THE

ONTARIO WEEKLY REPORTER.

(To and Including December 31st, 1903.)

VOL. II. TORONTO, DECEMBER 31, 1903. No. 45.

DECEMBER 21ST, 1903.

C.A.

RE NORTH GREY PROVINCIAL ELECTION.

BOYD v. MCKAY.

Parliamentary Elections—Controverted Election Petition—Order Extending Time for Trial.

Appeal by A. G. McKay, the respondent, from an order of OSLER, J.A., of 5th November, 1903, whereby the time for the commencement of the trial of the petition was extended until the 31st January, 1904.

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

E. B. Ryckman, for respondent.

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

MOSS, C.J.O.—Upon full consideration of this appeal and a reference to the cases cited and others, we have come to the conclusion that it should be dismissed, for many reasons, some of which were indicated during the argument. We think that the learned Judge had jurisdiction to make the order complained of, and all that was required was that he should be satisfied that the requirements of justice rendered it necessary. No affidavit was called for, under the circumstances, which were quite apparent to the learned Judge, and could not be disputed by either party. The order was properly made, and is not open to the objections urged against it. The reference in the order, as drawn up and issued, to an affidavit, though erroneous, did not invalidate the order actually

pronounced. If necessary it may be amended in the manner pointed out in the judgment in the North Perth and North Norfolk cases, recently before this Court, ante 1079.

Costs to be costs in the petition.

TEETZEL, J. DECEMBER 21ST, 1903.

TRIAL.

ATTORNEY-GENERAL FOR ONTARIO v. WYNNE.

Water and Watercourses—River—License to Dam—Patent—Reservation—Interference with Navigation—Crown—Attorney-General—Pond Created by Dam—Easement—Sale of Lands according to Plan—Reservations in Deeds—Injunction to Restrain Obstruction of Pond—Continuous and Apparent Easement.

Action by the Attorney-General and the Trent Valley Woollen Manufacturing Co. for an injunction restraining defendant from proceeding with the construction of a building upon certain land adjoining the property of plaintiff company in the village of Campbellford, and for a mandatory order to remove the building material already placed thereon by defendant.

N. W. Rowell, K.C., George Kerr, and Joseph Montgomery, for plaintiffs.

G. T. Blackstock, K.C., and A. B. Colville, Campbellford, for defendant.

TEETZEL, J. . . . The plaintiff company and the defendant derive their titles under a patent of lot 10 in the 6th concession of the township of Seymour to one David Campbell, dated 25th August, 1852, which contains the following reservation: "Exclusive of the waters of the river front, which are hereby reserved, together with free access to the shores thereof for all vessels, boats, and persons."

On 25th February, 1856, Campbell conveyed the lands to James Cockburn and Nesbitt Kirchoffer (who afterwards signed a declaration of trust of an undivided one-third in favour of Robert Cockburn), and during the same year they constructed a dam across the river Trent where it intersected their property, and shortly afterwards built raceways on either side, connecting with the pond created by their dam,

and made other improvements and additions to utilize their water power. The effect of the dam was to flood their land on either side of the river for a considerable distance above the dam, at a much greater height than it had been naturally.

Until 1869 no express authority had been obtained from the Crown to thus intercept and pen back the waters of the river, but on the 9th December of that year a patent or license was issued to the owners whereby they were authorized to maintain the dam with the works and erections thereto belonging.

I think the effect of this license was to vest in the said parties the use and control of the waters of the river as against the Crown, subject to non-interference with navigation, etc., as therein provided.

If the river Trent was a navigable river—as to which there was no evidence except what might be inferred from the two patents—of course the title to the land in the bed of the river would still be in the Crown: Attorney-General v. Perry, 16 C. P. 329. In Kirchoffer v. Stanbury, 25 Gr. 413, the late Chancellor Spragge, dealing with this very water privilege, in speaking of the reservation in the original patent, says (p. 416): "Not a very accurate mode of reservation—it would, however, probably operate, though the waters only are reserved, as a reservation of the bed of the river."

It is not necessary for me to decide this question, as I am satisfied from the evidence that the original bed of the river did not extend as far west as defendant's land. The building proposed by defendant, therefore, not being on the original bed of the river and in no way an interference with the original navigability of the river, nor the free access to the shore, nor upon property ever dedicated, as I find, to the public, the Crown has no interest in this suit, and the defendant has not infringed any public right, and I direct the action, so far as it respects the Attorney-General, to be dismissed with costs, which I fix at $100, to be paid to defendant by plaintiff company, who were responsible for the action as constituted. . .

On 8th May, 1865, the Cockburns and Kirchoffer caused to be registered " a plan of the water lots south of the bridge and of the river frontage lots north of the bridge in the village of Campbellford, and on 31st December they caused a more detailed plan of said lots to be registered, upon which are indorsed conditions and specifications respecting the enjoyment of water privileges by the lot owners. On both these plans the lands now claimed by defendant, and upon which the building in question is being erected, were shewn as being

submerged by the waters of the river, and on the second plan as being within the area of the pond created by the dam. The lands owned by plaintiff company are shewn on said plan as lots A, B, and 1 to 8, inclusive; and plaintiff company acquired title to all these lands through various conveyances, as the same originally stood in Kirchoffer and the Cockburns.

Robert Cockburn in his lifetime, under deed of partition and otherwise, became the individual owner of lots A (except a small portion off the north-west corner thereof), 4, 5, 7, and 8, also a lot described on the second plan as "store" lot, which adjoined lot A immediately to the north. . . . The first conveyance of this lot, under the subdivision, was that of the 27th December, 1865, a deed from James Cockburn and Kirchoffer to Robert Cockburn, in which it is described as being the "corner lot at the south-west end of said bridge, fronting on George street," lying between George street and the river, and having a frontage of 80 feet on George street towards the west, the northerly limit being Tice street and the bridge, so far as it extends over that parcel, the easterly limit being the river, and the southerly limit being a line drawn parallel with the northerly limit a distance of 80 feet therefrom.

With considerable hesitation, I think this conveyance vested in Robert Cockburn not only that parcel of apparently dry land marked on exhibit 2 as "store" lot which lay between George street on the west and the actual waters of the river, shewn on the plan, but also the land under the water for the width of 80 feet, right to the middle thread of the river, assuming the river to have been non-navigable. . . . Micklethwaite v. Newlay, 33 Ch. D. 133, Massawippi v. Reid, 33 S. C. R. 457. And assuming the river to have been navigable, the said conveyance would vest in Robert Cockburn the title up to the line of the original bank of the river, which, from the evidence of old residents, was, in my opinion, at least 160 feet east of George street, and a considerable distance beyond defendant's lot.

By deed of 3rd May, 1880, Robert Cockburn conveyed to Dr. Bogart that portion of the lot having a frontage of 80 feet on George street by a depth of 50 feet, the easterly limit being described as "the foundation or easterly wall of the building now upon said parcel," and there is the following at the end of the description—"Reserving the right to the party of the first part, his heirs or assigns, to raise the dam one foot." And, though the deed is not executed by the grantee, it contains the following clause: "The said party of

the second part covenants and agrees to and with the said party of the first part, his heirs and assigns, not to interfere in any way with the water power of the said party of the first part at Campbellford."

Robert Cockburn died in 1894, having made no conveyance of any part between the east wall of the Bogart building and the centre or original bank of the river. In 1895 his representatives sold a strip 20 feet in width, lying to the east of the building, to one Gibson, the then owner thereof, and in the spring of 1896 the defendant made an agreement with the daughter and devisee of Robert Cockburn to purchase for $150 the land now claimed by him, and during that year entered upon the lot and deposited a quantity of stone, whereupon the plaintiff company served a notice upon him forbidding him making any obstruction whatever in front of their mill property, or in any way interfering with their water privilege, and threatening proceedings.

Nothing further was done . . . by defendant, and he did not obtain the conveyance . . . until 28th, December, 1901, when he obtained a quit claim deed, the property therein described being 60 feet by 24 feet, adjoining immediately to the east the 20 feet strip previously conveyed to Gibson. The quit claim deed contains the following reservation: "Reserving thereout the right to raise the dam at Campbellford one foot and subject to all rights of all other parties who have purchased or are interested in any lots on the bank of the river Trent and the water power at Campbellford."

In September, 1903, defendant commenced to build upon this 60 x 24 feet plot, by depositing thereon a quantity of earth and sand to raise the surface above the water, and began to construct a stone wall around the entire lot as the foundation for a store, and before action had built this wall between two and three feet high, and it is in reference to this that the injunction is sought.

When constructing the dam, the proprietors, presumably for the purpose of enlarging the area and capacity of the pond, removed a large quantity of earth down to the rock on the west side from the original natural bank or margin of the river to a point within about 50 feet of George street, and extending from the dam to a point about 70 feet above the bridge, and embracing defendant's lot. This area . . . was not a part of the original river bed . . . but is now part of the bed of the pond. . . .

After developing their water power scheme, the proprietors sold off various water lots in accordance with the second

plan, and as the result of the partition deed and by purchase there was for a number of years a common ownership in Robert Cockburn of the "store" lot and lot A, which are contiguous.

On 19th February, 1881, Robert Cockburn, by deed under the Short Forms Act, conveyed lot A to A. F. Gault, the plaintiff company's immediate predecessor in title, which deed contained the following: "Subject to all conditions for the support of the dam, raceway, etc., as stated on plan registered and in deed from the original proprietors of the dam to the said Robert Cockburn."

During 1881 and 1882 plaintiff company and Gault expended a large amount of money in erecting woollen mills upon lot A and adjoining lots and in constructing a large raceway across these lots, the westerly side of which, according to the evidence, is only some 17 feet from the south-east corner of defendant's proposed building.

Robert Cockburn was aware of these expenditures and of the construction of the new raceway and of a channel that was blasted from the mouth of the raceway to the bed of the river, and made no objection, and after these expenditures had been made, namely, on the 31st July, 1883, he conveyed to plaintiff company water lots 4, 5, 7, and 8, according to said plan, and subject to the terms and conditions indorsed thereon. . . [Reference to Bailey v. Clark, [1902] 1 Ch. 649, and cases cited.]

The manifest scheme and design of the original proprietors was not only to develop a water power system for their own use, but to sell lots on either side as sites for industries, which would use the power on the conditions indorsed on the second plan, and that the pond or reservoir should be tributary or appurtenant to each water lot, and that the land above the dam should, so long as the mill privileges were utilized, be subjected to the flooding as shewn on the plan. It could not, I think, have been contemplated by any person when plaintiff company acquired their titles that this land represented as being flooded would be available for building sites or that the area of the pond should be materially curtailed or used for any other purpose. . . .

It was contended on behalf of plaintiff company that their right to flood defendant's lot in common with the rest of the pond area, as shewn on the second plan, is given by an implied grant, if not an express grant, under the extended scope of the conveyances to them effected by sec. 4 of R. S. O. 1897 ch.

102; that the easement claimed would be embraced within the words of the statute, "privileges, easements, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining or with the same occupied and enjoyed," etc.

Upon a severance of ownership there passes to the grantee by implication of law all those easements over the part retained by the grantor without which the complete enjoyment of the severed portion could not be had, and all these continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted, and which were at the time of the grant used by the owner of the entirety for the benefit of the part granted: see Coulson & Forbes's Law of Waters, 2nd ed., pp. 215-227, and cases there cited.

I think the authorities respecting the effect of a conveyance made according to a plan prepared by the vendor are applicable. I take it to be well settled that whenever the owner of a tract of land lays it out into blocks and lots upon a map, and in that map designates certain portions of the land to be used as streets, parks, or in other modes of a general nature calculated to give additional value to the lots delineated thereon—for instance, a mill pond attached to water lots—and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated: see Rankin v. Huskeson, 4 Sim. 15; Rossin v. Walker, 6 Gr. 19; Re Morton and Town of St. Thomas, 6 A. R. 323; Sklitzsky v. Cranston, 22 O. R. 590; Lenning v. Ocean, 41 N. J. Eq. 606.

In this case the area indicated on the plan as the pond, from which the water power was drawn, naturally constituted an important, if not the chief, item of value in the water lots; and it seems to me that to permit the vendor or the defendant as his successor to appreciably diminish the capacity or area of this pond as indicated on the plan, would be a derogation of the grants made to the plaintiff company.

But, independently of the effect of the plan, I think the privilege of using the waters of the pond, accompanied by the right to flood the lands of defendant, was such a continuous and apparent easement at the date of the conveyance to plaintiff company, that the title thereto passed to them either by the express words of the conveyances, extended by the statute, or by implication of law. See Myers v. Catterson, 43 Ch. D. 470; Attril v. Platt, 10 S. C. R. 425; Brown v. Alabaster, 37 Ch. D. 490; Burrows v. Lang, [1901] 2 Ch. 502; Pollard v.

Gore, [1901] 1 Ch. 834; Gale on Easements, 7th ed., p 99 et seq.; Hamelin v. Bannerman, [1895] A. C. 237.

It was contended by defendant that, even assuming that plaintiff company had acquired the easement claimed, defendant had a right to make a reasonable use of his land, and that the proposed building was not unreasonable and did not appreciably affect plaintiff company's rights.

I think the evidence established that during a considerable portion of each year defendant's land was entirely flooded, the water ranging from a few inches to 4 feet in depth on the east, and 3 feet on the west side; but at other seasons, during low water, a large portion was dry.

Finding, as I do, that defendant has invaded a legal right of plaintiff company, in the face of warning, and in view of the reservation in their favour contained in his own deed, I do not think I should hesitate to accept the evidence of plaintiffs' witnesses as to injurious effect, rather than the evidence of defendant in support of his effort to have the maxim "de minimis non curat lex" applied.

The evidence in respect of the damage was somewhat conflicting, and consisted chiefly of expert opinion.

I think the weight of it shews that the appropriation and use by defendant exclusively of an area 60 feet by 24 feet, so near the intake of plaintiff company's raceway, will cause appreciable permanent injury to the enjoyment of their property; and I do not think damages would be an adequate compensation, and therefore an injunction should be granted, not only restraining defendant from proceeding with his building, but requiring him to remove the material already deposited, within six months, and that he should pay the costs of plaintiff company, with right to set off the $100 above awarded.

CARTWRIGHT, MASTER. DECEMBER 22ND, 1903.

CHAMBERS.

KIRK v. CITY OF TORONTO.

Jury Notice—Action against Municipal Corporation—Non-repair of Street—Judicature Act, sec. 104—Delay in Moving—Costs.

The statement of claim alleged that on 16th May, 1903, plaintiff was injured by negligent use of a steam roller on St. Alban street, in the city of Toronto. The roller was owned

by the defendant city corporation, and was being operated by their men under the direction of the officers of the defendant Dominion Construction and Paving Co.

The cause was at issue before the 8th October, 1903, on which day the plaintiff served a jury notice.

On the 18th December, 1903, the defendants moved to strike out the jury notice as being irregular under sec. 104 of the Judicature Act.

W. C. Chisholm, for the defendant city corporation, and J. E. Jones, for defendant company, relied on Clemens v. Town of Berlin, ante 1115, and cases there cited.

C. Nasmith, for plaintiff.

THE MASTER.—The sole question is, does plaintiff sue for injuries sustained through non-repair of the street? I think the question must be answered in the negative, for the following reasons:—

If the present case falls within the section, then it must extend to every accident happening on the streets or roads of a municipality with which their servants are in any way concerned. . . . [Reference to Hesketh v. City of Toronto, 25 A. R. 449.]

So far as I can see, this case is not different from that of any other person negligently using a dangerous vehicle, e.g., riding a bicycle or driving an automobile at an excessive rate of speed. . . .

In other words, if the benefit of sec. 104 is invoked, then the "causa causans," must be the state of the highway, as in Clemens v. Town of Berlin and cases cited. Here it is clearly not so. The condition of the highway was not in any way the cause of the accident. It was the alleged improper and negligent use of it by the servants of the city corporation and the company who were operating the roller. . . .

In Clemens v. Town of Berlin the roller was left on the highway, as alleged, when no longer required for use. Here it is negligent management of the steam roller itself which is said to have injured plaintiff. It is just the same in principle as if the machine in question had been in a yard off the street and had been making terrifying noises which caused the runaway in Yonge street that is said to have injured plaintiff.

The servants of the municipality are entitled to the same use of the streets as the rest of the public, with precisely the same duties and liabilities. If by their negligence injury is

caused, the corporation are liable just in the same way as the master is responsible for the negligence of his coachman. . . .

The motion must be dismissed. Considering the long delay, I think the costs should be to plaintiff in any event. See Phillips v. Beal, 26 Ch. D. 621. . . .

CARTWRIGHT, MASTER. DECEMBER 22ND, 1903.

CHAMBERS.

RE LAUGHLIN.

Infant—Legacies—Surrogate Guardian—Payment into Court.

Eliza Laughlin by her will gave legacies of $100 each to four infants aged 20, 19, 16, and 13 respectively. Both parents of the legatees were dead. A guardian was appointed by the Surrogate Court of the County of Peel on the 12th June, 1896. The security then given, it was admitted, had no reference to these legacies.

The executors applied for an order under the Trustee Relief Act allowing them to pay the legacies into Court.

D. L. McCarthy, for the guardian, contended that the money should be paid to him, citing Huggins v. Law, 14 A. R. 383, and Hanrahan v. Hanrahan, 19 O. R. 396.

A. McKechnie, Brampton, for the executors, submitted to whatever order might be made, but pointed out the facts as justifying payment into Court.

THE MASTER.—I stated at the argument that my impression, derived from 20 years' service in the Accountant's office, was that the policy of the Court was to have infants' money in Court. I am confirmed in this view by a fresh perusal of the judgment of the Chancellor in Re J. T. Smith's Trusts, 18 O. R. 327.

The order will therefore go as asked. Costs of the payment is fixed at $10, as the amount is small.

There was no suggestion that the money was needed for the maintenance of the infants. Application can always be made if any necessity arises hereafter.

DECEMBER 22ND, 1903.

C.A.

REX v. CALLAGHAN.

Criminal Law—Conviction for Theft—Leave to Appeal—Evidence for Jury—Weight of Evidence—Conduct of Case.

Motion by prisoner for leave to appeal from his conviction for theft at the General Sessions of the Peace for the county of York.

E. E. A. DuVernet and J. A. Macdonald, for the prisoner.

J. R. Cartwright, K.C., and H. H. Dewart, K.C., for the Crown.

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

OSLER, J.A.—It would serve no useful purpose to accede to the prisoner's application. There was evidence on which it was open to the jury to find, if they believed the witnesses for the Crown, that the statutory offence created by sec. 308 of the Criminal Code had been committed. The document which the prisoner relied upon as evidencing that the transaction was one of actual sale to him of the piano was not conclusive of that fact. It was open to explanation quite as much as a receipt is so, and it was proper to shew the circumstances under which it was given and everything else connected with the transaction in order to demonstrate its real character. No estoppel arose out of it. The only parties concerned were the original parties to the dealing, and neither of them had changed his position in consequence of anything stated in the invoice. It might have been very different had the question arisen between a third party and Crossin, and the authorities cited by counsel for the prisoner, Holton v. Sanson, 11 C. P. 606, and cases collected in Am. & Eng. Encyc. of Law, 2nd ed., vol. 11, pp. 429-431, would have been apt enough in such a case. It is quite clear that the trial Judge could not properly have withdrawn the case from the jury or directed an aquittal. On such a motion as the present the Court has nothing to do with the question whether the verdict was against the weight of evidence. That can only come before the Court on leave granted by the trial Judge. No evidence was improperly rejected or admitted. None at all events was admitted, looking at the case as a whole, which

can be reasonably supposed to have occasioned any substantial wrong or miscarriage; Criminal Code, sec. 746 (f). Statements as to the prisoner's intoxicated condition were perhaps unnecessary, but they were equally unimportant. There is no substantial objection to the Judge's charge, nor is it forbidden to a Judge to comment on the failure either of the Crown or the prisoner to call any particular witness other than the prisoner himself. And as regards the general conduct of the case and isolated observations by either counsel or Judge during the trial, it does not pertain to the Court to express either approval or disapproval, unless they fall within some distinct ground of objection which the Court is authorized under the Code to entertain, or unless they had led to some grave miscarriage. Motion refused.

MACMAHON, J. DECEMBER 23RD, 1903.

CHAMBERS.

FARMERS' LOAN AND SAVINGS CO. v STRATFORD.

Summary Judgment - Motion for - Action on Covenant in Mortgage— Defence— Denial of Execution and Consideration.

Appeal by plaintiffs from order of Master in Chambers (ante 1060) dismissing plaintiffs' application for summary judgment under Rule 603.

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

W. J. Elliott, for defendant.

MACMAHON, J.—. . . . The action was brought to recover $325 and interest under the covenant for payment contained in a mortgage deed. Defendant in an affidavit denied creating a mortgage and denied receiving the $325. On being cross-examined he admitted that the signature to a mortgage produced was like his, and would not swear it was not his. He said he signed an order (produced) to the plaintiffs to pay Mr. Gilmour $325, but said he never knew what it was for. In July, 1903, on being notified that proceedings were about to be taken against him by plaintiffs, he admitted his liability, but said he could not pay because he was bankrupt; and he afterwards offered his promissory note for $50 in settlement. . . . There was a complete admission of liability,

and no triable issue raised. Jacobs v. Booth's Distillery Co., 85 L. T. R. 262, distinguished.

Appeal allowed with costs and judgment for plaintiffs granted with costs.

MACMAHON, J. DECEMBER 23RD, 1903.

WEEKLY COURT.

RE SAW BILL LAKE GOLD MINING CO.

Company—Winding-up—Preferential Claim for Costs—Fi. Fa. in Sheriff's Hands Before Winding-up—Instructions not to Seize.

Appeal by claimants Hazlewood and Whalen and F. H. Keefer from so much of an order of the local Master at Hamilton as disallowed the claim of the appellants for costs, sheriff's fees, and interest, claimed as a preferential lien on the estate of the company. The claimants Hazlewood and Whalen recovered a judgment against the company on 4th October, 1900, for $400 damages and $140.21 taxed costs. A writ of fi. fa. goods and lands was issued on 2nd November, 1900, and on 5th November sent to the sheriff of the district of Rainy River, in which the lands of the company were situated. The letter of the claimants' solicitor enclosing the fi. fa. gave the following instructions to the sheriff: "You need not make seizure on the Saw Bill property chattels unless I further advise you, except that the placing of the writ keeps everything in their possession under seizure." On 20th March, 1901, the company made an assignment for the benefit of their creditors, and on 26th March a petition for a winding-up order was presented and the order subsequently obtained. On 1st April the solicitor telegraphed the sheriff to make a seizure, and a seizure under the writ was made by the sheriff about 6th April, and on 4th May, after the winding-up order was obtained, the sheriff withdrew from possession. The claimants were the only creditors who had an execution in the sheriff's hands.

C. A. Moss, for appellants.

A. O'Heir, Hamilton, for liquidator.

E. H. Ambrose, Hamilton, for certain creditors.

MACMAHON, J.—If the claimants had had an execution in the sheriff's hands binding the goods of the company, they

would have had a lien for their costs: Winding-up Act, sec. 66; R.S.O. 1897 ch. 147, sec. 11; and the sheriff would have been bound, on the request of the claimants to proceed to realize the amount of such costs: Gillard v. Milligan, 28 O. R. 645. But the fi. fa. did not bind the goods of the Saw Bill Company, as it was not in the hands of the sheriff to be executed, for the sheriff was instructed not to seize until further advised: Foster v. Smith, 13 U. C. R. 243; and the sheriff was not advised until after the petition had been presented, and by sec. 7 of the Act the winding-up commences at the presentation.

Appeal dismissed with costs.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

SEXTON v. PEER.

Parties—Mortgage Action—Death of Plaintiff—Assignment of Portion of Interest—Revivor—Executors—Assignee—Costs.

Appeal by Harold L. Lazier from order of STREET, J. (ante 845) reversing order of Master at Hamilton allowing appellant to continue the action as party plaintiff against the other parties named as defendants. The parties agreed upon the terms of an order to be substituted for that of the local Master except as to costs, which they left to be determined by the Court.

W. E. Middleton, for appellant.

W. S. McBrayne, Hamilton, for respondents.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that the proper order as to costs, under all the circumstances, was that appellant be allowed the same costs, to be added to his claim as mortgagee, as he would have been entitled to if the order now made had been made in the first place upon a proper application in Chambers, and that except as to these costs, each party do pay his own costs of and incidental to both of the appeals.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

RE ATCHISON, ATCHISON v. HUNTER.

Will—Direction to Executor to Pay Funeral Expenses of Testator's Father—Payment by Executor of Father—Claim against Estate—Motion for Administration Order—Status of Applicant—Beneficiary——Assignee of Claim—Costs—Originating Notice.

Appeal by plaintiff from order of BRITTON, J. (ante 856), dismissing without costs plaintiff's application for an order for the administration of the real and personal estate of John Atchison, deceased.

By the will of the deceased, dated 2nd April, 1901, he bequeathed to his father, James Atchison, who then and at the time of his death resided in Winnipeg, an annuity for life of $200, and he directed that his executors, upon his father's decease, should convey his remains to and inter them in the family plot in the Presbyterian cemetery at Harwood, in this Province, and have inscribed on his monument erected there a suitable epitaph to his memory.

By an instrument in writing dated 17th July, 1903, James Atchison assigned to the plaintiff all his enterest in the estate of the deceased, and directed and authorized the executors of the deceased to pay to the plaintiff "the moneys due by way of annuity under the will or to become due, and the moneys to be (sic) directed under the said will to be applied," for his funeral and burial expenses, and all moneys owing to him in any way whatever.

James Atchison died on the 21st July, 1903, having made his will on the 17th of the same month, by which he appointed the plaintiff executor, and by which he devised and bequeathed everything he possessed to him, especially mentioning the arrears of the annuity and the moneys which were by the deceased's will directed to be paid for his (James Atchison's) funeral and burial expenses.

Probate of this will was granted by the Surrogate Court of the united counties of Northumberland and Durham on 21st August, 1903.

The defendant Hunter, the executor of the will of John Atchison, admitted assets, and the only question in dispute was as to the right of the plaintiff to be reimbursed what he ex-

pended in conveying his testator's body from Winnipeg to Harwood and interring it there, and having the epitaph inscribed on his monument.

The amount claimed was $225.75, made up of the undertaker's bill at Winnipeg, $125; the undertaker's bill at Cobourg, $17.75; the cost of conveying the remains from Winnipeg to Cobourg, $70; what was paid for digging the grave, $3; and $10 for the expenses incurred in having the epitaph inscribed on the tombstone.

No complaint was made by the defendant Hunter of the way in which the funeral arrangements were carried out, except that they were undertaken by the plaintiff without any communication being had with him (defendant Hunter) on the subject, and without his knowledge, and he contended that on this ground he was not liable for them.

F. M. Field, Cobourg, for plaintiff.

C. A. Moss, for defendants.

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

MEREDITH, C.J.—Having regard to the fact that the deceased lived near Harwood and his father at Winnipeg, it cannot, we think, have been intended that the deceased's executors should undertake the funeral arrangements connected with the father's burial, but what was meant was, that these arrangements should be at the cost of the deceased's estate, leaving them to be undertaken by the executors of the father, upon whom the duty primarily rested. As a matter of taste, it would have been more fitting had the deceased's executor been consulted or at least communicated with, but the omission to take that course ought not to deprive the estate of the father of the benefit which the deceased intended to confer on it. It was a provision for the benefit of the father's estate, because it relieved it from the burden of paying the funeral expenses, which would otherwise have fallen upon it. It appears to be clear that in conveying the father's body from Winnipeg to Harwood and interring it there, the plaintiff intended to conform to the provisions of the will of the deceased, but for which it may well have been that the father's body would have been interred at Winnipeg at very much less expense than was incurred in the burial at Harwood.

It is probable, too, that it was not possible to delay the interment long enough to enable the defendant Hunter, if he desired to do so, to undertake the arrangements for it, unless

he had given instructions by telegraph to some one in Winnipeg, and had he done that, it is unlikely that they would have been carried out otherwise than in the way the plaintiff carried them out, or by any one but him.

Having come to this conclusion, we think that the plaintiff, as representing the estate of the deceased James Atchison, is a beneficiary under the will of the deceased John Atchison, in respect of and entitled to be paid the expenses incurred by him in connection with the funeral and interment of his testator.

Having regard to the question which was in dispute, it appears to us that the proper course for the plaintiff to have taken was not to have moved for a general administration of the estate of the deceased John Atchison, but by way of originating notice for the determination of that question. The costs of the litigation have been much increased by the course which the plaintiff has taken, and he should be allowed only such costs as he would have been entitled to if he had proceeded by way of originating notice, and the order which we now make had been made on such an application. As to the residue of the costs, each party will pay and bear his own.

The defendant Hunter having admitted assets, the order will be for payment of the $225.75 claimed by the plaintiff. But, if the defendant Hunter desires it, he may require the plaintiff to vouch the items of his claim, and if he does so that will be done before the Registrar in settling the order. The order will also provide for payment by the defendant Hunter of the costs which we have awarded to the plaintiff.

DECEMBER 23RD, 1903.

DIVISIONAL COURT.

MICKLE v. COLLINS.

Sale of Goods — Contract — Description — Measurement — Rejection — Evidence — Findings.

Appeal by defendant from judgment of junior Judge of County Court of Simcoe in favour of plaintiffs in action in that Court to recover the price of a car load of lumber sold by plaintiffs to defendant.

J. J. Warren, for appellant.

A. E. H. Creswicke, Barrie, for plaintiffs.

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

MEREDITH, C.J.—The contract was for the sale of a car load of 2 x 6 and wider tamarac at $14 per 1,000 feet, delivered at Severn Bridge f.o.b. the cars there.

A car load of tamarac measuring, according to the contention of plaintiffs, 15,057 feet, was loaded upon a car at Severn Bridge and shipped to the defendant at Toronto on 24th March, 1903.

Upon its arrival in Toronto the defendant refused to receive the lumber, alleging that it did not answer the description of "2 x 6 and wider" tamarac within the meaning of the contract.

It was not disputed by counsel for defendant that the place of delivery was Severn Bridge, and that, unless it was made to appear that the lumber which was shipped to him was of a different character from that which he had purchased, he was not entitled to reject it, but must receive and pay for it and look to the plaintiffs by cross-action or by counterclaim for his damages occasioned by any defect in the quality of the lumber.

The learned junior Judge came to the conclusion, on conflicting testimony, that the lumber shipped answered satisfactorily the description mentioned in the contract, and gave judgment for plaintiffs for the full amount of their claim, reserving to defendant the right to sue for any damage to which he might be entitled for defects in the quality of the lumber.

We agree in that conclusion. Upon the testimony adduced by plaintiffs it was well warranted, and the testimony which defendant produced, while it would, no doubt, if believed in preference to what was opposed to it, shew that a great deal of lumber was defectively manufactured and some of it otherwise defective in quality, fell far short of shewing that defendant had not received substantially that which was the subject of his purchase. There was a good deal of difference of opinion as to what would answer the description "2 x 6 and wider;" the plaintiffs' witnesses testifying that anything which measured one-quarter of an inch above or below two inches would do so; the defendants' witnesses did not agree in that opinion, but all of them who testified on this point admitted that some margin ought to be allowed—though they put it at one-eighth of an inch or less—and the result of the examination of the lumber by Rattan, the first witness called by defendant, was that, in his opinion, 10,886 feet answered the description of "2 x 6 and wider." This witness allowed a margin of one-eighth of an inch, and if the margin

should have been one-quarter of an inch, but a small quantity of the lumber would not have answered the description. We cannot say, therefore, that the learned Judge erred in his findings of fact, and that being our opinion, as he rightly applied the law as enunciated in the authorities to which he referred to the facts as found, the result is that the appeal fails and must be dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 24TH, 1903.

CHAMBERS.

McINTYRE v. COSENS.

Venue—Change of—Grounds—Counterclaim respecting Land—Preponderance of Convenience—Witnesses—Expense—Poverty of Defendant.

Motion by defendant to change venue from St. Thomas to Hamilton.

G. C. Thomson, Hamilton, for defendant.

R. H. McConnell, St. Thomas, for plaintiff.

THE MASTER.—The action was brought to recover certain bank deposit books, cash, household furniture and effects, and other securities for money and other property of the value of $325 and upwards. These were claimed by plaintiff as executor of one Ellen Milne, who at the time of her death boarded with defendant. The statement of defence alleged that these chattels were given to defendant by the testatrix just before her death by way of donatio mortis causa. Defendant also counterclaimed for a declaration that she was entitled to an undivided one-half interest in the real estate of the testatrix, and for partition or sale. The real estate is situated in the city of St. Thomas. This last fact renders it necessary to refuse the motion. Rule 529 (c) requires an action, which includes a claim for the recovery of land, to be tried at the county town of the county in which the land is situated. If the counterclaim should succeed (though this may be doubtful, in view of Wakeford v. Laird, ante 1093, and cases cited, assuming that the alleged promise here, as in that case, was oral only), the reference would naturally be to the Master at St. Thomas. There is no decided preponderance of convenience in favour of the change. The affidavit in support of the motion did not state how many witnesses the defendant would require. The affidavit of plaintiff's solicitor in answer pointed out four that plaintiff

would have. The affidavit in reply (if admissible) alleges that defendant will require seven This is not sufficient, in view of Dwyer v. Garstin, ante 1105, the last decision on this point. The defendant also pleads poverty and that she cannot pay the witness fees of a trial at St. Thomas. There is no authority for giving effect to such a reason.

Motion dismissed. Costs in the cause.

OSLER, J.A. DECEMBER 24TH, 1903.

CHAMBERS.

RE DELLER.

Will—Construction—Devise to Widow—Condition against Re-marriage—Validity—Absolute Gift—Gift over—Executor.

Motion by executor of will of George Deller (who died on 23rd May, 1886) for directions under R. S. O. ch. 129, sec. 39, and Rule 938. The will was as follows: (1) There shall be paid out of my estate for the chapel on the burying ground at Ste. Agathe in ten years $50. (2) My wife, nee Catherine Kittel, shall have the whole of my estate which remains at my decease, however, with the observation that should she marry again, then she will only receive the third part, and the residue shall be equally divided between my five children, namely, 1. Ottillia; 2. Alexander; 3. Emma; 4. Ellora; 5. Maria Anna. (3) I appoint as my executors my friends John Deller and Wendel Kittel, and I empower them to do all things in my name necessary to be done, and I consider it the same as if I had done it myself. (4) I revoke all former wills. Probate was duly granted on 24th February, 1888, to the executors named therein. The affidavit of John Deller, the sole surviving executor, stated that Maria Anna Deller, one of the children of the testator, died on or about the 24th September, 1888, intestate and without issue; that Catharine Deller, the widow, has not married again and claims to be entitled under the will to all the residue of the estate (about $1,600) remaining after payment of the legacy of $50 and the debts and funeral and testamentary expenses of the deceased; that the four surviving children of the testator claimed that two-thirds of the said residue should remain in the hands of the executor in order to be paid over to them in case the said Catharine Deller should marry again. It was stated that the property of the testator consisted wholly of realty.

E. P. Flintoft, Waterloo, for executor.

F. Denton, K.C., for widow.

G. R. Geary, for children.

OSLER, J.A.—The words of the second clause of the will are sufficient to create a condition, and such a condition is valid. Allen v. Jackson, 1 Ch. D. 399, and Cowan v. Allen, 26 S. C. R. 292, 313, referred to. The condition being valid, the true construction of the clause is, that there is an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds of it if she marries again; so that, until this event happens, or if it never happens, no one but the widow can be entitled. Nevertheless, as the event provided against may happen, it follows that the executor cannot safely or properly pay over to her more than one-third of the corpus, and must retain the remaining two-thirds, paying her the income or interest until her death or marriage, when it will fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. McCulloch v. McCulloch, 3 Giff. 606, is much in point. Cases like Perry v. Merritt, L. R. 18 Eq. 153, Lloyd v. Truedale, [1898] 1 Ir. R. 5, and Re Jones, [1898] 1 Ch. 438, have no application except in so far as they tend to support the view that the widow's interest is not a mere life estate in the property devised. They do not deal with the effect of such a condition as that in question. Order declaring accordingly.

STREET, J. DECEMBER 26TH, 1903.

WEEKLY COURT.

RE GUELPH LINSEED OIL CO.

Company—Winding-up—Appointment of Liquidator — Manager of Business of Principal Creditor—Notice to Shareholders—Sale of Assets—Approval—Completion—Removal of Liquidator.

Motion by David Little, Robert Dowie, and F. T. Coghlan, three shareholders of the company holding $1,300 each of the stock of the company, to set aside an order made by BRITTON, J., in Chambers, on 13th October, 1903, upon the application of the Traders Bank of Canada, and upon the consent of counsel for the company, appointing Mr. A. F. H. Jones to be liquidator of the company upon his giving security in $5,000, with power to carry out a sale of the assets of the company to the Dominion Linseed Oil Co. for $21,000, and to accept stock of that company at par in payment of the purchase money. This order was made at the same time as an

order for the winding-up of the company under the Dominion statute. No notice of either application was given to the shareholders of the company. The paid up capital was about $32,000, of which the directors held $22,000 or $23,000. The only creditors of the company were the Traders Bank, to whom $33,000 was said to be due, and the solicitors of the company, to whom $18 was due. With the exception of the three shareholders who were moving, all the shareholders approved what had been done.

F. E. Hodgins, K.C., for the applicants.

D. Guthrie, K.C., and A. B. Aylesworth, K.C., for the bank.

C. A. Moss, for the company and the liquidator.

STREET, J.—Section 20 of the Winding-up Act is express in declaring that the liquidator must be appointed only after such previous notice as shall be prescribed by the Court, and the absence of such notice is a substantial objection to the appointment: Schoolbred v. Union Fire Ins. Co., 14 S. C. R. 624. The objection to Mr. Jones as being manager at Guelph of the Traders Bank is well founded. The bank are practically the sole creditors, and Mr. Jones, as their manager at Guelph when the indebtedness of the company was incurred, must almost necessarily be expected to act entirely in the interests of the bank. The order appointing him liquidator cannot therefore be permitted to stand. He has, however, since his appointment, negotiated a sale to the Dominion Linseed Oil Co. of certain assets of the insolvent company which all parties seem to be satisfied with, and upon which the local Master has reported favourably. The order should be modified so as to declare Mr. Jones provisional liquidator, and to permit him to complete the proposed sale. Reference to local Master at Guelph to appoint some suitable person to be permanent liquidator. It was urged by the bank as an objection to the motion that the object of the applicants was to have a liquidator appointed who would bring an action against the directors and perhaps also against the bank to recover some of the money which the directors are alleged to have lost in speculation with the assistance of the bank, and that the costs of that contemplated litigation, if unsuccessful, will come out of the assets of the company, which practically all belong to the bank. . . . The time has not yet been reached for the discussion of this objection.

Order to be varied as indicated. Costs of all parties out of the estate.

DECEMBER 26TH, 1903.

DIVISIONAL COURT.

LITTLER v. BERLIN ACREAGE CO.

Landlord and Tenant—Action for Rent—Gale Accruing after Action —Counterclaim for Damages to Tenant's Crop—Cattle—Fences—Duty of Tenant Neighbour—Evidence—Leave to Adduce on Appeal.

Appeal by plaintiff from judgment of County Court of Waterloo.

Plaintiff on 10th April, 1902, leased to defendants 32 acres of his farm, consisting of two fields, referred to in the evidence as the "barn field" and the "road field," from that date until the 1st March following, at the rent for the term of $9 per acre, payable in two equal instalments on the 20th November and December, 1902, respectively.

The lease, which was not under seal, contained an agreement on the part of the defendants to pay the rent, and an agreement on the part of the plaintiff as to the preparation of the land for planting sugar-beet seed, the purpose for which the land was rented by the defendants being the growing of sugar beets on it, but there was nothing said in it as to repairs.

The plaintiff sued to recover the two gales of rent, and his action was begun on 2nd December, 1902, and therefore before the second gale became payable.

By their statement of defence the defendants admitted their liability for the first gale of rent, and they counterclaimed for damages sustained by them owing to the plaintiff's cattle having escaped from his premises and broken into and entered on their fields and trampled down and eaten the crop of sugar beets which was growing in them, whereby the crop was destroyed.

To the counterclaim the plaintiff replied denying the statements contained in it, and alleging that, if his cattle entered the fields, their doing so was due to the negligence of the defendants in not keeping the fences surrounding their lands in a proper state of repair.

At the trial a good deal of evidence was given on the part of the defendants for the purpose of shewing that cattle had done the injury they complained of, and that the offending cattle belonged to the plaintiff. Evidence was also given as to the condition of the fences, and there was a wide difference

of opinion between the witnesses as to the extent of the injury which had been done, the defendants' witnesses estimating the damages at several hundreds of dollars, while those of the plaintiff testified that it was but trifling.

The County Court Judge gave judgment for the plaintiff for $144 (the amount of the first gale of rent) with interest and without costs, and he found for the defendants on their counterclaim and assessed their damages at $316.20, and gave them judgment against the plaintiff for so much of that sum as was equal to the amount for which he gave judgment for the plaintiff on his claim, without prejudice to the right of the defendants to proceed to recover the residue of their damages as he had assessed them, as they might be advised.

E. E. A. DuVernet, for plaintiff.

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

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

MEREDITH, C.J.—It is not open to question that the disposition made by the Judge of the plaintiff's claim was the right one, for the reasons which he gives, and his judgment on the claim ought therefore to be affirmed.

With regard to the counterclaim, however, as the case stands at present, we are unable to agree with the conclusion of the learned Judge.

We agree that, in the absence of a municipal regulation permitting cattle to run at large, it is the duty of the owner of them to prevent them from trespassing on his neighbour's lands, even though the lands are unfenced, but that duty is, we think, displaced where the neighbour is tenant of his lands to the owner of the cattle, and is under an obligation to fence or to keep up the fences, and the cattle have obtained access to the lands owing to the failure of the tenant to perform that duty.

In this case there was an implied obligation on the part of the defendants as tenants of the plaintiff to keep the fences on the lands demised to them in repair, and also, we think, where there were bars in the fence answering the purpose of a gate, to keep them up, and there is a good deal of testimony which points to the conclusion that if the plaintiff's cattle did the injury complained of, they obtained access to the defendants' "road field," the crop in which was the one damaged by cattle, owing to the bars not having been kept up, and to the defective condition of the fences on the west side of the field. . . .

In order to ascertain the extent of the duty which the defendants owed to the plaintiff as to the repair of the fences or the keeping up of the bars, it is important to know what the nature and condition of the fences and the bars were when the defendants became tenants to the plaintiff of the "road field." The evidence as to this, as it appears in the shorthand notes, is neither clear nor full, and what there is is difficult to understand.

Under these circumstances, we are of opinion that further evidence should be adduced to make clear what the condition of matters in these respects was, unless the defendants have failed to shew that their crop was damaged by the cattle of the plaintiff, in which case the inquiry suggested would be unnecessary.

There is no doubt that some damage was done to the defendants' crop in the "road field" by cattle, and the Judge has found that it was done by the plaintiff's cattle.

As the evidence stands at present, we think it very doubtful whether that conclusion is the proper one. . . .

In strictness perhaps we ought to hold that on the case as it now stands the defendants failed on their counterclaim, but upon the whole we have come to the conclusion that the parties should be permitted to adduce further evidence on this branch of the case.

We do not think that the parties should be put to the expense which would be entailed by sending the case back for a new trial, with the possibility of a second appeal, but that the power which the Court has of receiving further evidence should be exercised, and that the further evidence should be taken at the next High Court jury sittings at Berlin. . . . and that the appeal should stand over to be disposed of when the further evidence has been taken, and that the costs of taking the further evidence should be costs in the appeal to the successful party.

The defendants may not take advantage of the leave to adduce further evidence which we give, and if they do not, the appeal as to the counterclaim will be allowed, and, in lieu of the judgment pronounced in respect of it in the Court below, judgment will be entered dismissing the counterclaim with costs, leaving the judgment to stand as a judgment for the plaintiff on his claim for $144 and interest without costs, and there will be no costs of the appeal to either party.

MEREDITH, J. DECEMBER 28TH, 1903.

CHAMBERS.

RE CORNYN.

Infant—Custody—Right of Father—Agreement with Relative—Interests of Child—Habeas Corpus Application—Costs.

Motion by William Cornyn, the father of Gladys Cornyn, a girl four years old, on the return of a habeas corpus, for an order for the custody of the child, as against an aunt named Hewson and her husband, who had had charge of the child since February, 1900.

J. E. Jones, for applicant.

C. R. McKeown, Orangeville, for respondents.

MEREDITH, J.—It cannot be found upon the evidence that there was any contract as to the length of time for which the aunt should have the custody of the child. The custody and the affections and the upbringing of the child are the rights and the duty of the parents, not lightly to be interfered with. The charges made by the aunt's children against both the father and mother would have greater weight if there were not the feeling and bias caused by the earnest and bitter fight between the families for the custody of the child to be taken into account, and if these children had not continued to make the home of the father and mother their abiding place whenever visiting Toronto, after all that they now charge is said to have happened. The applicant is entitled to the custody of the child. No order as to costs; the respondents have acted in good faith throughout, and their opposition to the application has been made in the belief that it is entirely in the child's interest.

MEREDITH, J. DECEMBER 28TH, 1903.

CHAMBERS.

RE ADAMS.

Distribution of Intestate Estate—Devolution of Estates Act—Cousins—Half-blood—Per Stirpes or per Capita—Double Cousins.

Motion by the administrator of the estate of an intestate for directions as to the distribution of the estate among the

next of kin. The deceased left no relatives nearer than cousins, some of whom were of the half blood, and one of whom was a "double cousin" of the deceased, that is, a niece of the intestate's father and also of the intestate's mother. The questions raised were whether the cousins were to share per stirpes or per capita, whether those of the half blood were entitled to share, and whether the "double cousin" was entitled to a double share.

J. E. Farewell, K.C., for the administrator.

E. D. Armour, K.C., for Elizabeth Ann Daly.

G. C. Campbell, for Mercer J. Adams and others.

George Bell, for Thomas Bennett and Elizabeth Engle.

MEREDITH, J.—Under the Devolution of Estates Act, all the property in question is to be distributed as personal property is now distributable. And among collateral relatives in the same degree of kinship, it is so distributable equally. They take in their own right, not by way of representation. And there is no question of quantity or quality of blood; those of the half blood take equally with those of the whole blood; and those of the double blood—if such a term is appropriate and applicable—take no more, for all are akin to the intestate, and all in the same degree of kinship.

These observations, applied of course only to such circumstances as those stated in this case, cover all the grounds of this motion, and answer all the substantial questions propounded in it.

Order accordingly, that is, that all parties are entitled equally to the residue of the estate in question. Costs out of the estate, as usual. Payment into Court of the share of the absent party, if desired.

The following among other cases were referred to: Watts v. Cook, Show. P. C. 108; Smith v. Tracy, 1 Mod. 209; Lloyd v. Tuck, 2 Ves. Sen. 714; Moor v. Botham, referred to in Blackborough v. Davis, 1 P. Wms. 53; Mercer v. Morland, 2 Lee Cas. t. H. 499; Brown v. Wood, Aleyn 36; Smith v. Tracy, 1 Ventr. 523; Collingwood v. Pace, 1 Ventr. 424; Cotton v. Scaranache, 1 Mad. 45; Greaves v. Rawley, 10 Hare 68; Baker v. Chalfint, 5 Watts (Pa.) 481; Gardner v. Colems, 2 Pet. (U. S.) 87; In re Watt, 37 Ch. D. 517; Gundy v. Punnegas, 14 Beav. 94.

In Fredin v. Ashworth, L. R. 20 Eq. 410, the circumstances, not disclosed in this report of the case, were such that admittedly under the Statute of Distributions the next

of kin would take per stirpes, and the one question was whether they took equally under the words of the will, or per stirpes under the statute. That case obviously affords no assistance in solving any of the questions involved in this case.

STREET, J. DECEMBER 28TH, 1903.

WEEKLY COURT.

FORBES v. GRIMSBY PUBLIC SCHOOL BOARD.

Public Schools—Requisition to Municipal Council—Money for School Site and Building—Meeting of School Board—Notice Specifying Business—Meeting of Municipal Council—Adjourned Meeting—New Business—By-law—Recital of Debt—Debentures—Payment—Instalments.

Motion by plaintiff for interim injunction restraining the defendants the municipal corporation of the village of Grimsby from issuing or selling the debentures of the village authorized by by-law 179, and from paying to the defendants the school board or any other person any moneys arising from such debentures, and restraining the defendants the school board from receiving any such moneys, and restraining the defendant Van Dyke from authorizing any further work in connexion with the erection of a proposed public school building, and restraining the defendant Lipsit from proceeding with any further work upon the school building. This action was begun on 16th November, 1903, after the refusal on 5th November of an order to continue the injunction granted in a former action (ante 947). On 11th November, at a meeting of the school board, a new resolution was passed asking the municipal corporation to pass a by-law for the issuing of debentures to the amount of $12,500 for the purchase of a school site and towards the erection of a school house thereon. This requisition was presented on the same day to the municipal council at a meeting of the council then held, and by-law 179 was passed. There were five members of the school board. All of them were orally notified by the chairman of the meeting to be held on 11th November. Four of them were present, and the fifth, on being notified, stated that it would be impossible for him to attend. None of them objected to the manner of giving the notice.

A. H. Marsh, K.C., and C. H. Pettit, Grimsby, for plaintiff.

G. Lynch-Staunton, K.C., for defendants.

STREET, J.—In the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it is unnecessary that the notice calling any meeting of a school board or municipal corporation should specify the business to be transacted. Rex v. Pulsford, 8 B. & C. 350, and La Compagnie de Mayville v. Whitney, [1896] 1 Ch. 788, followed. Marsh v. Synod of Huron, 27 Gr. 605, and Cannon v. Toronto Corn Exchange, 5 A. R. 268, distinguished.

The meeting of the village council held on 11th November was an adjourned meeting from the regular monthly meeting held on 9th November. The adjournment was general, and the business to be transacted at the adjourned meeting was not restricted. The requisition of the school board was sent in in the interval. If this had been the first requisition made by the school board for the sum of $12,500, it might be open to doubt whether the council could regularly and properly have dealt with it at the adjourned meeting; but the requisition of 11th November was unnecessary and only given as a precaution; the former requisition was sufficient as a basis for by-law 179.

The by-law sufficiently recited the amount of the debt intended to be created; it recited that application had been made by the school board to the council to raise $12,500 by the issue of debentures, and it proceeded to authorize the issue of debentures to that amount.

Sub-section 1 of sec. 386 of the Municipal Act of 1903 authorizes the issue of debentures providing for the payment of the principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of sub-sec. 5 of sec. 384.

Application dismissed with costs.

BOYD, C. DECEMBER 28TH, 1903.

TRIAL.

ELGIN LOAN CO. v. NATIONAL TRUST CO.

Company—Shares—Deposit of Certificates for Safe Keeping—Bailment—Trust—Winding-up of Company Interested in Shares—Appointment of Bailees as Liquidators—Conflict of Interests—Jurisdiction in Winding-up Proceedings—Trustees—Excuse—Relief from Liability—Detinue—Damages—Waiver—Measure of Damages.

An action in the nature of an action for trover and detinue in respect of certificates for 525 shares of Dominion

Coal Company stock and 50 shares of Dominion Iron and Steel Company stock, deposited by the plaintiffs with the defendants for safe keeping. The certificates were put into the name of the defendants for convenience of collecting the coupons. It was an express term of the contract between the parties that the certificates were to be held to the order of plaintiffs and delivered upon demand under proper authority. The defendants, in acknowledgment of the securities, gave plaintiffs a document under corporate seal called "Receipt and Guarantee."

Demands were made for the redelivery of all the scrip on 25th and 30th June and 6th July, 1903, but, default being made, this action was brought on 17th July.

The defendants set up that the scrip was accepted and held by them as trustees, and pleaded that if there was any breach of trust, they should be excused under 62 Vict. (2) ch. 15, sec. 1 (O.) The defendants also pleaded that no damages had accrued to plaintiffs.

It appeared that the Atlas Loan Company were interested in 375 of the shares of Dominion Coal stock deposited with defendants.

The Atlas Loan Company were put into liquidation by winding-up order dated 8th June, 1903, and the defendants were appointed liquidators. A winding-up order was made as to plaintiffs on 22nd June, 1903, and the London and Western Trusts Co. were appointed liquidators. The reference for the winding-up of the Atlas Loan Co. was to the Master in Ordinary, and for the winding-up of plaintiffs to Mr. Hughes, Judge of the County Court of Elgin, as an Official Referee.

G. C. Gibbons, K.C., Shirley Denison, and W. K. Cameron, St. Thomas, for plaintiffs.

S. H. Blake, K.C., and W. H. Blake, K.C., for defendants.

Boyd, C., stated the facts and evidence at length, and found as a fact that no direction was given by the Master in Ordinary in the winding-up of the Atlas Loan Company on or before the 22nd June which in any way protected defendants as custodians of the scrip from handing it over upon the demand made on 25th June. Mr. Hunter, the solicitor for the liquidators of the Atlas Loan Company, said that on the 30th June he obtained the Master's direction not to deliver over to the liquidators of the Elgin Loan Co. the 525 shares of Dominion Coal and the 50 shares of Dominion Steel. The only written evidence of this was an ex post facto certificate signed ex parte by the Master a week before the trial.

Though an interest on behalf of the Atlas Loan Co. was claimed only in 375 shares, yet it was said the Master directed the whole of the stock to be held, treating all as in the hands of the defendants as liquidators of the Atlas Loan Co., although it was really in their hands as bailees. No claim was made at the trial as to the Atlas Co. having an interest in the securities beyond that pertaining to the 375 shares, and as to them there was no partnership between the two companies, but only an interest of the Atlas Company wiped out by the shrinkage in value of the shares. The Master's ruling appears to have been given at some time, but it is very vague, and would cast upon the liquidator the onus of determining what was included therein. After action, and as a result of a motion therein, an order was made on 11th September, 1903, for the delivery of all the certificates to the Elgin liquidator—the defendants withdrawing all claim to the possession of these certificates, and plaintiffs to hold the same subject to all the equities attaching thereto, and on 12th September they were received by plaintiffs under the terms of that order. This final act of handing over all these securities might have been done with perfect propriety and safety by the depositary in response to the first demand. The duty incumbent on the National Trust Company would then have been fulfilled, and the certificates would have passed subject to all the equities into the hands of an officer of the Court—the liquidator of the Elgin Loan Company, the proper custodian. This result, which would have enured to the benefit of all interested, was frustated by the course pursued by the defendants, which has resulted in great loss from the fall in price of both classes of stock.

I think that a breach of contract on the part of the defendants is clearly proved by their own letter of 26th June, when the stock might have been delivered in due execution of the contract to the Elgin Company, instead of being withheld in order to seek the intervention of the officer charged with the liquidation of the Atlas Company.

Now, one main line of defence is, that the defendants are trustees to be protected under the provisions of the Act already referred to. And the case of In re Tilsonburg, Lake Erie, and Pacific R. W. Co., 24 A. R. 378, is relied on to shew that the relation between the Elgin Company and the defendants was that of trusteeship. That was a clear case of property being held in trust for the benefit of another upon certain conditions being complied with. There existed the three conditions usually to be found in trust transactions, i.e., the creator of the trust, the trustee of the property, and the

cestui que trust to be benefited by the creation of the trust. Here there was no cestui que trust in the ordinary sense, unless that term can be applied to the bailor of the scrip certificates. There were no duties to be performed by the defendants except to collect the coupons and transmit the money to the Elgin Company, and to hold safely the scrip till its return was demanded. That rested on the terms of the contract, and not upon equitable obligations of fiduciary import.

The chief instrument between the parties was for the sole benefit of the Elgin Company as bailors, and the National Trust Company came in as a paid depositary to take custody and care of the securities for the owners.

Though the word "trust" is used in some of the letters, the word "agent" used in others is more pertinent. As said by Lord O'Hogan in Kinloch v. Secretary of State, 7 App. Cas. 620, there is no magic in the word "trust," and, except in the name of the defendants, the word is not used in the "Receipt and Guarantee" which manifests the transaction. Regard must be had to the nature of the transaction and the terms of the instrument relating thereto in order to determine whether the grantor, donor, settlor, or bailor intends to create a trust for the benefit of another (cestui que trust) or merely to arrange for the disposal of property to suit his own convenience by giving some revocable direction to the transferee of the property. In the one case the instrument is one of trust properly speaking, one in which we find the three parties, the owner—the maker of the instrument—transferring property to a trustee for the advantage of the beneficiaries; in the other case the owner gives directions to an agent for his own convenience, with express or implied power at any time to countermand the directions and recall the property: New Oram Co. v. Homfray, [1897] 1 Q. B. 607, and S. C., in appeal, 2 Q. B. 24 and 30; Johns v, James, 8 Ch. D. 744, 749; Alexander v. Wellington, 2 R. & M. 60.

Even if a trust proper has been created, yet where the property is in the hands of the trustee merely for the benefit of the settlor himself, he can at any time revoke such trust, and call upon the trustee for a reconveyance to himself: Strong, J., in Poirier v. Brule, 20 S. C. R. 97, 102.

I have a strong impression that this bailment for the sole advantage of the bailor is not such a trust as is contemplated by the statute of 1890. And this view is strengthened when the property deposited has been recalled by the bailor and the depositary withholds in wrongful detention that which he should at once transmit to the owner from whom he received it. The relation of trust, if it existed, has been revoked, and

the depositary acting in plain violation of the terms of the contract cannot invoke the aid of the Act relating to trustees. The law has already provided for a case of this kind, where a claim is made upon the property or an adverse interest alleged to exist therein, by permitting the bailee to interplead: Biddle v. Bond, 6 B. & S. 225. It would seem undesirable to extend the law of trusteeship to these dealings of commercial and financial import, where the law has settled into definite lines of responsibility and relief.

But I would further deal with the case on the assumption that it was a trust transaction, and that "fiduciary responsibility" within the meaning of the statute still existed after the demand made for the return of the property on 25th June.

Did the defendants as trustees (by this hypothesis) "act honestly and reasonably and ought they fairly to be excused for the breach"—using the language of the statute? Now, the radical difficulty I find in the case is that, owing to the dual character of the defendants, it became impossible for them to act with singleness of purpose, and the obligations of the trustee became obscured by the zeal of the liquidator. The course was clear to hand over the securities after the first demand, but, instead of this, delay arises from matters suggested by the custodian, the solution of which is not essential to his safety (see Dewey v. Thornton, 9 Ha. 232.)

Misconception appears to have existed from the outset as to the scope of the liquidation under the Atlas Company winding-up order. Mr. Home Smith's first concern was to prevent the collateral securities held by creditors of the Atlas from being sold, and later this took the shape of preventing them being sold without the concurrence and intervention of the liquidator of the Atlas to the end that the proceeds might be administered in that liquidation. The directions given by the Master were with this intent, and the action thus taken must have proceeded upon a misapprehension of the real and true state of the case: Re Brampton Gas Co., 4 O. L. R. 509. These securities belonged to the Elgin Company, and it was optional with that company to prove in the Atlas liquidation and upon proof to bring in and value their securities or to stand aloof and sell their securities as they might think best.

There is no jurisdiction under the Winding-up Act, sec. 39 (cited to support the direction) to deal with assets which are not in the hands, possession, or custody of the liquidator. These securities were owned by the Elgin Company and were temporarily deposited for a purpose with the National Trust

Company as agents or trustees of the owners, and could by no possibility pass to or become vested in the National Trust Company as liquidators as a result of the winding-up order. Yet upon no other theory can the Master's direction as a whole be supported. Upon a representation that the Atlas Loan Company was interested in all this stock he may have given a direction which must be limited to the 375 shares; but even as to these the facts before him, or which should have been made known to him, disclose no real interest. All that it amounted to was a security held by the Elgin Company derived from the Atlas Company, which fell far short of paying the unquestioned debt, and was of precarious and fluctuating value owing to the state of the stock market.

The mandate of a Court without jurisdiction affords no protection or defence, and it may well be accounted a thing of nought, as we said in McLeod v. Noble, 28 O. R. 528.

These considerations indicate that the course pursued quoad the real owners was not a reasonable one, and that it would be unfair to exonerate the defendants from all legal consequences resulting from their detention of the certificates.

In brief: under the Trustee Act the advice of competent counsel and the opinion of the Court, even if erroneous, may afford sufficient protection to the honest trustee. But in this case there was no independent counsel sought, simply reliance on what was done and directed by the solicitor for the liquidator, which cannot be regarded as proper advice for the guidance of the trustee: Chapin v. Brown, [1902] 1 Ch. at p. 805. The breach complained of is not so much in administration of the alleged trust as in contravention of the terms of the contractual obligation, and the intervention of the Official Referee in the liquidation of the Atlas Loan Company was ex parte and without jurisdiction as regards the Elgin Loan Company and its liquidation.

So one is shut up to the conclusion that the defence fails on the excuse, and it remains to ascertain the amount of damages recoverable for the illegal detention.

The defendants set up in mitigation or extinction of damages various offers and propositions made which were not accepted by the plaintiffs. The first is on or about the 30th June, to this effect: if Mr. Moore considered it advisable that the securities should be sold, the defendants as liquidator would join in an application to the Master for an order permitting the sale, and that the money resulting from sale should be held by the National Trust Company as liquidator

of the Atlas Loan until the rights of the parties were determined. (See affidavit of R. H. Smith, paragraph 6, sworn 23rd July, 1903.)

Again on 4th July a letter was written suggesting that if a full statement of facts was made by the liquidator of the Elgin Loan Company, the matter could be laid before the Master in Ordinary and an arrangement satisfactory to all parties would be likely to result. (Same affidavit, paragraph 7.)

Both these offers were before action, and proposed that the Elgin Loan Company should, as it were, attorn to the jurisdiction of the Court charged with the Atlas liquidation, and that sale and proceeds should abide the result of what might be determined therein. The attitude of the plaintiffs was that they required an unconditional redelivery of the certificates to the end that they might be able to realize and apply the proceeds to pay a dividend in the Elgin liquidation, and had this delivery been made it is said that the Elgin depositors would have been before this time paid in full.

After action brought, like offers to sell and bring the proceeds into Court under the Atlas liquidation were made by letters, set forth in the defence, dated 23rd July, 1903, and 28th July, the latter being based on one term in an order made upon consent in this action on application to stay proceedings. That term was thus expressed: "Upon the plaintiffs and the liquidators of the Atlas Company agreeing to do so they shall be at liberty to join in the sale of the stock, and the proceeds thereof to be held pending the disposition of this action by the defendants in the same manner and subject to the same trusts and conditions as the stock is now held under."

No sale was agreed upon, and next came the final order of 11th September, under which all the securities were handed over unconditionally to the plaintiffs—the defendants relinquishing claim to the possession.

Now, in cases of detinue, where delivery is made pending action, damages for the unlawful detention are properly given based on estimates of what has been lost by the detention.

The offers from 30th June up to and inclusive of that on 23rd July contemplated sale and liquidation of the proceeds in the Atlas Company winding-up. The plaintiffs were entirely right in refusing to recognize any jurisdiction in that forum, and were justified in declining to attorn to that Court.

The conditions attached to those various offers were such as to nullify their effect. But other considerations arise in regard to the consent order of 28th July and the letter which

followed of the 30th July, shewing the willingness of the Atlas liquidator to join in the proposed sale; on that the money would have come into the hands of the defendants as trustees and have been dealt with in the progress of this action. There is no valid or other reason assigned for the refusal of the Elgin liquidator to join in that sale as proposed in the consent order, and I think that the failure to realize the value of the securities at that date is attributable to the unwillingness of the Atlas liquidator to sell at the current prices. It appears to me that the wrongful detention, so far as damages are concerned, ceased at that time, say 30th or 31st July, 1903: Serrao v. Noel, 15 Q. B. D. 549.

As to measure of damages the cases shew that in cases of wrongdoing, such as this is found to be, where there is from the time of the demand a continuous obligation to restore the property to the owners, it is not unreasonable to take the highest price of the thing between the demand and the delivery: Michael v. Hart, [1901] 2 K. B. 867, and in appeal [1902] 1 K. B. at p. 488, as contrasted with Mansell v. British Linen Co. Bank, [1892] 3 Ch. 159, 163.

The evidence shews that the plaintiffs were minded to sell the Coal stock when it went above par (p. 19). This it did, and realized its highest point (between 25th June and 31st July) on 9th July, when it went up to 109 at Montreal and 108 at Toronto. The letter of 23rd intimates that it might be sold at 93. That was about the rate on that day, but it dropped on the next. Looking at all the figures, I think it could easily have been sold on 7th, 8th, and 9th July at 105, and this I take to be a fair figure, so that on the Coal scrip the damages would be the difference between 93 and 105, or 12 points for 525 shares, equals $6,300.

As to the other stock, the Iron and Steel, this reached the highest point (within the given limits) on 8th July, then sold at 60; but at the end of July it had fallen to 40 and 42. I should say the proper damage is the difference between 58 and 42, i.e., 16 points; that on 50 shares equals $800. Interest should also be paid by the defendants on the amount of dividends collected from the time of receipt till time of payment over to plaintiffs, and the costs of the litigation.

The Registrar may compute the amount of interest and insert in the judgment.

DECEMBER 28TH, 1903.

DIVISIONAL COURT.

GARNER v. TOWNSHIP OF STAMFORD.

Evidence—Cause of Death—Way—Non-repair—Negligence—Fatal Accidents Act—Statement of Deceased—Narrative of Event—Rejection—Other Evidence—Sufficiency of to Establish Liability—Municipal Corporations—Joint Liability.

Plaintiffs, husband and wife, sued under Lord Campbell's Act to recover from defendants, the municipal corporations of the township of Stamford and the village of Niagara Falls, damages for the death of their daughter, caused, as they alleged, by the negligence of defendants. The daughter died of peritonitis apparently caused by an injury which she received by falling over a stone in a footpath which she was lawfully walking upon. The action was tried before MACMAHON, J., without a jury. Evidence was admitted subject to objection of statements made by the deceased as to the cause of her injury, but the trial Judge excluded it from his consideration, and dismissed the action. The plaintiffs appealed.

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

C. A. Masten and F. C. McBurney, Niagara Falls, for plaintiffs.

F. W. Hill, Niagara Falls, for defendant village corporation.

F. W. Griffiths, Niagara Falls, for defendant township corporation.

STREET, J.—. . . . In Regina v. McMahon, 18 O. R. 502, . . . the question of the admissibility of the statements of a deceased person as part of the res gestæ was fully discussed. The effect of that decision . . . is to exclude everything offered in evidence as part of the res gestæ which is found to be a mere narrative of the event in question after it has happened. All the statements of the deceased offered in evidence here, and received subject to objection, but subsequently excluded by the trial Judge from his consideration, plainly consist of narrative . . . easily distinguishable from those voluntary and contemporaneous exclamations and statements made without time for reflection which are the

only class of statements properly admissible as part of the res gestæ. . . . These statements were not properly admitted, and they should not be considered in coming to a conclusion as to plaintiffs' rights.

Excluding them, however, I am of opinion that there remains a body of evidence upon which we may properly find in favour of plaintiffs.

We have, in the first place, uncontradicted evidence of the existence of a dangerous nuisance upon the footpath, for which defendants are responsible. Then it is shewn that deceased left Mr. Biggar's house in good health on the evening in question, and was at Mr. Garner's house a few minutes later suffering great pain. On the same evening, at an hour which must have been very close to that at which the deceased would pass the stone, a young woman answering the description of the deceased is found by Mr. Hapgood lying across the stone in question suffering great pain. The doctor who attended the deceased the same night found her suffering from injuries which might have been caused by a fall upon the stone in question; and the injuries she had received caused her death. I think there was here evidence which could not have been withdrawn from a jury in support of plaintiffs' case, and upon which, in my opinion, we should find for plaintiffs: Fenna v. Clare, [1895] 1 Q. B. 199.

The judgment entered for defendants should, therefore, in my opinion, be set aside, and there should be judgment for plaintiffs for $1000, divided as the learned trial Judge suggested, that is to say, $700 to the father and $300 to the mother, and the costs of the action and of this appeal.

The defendants are made jointly liable by sec. 610 of the Municipal Act, and no evidence was given at the trial upon which a division of their liability could be based, nor was any such division suggested.

FALCONBRIDGE, C.J., concurred.

BRITTON, J.—Without expressing any opinion as to the admissibility of the statement made by deceased to Hapgood on the night of the accident . . . I agree entirely with my brother Street upon the other branch of the case. There remains evidence upon which a Judge could properly find in favour of plaintiffs. . . .

OSLER, J.A. DECEMBER 28TH, 1903.

C.A.—CHAMBERS.

BREADY v. GRAND TRUNK R. W. CO.
HUGHES v. GRAND TRUNK R. W. CO.

Appeal—Court of Appeal—Consolidation of Two Appeals—Directions for Printing.

Motion by defendants for directions as to the manner in which the appeal books should be prepared, the appeal cases having been settled. The actions arose out of the same accident; the pleadings were the same in each; they were tried as one action, the evidence being applied to each, as also were the answers of the jury; the reasons for and against the appeal were the same.

H. E. Rose, for defendants.

H. W. Mickle, for plaintiffs.

OSLER, J.A.—An order will be made as in Beam v. Beatty and Bunting v. Beatty, Order Book No. 9, pp. 270, 271, except that if the books are to be printed, instead of a separate book of the evidence a complete appeal book is to be made up, in one case, of statement of case, pleadings, evidence, reasons for and against appeal, etc., and reference is to be made in the other to the evidence as printed in the former. In the event of the cases going further, there will thus be one of them in which it will not be necessary to reprint any of the proceedings. The answers of the jury must be set out in each case, but it is not necessary to print more than a brief abstract of or reference to the letters of administration to the plaintiffs, in the form the defendants propose, as it is evident that nothing turned upon them at the trial. Costs (as of one motion) in the appeal.

OSLER, J.A. DECEMBER 28TH, 1903.

C.A.—CHAMBERS.

RE NORTH YORK PROVINCIAL ELECTION.
KENNEDY v. DAVIS.

Parliamentary Elections—Controverted Election Petition—Examination of Respondent for Discovery—Questions Relating to Previous Election—Corrupt Practices—Previous Election Declared Valid—Corrupt Offer Renewed at Present Election—Length of Examination—Adjournment—Attendance—Discretion.

Motion by petitioners to compel respondent to attend at his own expense and submit to be further examined and to com-

plete his examination for discovery and to answer a certain specified question and also all questions relating to or connected with allegations of matters of a corrupt character practised by the respondent or his agents at the Provincial election of May, 1902, for the same riding, as well as all questions having reference to similar acts connected with the election which was the subject matter of the present petition.

S. B. Woods, for petitioners.

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

OSLER, J.A.—The main question argued was whether the respondent was liable to make discovery of corrupt practices committed by himself or his agents at the election of 1902. At that election the respondent and Mr. T. H. Lennox were candidates, and the respondent was returned as being duly elected. A petition against his return was presented, in which one of the present petitioners was also a petitioner, A cross-petition against Mr. Lennox was also presented. Both petitions came on for trial before an Election Court in January, 1903, and were then tried and dismissed, and the Court certified that the respondent Davis was duly elected and returned as member for the electoral division. Some time afterwards the respondent resigned his seat, and a new election was held, at which he and Lennox were again candidates. The respondent was again returned, and against that return the now petition was presented and is now pending.

The election of 1902 not having been set aside or avoided, sec. 171 (3) and sec. 179 of the Election Act need not be referred to. It was, on the contrary, upheld and affirmed and certified to be a good and valid election. That determination is, by sec. 55 of the Controverted Elections Act, final to all intents and purposes, and the present election, not having been held in consequence of the avoidance of the election of 1902, is a new election disconnected from and not a part of or continuance of the former election: Cornwall Election (Dom.) (2), H. E. C. 647; Burrough v. Dungarvan, 2 P. R. & D. 300, 309. As I read these cases and the cases of Stevens v. Tillett, L. R. 6 C. P. 147, 161, 162, 165, 175, and Waygood v. James, L. R. 4 C. P. 361, corrupt practices said to have been committed by the now respondent at the former election, on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, now be inquired into for the purpose of invalidating the present election. Therefore, in

so far as it is sought to permit a general inquiry on this examination into such corrupt practices, I hold, as at present advised, that there is no such right, unless it can be shewn that they are in some way connected with and are still operative upon the present election.

In the Windsor Case, 2 O'M. & H. 89, the question was whether acts of intimidation by an employer against his workmen at a former election could be given in evidence on a petition against a subsequent election. The evidence was admitted, not on the ground that they were corrupt practices at the previous election, but because, under the circumstances, they were or might be still operative in the minds of the workmen. "Unless you can shew," said Baron Bramwell, "that the bribery or threat is one the force of which is still in existence, it is not a bribe or threat which will avoid the election."

To that extent, therefore, the examination sought may be proper; at least I do not see my way to restrain it, in the absence of any specific inquiry or question, which, except in the instance I shall presently refer to, has not yet arisen. That instance, however, will serve as an illustration of the extent to which only, as I conceive, the examination can be pressed. On this part of the motion I only add with respect to Stevens v. Tillett, supra, which Mr. Woods relied upon, that the Court distinguished between the case of the certificate of the Judges as to the status of the sitting member, which is final, and their report as to the petitioner or candidate, which is not. Therefore, although by their report they absolved the latter in respect of the recriminatory charges against him and set aside the election, that report did not prevent such charges from being again brought forward on a petition against his return at the succeeding election. The decision affords no ground for the conclusion—indeed is quite opposed to it—that on a subsequent election, like that now in question, evidence of corrupt acts by the same respondent at a previous election, can be given.

2. A question, No. 1719, was asked of the respondent: "Now, do you still refuse to say whether there was any discussion between you and Absalom Wilson with reference to his appointment to a public position prior to the present election?"

The respondent, on the advice of counsel, refused to answer, and he was then asked: "And this refusal is with the knowledge that the question is asked on the ground that we

assert that the matter was again discussed and renewed prior to the bye election?"

Counsel for the respondent: "Quite so."

"1721. And we expect to be able to prove that it was an inducement to Wilson to support Davis at the bye-election?"

Counsel for the respondent: "Your statement is absurd, because prior to the general election Mr. Davis could not have known that there was going to be a bye-election."

Mr. Lennox; It was renewed prior to the bye-election."

The question was not answered.

In my opinion, it should have been.

The examination of the respondent was proceeded with at great length, whether necessarily so or not I do not know, but if it is not continued with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed.

The examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it. The respondent's counsel refused to consent to any enlargement or adjournment, and stated that if it was enlarged the respondent would not attend. The examiner said that if that was the case it was useless for him to fix a time, and enlarged the examination sine die. The course pursued is not that which the respondent should have taken, and, finding him to be in default as regards the above specified question, I must direct that he shall attend before the examiner at such time and place as he shall appoint in order that the examination shall be proceeded with.

It is perhaps needless to add that the view I have indicated as to the principal question argued does not in the least effect the right of the petitioner, if so advised, to take the opinion of the trial Judges unembarrassed by my decision, and to frame his particulars in the widest possible way in setting forth the charges of corrupt practices which he may deem open to him.

I make no order as to costs.

CARTWRIGHT, MASTER. DECEMBER 29TH, 1903.

CHAMBERS.

PARKE v. HALE.

Security for Costs—Action for Defamation—Defence—Fair and Accurate Report of Public Meeting—Municipal Council Meeting—Financial Liability of Plaintiff—Property Exigible under Execution—Criminal Charge.

Action for libel. Plaintiff complained of an article published in a newspaper. Defendants moved for security for

costs upon an affidavit stating that the article was a fair and accurate report of a public meeting of the municipal council of the town of Orillia—"which publication was for the public interest." The affidavit further declared that the plaintiff was not possessed of property sufficient to answer the costs of the action.

C. A. Moss, for the defendants.

W. M. Boultbee, for plaintiff.

THE MASTER.—The plaintiff's cross-examination shews that while he is in receipt of a good annual income from his profession as an electrical engineer, he has not unincumbered personal property more than sufficient (to put it most favourably) to meet an unsatisfied judgment for $400 which has been standing against him since June, 1902, and on which no substantial payments have yet been made.

He also has an interest in certain real estate in or near the town of Cornwall under the will of his mother's father. The will has been produced. From it the plaintiff would seem not to have any interest which would give security to a defendant in the sense of being practically exigible under execution, or of such a nature that a prudent man would lend money on it. The devise in question reads: "In trust for the benefit of my daughter Louisa, . . . for life . . . and after her death for the benefit of my said daughter's children." In the next clause the trustees are directed, on the daughter's death, to convey the lands so settled to her surviving lawful children and to the descendants of such, if any, of the children as may have died. From this it would appear that there is nothing vested in any one of the children or grandchildren until the death of the plaintiff's mother; and, even if vested, the plaintiff's interest could only be made available by further proceedings. In his cross-examination he says (question 57) that the whole property is worth $10,000 to $12,000, and that there were eleven children, but three have died without issue, leaving at present eight to share. There is no evidence of the age of the plaintiff's mother. He himself is neither a householder nor freeholder.

Mr. Boultbee argued very strenuously that in any case the defendants were not entitled to security, because the meeting in question was not a public meeting within the meaning of the Act, as interpreted by the corresponding English Act of 1887, and subsequent Act of 1889. The point has never been decided in this Province. But, however serious it may prove to the defendants at the trial or on a demurrer to the state-

ment of defence, I do not think I can decide it now, in face of the defendant's affidavit that the publication is for the benefit of the public. Both allegations shew a good defence, if they can be proved. And that is all that can be decided on this motion, as the cases shew. . .

[Bready v. Robertson, 15 P. R. 7, referred to.]

The motion will be allowed.

Costs will be in the cause.

I have not overlooked the argument that the statements made at the meeting, as reported, amounted to a criminal charge, under sec. 360 of the Code. The expression said to have been used by the mayor and Councillor Sanderson, that the council was being "held up" by the plaintiff, does not seem to me capable of that construction, nor the following, "A suggestion that (the plaintiff) be asked to come up and point out that $7,000 worth of machinery, raised an ironical laugh."

If the payment of a demand is made with full knowledge of the facts, I do not see how the payment could afterwards be made a ground of criminal proceedings against the receiver by those who paid it to avoid a civil action, and however much they may think, rightly or wrongly, that it is a case of sharp practice.

CARTWRIGHT, MASTER. DECEMBER 29TH, 1903.

CHAMBERS.

GAMBLE v. HEGGIE.

Particulars—Seduction—Times and Places—Special Damage—Stage of Action at which Particulars Ordered—Formal Affidavit of Defendant Denying Seduction—Right of Plaintiff to Cross-examine.

Motion by defendant for particulars of dates, times, and places and of special damage alleged, in an action for the seduction of the plaintiff's daughter.

W. E. Middleton, for defendant.

T. J. Blain, Brampton, for plaintiff.

THE MASTER.—The defendant has filed an affidavit, as required by the practice, denying most positively the plaintiff's allegations. On the return of the motion Mr. Blain asked for an adjournment in order to cross-examine defendant, as he contended he was entitled to do under Rule 490. Mr. Middleton objected that by appearing on the motion without having taken out any appointment for that purpose plaintiff had waived his right, assuming he had such right. . . . . Mr. Middleton also drew attention to the fact that plaintiff had not brought himself within such cases as

Robinson v. Sugarman, 17 P. R. 419, by making an affidavit that he was unable to give any particulars without examining defendant. He also contended that on the principle of Dryden v. Smith, 17 P. R. 500, plaintiff could not be allowed to have what would be equivalent to an examination for discovery before giving particulars of the statement of claim.

I enlarged the motion to allow plaintiff to file an affidavit (if so advised) and restrained any cross-examination of either party in the meantime.

On the motion coming on again Mr. Blain stated that plaintiff declined to file an affidavit, and he insisted again on his right to cross-examine defendant on his affidavit filed. The argument proceeded, on my direction, notwithstanding the objection.

It is quite clear, as was said in Mason v. Van Camp, 14 P. R. 296, that at some time or other, and in time to enable him to meet at the trial, the defendant is entitled . . . to all necessary particulars of plaintiff's claim. . . .

This is not denied by Mr. Blain, but he contends that the order should not be made before defence filed.

Usually, no doubt, this has been the case, but in Knight v. Engel, 61 L. T. 780, it was decided that, the defendant having made such an affidavit as he has in this case, particulars should be ordered before defence.

I have not been referred to any cases in our own Courts where the order has been made at this stage, nor have I been able to find any. I do not, however, see any objection to it on principle. Particulars, it was said in Milbank v. Milbank, [1900] 1 Ch. 384, are only amendments of the pleadings. . . . In the present case no child of the alleged seduction has yet been born. . . . The defendant has no means of protecting himself against an unfounded accusation unless particulars are furnished. . . .

[Marriner v. Bishop of Bath and Wells, [1893] P. 146, Smith v. Boyd, 17 P. R. 463, 467, Odgers on Pleading, 5th ed., pp. 114, 132, referred to.]

I am of the opinion that the order should be made as asked in deference to the cases cited. They seem to me also to dispose of Mr. Blain's argument that he is entitled to cross-examine the defendant. The reason of Rule 490 is surely this, that affidavits are almost universally filed to settle disputed questions of fact, and in all such cases cross-examination is right and proper. But here the case is different, and the maxim "cessante ratione cessat lex" may properly be applied. No disputed question of fact is before the Court

on this motion. . . . . The affidavit of defendant is only filed for the information of the Court and as a proof of good faith of the defendant. . . . .

The order must go as asked, requiring plaintiff within three weeks to furnish the particulars asked, including those of special damage (see Odgers on Pleading, 5th ed., p. 196). The time for filing the statement of defence will be extended so as to run only from the service of such particulars.

Both points under discussion being new, costs will be in the cause.

MEREDITH, C.J. DECEMBER 29TH, 1903.

WEEKLY COURT.

SLEMIN v. SLEMIN.

Receiver--Equitable Execution—Judgment for Alimony—Attempt to Reach Pension under Benefit Fund—"Creditors."

Motion by plaintiff for an order continuing her as receiver of certain moneys. The action was for alimony, and by an order of 9th December, 1901, defendant was directed to pay plaintiff interim alimony at the rate of $5 a week from the service of the writ of summons, $2.70 for interim disbursements, and $69 for prospective disbursements. Nothing had been paid on account of the alimony or disbursements. The defendant was a member of the police force of the city of Toronto, and was a member of "The Police Benefit Fund," a friendly society incorporated under the provisions of R. S. O. 1897, ch. 211. He had retired from the police force, and under the rules of the society, as plaintiff alleged, was entitled to a pension of $1 a day during his life. By a rule of the society, every application for a pension must come before the Benefit Fund committee, whose duty it was to go fully into the circumstances of the case and report on it to the Board of Police Commissioners, with whom rested the final determination as to the disposition to be made of the application. Defendant had not yet applied to the society for his pension, and it had not yet been awarded to him. The pension, according to the affidavit of plaintiff, is payable from the date of the defendant's retirement from the police force.

Section 12 of R. S. O. ch. 211 provides that when under the rules of a society money becomes payable to a member, such money shall be free from all claims by the creditors of such member.

W. J. O'Neail, for plaintiff.

J. M. Godfrey, for defendant.

MEREDITH, C.J., held that the word "creditors" in sec. 12 is to be read as the equivalent of "persons to whom the member is indebted or to whom he is liable to pay money." A claim for alimony is not a debt provable under the Bankruptcy Act, and instalments of alimony do not constitute such a debt as can be proceeded for by an action (Lee v. Lee, 27 O. R. 193); but the object of sec. 12 is to preserve for the use of the member the moneys which become payable to him according to the rules of the society, an object which would be frustrated if they could be reached by a person to whom the member is under a liability to pay money, though the liability does not create a legal debt in the strict sense of the term "debt." If plaintiff is not a creditor of defendant, it is difficult to see what right she has to call upon the Court for relief in the nature of equitable execution. Arrears of a pension constitute a debt which may be attached; Booth v. Traill, 12 Q. B. D. 8: Trust and Loan Co. v. Gorsline, 12 P. R. 654; but an unearned pension cannot be reached either by that procedure or by the appointment of a receiver: Trust and Loan Co. v. Gorsline, supra; Central Bank v. Ellis, 20 A. R. 364; Holmes v. Millege, [1893] 1 Q. B. 551. Defendant has not made any application for a pension, and none has been awarded to him; he may not apply, and if he does his application may not be successful.

Application dismissed without costs.

MEREDITH, C.J. DECEMBER 29TH, 1903.

WEEKLY COURT.

HAYCOCK v. SAPPHIRE CORUNDUM CO.

Mechanics' Lien—Action to Enforce—Parties — Subsequent Incumbrancers—Execution Creditors— Incumbrance Arising pendente Lite—Notice of Trial—Judgment—Setting Aside.

Petition by the Hamilton Powder Co. to have their name struck out of the judgment and to vacate the judgment so far as it affects them. The action was brought to enforce a mechanics' lien against the lands of the defendant company, and was tried before the local Master at Peterborough under sec. 35 of the Mechanics and Wage-Earners' Lien Act, R. S. O. ch. 153. The petitioners were at the time of the trial judgment creditors of defendant company, having a fi. fa. goods and lands in the hands of the sheriff of Peterborough. The judgment recited that the petitioners had a lien on the lands, and declared that

plaintiffs and others were entitled to mechanics' liens, but did not otherwise affect to settle priorities. The petitioners were not served with any notice of trial, and they did not appear at the trial or prove any claim. The trial was on 20th June, 1903, and their fi. fa. was placed in the sheriff's hands only on the 15th June, 1903.

F. E. Hodgins, K.C., for the petitioners.

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

MEREDITH, C.J. — In actions for the foreclosure of mortgages . . . it is not necessary to add as a party in the Master's office an incumbrancer whose incumbrance comes into existence pendente lite; Robson v. Argue, 25 Gr. 407, and other cases referred to in Holmested & Langton, 2nd ed., p. 910; though it would appear that a different rule is to be applied in a partition action: Robson v. Robson, 10 P. R. 324. In proceedings under the Mechanics' Lien Act, sec. 36 seems to render it necessary to consider how far one or other of these modes of procedure would be the proper one to apply, for it is the persons who are incumbrancers at the time fixed for serving notice of trial, that is, eight days before the trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in.

Order made that the name of the petitioners and all reference to their claim be stricken out of the judgment. Plaintiffs to pay to petitioners a portion of their costs, fixed at $20.

MEREDITH, C.J. DECEMBER 29TH, 1903.

TRIAL.

TORONTO HARBOUR COMMISSIONERS v. SAND AND DREDGING.

Contract—Work and Labour—Breach by Contractors—Completion of Work by Employers—Notice to Contractors—Assent by them—Reasonable Expenditure by Employers—Recovery from Contractors—Construction of Contract—Condition Precedent.

Action to recover the amount expended by the plaintiffs in dredging in the harbour of Toronto for the purpose of removing obstructions to the entrance of certain wharves or slips, which was part of the work which the defendants (incorporated as "Sand and Dredging," called in the judgment

"the contractors") contracted to do for the plaintiffs by an agreement dated 6th March, 1902.

A. M. Stewart, for plaintiffs.

J. M. Godfrey, for defendants.

MEREDITH, C.J.—The contractors, according to the provisions of the agreement, were to complete so much of the work as consisted of "dredging of the range course and at the various slips and wharves in the said harbour" on or before the 14th May, 1902, and the rest of it by a later date.

The agreement further provided that if the contractors should not proceed with the work in accordance with the terms of the contract and of the specifications for the work to the satisfaction of the plaintiff's engineer, and so as to ensure in his opinion the satisfactory completion of the work by the time provided in the agreement for its completion, or should not complete it within that time, the plaintiffs might either before or after "the completion (sic) of the work, if they should see fit, complete any portion of it and deduct the expense so incurred from any moneys due to the contractors under that or any other contract, or might, after twenty-four hours' notice to them, make such new arrangements as the plaintiffs might deem expedient for the completion of the work:" paragraph 8.

The contractors also covenanted with the plaintiffs that, upon receiving notice that such new arrangements had been made or that the works would be completed by the plaintiffs as provided by paragraph 8, they would forthwith give peaceable possession of the works to the plaintiffs or their engineer, and that they would not delay or hinder the plaintiffs in the execution of the works, and that the cost and expense occasioned by and incidental to the making of such new arrangements for the completion of the works might be, with all increase in cost occasioned by the contractors' non-completion, deducted from any moneys in the hands of the plaintiffs or recovered from the contractors as money paid at their request.

The contractors did not begin the work in time to insure its completion by the time named in the agreement, and the engineer, having come to the conclusion that they had failed to proceed with it so as to insure the satisfactory completion of it by that time, gave written notice to the contractors that he had so decided, and that it would be his duty, after the expiry of twenty-four hours, to make arrangements for the completion of the work then urgently required to permit vessels to unload at the several wharves.

This notice was mailed to the contractors on the 2nd May, 1902, but was not received by them until half past nine o'clock of the morning of the 5th of that month.

The engineer on the 5th May, 1902, employed Frank Simpson to do the work referred to in the notice, for which he was to be paid at the rate of $8 an hour working time, and to be allowed for the time employed in removing his dredge and scows from Church street to and returning them from the work.

Simpson began his work on the same day and was employed from that day up to and including the 21st May, Sundays excepted, the number of hours being one hundred and sixty-eight.

It is beyond question that the contractors assented to the propriety of the course which was taken by the engineer, though it was no doubt not anticipated either by them or by the engineer that Simpson would be employed for so long a period as he was actually occupied in doing his work.

I find, however, that what was done by the engineer was reasonable under the circumstances, and that it was necessary to employ Simpson for the whole time for which he was employed, in order to enable incoming vessels to reach the wharves, where they were to be unloaded, which it was impossible for them to have done until the entrance to the wharves had been cleared by dredging.

I find also that there were no means available to the contractors for doing the dredging that was done by Simpson at the time when it was necessary to do it, and it was done by him.

It was not in my opinion a condition precedent to the plaintiffs exercising the right of completing a part of the work—they not desiring to take the whole of it out of the hands of the contractors—that they should first give twenty-four hours' notice to the contractors of their intention to do so, but the notice was required only if the plaintiffs should desire to make new arrangements for the completion of the whole work.

If, however, the notice was necessary in both cases, what took place between the contractors and the engineer was, in my opinion, a waiver of notice or an acquiescence in the one which was given as a sufficient notice. The contractors' letter of the 5th May amply warrants this conclusion and makes it clear that they consented to the engineer making such arrangements as he might deem necessary for doing such of the work as would not admit of delay, and, as I have already said, the work that Simpson was employed to do was of that character.

It was contended by counsel for the defendants that in any case the plaintiffs, if they exercised the right conferred on them by the contract of doing part of the work, were not entitled to look to the contractors for reimbursement of their expenditure in doing it, and that their only right was to retain what should be owing to the contractors on account of the work which had been or should be done by them under the agreement or any other contract with them.

I am not of that opinion; such an arrangement is an unlikely one to have been in the contemplation of the parties, and it seems to me, therefore, that the provision of the 9th paragraph ought to be construed so as to include the expenditure which is in question, if its words can be given that meaning.

The words "all increase in cost occasioned by the contractors' non-completion" are, in my opinion, sufficient to include this expenditure, and, therefore, the plaintiffs, in addition to being entitled to deduct the amount of it from any moneys owing by them to the contractors, are also entitled to recover it from them as money paid at their request.

If I am wrong in this view and there is no express provision requiring the contractors to pay the additional expense which was caused by their delay, they would, I think, be liable for it as damages occasioned by the breach of their covenant to do the work.

The plaintiffs' claim, including the engineer's charges in connexion with the work done by Simpson, amounts to $728.11, made up of the difference between the cost of the work ($1,344) and what it would have cost at the price which was to be paid to the contractors ($652.46), amounting to $691.54, and $34.57 for the engineer's charges.

I do not think that the plaintiffs are entitled to charge the whole $1,344 to the contractors. Simpson was a tenderer for the work when it was orginally let by the plaintiffs, and then offered to do it at the rate of $8 an hour, or 15 cents per cubic yard. It is most likely, had the engineer required him to do the work in question on the same terms, that he would have undertaken to do it on those terms; and I have no doubt that he would have undertaken it, if not at 15 cents a yard, at a price per yard which would have resulted in the work being done at a cost considerably less than $1,344; the engineer, however, made no such request, but accepted the offer of Simpson to do the work at the price ultimately agreed on, $8 an hour, without question. It appears also that Simpson was allowed for the time occupied in standing by with his dredge while one or two vessels

passed through to the wharf, and in assisting the vessels to do so, and this work the contractors were not bound to do, and are, therefore, not chargeable with the cost of it.

At 15 cents a yard for the 6941 yards dredged by Simpson, the cost would have been, instead of $1,344, $1,041.15.

A sum approaching the mean between these two sums seems to me to be a reasonable one, and I therefore allow for the expenditure, including the engineer's charges, $1,150, which makes the loss to the plaintiffs owing to the contractors' default, $497.54, from which is to be deducted $250, the amount in the hands of the plaintiffs belonging to the contractors, leaving the balance due to the plaintiffs $247.54, for which, in my opinion, they are entitled to judgment against the defendants.

It follows that the defendants' counterclaim to recover the $250, and a further sum of $150.39, which they say would have been coming to them if only necessary work had been done by Simpson, and it had been done as expeditiously as it might have been, must be dismissed.

The plaintiffs are entitled to their costs on the High Court scale.

DECEMBER 29TH, 1903.

DIVISIONAL COURT.

GRAHAM v. BOURQUE.

Chose in Action—Assignment of—Scope—Money to Become Payable "in Respect of the Contract"—Compensation for Breach of Provision Implied in Contract—Attachment of Debts.

Appeal by plaintiff from order of STREET, J., in Chambers (ante 927) reversing order of local Judge at Ottawa, and deciding in favour of the claimants, the Bank of Ottawa, a question arising upon a garnishing application made by plaintiff after judgment recovered against defendant. The moneys garnished were the fruits of a judgment recovered by defendant against the corporation of the city of Ottawa for damages for interference with defendant in the performance of work under a contract with the city. Defendant had assigned to the Bank of Ottawa all moneys coming to him in respect of the contract. STREET, J., held that the moneys recovered under defendant's judgment were covered by the assignment.

A. B. Aylesworth, K.C., for plaintiff, contended that the moneys were not in respect of the contract.

W. E. Middleton, for the Bank of Ottawa, contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.) held that, as defendant could not have completed the

contract or become entitled to the moneys payable thereunder without doing the additional work caused by the discharge of the sewage into the trenches dug by him, owing to a breach of duty on the part of the city corporation, the additional expense so caused was to enable him to complete the work, under the altered conditions which had arisen, and was therefore "in respect" of the contract. Brush v. Trustees of Whitehaven, 52 J. P. 392, Hudson on Building Contracts, 2nd ed., vol. 2, p. 121, followed. Appeal dismissed with costs.

CARTWRIGHT, MASTER. DECEMBER 31ST, 1903.

CHAMBERS.

WADE v. PAKENHAM.

Parties—Third Parties—Company—Directors—Partnership—Illegal Payment—Setting Aside Third Party Notice.

Motion to set aside a third party notice served on one Renfrew by the defendants Kendrick, Forsyth, Boyer and Pakenham. The plaintiff was the liquidator of the Pakenham Pork Packing Co., Limited, under order of 11th June, 1903. The defendants above named were members of the Pakenham Pork Packing Co., a co-partnership formerly carrying on business at Stouffville. The limited company was formed in June, 1901, to purchase the business of the partnership, and in pursuance of this object the shareholders of the company at a meeting held on 2nd April, 1902, authorized directors when elected to carry out the terms of an agreement dated May, 1901, authorizing purchase of the business of the partnership for the consideration therein named and clear from all incumbrances.

At the same meeting five directors were elected, two of the defendants to this action, Pakenham and Boyer (who were also members of the partnership) being two of them. The parties sought to be added as third parties were the other three. On the 4th July, 1902, the agreement sanctioned by the shareholders was duly executed by all necessary parties, the consideration for the purchase by the company of the business being stated to be $20,000 cash, $10,000 in fully paid up shares to be delivered to James Pakenham, and a further sum to be paid to the partnership for outlay by them subsequent to the agreement of May, 1901.

All this was done by the company. But prior to that, on 4th June, 1902, the directors passed a resolution providing for the business being carried on by the partnership until the company was ready to take it over, and agreeing to "in-

demnify and save harmless the partnership from all loss occasioned by the continuation of the said business by the said partnership." Under this resolution the business was so carried on until 19th November, 1902, when another resolution was unanimously passed by the directors authorizing a new agreement, which, after reciting the agreement of 4th July, and purporting to be in pursuance thereof, assumed to promise and covenant with the partnership to pay off, indemnify, and save them harmless from all the liabilities and obligations of the partnership in connexion with the business. These liabilities, when afterwards submitted, made up a total of $30,736.85, of which $30,094.63 was due to the Standard Bank. That resolution further provided that the agreement, with list of debts attached, should be submitted to the directors for approval before being finally executed.

On 21st January, 1903, the directors by resolution authorized the making of the agreement of November, 1902, and assuming the liabilities to the amount of $30,736.85. Renfrew alone voted against this resolution. On 27th October, 1903, the liquidator commenced this action against the four members of the partnership, James Pakenham individually, and the Standard Bank, to recover in all a little over $50,000, "the amount wrongfully paid by the company in discharge of the indebtedness of the partnership and its members to the Standard Bank and other persons," on the ground that the resolution of 21st January, 1903, authorizing the agreement of 19th November, 1902, was beyond the powers of the directors and in violation of their trust, and asking to have the agreement of November, 1902, cancelled, and the resolution authorizing it declared illegal and void.

On 14th December, 1903, on application of defendant Kendrick, an order was made ex parte to have Renfrew and the other two directors, Clarke and Morden, added as third parties, on the ground of the resolution of 4th June, 1902, and because, in the view of the defendants, the sums sought to be recovered by the liquidator represented losses incurred while the business was being carried on by the partnership pursuant to that resolution; and because of the subsequent resolution of 19th November, 1902, and the execution of the agreement of that date, and that there was an implied warranty by the directors that they had power to do what it was now sought to have declared by the Court to have been illegal and void.

This motion was to set aside this third party notice and order on which same issued, on behalf of Renfrew only.

R. McKay, for Renfrew.

J. W. McCullough, for Kendrick

W. S. Ormiston, for Forsyth.

THE MASTER referred to Wilson v. Boulter, 18 P. R. 107; Confederation Life Assn. v. Labatt, 18 P. R. 267; Windsor Fair Grounds Assn. v. Highland Park Club, 19 P. R. 130; Langley v. Law Society, 3 O. L. R. 199; and Miller v. Sarnia Gas Co., 2 O. L. R. 546: and proceeded:—These cases seem to make the test of the propriety of the application of the Rule to be: "Are their common questions between all the parties, which, if decided in favour of the plaintiff, would give the defendant a right to indemnity against the third party on the ground of contract express or implied?" And which would entitle the defendant to recover against the third party the very damages which the plaintiff recovered against him. In the present action the plaintiff asks the Court to declare two things, 1st, that the payments which he seeks to recover were not in discharge of debts of the company, and 2nd, that the resolution of January last, which authorized such payments, was void. He must succeed in both these contentions unless he is to fail in his action, which really asserts a breach of trust on the part of the directors. The plaintiff attacks only the resolution of January, 1903, and does not notice the resolution of November on which the defendant relies as conferring the necessary right to indemnity as against third parties. But the resolution of November was only provisional. When it was passed there was no list of liabilities produced. When this was made known at the January meeting Renfrew refused to agree to it. Whatever may be said as to the position of the other two, it is clear that Renfrew was not in any way answerable for anything done or suffered by the partnership in reliance on that resolution; and it is equally clear that the resolution of November bore on its very face its merely provisional character. The concluding paragraph of that resolution, as set out in Kendrick's affidavit, makes this very plain.

The first paragraph was only carrying out what had long been agreed on between the limited company and the partnership as long ago as July previous. By this the liquidator was bound, as he must admit, and to this he, as liquidator, could not possibly make any objection. It is to rescind the second paragraph, when consumated by the resolution of January last, that he seeks the aid of the Court and claims recovery of money wrongfully paid before as well as after that date, as appears from the particulars of the statement of claim.

But, whatever may be hereafter decided as to the position of those directors (including, be it always remembered, Pakenham and Boyer, who now as defendants are seeking indemnity from their co-directors against their own acts), who voted for the resolution and authorized the payment of the amounts set out in schedule A., Renfrew, who voted against that resolution, cannot be held personally responsible.

The very peculiar facts of this case, and the dual character of Pakenham and Boyer as members of the partnership and afterwards directors of the limited company, present an insuperable difficulty to the application of the third party practice. Whatever rights the other two members of the partnership, Forsyth and Kendrick, may have against the directors or some of them, it is inconceivable that Pakenham and Boyer, as defendants to the action and members of the partnership, can call upon the directors, including themselves, to indemnify them against what they not only did, but did in defiance of the opposition of Renfrew at least. For there is no contribution among joint tort-feasors. There is also the other objection, that the recovery sought by the plaintiff is for sums different from these mentioned in the agreement of November. So that even the alleged indemnity is not co-extensive with the plaintiff's claim, and so the present case does not comply with the rule laid down in Miller v. Sarnia Gas Co., supra. So far as I can understand the matter, it is only Kendrick and Forsyth that can have any claim against the directors, and, for the reasons already given, they must be left to take such an action as they may be advised to assert such claim, if any exists. The third party notice must be discharged, as not being suitable to a case presenting such peculiar complications as the present,

I see no good reasons for depriving Renfrew of his costs.

CARTWRIGHT, MASTER. DECEMBER 31ST, 1903.

CHAMBERS.

KNAPP v. CARLEY.

Lis Pendens—Motion to Vacate—Tying up Land pending Result of Previous Action—Summary Dismissal of Action.

In October, 1902, an agreement was made between Knapp and Carley to exchange farms on 1st March, 1903. However, on the previous day, Carley conveyed his farm to Patterson; and on 2nd March Knapp brought an action against Carley and Patterson to have this sale set aside as being fraudulent and void, and to enforce specific performance of the agree-

ment of October. The action was defended, and Carley paid into Court $200, which he alleged had been agreed on as liquidated damages for breach of the agreement, if any agreement had been made, which he denied. The action was tried on 18th May, and judgment was given dismissing it as against Patterson without costs, but finding that Carley had committed a breach of the agreement of October, and directing a reference to assess damages, further directions and costs being reserved. The reference proceeded forthwith, and on 21st August the local Master made his report fixing damages at $220. In the meantime Carley appealed to a Divisional Court from the judgment at the trial, and this appeal was argued and stood for judgment.

The certificate of lis pendens registered in respect of that action was vacated by an order, made on the defendant's application, in November.

While the appeal was pending, and, as it would seem, in consequence of the lis pendens having been discharged, or a motion made for that purpose, Knapp began a new action on 28th October, 1903, against Carley alone, and another on 21st November, 1903, against Carley and Patterson, so endorsing his writ of summons in each case that he was able to obtain a lis pendens in each, both of which were duly registered, though neither writ was served up to the middle of December, 1903. In the first of the new actions plaintiff's claim was for an injunction restraining Carley from dealing in any way with the mortgage which Patterson had given him to secure balance of unpaid purchase money on the land in question in the original action, on the ground that he should be prevented in this way from defeating the claims of the plaintiff and his other creditors. In the second action the claim was for a decree declaring that the sale by Carley to Patterson was made without proper consideration and with intent to defeat the plaintiff and other creditors of Carley, and for an order setting aside the conveyance to Patterson and declaring the lands liable to the claim of the creditors of Carley, though, so far as appeared, there were none. On discovering what had been done, the defendants at once moved to vacate these certificates of lis pendens and dismiss both actions as being an abuse of the process of the Court.

C. A. Moss, for defendants. Grayson Smith, for plaintiff.

THE MASTER.—I have no doubt at all that the actions should be dismissed. The plaintiff has no interest in the lands, and is not claiming any. Any such claim was dismissed by the Chancellor, and plaintiff was remitted to dam-

ages, as his sole remedy. In this he acquiesced by going on with the reference.

The present actions are clearly brought to prevent, if possible, the defendant Carley from alienating his property, which would otherwise be liable to satisfy the plaintiff's claim in the original action, if he succeeds in the final stage.

By his own evidence it is plain that the plaintiff is not a creditor of Carley at all—much less is he a judgment creditor. . . [Burdett v. Fader, 2 O. W. R. 942, referred to.] These actions are attempts to reach the same end, but by the way of a new action and lis pendens, instead of by injunction, as there. No such action is maintained (see Holmested & Langdon, p. 80, and cases there cited in last paragraph), and so should be dismissed (see ib. p. 136 and cases cited there and in Burdett v. Fader.) A little consideration will shew that this must be so. For all we can tell, the original action may travel to the Supreme Court (the title to land being in question), and that Court may reverse the Court of Appeal after it has reversed the Divisional Court, which may reverse the trial judgment. This is exactly what did happen in the case of Thompson v. Coulter, 1 O. W. R. 205, and in many earlier cases, such as Beatty v. North-West Transportation Co. If the present actions are maintainable, the defendants, if successful in the Divisional Court, could commence a similar action against Knapp, if he went to the Court of Appeal, to restrain him from alienating or incumbering his lands. Then, are the lands of both litigants to be tied up until the final disposition of this dispute? How could either of these actions go to trial at the Brockville Assizes on 1st March if the Divisional Court has not given judgment by that time? Or if there is an appeal from the report undisposed of? This shews at once that these actions are improper; for speedy trial is of the very essence of the right to issue a lis pendens: see Finnegan v. Keenan, 7 P. R. 385. No case can be found in which a plaintiff has succeeded in restraining a prospective debtor from alienating his assets by an action quia timet such as the present. If Knapp was a judgment creditor, he could issue execution, which would be much more effectual than any lis pendens. If execution is stayed by Con. Rule 827, then he is not a judgment creditor, nor is he as yet a creditor at all, and he cannot therefore avail himself of any of the cases cited in Holmested & Langton on Rule 1015 and following Rules.

The affidavit of the plaintiff is such an admission of the true character of his actions as satisfies the requirements of

Jameson v. Lang, 7 P. R. 404; approved in Sheppard v. Kennedy, 10 P. R. 242, where it is said that a lis pendens cannot be made use of on the issue of a writ for alimony because the plaintiff fears that her writ may otherwise be fruitless.

TEETZEL, J. DECEMBER 31ST, 1903.

CHAMBERS.

SOUTHORN v. SOUTHORN.

Arrest—Intent to Quit Ontario—Alimony—Desertion of Wife—Return to Ontario—Fraudulent Intent—Discharge—Terms—Restraint on Disposition of Prosperity.

Motion by defendant for his discharge from custody under an order of arrest made by the Judge of the County Court of Lambton in an action for alimony. The order was made upon the affidavit of the plaintiff only, which stated that for the past eight years the defendant had been guilty of many acts of cruelty towards her and her family, and in July, 1902, deserted her and absconded from this Province to the State of Ohio; that she had no means of support; that defendant had recently returned, and, in her belief, unless an order for arrest should be made, he would quit Ontario forwith; that he was indebted to his creditors in and about Sarnia to the extent of about $300; that she believed the defendant intended to quit Ontario for the purpose of freeing himself from any sum which she might recover against him for alimony; that she was informed and believed that he came back to Ontario for the sole purpose of quietly disposing of his property to defraud his creditors, and her in particular, and was liable at any time to leave Ontario; that there was good and probable cause for believing, and she did believe, that unless forthwith apprehended he was about to quit Ontario with intent to defraud his creditors generally, and her in particular of her claim for alimony. The plaintiff did not disclose any other particulars or information upon which she based her belief, either as to intention to dispose of property or as to leaving Ontario. The defendant owned the house and lot in Sarnia in which his family resided, said to be worth about $700, and that appeared to be his only asset.

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

S. B. Woods, for plaintiff.

TEETZEL, J.—The affidavits shew that defendant and his wife lived for many years most unhappily, and prima facie plaintiff is entitled to alimony by reason of his cruelty and

desertion. But defendant did not abscond from Ontario in 1902, within the meaning sought to be conveyed by plaintiff in her affidavit; he simply left his home owing to unhappy differences with his family, and, although he went to a foreign country, did not "abscond." (Sweet's Law Dictionary and Wharton's Law Lexicon, referred to). He is not an absconding debtor within the meaning of sec. 2 of R. S. O. 1887 ch. 79. Defendant returned to Sarnia about 3rd or 4th December, for the purpose, as stated in his affidavit, of inducing his wife to keep a man named Cook away from his (defendant's) house, and to return to live with his wife and children. He was summoned before the police magistrate at Sarnia, charged with failure to maintain his wife and children, the summons being returnable about 10th December, and on its return, he having failed to appear, a warrant for his arrest was issued, and on 11th December he was brought before the magistrate, but was released on his own bail, and the hearing of the charge adjourned. On 15th December a proposition was made by his counsel that he would return and live with his wife, provided Cook should leave the house. Plaintiff refused to agree to this, stating that she would never live with him. The proceedings were then adjourned until 22nd December, as stated in an affidavit of defendant's solicitor, with the understanding that it should be again enlarged for another week, so that defendant might return to his house and demonstrate that his offer was made in good faith. These police court proceedings were not disclosed by plaintiff in her affidavit upon which the order for arrest was obtained. In this respect, and also in respect of not having disclosed the condition of defendant's property and his means, the affidavit was, to say the least, somewhat disingenuous. The affidavits subsequently filed by plaintiff disclosed at most an intention by defendant to return to Ohio, but plaintiff's material entirely fails to disclose any intention on defendant's part to quit Ontario with intent to defraud his creditors in general or plaintiff in particular. Phair v. Phair, 19 P. R. 67, followed. In any view of the statements contained in the affidavits filed by plaintiff, defendant has established that he did not intend to quit Ontario with intent to defraud. Order made for his discharge, but, having regard to all the circumstances, the order should contain a clause that defendant shall not incumber or dispose of his house and lot pending the disposition of the action. Costs of the application to be disposed of by the trial Judge.