THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING DECEMBER 13TH, 1902.)

VOL. I. TORONTO, DECEMBER 18, 1902. NO. 43

DECEMBER 8TH, 1902.

ELECTION TRIAL.

RE SOUTH OXFORD PROVINCIAL ELECTION.

Parliamentary Elections—Corrupt Practices—Hiring Vehicles—Statutory Declarations of Proposed Witnesses — Saving Clause — "Trifling Extent"—Personal Charges against Respondent—Disagreement of Judges.

The particulars of the petition contained 114 distinct charges of corrupt practices. At the trial before STREET and BRITTON, JJ., at Woodstock, evidence was given as to 24 of the charges, the others being abandoned.

G. H. Watson, K.C., and A. G. Slaght, for the petitioners.

S. H. Blake, K.C., and Edmund Bristol, for the respondent.

STREET and BRITTON, JJ., were unable to agree as to two of the charges, one of which was a personal charge against the respondent of having corruptly paid to one Lloyd, the hostler at an hotel, the sum of $1; and the other of which was the charge of bribery by an agent. The only charge they both held to have been proven was charge No. 6, to the effect that John W. Patterson, whose agency was established to their satisfaction, had hired horses and conveyances from two livery stable keepers in Ingersoll, for the purpose of conveying voters to and from the polls on election day.

STREET, J., referred to the practice of engaging vehicles to drive voters to the polls, and said:—

There is no doubt that at every election numbers of public cabs and livery vehicles are furnished to both sides for the purpose of carrying voters to the polls, and I think I am not

wrong in saying that in most cases these are paid for as soon as it is deemed safe so to do. In other words, the law upon this subject is systematically broken or evaded, and it strikes me as most desirable that some change should be made, and that the use for election purposes of public conveyances kept for hire should either be prohibited absolutely on the day of the election, or their owners should be permitted to let them out on election days at the usual rates of hire.

The hiring of these conveyances by Patterson being the only corrupt practice proved to have been committed in the judgment of both the Judges presiding at the trial, we are asked by counsel for the petitioner to hold that the election is void. In my opinion, however, we must give effect to the saving clause introduced in the Act by sec. 172, which, though not happily expressed, appears to me to be intended to meet such a case as the present, where the corrupt practices proved are of such trifling extent that it cannot reasonably be supposed that the result has in any way been affected by them. Indeed, if we are not to apply it in this case, we must, in effect, hold that the saving clause is practically a dead letter. The proper holding, in my opinion, must be that the corrupt practices proved have not voided the election, and that the respondent is entitled to retain his seat.

As to the question of the propriety of taking statutory declarations from persons giving information of alleged corrupt practices was much discussed during the trial and upon the argument before us, I think I should add a few words with regard to it. The impropriety of taking such declarations has been repeatedly pointed out, and the reasons why the practice is improper stated. When, however, the persons making these declarations are paid sums of money for making them, it is obvious that the impropriety is greatly increased. A new element is then introduced, adding seriously to the difficulty, already sufficiently great, of separating the truth from the mass of perjury which is so common a feature of election trials. It is a practice which is not only improper, but unwise, for it goes far to defeat its own object by necessarily casting an increased amount of suspicion and doubt upon the evidence of all witnesses who state that they have taken bribes for their votes.

The respondent should have the general costs of the petition and trial, but the petitioners may set off their costs of the charges upon which they succeeded, and there should be no costs to either party of the charges upon which we have disagreed.

BRITTON, J.—This is a case where, at the most, whatever disagreement there may have been or suspicion, if any, on the part of either or both Judges, it is found that two corrupt practices by agents of the respondent have been committed. If these were committed with the knowledge of the respondent, then his election is void, but the relieving clause, 174, may be invoked against disqualification. If without the knowledge of the respondent, his election is void unless these corrupt practices were of such a trifling nature or extent that the result cannot have been affected by them altogether in connection with other illegal practices. The corrupt practices proved were the hiring of teams by J. W. Patterson to convey voters on election day. I do not find any evidence to shew that either of these corrupt acts was done with the knowledge of the respondent. Speaking for myself, I must say the evidence of the respondent, if he did not really know of or consent to the hiring of rigs, might have been more full. In dealing with a serious charge of this nature there should be affirmative evidence of the respondent's knowledge or consent, and I do not find that.

Section 172 recognizes that there may be a corrupt practice of a trifling nature which would not affect the result. The question then is: Has this election been reasonably affected by the corrupt practices established at the trial? The vehicles were hired to convey presumably legal voters to the polls. The question of influencing cannot be considered, as one of them was a Liberal and the other a Conservative. As to the application of sec. 172, I have read carefully the sections to which we have been referred. I adopt the language of Mr. Justice Ferguson in the Hamilton Case, 1 Elec. Cas. at p. 524: "As to whether or not the act was of trifling extent, I have difficulty in perceiving just what is meant by the expression, but I do not intend to add to what has been said by so many Judges in regard to the difficulties in construing or understanding this section. The reasoning of the learned Chancellor in the East Simcoe case is applicable in this case. Chief Justice Cameron says the section is pernicious in its effect and calculated to open the door to misconduct in elections, but the section is there, and I am bound to give it effect. . . ."

To deal with this particular case, where the majority was 173, we cannot say otherwise than that the two corrupt acts proved were of such trifling nature and extent that the result cannot reasonably be supposed to be affected by them. I therefore agree with my learned brother in the application of this section.

Moss, C.J.O. DECEMBER 8TH, 1902.

C.A.—CHAMBERS.

SMITH v. HUNT.

Appeal—To Supreme Court of Canada—Extension of Time—Grounds for Allowing—Negotiations for Settlement—Special Circumstances—Bona Fide Intention to Appeal.

Motion by defendants Hunt and Roberts for an order extending the time for appealing to the Supreme Court of Canada from the judgment of the Court of Appeal (ante 598).

D. L. McCarthy, for the applicants.

F. A. Anglin, K.C., for plaintiff.

Moss, C.J.O.—The judgment of this Court was delivered on the 19th September, 1902. The first proceeding taken toward an appeal was the service on 17th November of a notice of intention to appeal, but, as no such notice was necessary, its service was material only as evidence of the intention it expressed.

The affidavit filed in support of the motion set out that about the end of September negotiations for a settlement were going on, and that these continued until 17th November, when defendants and their attorney spent all day with plaintiff's solicitors, ultimately failing to reach a settlement. Thereupon, as the defendants alleged, plaintiff's solicitors were advised to proceed with an appeal. Notice of appeal was served and leave to serve notice of this motion obtained 20th November.

Upon an application of this nature it lies upon the applicant to shew, among other things, a bona fide intention to appeal, entertained while the right of appeal exists, and a suspension of further proceedings by reason of some special circumstances in consequence of which they are held in abeyance. No such case was made out here. Further, there was no evidence of any communication to plaintiff or his solicitors of any intention to appeal, or any arrangement or any understanding that the time for appealing should not be considered as running during the negotiations. In spite of In re Manchester Economic Building Society, 24 Ch. D. 488, where it is said that leave should be granted where justice requires it, no leave should be given here; and in any case no extension should in any event have been granted in favour of the defendant Roberts, who did not appeal from the judgment at

the trial, but as respondent urged some objections to the judgment, chiefly in respect to the jurisdiction of the Court and to costs.

Application of both defendants refused with costs.

FALCONBRIDGE, C.J. DECEMBER 9TH, 1902.

CHAMBERS.

RE BERGMAN v. ARMSTRONG.

Division Court—Jurisdiction—Action for Declaration of Right to Rank on Insolvent Estate.

Motion by defendant for prohibition to the 1st Division Court in the county of Middlesex against further proceeding on a judgment obtained in that Court against defendant, as assignee of an insolvent, declaring that plaintiff, as an employee of the insolvent, was entitled to rank upon the insolvent's estate for wages earned up to the time of the insolvency, in priority to ordinary creditors.

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

W. Davidson, for plaintiff.

FALCONBRIDGE, C.J., held that the Division Court had no jurisdiction to entertain the action under the Division Courts Act: Whidden v. Jackson, 18 A. R. 439. It would have been supposed that the amendment made to sec. 22 of the Assignments and Preferences Act (R. S. O. ch. 147) in the revision of 1897, whereby it was provided that in case an action to establish a claim against the estate of an insolvent was brought in the Division Court, the summons should be served upon the assignee, was intended to be of some effect. The question, however, came before Ferguson, J., since the amendment, in a case of Perry v. Laughlin, unreported, and he came to the conclusion that there was no jurisdiction in the Division Court.

Order made for prohibition as asked. No costs, the earlier decision not having been reported.

BOYD, C. DECEMBER 9TH, 1902.

CHAMBERS.

REX v. HAYWARD.

Criminal Law—Magistrate's Conviction for Theft—Juvenile Offender—Place of Imprisonment—Duration of Sentence—Discharge—Order for Further Detention—Circumstances.

Motion for discharge of prisoner brought up on habeas corpus from the Central Prison. The information was for

stealing eighty cents out of the contribution box in the Congregational Church at Paris. The defendant pleaded guilty before a police magistrate, and was convicted and sentenced to imprisonment for two years in the Provincial Reformatory. The magistrate was informed that the defendant was over seventeen years of age, and this was sworn to on this application. A formal commitment to the reformatory was made out, under which the prisoner was received there, but he was sent thence to the Central Prison without any formal direction.

E. E. A. DuVernet and Gordon J. Smith, Paris, for the prisoner.

Frank Ford, for the Crown.

BOYD, C., held that there had here been a miscarriage, first in sending a boy over 17 years of age to the reformatory, and next in sending him on a sentence of two years to the Central Prison, whereas a sentence of less than two years only should be to the Central Prison, and a sentence for not less than two years to the Penitentiary: Criminal Code, sec. 955; R. S. C. ch. 183, sec. 19. Therefore, upon the papers, no legal authority appeared to authorize the warden of the Central Prison to receive and detain the defendant.

On the question of whether the case was a proper one for further detention, under sec. 752 of the Code, and on a consideration of the facts, bringing the case under Reg. v. Randolph, 32 O. R. 212, the Chancellor held, that the matter fell to be dealt with under sec. 783 of the Code, the correct reading of sec. 785, suggested by the gloss on the margin, being to comprehend summary trial in "certain other cases" than those specifically enumerated in sec. 783. When the case in reality falls under sec. 783 (*a*), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months.

Discharge of prisoner ordered, he having been imprisoned since 2nd October, not being now in lawful custody, and being a first offender. No action to be brought against anyone by reason of imprisonment.

BOYD, C. DECEMBER 9TH, 1902.

WEEKLY COURT.

LEDUC v. BOOTH.

Will—Construction—Provision for Maintenance of Person—Alternative Provision.

Motion by plaintiff for judgment on the pleadings in an action brought for a declaration of the true construction of

the will of James Eves, and for arrears of an annuity granted thereby. By the will all testator's real and personal property was bequeathed to William Booth (the defendant) on condition that he should pay $50 per month to the plaintiff, "she also to have the use of the house where I now live." By a codicil the will was varied by providing that if William Booth "in his own absolute judgment is of opinion that it will be best for" the plaintiff "to be cared for in some institution or hospital, . . . then the said William Booth shall have the right . . . to place her in a place where she may receive proper care, attention, and necessaries for one in her condition . . . and may, with the consent of the plaintiff, "remove her to one of the institutions carried on under his direction." After the removal of plaintiff to the hospital the provision as to the plaintiff's occupation of testator's house was declared to be void, and the codicil further provided that the payment of the $50 per month "shall not be a charge upon my property, real or personal."

J. E. Jones, for plaintiff.

A. Hoskin, K.C., for defendant.

BOYD, C.—In August, 1901, the defendant came to the conclusion, and made it known to the plaintiff, that it would be for her welfare to give up keeping house and take the substituted benefit contemplated by the will and left to be brought into effect by the absolute judgment of the defendant. He was to have the right and authority to place her in a suitable institute, with this limitation, that, if the institution was one carried on under his direction, (i.e., as part of the organization of the Salvation Army) then the removal of the plaintiff was to be with her consent. The will is not to be read as requiring the consent of the plaintiff if the defendant selected an independent and sufficiently adequate house for aged and infirm persons. This he has done in the selection he has made, and he is willing that the plaintiff should take any other place of a similar nature, and not too expensive, if she prefers it.

Judgment declaring defendant to be entitled to possession of the house, and to cease the payment of the $50 per month, and charging him with no further sum than $17 per month, since December, 1901; directing him (as in terms of his offer) to allow plaintiff $15 pocket money, pay her expenses at a home not under his direction, and pay the costs of the litigation.

FALCONBRIDGE, C.J. DECEMBER 9TH, 1902.

TRIAL.

COTÉ v. MELOCHE.

Mortgage—Default of Payment of Interest—Possession.

The husband of the plaintiff had, before he died, in order to befriend defendant, taken a deed of the land in question in his own name, and executed a mortgage back for part of the purchase money. The mortgagee died, and the plaintiff, not as administratrix of her husband's estate, but out of her own moneys, bought the mortgage and took an assignment thereof from the executors of the mortgagee, who had threatened her with legal proceedings.

The plaintiff now claimed possession of the land.

A. H. Clarke, K.C., for plaintiff.

D. R. Davis, Amherstburg, and F. H. A. Davis, Amherstburg, for defendant.

FALCONBRIDGE, C.J., said that it was very unfortunate that the matter could not have been accommodated without costly litigation. No interest having been paid by defendant since March, 1901, the plaintiff was entitled to possession.

Judgment for plaintiff without costs.

DECEMBER 9TH, 1902.

C. A.

BERTUDATO v. FAUQUIER.

Master and Servant—Injury to Servant—Workmen's Compensation Act—Railway Contractors—Sub-contractors—Question of Liability—Ruling of Trial Judge—Questions for Jury—New Trial.

Appeal by defendant from judgment of LOUNT, J., in favour of plaintiffs upon the findings of a jury, for $900 and costs in an action under the Workmen's Compensation Act and at common law. The plaintiff, who was a workman upon railway construction work, was injured by a stone thrown by a blast. The chief question in the appeal was whether the plaintiff was in fact employed by defendants, who were the principal contractors, or by independent sub-contractors.

The appeal was heard by OSLER, MACLENNAN, MOSS, GARROW, JJ.A.

E. E. A. DuVernet, for appellants.

A. H. Marsh, K.C., and W. R. Wadsworth, for plaintiff.

On 24th November the Court intimated that the appeal would be allowed and a new trial directed.

Reasons for judgment were afterwards given by

OSLER, J. A.:—The plaintiff, when injured, was at the place provided for the men to sleep and cook their food. The questions upon which the appeal was taken were whether the effect of a contract between defendants and Chambers and Bell was to make the latter sub-contractors for the former, and whether the liability of defendants to the plaintiff was thereby excluded. There is not much room for doubt that the contract in question was in terms a sub-contract for the performance of that for which defendants had contracted, and that, therefore, if at the time of the accident the work was really being carried on under this contract, the defendants would be liable, if at all, only under the provisions of sec. 4 of the Workmen's Compensation for Injuries Act. The evidence would not warrant a recovery under that section, although the sleeping place at which plaintiff was hurt was provided by the defendants, if the defendants were not themselves carrying on the work, since the sleeping place might, as circumstances required it, have been moved according to the best judgment of those actually engaged in control. The more serious question was as to who was in fact carrying on the work, and as to the evidence tending to shew that, whatever was the effect of the sub-contract, the defendants were themselves in actual control. The defendants were entitled to a clear and distinct ruling of the trial Judge as to whether the document they relied upon was, as they contended, a sub-contract. This they did not obtain, and if the document had been construed as would have been proper, namely, as a sub-contract, the distinct issue might then have been presented to the jury, whether it had been abandoned, and whether the work was in fact being done by defendants or by Chambers and Bell independently. The trial was not satisfactory in this regard, and the persons who could have cleared up much of the confusion were not called.

New trial ordered, before which plaintiff may determine on what clause of the Workmen's Compensation for Injuries Act he will rest his case.

DECEMBER 9TH, 1902.

C. A.

DODGE v. SMITH.

Appeal—Leave to Adduce Further Evidence.

Motion by plaintiffs for leave to adduce further evidence on their appeal to the Court of Appeal from the decision of a

Divisional Court, (ante 46, 3 O. L. R. 305) reversing the judgment of the trial Judge, which was in favour of plaintiffs, and dismissing the action.

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

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

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

MOSS, C.J.O.:—Leave should be given to adduce in evidence the letters referred to on the affidavits, and such explanatory oral testimony as may be deemed necessary, and defendants should be at liberty to answer the evidence adduced by plaintiffs. Evidence to be taken before County Judge of Frontenac and returned by him to this Court, unless parties agree to have it taken at the approaching Assizes at Kingston.

OSLER, J.A. DECEMBER 9TH, 1902.

C.A.—CHAMBERS.

BAIN v. COPP.

Appeal—Court of Appeal—Leave to Appeal—Grounds—Life Insurance—Title to Moneys.

Motion by plaintiff for leave to appeal from the decision of a Divisional Court (ante 784) affirming the judgment of MACMAHON, J. (ante 706), at the trial, determining in favour of defendants the question of title to £2,500 paid into Court by the Star Life Insurance Company. The company took a mortgage from defendants, who covenanted to take out a policy in the company, to be deposited with them as collateral security. A life offered by defendants having been rejected, they procured one W. L. Bain to apply to the company for a policy, and one was issued in his favour, which was assigned by Bain to the defendants, who paid all the premiums thereon. Bain died, and the company paid the amount of the policy into Court, leaving the question of the right to the money to be determined in this interpleader issue, in which the administrator of W. L. Bain's estate was plaintiff, and the mortgagors, the assignees of the policy, defendants.

Plaintiff applied for leave to appeal on the sole ground that the policy was void under secs. 1 and 2 of the statute of Geo. III.

J. W. McCullough and S. W. McKeown, for plaintiff.

W. N. Tilley, for defendants.

OSLER, J.A.:—If the company had chosen to be dishonest, they might have resisted payment on the ground taken, but, having acted as a respectable company usually does when they

have received the benefit of the premiums, and having paid the money into Court, the statute is out of the question. If the action had been upon the policy, the Court might have taken notice of the illegality and refused relief against the company even if they had not set it up: Gedge v. Royal Ins. Co., [1900] 2 Q. B. 214. It is, however, now a question of the title to the money paid into Court, and all evidence of the origin of the policy is irrelevant. If the plaintiff set up the illegality, and shewed that the policy was void, that would effectually defeat his own title, while the defendants could establish their claim without proof of more than the policy itself, admitted by the Company, and the assignment thereof to them, in view of which it is not easy to see what right the deceased or his administrator could have. Worthington v. Curtis, 1 Ch. D. 419, is a satisfactory authority for the view that where the contest is between rival claimants to the policy moneys which the insurance company have paid, without regard to possible defences, the Court will look no further than to the title which they may be able to establish as between themselves.

Motion for leave to appeal refused with costs.

BOYD, C. DECEMBER 10TH, 1902.

CHAMBERS.

RE ROCHON v. WELLINGTON.

Division Court—Attachment of Debts — Wages of Debtor — Married Man—Proof of Being—Error in Ruling as to Evidence—Prohibition.

Motion by primary debtor to prohibit the clerk of the 4th Division Court in the district of Nipissing from paying over to the primary creditors a greater sum than $7.03 out of $32.03 paid into Court by the garnishees, the employers of the primary debtor, the former sum being the whole amount due by them to the primary debtor for wages. The Judge in the Court below decided that, as it was not proved that the primary debtor was a married man, the whole amount should be paid over to the primary creditors.

W. E. Middleton, for the primary debtor.

E. Bayly, for the primary creditors.

BOYD, C.:—All the evidence adduced went to shew that the primary debtor was a married man, with a number of children, whom he supported, and the fact was made out with reasonable clearness and sufficiency as a matter of repute extending over at least four years. The decision below was

not founded upon conflicting evidence, but upon the theory that the best evidence must be given, and that it was essential to produce the debtor (who could not be found) and prove the fact of actual marriage by him. This was a wrong assumption in point of law, by which was nullified the beneficial effect of the exemption as extended to labourers' wages up to $25 from the effects of compulsory process. Prohibition as asked on authority of Elston v. Rose, L. R. 4 Q. B. 5, and Liverpool Gas Co. v. Everton, L. R. 6 C. P. 414. No costs.

BOYD, C. DECEMBER 10TH, 1902.

CHAMBERS.

RE JOHNSTON, CHAMBERS v. JOHNSTON.

Will—Construction—Bequest to One for Use of a Church—Trust—Mixed Fund—Perpetuity.

Motion by executors for directions as to disposition of $2,000, part of estate of James Johnston. The testator made his will more than six months before his death, thereby directing that land should be sold and out of the mixed realty and personalty, $2,000 paid to the Rev. N. W. for the use of the Reformed Presbyterian Church. He added that such sum was to be expended by N. W. in the manner best calculated by him to advance the principles of the church.

W. M. Douglas, K.C., for the executors.

D. W. Saunders, for the Reformed Presbyterian Church.

J. G. O'Donoghue, for next of kin.

BOYD, C.:—This is a bequest of moneys derived from the lands, to N. W. as trustee for the church named, and it is valid under sec. 24 of the Religious Institutions Act (R. S. O. ch. 307). The person named having exercised the functions of his trusteeship by granting the fund (as N. W. had done), to the church, there the fund was at home, and should not be disturbed. So far as the $2,000 came out of personalty no objection could arise as to perpetuity. Costs out of estate.

MACMAHON, J. DECEMBER 10TH, 1902.

TRIAL.

PHELPS v. McLACHLIN.

Sale of Goods—Refusal of Vendor to Deliver until Payment—Breach of Contract—Damages—Reference.

Action for damages for non-delivery of certain poles, under a written contract, which, as the plaintiff contended,

he could not be called upon to pay, until the poles had been first inspected and passed by both parties, and defendants had supplied the cars and shipped the poles. The defendants contended that if the poles had been on the ground for thirty days and an estimate was made after the thirty days had elapsed, the plaintiff was obliged to make immediate payment; otherwise they (defendants) were not called upon to deliver.

W. R. Riddell, K.C., and R. J. Slattery, Arnprior, for plaintiff.

G. F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for defendants.

MacMahon, J., held that both parties were wrong in their interpretation of the contract on these points, but that the plaintiff was justified in treating the defendants' letter to him of the 2nd August, in which they refused to load the poles until payment, as a breach of contract to deliver, and in rescinding the contract.

Judgment for plaintiff, with a reference to the Master at Ottawa to assess the damages the plaintiff has sustained from the non-delivery of such poles as defendants had on hand under the estimate (20,000) referred to in the contract, and which would pass inspection.

Boyd, C. December 11th, 1902.

WEEKLY COURT.

ATTORNEY-GENERAL v. TORONTO GENERAL TRUSTS CORPORATION.

Revenue—Succession Duty—Provisions of Will—Future Estates—Future Enjoyment—Duty not Presently Payable.

Stated case, submitting to the Court the question whether or not the property disposed of by paragraphs 11 to 23 of the will of Hugh Ryan, was presently liable to the payment of succession duty under sec. 12 of the Succession Duties Act. The estate was vested in the Toronto General Trusts Corporation, the trustees and executors, upon trust to collect the income and apply the whole net income for the benefit of the children and children's children for twenty-one years after the death of the testator. At that time, or upon the death of the last surviving child, the capital of the estate was to be divided among the specified members or descendants of testator's family. In the first twenty-one years after the death of the testator, the trustees had a discretion as to the distribution or accumulation of the income, which was to be divided

into fourths: one-fourth being intended for the benefit of each of the four children of testator. After the end of the twenty-one years and before the death of the last surviving child, distribution was to be made, with the accumulations of income, among all the beneficiaries. The children and their families were absolutely entitled to the beneficial use of all the income during the period beginning twenty-one years after testator's death and the death of his last surviving child. During the twenty-one years the children were not absolutely entitled to the whole income from year to year, but the frame of the will was such that the trustees, in loco parentis, should exercise a discretion to have each or all supported and maintained with as large an allowance as would be beneficial and advantageous to them, and further that, if the whole income was not expended in its fourfold division, the accumulations should, at the end of the twenty-one years or sooner, be paid to such of the family group, who had been maintained, as the trustees should decide.

G. F. Shepley, K.C., for the Attorney-General.

J. J. Foy, K.C., for the trustees.

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

BOYD, C.:—There is a plainly marked future period at which the estate is to be divided. Till then the income is to be applied for the maintenance of the children, and, if not all so applied, is to be accumulated for the benefit of the children at the end of twenty-one years. The scheme of the Succession Duties Act is to provide for a duty on succession to property by persons succeeding to estates or interests in property by testate or intestate title. The Act provides for the present payment of the duty on the present possession or enjoyment of the estate. In the case of future estates, the duty is not to be levied until the person shall come into actual possession by the determination of the prior estate for life or years. Here, there was a prior interest for life or years (according to the event in fact) in which the trustee (standing in loco parentis) was entitled to the present income of the property, and was to be so entitled until the time arrived when the corpus was to be divided. The trustee was not entitled to the beneficial enjoyment of this income, but the Act did not use the word "beneficial," though that was found in the new section substituted for sec. 11 (2) in 1901. The trustee, nevertheless, collected and held for the enjoyment and support of the beneficiaries, and the whole of each year's income might be so expended during or at the end of the 21 years. This share of testamentary disposition satisfied the meaning of the statute, that where there was a present enjoyment there

should be a present payment of the duties, based upon the estate or interest which was enjoyed. In this case that was the prior estate for years or the life of the longest lived of the children—after which came the future estate in fee, not now to be levied upon for the payment of duty.

Stated case answered in favour of defendants.

BOYD, C. DECEMBER 12TH, 1902.

CHAMBERS.

RE NAYLOR.

Will—Devise in Trust for Church after Expiry of Life Estates—Time of Making Will—Statute.

Motion by executors for order declaring the construction of a will, the question presented being with respect to a devise in trust to the Western Circuit of the Bible Christian Methodist Church after the expiry of life estates.

W. E. Middleton, for the executors.

W. F. Kerr, Cobourg, for the Church.

BOYD, C.:—The will was made more than six months before the testator's death. Therefore it was valid under R. S. O. 1877 ch. 216, sec. 19, and since the title of the church first arose on the expiry of the life estates, which was the period of "acquisition" within the meaning of sec. 12 of the Act referred to, the church might hold the land for seven years. Since the devise was covered by this clause of the statute, it did not appear necessary to consider the various cases cited and points urged. Costs out of the estate.

MACMAHON, J. DECEMBER 12TH, 1902.

TRIAL.

BERRY v. DAYS.

Covenant—Restraint of Trade—Breach—Waiver—Injunction—Damages—Reference.

Action to recover damages for an alleged breach by the defendant of a covenant, contained in a bill of sale of defendant's drug business to the plaintiff and his son, that he (defendant) would not "directly or indirectly engage in the drug business in the village of Lucknow or within a radius of ten miles therefrom during a term of five years: and that he will not open or have part in a third or further drug store in the said village during a term of ten years." The plaintiff subsequently promoted a partnership drug business between his son and defendant, his interest in which, however, the

latter sold, and, as was admitted, opened a third or further drug store in the village.

W. Proudfoot, K.C., and P. A. Malcomson, Lucknow, for plaintiff.

H. Morrison, Lucknow, for defendant.

MACMAHON, J.:—There were two distinct covenants by defendant, one not to engage in a drug business in the village or within ten miles during five years, and the other not to open or have part in a third or further drug store in the village during ten years. By permitting defendant to enter into partnership with his son in an already existing business, plaintiff had waived the breach of the first covenant, but not of the second. See Barwell v. Inns, 24 Beav. 307; Parnell v. Dean, 31 O. R. 517; Roper v. Hopkins, 29 O. R. 584.

Injunction granted restraining defendant from having any part or interest in any third or further drug store in the village of Lucknow during the remaining period of ten years. Reference to the local Master at Goderich as to damages. Costs of action and reference to be paid by defendant.

DECEMBER 12TH, 1902.

ELECTION TRIAL.

RE LENNOX PROVINCIAL ELECTION.

PERRY v. CARSCALLEN.

Parliamentary Elections—Corrupt Practices—Bribery by Respondent —Bribery by Agents—Evidence—Hiring Vehicles — Payment for Vehicles on Polling Day.

Petition tried at Napanee before OSLER and MACLENNAN, JJ.A.

G. H. Watson, K.C., and W. S. Herrington, Napanee, for petitioners.

Walter Cassels, K.C., E. Bristol, and G. F. Ruttan, Napanee, for the respondent.

At the trial judgment was reserved on five charges, numbers 22, 29, 30, 43, 52.

Charge 22 was a personal charge against the respondent of bribery of one Whisken by giving him, at the close of a meeting in a hall at Bath, of which he was caretaker, 50 cents more than the usual fee for his trouble about the hall, and asking him at the same time for his vote.

OSLER, J.A., held that, even if there was a suspicion (which there was not) of the truth of the respondent's denial, the payment of the trifling additional sum over and above what was perfectly legitimate, should, both as to fact and intent, be proved, if not to a demonstration, yet, at the least, so as to produce moral certainty, and even this had not been done.

MACLENNAN, J.A., held that it was impossible to give credence to the account which the respondent gave of the transaction, contradicting the evidence of Whisken, having regard also to the respondent's account of the sum of $500 received by him from the Conservative Association, and the two sums of $100 each received by him from Alexander Carscallen and Uriah Wilson respectively, and therefore the charge must be found to have been established.

Owing to difference of opinion, charge dismissed.

Charge No. 29 was as to the bribery of R. T. Jones by the payment to him of $2.25 to induce him to vote for respondent, or for hire and payment for his employment in carrying voters to the poll in violation of sec. 159 (1) (a) and (c) of the Election Act.

THE COURT held that there was not the least pretence that this was a corrupt payment.

Charge No. 30 was as to a payment to John Smith, similar to that made to R. T. Jones.

Dismissed on the same ground.

Charge No. 43 was as to the payment by James A. Wilson of $1 to F. W. Parkinson to induce him to vote for respondent. The charge was made by Parkinson and categorically denied by Wilson.

OSLER, J.A., held that as there was no corroboration of Parkinson's statement, or any circumstances which would lead to its being preferred to Wilson's, but rather the contrary, the charge must be dismissed.

MACLENNAN, J.A., held that the fact of the payment ought to be regarded as proved, but that there was no sufficient evidence of Wilson's agency, and that the charge should be dismissed.

Charge No. 52 was as to the hiring by the candidate and his financial agent and other agents, and their payment for or promise to pay for, vehicles to carry voters to and from the poles.

THE COURT held that, although the liverymen had, before the day of the election, charged the candidates more

than they charged at other times for the use of vehicles, this was done to protect themselves from loss by furnishing their conveyances gratis (as they did) to the friends of both candidates on election day, and that although, if the overcharging had been done by arrangement with the candidates or their agents, it would probably have been an unsuccessful attempt to evade the statute, yet as the petitioner had not, as was necessary, made out a clear case on plain evidence of a charge made or intended to be made for the use of the vehicles on election day, the charge against respondent must be dismissed.

DECEMBER 12TH, 1902.

DIVISIONAL COURT.

REX v. McGINNES.

Conviction—Motion for Rule nisi to Quash—Untenable Grounds—Like Motions in Other Cases—Rule Granted on Terms.

Motion by defendant, on return of a writ of certiorari, for a rule nisi to quash his conviction by a justice of the peace for the county of Simcoe, at Bradford, for an alleged offence against the Master and Servant Act, R. S. O. ch. 157, as amended by 1 Edw. VII. ch. 12, sec. 14, in leaving the employment of one Stoddart before repaying the cost of transportation advanced as wages.

S. B. Woods, for defendant, contended that the information disclosed no offence, or at most the offence of obtaining money under false pretences, over which the magistrate had no jurisdiction, and objected to the conviction on grounds of irregularity.

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

MEREDITH, C.J.:—Many of the numerous grounds urged against the conviction are manifestly untenable, and we should have hesitated to grant a rule nisi on any of the objections, but that another Divisional Court, in three other cases arising out of the same circumstances, has granted rules nisi to quash the convictions, and these rules are now pending.

We therefore grant the rule nisi as asked, but it is not to issue until the other cases are disposed of, and then only in the event of the convictions in these cases being quashed; and in that event, if the respondent consents to the conviction in this case being quashed on the same terms, instead of a rule nisi, a rule absolute will go quashing the conviction on these terms.