Sugden v. Lord St. Leonards, 1 P. D. at pp. 76, 201, 203, 224, 225, 232; Poulton v. Poulton, 1 Sw. & Tr. 55; Finch v. Finch, 1 P. D. 371; Battyll v. Lyles, 4 Jur. 718; Allen v. Morrison, 17 N. Z. L. R. 678, [1900] A. C. 604, concluded):—There is not in this case, as there was in Allen v. Morrison, a presumption against the hypothesis of fraudulent abstraction. There is here, as there was in Finch v. Finch, Battyll v. Lyles, and Sugden v. Lord St. Leonards, evidence from which a strong inference arises that the will was fraudulently abstracted by the person (the defendant Eliza McIntyre) who declared almost immediately after the death of the testator that she had in her possession his private papers, which she said would prevent the Stewarts handling a dollar of McLaren's money.

But, although on the evidence this inference may be drawn, yet, for the reasons stated in Finch v. Finch, the Court is not bound to come to a conclusion one way or the other on that question.

McLaren during his last illness gave directions to the plaintiff as to the management of some of the more important matters connected with his business. He knew his illness was of a serious nature, and, had he not thought the will was still in existence, he was fully capable of giving instructions for a new will, unless he had changed his mind, and intended that the Government should, by his intestacy, become possessed of his whole estate.

The evidence satisfies me that there was no change of mind in the testator towards the beneficiaries named in the will, and from the expressions used by him up to a late period of his life his determination not to die intestate remained unaltered.

The testator was a man of education and excellent business capacity, and had full knowledge of the contents of his will, and approved of the same. There was no evidence of undue influence by the plaintiff, his solicitor, who drew the will. The provisions contained in the will emanated

wholly from the testator, and were dictated by him. And from the evidence, I conclude he was not a man who would be influenced as to the disposition of his property by the plaintiff or any one else.

Before the trial commenced counsel for the Attorney-General urged that the National Trust Company, which had been by consent appointed administrator pendente lite of the estate, real and personal, of John A. McLaren, was a necessary party to the suit.

Mr. Aylesworth cited two cases in support of his contention, viz., Dowdeswell v. Dowdeswell, 9 Ch. D. 294, and Weiland v. Bird, [1894] P. 262. In Dowdeswell v. Dowdeswell, where the object of the suit was to establish the title of the plaintiff as the sole next of kin, it was held that a general administrator of the testator's estate was a necessary party to the suit, and not an administrator ad litem. There is no reference whatever in the case to an administrator pendente lite. In Weiland v. Bird the only question was as to when the functions of an administrator pendente lite terminated, and it was decided that they terminated with a decree pronouncing in favour of a will with executors. The President (Sir Francis Jeune) said:—"After that (the decree) the position is the same as if there never had been a lis, and as if a testator had died leaving an undisputed will, with executors."

Wharton's Law Lexicon says:—"Administration pendente lite is granted where a suit is commenced in the Probate Court concerning the validity of a will or the right to administration, until the suit be determined, in order that there may be somebody to take care of the testator's estate."

In England, by an amendment to the Probate Act, 20 & 21 Vict. ch. 77, sec. 70, it is provided that, "pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person: and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court, and act under its direction."

Under this Act, an administrator pendente lite may be appointed at the instance of a creditor who is not a party to the suit: Tichborne v. Tichborne, 1 P. & D. 730.

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

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

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

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

JULY 12TH, 1902.

DIVISIONAL COURT.

McINTYRE v. TOWN OF LINDSAY.

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

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

had put up any lights at the point in question, and the street itself was dark. On previous nights the gas company had hung lamps along the excavation to warn persons of its existence.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

William Steers, Lindsay, for plaintiff.

H. L. Drayton, for defendants.

STREET, J.:—The action was properly brought against both the town corporation, whose duty it was to keep the highway in repair, and the gas company, who had dug the trench: Stilliway v. City of Toronto, 20 O. R. 98. An absolute duty was cast upon the town corporation by sec. 606 of the Municipal Act to keep the highway in repair, and they could not divest themselves of this duty by requiring the gas company to assume it. The gas company had no right to dig up the highway without the authority of the by-law passed by the council, and in giving that authority the town corporation did not free itself from its statutory liability. Section 611 does not apply, because the gas company was acting with the consent and license of the corporation. The evidence shews that the highway was out of repair to the knowledge of the town corporation, and that the accident was caused by such non-repair and by the negligence of both defendants to see that the trench was lighted.

Appeal allowed, and judgment to be entered for plaintiff against both defendants for $75 with costs. The town corporation to have judgment over against the gas company for the amount so recovered and the costs of the plaintiff and of the town's defence. The plaintiff to be paid the costs of this appeal by the town corporation, but the town corporation should not recover these costs from the gas company. No costs of appeal to gas company.

FALCONBRIDGE, C.J., concurred, and referred to and distinguished Dallas v. Town of St. Louis, 32 S. C. R. 120.

BRITTON, J., concurred.

William Steers, Midland, solicitor for plaintiff.

G. H. Hopkins, Lindsay, solicitor for defendant corporation.

Hugh O'Leary, Lindsay, solicitor for defendant company.

JUNE 28TH, 1902.

C. A.

McDONELL v. CITY OF TORONTO.

Assessment and Taxes—Local Improvement Rates—Charge on Land—Distress—Invalid By-law—Validating Statute—Effect of—Frontage Tax—Special Rate.

Appeal by plaintiff from judgment of ROBERTSON, J., dismissing the action. The plaintiff claimed a declaration that the assessment of plaintiff's property for local improvements (part of the cost of opening up Sunnyside avenue, in the city of Toronto) for the years 1892, 1893, 1894, 1896, and 1897, was illegal and void; that the defendants had no right to distrain for such taxes; and that they had now no right to collect such taxes by action or in any other way; and that such taxes did not form a charge on plaintiff's lands fronting on Indian road.

On 12th January, 1892, $36,517.77 was required to be raised by the issue of debentures to pay for the opening and construction of Sunnyside avenue, and the city engineer having submitted a description of the property that would be benefited by such opening, as recommended on the initiative, the defendants' counsel on 1st February, 1892, passed by-law No. 3012 to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Sunnyside avenue. The by-law imposed a special rate of 34 cents and 8 mills on the real property described in it, according to the frontage thereof, sufficient to produce in each year $2,687.70, for 20 years. Under this by-law the defendants assessed the plaintiff upon a frontage of 671.3 feet for an annual payment of $233.60. In passing the by-law and making the assessment the provisions of 53 Vict. ch. 50, sec. 618 (1) and (2), (O.) then in force, were not observed.

By 56 Vict. ch. 85 (O.) this by-law and all debentures issued and to be issued thereunder, and all assessments made were validated and confirmed.

The plaintiff's land was assessed in the assessment rolls for the years 1892 to 1898, inclusive, but she disputed the assesssments, and paid no taxes for any of these years.

A bailiff, acting under a warrant from the collector of taxes for 1896 and 1897, on the 17th May, 1899, distrained the plaintiff's goods for $1.347.77 for taxes therein alleged to be in arrear for 1896 and 1897.

The plaintiff thereupon gave a bond to the defendants reciting that they claimed from her $1,347.77 for local improvement taxes (and percentages thereon) for 1892, 1893, 1894, 1896, and 1897, for the opening of Sunnyside avenue, and also $530.63 for like taxes for 1895 and 1898 and interest thereon, and that the plaintiff had, since the taxes for 1892 became payable, asserted that the city had no right to assess such taxes upon her property extending from Sunnyside avenue to Indian road, some portions of which were mortgaged, and that the collector had no right to seize any of her goods for such taxes, and that her lands and goods were not liable therefor, and that it had been arranged that plaintiff should bring an action against defendants to test the right to collect such taxes either by distress or action or in any other way, or to charge them upon the land, the question of the taxes for the two different periods being treated as different issues, which bond contained a condition for making the same void if plaintiff should well and truly prosecute the action and pay whatever might be found due to defendants in respect to the taxes, and costs. The plaintiff agreed not to make any objection on account of the defendants not having included the taxes for 1895 and 1898 in the distress made.

The plaintiff had resided on the land ever since she became the owner of it, in 1886, and had always ample goods on the land out of which the amount of the taxes could have been levied by distress in each year.

The appeal was heard by ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, LISTER, JJ.A.

W. Cassels, K.C., and W. H. Lockhart Gordon, for appellant, plaintiff.

E. D. Armour, K.C., and W. C. Chisholm, for defendants the city corporation.

H. C. Fowler, for defendant Duncan.

ARMOUR, C.J.O.—The provisions of the law governing the proceedings taken in 1892 are to be found in 53 Vict. ch. 50, as amended by 54 Vict. ch. 42.

By-law 3012 was intended to be passed under the authority of sec. 612 (setting it out, and also secs. 613 and 618 (1) and (2).

No notice was ever given as required by sec. 618 (1) and (2), and no Court of Revision was held, and none of the

parties affected by the proposed assessment had any opportunity of being heard against it; and, notwithstanding this, the Legislature, by what cannot be regarded as other than an abuse of power, validated and confirmed it.

The first question to be determined is whether by-law number 3012 and the assessment made thereunder, validated and confirmed as they were by the Legislature, formed any lien or charge upon the real estate of the plaintiff; and it is only by virtue of sec. 343, R. S. O. 1887 ch. 184, that they could be held to form such lien or charge, which section provides that "Every special assessment made, and every special rate imposed and levied, under any of the provisions of this Act, and all sewer rents and charges for work or services done by the corporation, on default of the owners of real estate, under the provisions of any valid by-law of the council of the said corporation, shall form a lien and charge upon the real estate in respect of which the same shall have been assessed and rated or charged, and shall be collected in the same manner, and with the like remedies, as ordinary taxes upon real estate are collectable under the provisions of the Assessment Act."

In order to the assessment of a valid rate upon the real property fronting or abutting upon Sunnyside avenue for the expense of opening the same the real property so fronting or abutting which was immediately benefited thereby must have been ascertained and determined, for it was upon the real property to be benefited thereby that the special rate was to be assessed, and not upon, but only according to, the frontage thereof. And the proportion in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited must also have been ascertained and determined, and this is made more apparent, if need there was, by the notice required to be given by section 618 (2), shewing the amount of the assessment "on the particular piece of property."

Now, by-law number 3012 did not provide any means of ascertaining and determining what real property would be immediately benefited by the opening of Sunnyside avenue, the expense of which was to be assessed upon the real property to be benefited thereby, nor did it ascertain and determine it, nor did it provide any means of ascertaining and determining the proportions in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited, nor did it ascertain and determine them.

Nor was the real property immediately benefited by the opening of Sunnyside avenue, the expense of which was proposed to be assessed upon the real property benefited thereby, ascertained and determined by the proposed assessment made under the said by-law, nor were the proportions in which the assessment of the cost thereof was to be made on the various portions of real estate so benefited ascertained and determined by the said proposed assessment.

The by-law treats the frontage or front line of the real property fronting or abutting upon Sunnyside avenue as real property, and imposes the special rate thereon instead of imposing it upon the real property fronting or abutting on Sunnyside avenue according to the frontage or front line thereof, when in truth and in fact this frontage or front line of the real property fronting or abutting upon Sunnyside avenue is not real property at all, but a mere mathematical line—length without breadth—and which could not be the subject of a lien or charge within the meaning of sec. 343 above quoted.

And all that was done by the proposed assessment made under the said by-law was to set down the names of the owners of the real property fronting or abutting upon Sunnyside avenue, the frontage of the real property of each so fronting or abutting, the annual payment to be made by each, and the number of each upon the assessment roll for 1892.

The by-law and proposed assessment thereunder, in my opinion, therefore, formed no lien or charge upon the real estate of the plaintiff, and forming no lien or charge upon it, the validating and confirming by the Legislature of the by-law and assessment created no lien or charge upon it.

The effect, however, in my opinion, of the validating and confirming by the Legislature of the by-law and assessment was to constitute a valid personal assessment of the plaintiff for an annual special rate for twenty years from the first day of January, 1892, of thirty-four cents and eight mills per foot of the frontage of her real property fronting or abutting upon Sunnyside avenue, which frontage is now agreed to be six hundred and twenty-one feet, collectable in the same manner and with the like remedies as ordinary taxes upon real estate are collectable under the provisions of the Assessment Act.

There was no valid reason why this special rate should not have been collected for the years 1892, 1893, 1894, 1895,

and 1898 by the respective collectors for those years respectively, but they neglected their duty in this respect, and the special rate for those years has thus become lost to the defendants: Caston v. City of Toronto, 30 O. R. 16, 26 A. R. 259, 30 S. C. R. 397.

The collector's rolls for the years 1896 and 1897 were in the collector's hands, although the time at which they should have been returned had expired, and the seizure by him of the plaintiff's goods for the special rate for those years was, therefore, justifiable: Newberry v. Stephens, 16 U. C. R. 65; Lewis v. Brady, 17 O. R. 377.

Upon payment, therefore, by the plaintiff of the special rate for the years 1896 and 1897 and the costs of the distress, her bond will be delivered up to be cancelled, and the said by-law and assessment, and the statute validating and confirming the same, will be declared to form no lien or charge upon her real estate.

And as to the costs, there should be no costs of the action to either party, but the plaintiff should have the costs of the appeal.

OSLER and MOSS, JJ.A., wrote opinions to the same effect.

MACLENNAN, J.A., dissenting, gave his reasons in writing.

LISTER, J.A., died while the appeal was *sub judice*.