THE

ONTARIO WEEKLY REPORTER.

(To and Including December 14th, 1903.)

VOL. II. TORONTO, DECEMBER 17, 1903. No. 43.

MEREDITH, C.J. NOVEMBER 20TH, 1903.

CHAMBERS.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Solicitor—Authority to Bring Action in Name of Company—Determination of Question—Stay of Action.

Appeals by plaintiffs from orders of Master in Chambers, ante 944.

W. N. Ferguson, for plaintiffs.

J. W. St. John, for defendants the Leadleys.

A. J. Russell Snow, for defendant Moore.

MEREDITH, C.J., dismissed the appeals. Costs in the cause.

MACMAHON, J. DECMEBER 7TH, 1903.

CHAMBERS.

FLYNN v. TORONTO INDUSTRIAL EXHIBITION ASSOCIATION.

Pleading — Statement of Claim — Action for Personal Injuries—Negligence—Defective Construction of Machine —Allegation that Defendants Insured against Accident —Irrelevancy—Striking out.

Appeal by plaintiff from order of Master in Chambers, ante 1047, striking out the 9th paragraph of the statement of claim.

W. N. Ferguson, for plaintiff.

G. L. Smith, for defendants.

MACMAHON, J., dismissed the appeal with costs to defendants in any event.

BOYD, C. DECEMBER 7TH, 1903.

CHAMBERS.

RE MCKENZIE.

Will—Legacy—Ademption—Parol Evidence—Issue Directed to be Tried.

Motion by executor under Rule 938 for order declaring construction of will of William McKenzie, late of the town of Kincardine, farmer. The will was divided into clauses:—(1) directing payment of debts, etc.; (2) a bequest of $500 "to my housekeeper Flora Fraser, to be paid her as soon as possible after my decease;" (3) to the testator's brother Hugh McKenzie the right to use and occupy a house and lot in Kincardine and to use fruit growing on the lot; (4) a devise to Flora Fraser for life of a house and lot in Kincardine; (5) "I will, devise, and bequeath to Hugh Graham, executor and trustee of this will, all my real and personal property . . . after the payment of the bequest in clause 2, and when the bequests in clauses 3 and 4 expire by the death of the parties mentioned therein, in trust to support and maintain . . . Flora Fraser for . . . life." (6) "Whatever remains of my estate after the keep and support of . . . Flora Fraser during her life shall be paid over to my nephew John McKenzie, his heirs and assigns forever." The question was as to ademption of the legacy of $500 by payments in the testator's lifetime.

C. C. Ross, for executor.

J. H. Moss, for Flora Fraser.

T. D. Delamere, K.C., for the other beneficiaries.

BOYD, C., held, following Re Smythies, [1903] 1 Ch., that this must be regarded as a legacy given merely for bounty, and not for a particular purpose. No purpose is referred to in the will, and one cannot be imported into the case as the legal effect of acts done in the lifetime of the testator. Re Fletcher, 38 Ch. D. 375, referred to. Apart from the affidavits, the will contains a plain direction to pay $500 to the beneficiary. Having regard to Tuckett-Lawry v. Lamoureaux, 1 O. L. R. 364, 3 O. L. R. 577, evidence of intention is admissible, and if the parties seek to litigate further as to the effect of the evidence, an issue will be directed, but with this proviso, that if the result is that the decision in favour

of the legacy stands, the party seeking the issue shall pay the additional costs, unless for good reason he is excused by the trial Judge. If no issue, costs of application to all parties out of the estate.

BOYD, C. DECEMBER 7TH, 1903.

TRIAL.

HACKETT v. COGHILL.

Lien — Repair of Ships — Possessory Lien — Parting with Possession—What Amounts to—Floating Ships on Navigable Waters—Caretaker for Owners.

Action to recover the value of work done in repairing vessels and to establish a lien therefor on the vessels.

R. C. Clute, K.C., and W. H. B. Spotton, Wiarton, for plaintiff.

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

BOYD, C.—The single issue which came before me for trial was, whether or not plaintiff had a lien for his charges to any extent upon the dredge and scows owned by defendants. Plaintiff's claim is in respect of repairs done upon these vessels when they were hauled out in the harbour at Wiarton. After the work was done the vessels were respectively restored to the water and taken first to the dock belonging to Castner and afterwards to the old dock erected by the town, which was in common and public use even after the erection of a new dock by the town about two years ago. When lying at the old dock plaintiff put lock and chain upon the dredge and notified the owners, but before this he says that he had tied up the vessels at this dock and claimed to be in possession of them.

The evidence shews that plaintiff had permission from the owner to use Castner's dock, and from the town authorities to use the old dock, by verbal license, for the purpose of his business in repairing vessels. The legal possession of the water lots on which the mooring existed at the time of the dispute as to possession which is now being litigated, was vested in the Crown. . . . It is further in evidence that the owners had a person in possession of the dredge for the purpose of looking after it and keeping the machinery in proper order, and he was on the boat at the time it was chained up by plaintiff.

Upon this state of facts it appears to be impossible to support the claim of plaintiff to a lien on the vessels. His

right exists only at common law to a possessory lien, and the origin and extent of that lien is defined by Buller, J., in Lickbarrow v. Mayor, 6 East 25 n., thus: "Liens at law exist only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone."

Later cases shew explicitly that one necessary ingredient of lien is that the person claiming it should have full possession, meaning thereby exclusive and continuous possession, and, if the things are moved from the place of repair, it must be to a place where absolute and entire dominion over them can be retained—a thing which can rarely be done: see Mors-le-Blanch v. Wilson, L. R. 8 C. P. 227, at p. 238; Ex p. Willoughby, 16 Ch. D. 610, 612.

When the vessels in this case were floated, it was on navigable water, and when they were tied up it was at first to a place where plaintiff had only permission to go from Castner, and ultimately to a dock which was in public use and to which plaintiff has no exclusive possession or right of access . . . [Reference to King v. Indian Ordnance Co., 11 Cush. 231; The Scio, L. R. 2 Ad. & Ecc. 353, 356.]

Still further, the acts of removal and tying up were not done by plaintiff alone, but in conjunction with the employees of the defendants and the agent of the owner.

That possession was not retained by plaintiff on the moving of the vessel to the dock, is evident from the presence on board the dredge as caretaker and agent of the owners of a succession of persons following each other down to the date of the litigation. It may be that there is no need to keep the vessel within the premises of the repair-man to preserve the lien, and that placing a ship-keeper aboard to retain possession for the lien-holder when the ship is floated on public waters, might suffice, as was suggested and apparently sanctioned in British Engine Co. v. Ganes, E. B. & E. 361 (affirmed, 8 H. L. Cas. 342). But here that act of supervision was attended to by and in the interest of the owners, and affords a visible token of their being in possession throughout.

There can be no intermittent possession quoad such a lien —once lost it is gone and cannot be restored by repossession: Hartley v. Hitchcock, 1 Stark. 408; Jones v. Peart, 1 Stra. 557; Forth v. Simpson, 13 Q. B. 680; Reilly v. McIlmurray, 29 O. R. 167.

My decision is against any right to hold the vessels for the payment of the debt, and they must go to the possession of the owners as against this claim of plaintiff.

DECEMBER 7TH, 1903.

C.A.

RE NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

RE NORTH PERTH PROVINCIAL ELECTION.

MONTEITH v. BROWN.

Parliamentary Elections—Controverted Election Petition—Extending Time for Trial—Fixing Day for Trial—Grounds for Extension—Order—Appeal.

Appeals by Little and Brown, the successful candidates, from orders made by OSLER, J.A., on the 11th November, extending the time for the commencement of the trial of the petitions against their respective elections, until 31st January, 1904.

J. P. Mabee, K.C., for the respondent Brown.

H. L. Drayton and A. G. Slaght, for the respondent Little.

J. Baird, for the petitioner Monteith.

E. B. Ryckman, for the petitioner Snider.

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

MOSS, C.J.O.—On the 5th November an application was made on behalf of the petitioners, Messrs. Snider and Monteith, to Mr. Justice Osler, one of the Judges on the rota, to fix days for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the learned Judge was unable to fix dates on which it was certain that the four Judges required would be able to proceed with the trials. The respondents were not prepared to agree to an extension of time, and the application to fix the date of trial stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before Mr. Justice Osler on affidavits, and the orders now appealed from were made.

The grounds of appeal chiefly relied on are, that no material or sufficient facts or circumstances to justify the extension of time were shewn; that the petitioners were guilty of delay; and that there were no substantial reasons upon

which a judicial discretion might or ought to be exercised in favour of the applications.

Section 47 of the Controverted Elections Act enacts that, subject to the provisions of sec. 48, the trial of every election petition shall be commenced within 6 months from the time when the petition was presented, and, so far as practicable, shall be proceeded with de die in diem, unless on application supported by affidavits it is shewn that the requirements of justice render it necessary that a postponement of the case should take place.

The section further enacts that an application to postpone the case or extend the time for fixing the day of trial may be made to a Judge of the Court of Appeal at any time before the expiration of the 6 months, and the Judge may thereupon, in his discretion, postpone the case or extend the time for fixing the day of trial to a day before or after the expiration of the 6 months.

Section 48 enacts that in the computation of any delay allowed for any step or proceeding in respect of the trial or for the commencement of the trial under the 47th section the time occupied by the session shall not be reckoned.

The material dates are the following:—

	1903.
Presentation of petition	February 4
Commencement of session	March 10
Prorogation	June 27
Application to rota Judge to fix dates of trial	November 5
Motion to extend time	November 11

On the 10th March, when the session commenced, 1 month and 5 days had elapsed since the time of the presentation of the petition. From the 27th June to and inclusive of the 5th November, 4 months and 8 days elapsed, making together 5 months and 13 days, to be reckoned from the date of the presentation of the petition. There were therefore 17 days before the expiration of the 6 months. The last of these days would expire on Sunday 22nd November. Reckoning in the most favourable way for the respondents and excluding the following Monday, there remained the 20th and 21st November, for either of which the 15 days' notice of trial required by Rule 27 might have been given by the Registrar, if the learned Judge had been in a position to fix either or both of them as the days for the commencement of the trials. The applications to the rota Judge were therefore in time to enable the trials to be commenced within the 6 months, and the failure to fix days cannot be attributed to the petitioners.

The provisions bearing on the fixing of days are sections 16 and 47 of the Act, and Rules 26 and 27, and these leave the matter in the hands of the rota Judges. The petitions, as far as conveniently may be, are to be tried in the order in which they stand in the list to be prepared by the Registrar; the trials are to be commenced within 6 months from the presentation unless the time is extended; and the time and place of the trials are to be fixed by the Judges on the rota. And the fact that, owing to other engagements, the Judges were unable to commence the trials within the time limited should not prejudice the petitioners. Probably the only motion open to them, under the circumstances, was to extend the time for fixing the days of trial.

It was argued that the petitioners have shewn no diligence in preparing for trial, and that the affidavits shew that they would not have been ready to proceed on any of the days mentioned. But, if the days had been fixed, they would have been obliged to proceed, or shew good grounds for a postponement. If they proceeded, their want of preparation could be no disadvantage to the respondents, and if they applied for a postponement, their neglect to take the usual steps could be strongly urged in opposition to the application. While the lapse of 3 months from the presentation of the petition without the day for trial having been fixed, entitles any elector interested in the election to move under sec. 46 to expedite matters by procuring himself to be substituted for the petitioner, it is not open to the respondent to complain of lack of diligence by the petitioner within the 6 months—no days for trial having been fixed. If days had been fixed, and there were delays after that, different considerations might arise: Re Addington Election, 39 U. C. R. 131.

Much of what was necessary to be shewn on the application to extend the time transpired in the presence of the learned Judge, and the facts were within his own knowledge. There is no reason why he should not act upon that knowledge in considering the application to extend the time.

And having regard to the whole circumstances, the justice of the case was entirely in favour of making the orders. The learned Judge rightly exercised his discretion, upon sufficient grounds and for sufficient reasons appearing before him, and his orders should not be interfered with.

Having regard to the statute and Rules and the stage at which the applications were made, the appropriate form of the orders would seem to be to extend the time for fixing the days of trial rather than the time for the commencement

of the trial. If necessary, they may be amended in that respect.

The cases will then be left to be dealt with by the rota Judges along with the other petitions on the Registrar's list.

The appeals are dismissed. Costs in the petition.

CARTWRIGHT, MASTER. DECEMBER 8TH, 1903.

CHAMBERS.

RE SOLICITORS.

Solicitor—Agreement with Clients—Retaining Gross Sum for Costs—Proof of Agreement—Application for Delivery and Taxation of Bill—Estoppel by Agreement.

Motion by solicitors to set aside a præcipe order for delivery and taxation of a bill of costs.

E. E. A. DuVernet, for the solicitors.

W. E. Middleton, for the clients.

THE MASTER.—The solicitors set up an alleged agreement by the clients to accept $200 in settlement of a claim, leaving the solicitors to get as much as they could for their costs from the opposite party. After some negotiations, and apparently after the issue of a writ of summons, a payment was made to the solicitors by the opposite party of $300. Of this sum $200 was paid by the solicitors to the clients, and the remainder was kept by the solicitors for their costs, no account of any kind being rendered. The clients and solicitors live in different but neighbouring towns, so that a considerable correspondence passed between them. . . .

[The Master set out the correspondence and referred to the affidavits.]

In my view, there is nothing in the correspondence to support any such agreement as is now set up by the solicitors. . . . Whether or not such a bargain was orally made it is idle to inquire. Anything of the sort is emphatically denied. In any case it was the duty of the solicitors to have preserved evidence that any such bargain, if made, was fully explained to the clients and accepted by them. The same rules must apply as in the case of a retaining fee and a retainer. I refer to what I said on this point in Pirie v. McCann, ante 546, and cases there cited. . . .

So far as I understand the law of this Province, a client is not estopped by such an agreement from claiming his right to delivery of a bill and taxation. The law in England is apparently different. Re Chapman, 20 Times L. R. 3, relied on by Mr. DuVernet, is therefore distinguishable, (1) on this ground, and (2) because the Court of Appeal thought the agreement savoured of an arrangement to stifle a criminal prosecution, and so declined to aid any of the parties concerned therein. . . .

[Re Pinkerton and Cooke, 18 P. R. 331, and Re McBrady and O'Connor, 19 P. R. at p. 44, referred to.]

An attempt was made some years ago to adopt the English law, but the bill was withdrawn, and has not since been brought before the Legislature.

The motion must be dismissed with costs to be set off against such costs as may be taxed on the reference, and the balance of the $300 will be payable to the clients, together with the excess (if any) of the costs of this motion over what is taxed to the solicitors.

CARTWRIGHT, MASTER. DECEMBER 8TH, 1903.

CHAMBERS.

APPLETON v. FULLER.

Parties—Joinder of—Several Torts—Actions for Penalties—Company and Agent—Election.

Action to recover penalties under 63 Vict. ch. 24 (O.) against the Eagle Lake Gold Manufacturing Co. and against one Fuller, as the company's representative. The statement of claim alleged (1) that the company had carried on business in Ontario without the necessary license, and had thereby rendered themselves liable to a penalty of $50 a day for 87 days, counting from 23rd February, 1903, to the issue of the writ of summons, amounting to $4,300; (2) that defendant Fuller had carried on business as the representative of the company since 23rd February, 1903, and had thereby incurred a penalty of $20 a day for the same 87 days, amounting to $1,740.

The defendants moved for an order requiring plaintiffs to elect against which defendant they would proceed.

J. B. O'Brian, for defendants.

Casey Wood, for plaintiffs.

THE MASTER:— . . Under Rule 186, as explained in Hinds v. Town of Barrie, ante 995, it is impossible "to join claims against two or more defendants in respect of their several liability for several torts."

Mr. Wood suggested that in some sense it was really only one tort. But the answer is obvious. Either Fuller was acting as agent and thereby violating sec. 15 of the Act, or else the company were so acting and thereby violating sec. 14. That this suggestion was not the idea of the pleader is plain from there being a claim against each of the defendants and for a different penalty in each case. And it was long ago decided in Hurdymann v. Whittaker, 2 East 569 n., that, although in a proper case several defendants could be jointly sued in a qui tam action, only one penalty could be claimed or recovered.

The Act in question must be construed strictly. It nowhere has even a suggestion of both the company and their representative as agent being liable in respect of one and the same violation of the provisions as to obtaining a Provincial license. . . .

Even where the statute is plain, the Court does not favour qui tam actions. This is shewn by Longeway qui tam v. Avison, 8 O. R. 357, and cases cited.

The plaintiffs must elect within 14 days against which defendant they will proceed, and the action must then be dismissed with costs as against the other.

Under sec. 17 any further action against such other defendant will apparently be barred by lapse of time. It would appear from the statement of claim that the right of action must at the latest have arisen on the 21st May, when the writ was issued. It may be, however, that one or other of the defendants after that date continued to act without a license, and so may have incurred further penalties.

BOYD, C. DECEMBER 8TH, 1903.

CHAMBERS.

RE WAGNER.

Devolution of Estates Act—Intestate Succession—Real Estate—Right of Half Sister to Share—Rights of Father—Assignment of Father's Interest—Impeaching—Issue—Costs.

Application by the administrator of the estate of Flora Mills Wagner, a deceased infant, for an order determining the rights of David Peter Wagner, Robert Mills, Edwin

Mills, Stanley Mills, and Lois Home Wagner in the estate of Flora Mills Wagner, and for directions to the administrator. Nelson Mills, of the city of Hamilton, died in 1876, leaving a will by which he gave all his estate to trustees in trust in the first place to pay his debts, etc., and in the second place for the use and benefit of his wife Cynthia Mills, and his children Charles, Stanley, Robert, Flora, and Edwin, in equal shares, and directed the trustees to set apart and allot to each child, upon his or her attaining 25 years, his or her share. The daughter Flora married David P. Wagner. The only issue of the marriage was the infant Flora Mills Wagner, who was born 25th March, 1889. Her mother died on the same day, her share of the estate having been previously allotted to and accepted by her. After her death it was agreed between David Peter Wagner, as guardian of the infant Flora Mills Wagner, and the trustees, that certain land in Hamilton should be allotted to the infant as her share of the interest of her mother in the estate of Nelson Mills. David Peter Wagner married again in 1891, and had issue one daughter, Lois Home Wagner, born in 1892. The infant Flora Mills Wagner died 22nd June, 1903. Robert Mills, Edwin Mills, and Stanley Mills claimed the estate of the deceased infant under an assignment from David Peter Wagner of 13th August, 1896. David Peter Wagner denied this claim, and claimed the estate absolutely. Lois Home Wagner claimed a share.

W. S. McBrayne, Hamilton, for the administrator.

H. E. Rose, for David Peter Wagner.

E. D. Armour, K.C., for the infant Lois Home Wagner.

A. B. Aylesworth, K.C., for the assignees of David Peter Wagner.

Boyd, C.—The Devolution of Estates Act passed in Ontario in 1886 makes a change amounting to a new rule in the law as to the succession to real estate of persons dying intestate, and directs generally that land shall be distributed as personal property among the next of kin of a person dying intestate. The original sec. 4 of the Act (49 Vict. ch. 22 (O.)) enacts that so far as real property is not disposed of by deed, will, etc., the same shall be distributed as personal property not so disposed of is hereafter to be distributed. . . . One of the changes made in the law of distribution alluded to in the "hereafter" of the 4th section, appears in the provision of sec. 6 (R. S. O. 1897 ch. 127) in regard to the case of a person dying intestate and without issue,

the father surviving. He shall not be entitled to any greater share under the intestacy than the mother or any brother or sister surviving. . . .

Section 6 has been construed to mean that the father has to share the intestate estate of his child with the brothers and sisters of that child and the children of deceased brothers and sisters, so that there shall be equality of distribution among father and all children, living and dead with issue: Walker v. Allen, 24 A. R. 340.

The section has been thus construed as giving in the case of the father that which was given in the case of the mother surviving by 1 Jac. II. ch. 17, sec. 7 (R. S. O. ch. 335, sec. 5.) The privilege of the parent to take all in certain cases was abrogated and distribution made among the other next of kin as specified. Now, under the statute of James it has been held that brothers and sisters of the half blood are equally entitled to share with those of the full blood: Jessup v. Watson, 1 My. & K. 655. This decision is conformable to the rule which has long obtained in the application of the Statute of Car. II. as to distribution, whereby the half blood has an equal share with those of the full blood, and the distinction was at an early date noted between the inferior position of those of half blood as to descents of land as compared with administration of personal estates, where those of half and whole blood were all one: Earl of Winchelsea v. Norcliffe, 1 Vern. 437; Robbins on Devolution of Real Estate, 3rd ed., p. 296; Armour on Devolution, p. 244. . . .

I think it may be taken as a canon of interpretation that the words "brother" and "sister" used in a context relating to the testamentary disposition of personalty or land treated as personalty import and include those of the half blood, if nothing appears to the contrary: Greaves v. Rawling, 10 Ha. 63; Re Cozens, [1903] 1 Ch. 138.

The proper construction of sec. 6 of the Act is to read "brother" and "sister" as including one who has either parent in common with another, and nothing in the later part of ch. 127 (touching the distribution of estates real affected by the Devolution of Estates Act) detracts from this being the meaning of the section in question.

I find, therefore, in favour of the infant being entitled to one-half of the estate divisible.

An issue will be directed to ascertain who is entitled to the other half, the father or those who claim as his assignees under the instrument which he impeaches. The plaintiff in the issue should be the father, who seeks to avoid the

instrument he has signed. Costs of that issue reserved and to be paid out of that moiety.

The costs of this inquiry as to the parties entitled to the corpus will come out of that corpus.

CARTWRIGHT, MASTER. DECEMBER 9TH, 1903.

CHAMBERS.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Pleading—Statement of Claim—Irregularity—Delivery after Notification that Defendant does not Require—Defence and Counterclaim—Order for Production—Compliance with—Estoppel—Conformity to Indorsement on Writ of Summons—Immaterial Difference.

Motion by defendants to set aside the statement of claim for irregularity.

After the default judgment had been set aside (see ante 1030) defendants, on the last day for entering an appearance, namely, the 23rd November, appeared and at the same time filed a statement of defence and counterclaim; gave notice to plaintiffs that they did not require a statement of claim; and issued an order for plaintiffs to produce. This plaintiffs obeyed on the 3rd December, and on the same day delivered a statement of claim.

A. J. Russell Snow, for defendants, relied on Rule 171, which provides that if a defendant does not require plaintiff to deliver a statement of claim, he shall so state in his memorandum of appearance, and in that case shall serve a copy on plaintiff; and on Rule 247 as authorizing him to deliver a defence or counterclaim at any time within 8 days after appearance. He also contended that the filing of the affidavit on production by plaintiffs was an admission of the regularity of defendants' practice. He also urged that the statement of claim was irregular because it set up a different cause of action from that disclosed by the indorsement on the writ of summons.

C. P. Smith, for plaintiffs, relied on Rule 243 (b), providing that plaintiff may deliver a statement of claim with the writ, or at any time afterwards, either before or after appearance, and although defendant may have appeared and stated that he does not require the delivery of a statement of claim.

THE MASTER.—I think the contentions of plaintiffs must prevail. For the success of defendants' argument it would be necessary either that Rule 166 should have said that no statement of claim could be served after appearance without leave of the Court, or that a similar addition should have been made to Rule 247. To hold otherwise would enable a defendant to become practically dominus litis, and prevent a plaintiff from availing himself of Rule 244.

As to the argument that plaintiffs are estopped by filing their affidavit on production, I do not think this is entitled to any weight. All the facts and documents are well known to both parties . . Nothing would have been gained by delaying production, even in case the order was issued prematurely, which, in my opinion, it was not. . . .

Upon examining the indorsement on the writ of summons and the statement of claim, I think the other objection fails. The only difference is that in the writ credit is given for the Ivey and Blackley mortgages so as to reduce the principal on the original mortgage. The account is then taken for the balance of that mortgage, and afterwards the accounts of the Ivey and Blackley mortgages, the claim being for these three several amounts. In the statement of claim it is alleged that the Ivey and Blackley mortgages were collateral, the defendants joining in them as guarantors. Claim is then made on the original mortgage, credit being given for all payments received on account of the Ivey and Blackley mortgages, the result in both cases being substantially the same. This, in my view, does not exceed the liberty given to the plaintiff by Rule 244.

Motion dismissed with costs to plaintiffs in any event.

BRITTON, J. DECEMBER 9TH, 1903.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Costs—Taxation—Items—Copy of Correspondence for Brief—Counsel Fees—Partner of Defendant Acting as Counsel.

Appeal by plaintiff from the certificate of the senior taxing officer at Toronto on the taxation of the party and party costs of defendant Ryckman against plaintiff.

The items allowed which were objected to were:

(1) Copy of correspondence between defendant Ryckman and plaintiff, allowed in brief of defendant Ryckman.

(2) Counsel fees where counsel work done by a partner of defendant Ryckman.

W. R. Smyth, for plaintiff.

W. E. Middleton, for defendants.

BRITTON, J.—As to the copy of correspondence which was allowed as part of brief, that is within the discretion of the taxing officer, and I ought not to interfere.

[Budgett v. Budgett, [1895] 1 Ch. 202, referred to.]

This case perhaps differs from Budgett v. Budgett, as the correspondence was not used on the trial. It may have been necessary to brief it for the purpose of cross-examination of plaintiff, or in reasonable anticipation of the correspondence being required and used. Even if not used, the decision arrived at by the senior taxing officer must stand.

As to counsel fees, it was conceded on the argument that Mr. Ryckman would not, on the taxation of costs against the unsuccessful plaintiff, be entitled to counsel fees for himself, had he appeared in person : Clarke v. Creighton, 15 P. R. 105. It was, however, contended that this rule does not apply to a partner of a party to the suit, even if there exists no agreement between the parties to the effect that the one who acts as counsel for the other shall be paid by the other and shall be wholly entitled to the fee, and that the party to the suit shall get no part of such fee.

It is contended that there was an agreement between defendant Ryckman and his partner Mr. Kerr as to Mr. Kerr's work as counsel; such an agreement that the fee paid to Kerr in this case must be taxed in Ryckman's costs against plaintiff. . .

A counsel fee will not be allowed to a party holding his own brief: Smith v. Graham, 7 U. C. R. 268; Clarke v. Creighton, 15 P. R. 105.

In Henderson v. Comer, 3 U. C. L. J. O. S. 29, Burns, J., decided that "the rule of practice that a person cannot tax a counsel fee in his own case against the opposite party does not extend to his partner." No reasons are given, and it does not appear whether in that case any part of the counsel fee would belong to the party litigant or not, or whether the learned Judge thought that fact of no importance. That decision has not been overruled, but the facts brought out in this case seem to distinguish it.

[Strachan v. Ruttan, 15 P. R. 109, referred to.]

On principle I can see no reason why, if a solicitor in a personal action is entitled to tax and get his costs as solicitor

from an unsuccessful opponent, he should not also get a counsel fee if he acts as counsel. But he cannot do so, and, that being the case, I think it would be wrong to allow a barrister to get for his own use and to his individual profit, through his partner, what he could not get if he had personally acted. . . .

After more than one careful perusal of the affidavits and the cross-examination upon those affidavits, I have come to the conclusion that the agreement, so far as it can be called a concluded agreement between Messrs. Ryckman and Kerr, and their understanding before and at the time Mr. Kerr was acting as counsel for Mr. Ryckman herein, was that he should act and get his pay the same as if acting as counsel for some person other than a member of the firm. That being so, one-half of any proper fee taxable for Mr. Kerr's work as counsel herein would go directly to Mr. Ryckman, and he would thus get, through his partner, for his own benefit, from the plaintiff, what according to the authorities he could not get if he held his own brief and acted as counsel. . . .

I would not, unless compelled by authority, uphold any such conditional agreement as would permit one partner to get the whole fee and retain it for himself, where in the ordinary cause he would be obliged to divide with the other members of the firm. It ought not to be in the power of any firm of barristers to punish a suitor in that way. . . . A counsel fee ought not to be taxed to the partner of such barrister as against the opposite party to a larger amount than the partner so acting as counsel will be entitled to hold for himself and members of the firm, if any, other than the party to the action. . . .

Each counsel fee to Mr. Kerr to be reduced one-half, and as to the amount so taxed Mr. Kerr to be entitled to all subject to any accounting to the partner other than defendant Ryckman.

As the point is in part new, and as the appeal is successful only in part, no costs.

BRITTON, J. DECEMBER 9TH, 1903.

TRIAL.

SPOTSWOOD v. SPOTSWOOD.

Will—Devise Subject to Charge—Maintenance of Brother—Enforcement of Charge—Judgment—Terms—Reference—Costs.

Action to enforce a charge upon land devised to defendant subject to the maintenance of plaintiff.

Defendants accepted the land upon the conditions imposed, took possession, and for nine years maintained plaintiff. In 1900 plaintiff and defendant quarrelled, and plaintiff left defendant's house.

J. K. Dowsley, K.C., for plaintiff.

J. A. Hutchinson, K.C., for defendant.

BRITTON, J.— . . . I have come to the conclusion, upon the evidence, that plaintiff should not be required to reside with defendant in his house. It is not in the interest of either plaintiff or defendant that such should be the case.

The plaintiff's care, support, maintenance, and medical attendance, during his natural life, was by the will of Margaret Heenan made a charge upon the land.

Plaintiff is entitled to a reference to ascertain what would be a proper sum to allow for that purpose from 1st July, 1903.

I think the amount paid into Court by defendants is a proper sum to allow for that maintenance from October, 1900, when plaintiff left defendant's house, down to 1st July, 1903, and that sum must be accepted as sufficient to that date, and plaintiff so accepting it, I order payment out of Court to him.

My order as to the sufficiency of the amount paid into Court for maintenance for the period named is not to be taken by the Master as evidence either for plaintiff or defendant as to the sum to be allowed from 1st July, 1903.

Reference to the Master at Brockville to ascertain the proper annual sum to be allowed for plaintiff's maintenance, and to fix a place for payment quarterly after 1st January, 1904.

In case of default in payment of any instalment of the maintenance as directed by the Master for one month, the lands are to be sold with the approbation of the Master, and the proceeds applied in payment of costs and maintenance and arrears of maintenance in the usual way.

Plaintiff is entitled to his costs of the action.

Defendant may, if he desires, offer to pay such amount as he deems sufficient for maintenance, and if such offer is made, the costs of reference will be reserved. If no amount is offered, plaintiff to get costs of reference.

The costs and the amount found for maintenance from 1st July, 1903, to 1st January, 1904, to be paid within one month after the amount is ascertained.

MACMAHON, J. DECEMBER 9TH, 1903.

TRIAL.

BIGGART v. TOWN OF CLINTON.

Way—Non-repair—Injury to Person—Notice to Municipal Corporation—3 Edw. VII. ch. 18, sec. 130, sub-sec. 5—Failure to Give Notice—Reasonable Excuse.

Action to recover damages for injuries sustained by plaintiff through falling on the sidewalk in Victoria street in the town of Clinton, owing, as alleged, to the negligence of defendants in permitting the sidewalk to be out of repair and in a dangerous condition. The injury was on the 25th April, 1902. No notice of the accident was given to defendants until the 5th July, 1903, when plaintiff consulted a solicitor, who wrote to the clerk of the municipality informing him of the accident.

By 3 Edw. VII. ch. 18, sec. 130, sub-sec. 5 (amending the Municipal Act, R. S. O. 1897 ch. 223, sec. 606) "the want or insufficiency of the notice required under sub-sections 3 and 4 of this section shall not be a bar to an action, except where the action is founded on the existence of snow or ice on the sidewalk, if the Court or Judge before whom the action is tried considers that there is reasonable excuse for the want or insufficiency of such notice, and that the defendants have not thereby been prejudiced in their defence."

W. Proudfoot, K.C., for plaintiff.

E. L. Dickinson, Goderich, for defendants.

MACMAHON, J. (after referring to Drennan v. City of Kingston, 23 A. R. 406, 27 S. C. R. 46, and Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. at p. 568):—One excuse offered by plaintiff for not giving notice was that until she consulted the solicitor on 5th July . . she was not aware that notice was necessary. And that was the first intimation the corporation had of the accident or of the fact that plaintiff had a claim against them. The other excuse offered by plaintiff was . . that when her son had fallen some time before and was injured she had gone to the council and got nothing, and she did not "feel like" going to the council again.

There is, in my opinion, no reasonable excuse for the notice not being given. There was not, as in the Armstrong case, any notoriety given to the accident which happened to plaintiff, and the corporation had no knowledge of it. And if

mere want of knowledge on the part of the person injured were to constitute sufficient excuse for not giving notice, then the enactment might as well be repealed, as that excuse would be available to almost every person injured.

The action must be dismissed, but I think it is not a case for costs.

MACMAHON, J. DECEMBER 9TH, 1903.

TRIAL.

WAKEFORD v. LAIRD.

Contract—Master and Servant—Wages—Agreement to Remunerate by Legacy—Quantum Meruit.

Action against executor of William Carson, deceased, to recover wages for services or a share of the estate of deceased.

In 1861, when plaintiff was 12 years old, she went to live with deceased and his wife, who were childless. She was treated as one of the family. She said that when she was 21 she spoke to Carson about leaving, and he said to her that if she stayed on "he would do for me at his death." She remained on with the Carsons till 1878, when she was 29. In 1893 plaintiff returned to Carson's house in the position of a servant, and was paid for her services. Carson died in 1902, leaving a will in which no mention was made of plaintiff.

W. H. B. Spotton, Wiarton, for plaintiff.

E. L. Dickinson, Goderich, for defendant.

MACMAHON, J.— . . . It has been established to my satisfaction that in 1870, when plaintiff reached the age of 21, Carson promised that if she would remain on and work for him he would remunerate her by providing for her by his will. . . . Under this agreement she continued in his service for 8 years, until 1879. And eight years before his death he said to plaintiff, "Jennie, you will get it." He also told John Robinson that he intended leaving plaintiff $1,000 at his death. . . Immediately after the execution of his last will Mr. Cook, who drew the will, remarked to the testator that he had left the greater portion of his property to his wife, when the testator replied that she had to provide for Alexander Carson and Jennie Fields (the plaintiff), and the testator's wife, who was present, said to him, "I would rather you would provide for Alexander and Jennie yourself," and testator said to Mr. Cook, "You know they will be well provided for." . . .

After the death of the testator's wife, when he proposed to make another will, he stated that he intended leaving plaintiff a reasonable allowance, as she had worked for him since she was 12 years old. . . .

The testator told Alexander Carson that he intended leaving plaintiff $1,000, and he thus put a value on the services he considered plaintiff had performed during the 8 years from 1870 to 1878. As payment was not to be made until testator's death, the Statute of Limitations is not a bar.

In Smith v. McGugan, 21 A. R. 543, 21 S. C. R. 263, Murdoch v. West, 21 S. C. R. 305, Walker v. Boughner, 18 O. R. 448, and Richardson v. Garnett, 12 Times L. R. 127, the presumption arising from the relationship of the parties that the services performed were to be gratuitous, required to be rebutted. But in the present case no such relationship existed between plaintiff and William Carson, and there is, therefore, no presumption that the services performed by plaintiff between 1870 and 1879 were not to be remunerated by wages.

In Smith v. McGugan the Supreme Court held that specific performance of the oral promise made by plaintiff's grandfather to provide for her by will . . could not be decreed, but that plaintiff was entitled to remuneration for her services for 11 years as on a quantum meruit.

Ridley v. Ridley, 34 Beav. 478, was not cited by counsel in argument, nor is it referred to in the judgment of the Supreme Court, on the question as to specific performance.

On the authority of the cases above referred to, plaintiff is entitled to recover as on a quantum meruit for the 8 years' services performed, and I think a fair sum to allow for such services is $1,000, being the amount the testator fixed as what he intended leaving.

Judgment for plaintiff for that sum with costs.

OSLER, J.A. DECEMBER 9TH, 1903.

C.A.—CHAMBERS.

RE CENTRE BRUCE PROVINCIAL ELECTION.

STEWART v. CLARK.

Parliamentary Elections — Controverted Election Petition — Extending Time for Trial—Orders—Discretion—Practice.

Application by petitioner to fix a day for the trial of the petition, and, if necessary, to extend the time for proceeding to trial.

R. A. Grant, for petitioner.

OSLER, J.A.—The petition was filed on the 13th March, 1903. The Legislature was then in session, and did not prorogue until 27th June. There was still time to bring the petition to trial within six months from the filing of the petition, excluding the time of the session, and were the services of the necessary trial Judges certainly available for the purpose, this might now be ordered and notice of trial directed to be given by the Registrar under Rule 27. No application had until now been made by the petitioner to fix the time and place of the trial of the petition, or to extend the time for proceeding to trial, nor had the rota Judges taken the subject into consideration, and the engagements of the Judges during the last half year have been such as would have made it difficult for them to try this and other petitions during that time. The circumstances of this case are on all fours with those of the North Perth, North Norfolk, and North Grey cases, recently before me. According to the well understood and long settled course of practice, it is, under these circumstances, almost as of course that the time for proceeding to trial should be extended under sec. 47 (1) of the Controverted Elections Act. It is true that there was nothing to prevent the petitioner from making an application to the rota Judges to fix the time and place of the trial, but he cannot be said to be in default for not having done so. The obligation and the initiative in that respect are cast upon the rota Judges, the only penalty (if such it can be called) upon the petitioner being that if three months elapse after the presentation of the petition, no day for the trial having been fixed, any elector may on application be substituted for the petitioner, on proper terms: sec. 46. The requirements of justice so plainly demand, in this case, as they did in the others, an extension of the time for proceeding to trial, that I have no more hesitation in exercising in this, than I had in those cases, the discretion given by sec. 47 (1), and extending the time until 31st January, 1904. The course of the Court has been so constant that it would not be necessary to write anything on the subject, were it not in the hope, perhaps a vain one, of obviating the misapprehensions (to use a mild term) which so frequently attend judicial acts in these election cases. The time and place of trial will shortly hereafter be fixed by the rota Judges. Costs of the application to be costs in the cause.

CARTWRIGHT, MASTER. DECEMBER 10TH, 1903.

CHAMBERS.

BUSMAN v. CENTRAL TRUSTS CO.

Security for Costs—Plaintiff out of Province—Summary Proceeding to Enforce Mechanic's Lien—Statement of Defence Equivalent to Appearance—Motion before Statement—Undertaking to Defend—Waiver of Objections.

Motions by the several defendants for security for costs.

The proceedings were taken under the Mechanics' Lien Act. The statement of claim shewed that the plaintiff resided in New York.

J. W. Bain, for defendants.

Grayson Smith, for plaintiff.

THE MASTER.—It was argued (1) that the motions were premature, because (as was admitted) no defences had been filed; and (2) that in any case the motions were unnecessary, as a præcipe order could have been taken out, if the defendants were entitled to ask for security at this stage.

It was answered that the procedure under the Mechanics' Lien Act was different from that in an action. But sec. 31 (2 and 3) seems to put the statement of defence in the place of the appearance in an ordinary suit; and Rule 1199 gives the right to obtain security only after appearance. And properly so, for, until the defendant has submitted himself to the jurisdiction, it is plainly premature for him to move. Indeed he has no locus standi, and is only a stranger to the proceedings.

There is no reason why the motions should not be dismissed with costs to plaintiff in any event.

Any possible objections that could have been taken to the plaintiff's proceedings on the ground that sec. 13 of 3 Edw. VII. ch. 8 (O.) did not come into operation until 1st December were waived by the undertaking to appear.

CARTWRIGHT, MASTER. DECEMBER 10TH, 1903.

CHAMBERS.

PHERRILL v. PHERRILL.

Alimony—Interim Order—Refusal of—Defendant without Means.

Motion for interim alimony.

J. M. Godfrey, for plaintiff.

Allan McNab, for defendant.

THE MASTER.— . . The only material before me in support of the motion is plaintiff's affidavit. This states that the allegations in the statement of claim are true, and denies the allegations in the statement of defence. There is no evidence of any kind as to the ability of defendant to pay, if an order is made. On the other hand, the affidavit of defendant states positively that he is unable to pay any sum to plaintiff for alimony" . . . (giving a particular account of his circumstances). This affidavit is not impeached either by cross-examination or affidavits in reply. It must, therefore, be assumed to be true. It would be useless to make an order against a man who has no property on which it could operate.

The motion is refused.

BRITTON, J. DECEMBER 10TH, 1903.

TRIAL.

McGLEDDERY v. McLELLAN.

Limitation of Actions—Real Property Limitation Act—Possession of Widow of Owner—Oral Agreement for Occupation of Land in Lieu of Dower—Conduct of Parties.

Action for a declaration that the south-west quarter of the west half of lot 26 in the 3rd concession of the township of Eramosa, containing 25 acres, is the property of plaintiff and to vacate the registry of a conveyance thereof from Ellen McLellan to defendant as a cloud on plaintiff's title. Counterclaim for improvements.

D. Guthrie, K.C., and W. R. Riddell, K.C., for plaintiff.

J. J. Drew, Guelph, for defendant.

BRITTON, J.—Plaintiff establishes a clear paper title. One Alexander McGleddery was the owner. He died on 17th June, 1851, intestate, and under the law then in force the oldest son, Samuel McGleddery, became entitled to it as heir-at-law. Samuel, by his will dated 31st December, 1898, devised this land to plaintiff. Samuel died 8th March, 1899.

Alexander McGleddery left his widow Ellen him surviving. She married John McLellan, and defendant is a son by this

second marriage. She went into possession of the land in question about 1863, and remained in possession by her tenants until her death, which occurred 18th October, 1902.

On 23rd June, 1902, Ellen McLellan conveyed this land to her son, the defendant. The conveyance recites that Ellen McLellan was the wife of Alexander McGleddery, and that she had been in actual and undisputed possession of the land since his death. . . .

The question in this case for determination is whether or not Ellen McLellan was in possession under an agreement with her husband's heir-at-law that she should occupy this land during her life in lieu of dower.

It is contended by the defendant that, as the dower of Ellen McLellan was never actually assigned, her possession ripened into a title.

This case is distinguishable from Johnston v. Oliver, 3 O. R. 26, because here there is evidence upon which I can find, and I do find as a fact, that there was an oral agreement between Ellen McLellan and Samuel McGleddery that she should occupy the land in dispute during her life in lieu of dower in the 75 acres which her husband Alexander McGleddery owned at the time of his death. That evidence brings this case within Leech v. Slim, 8 Gr. 494, and Fraser v. Gunn, 27 Gr. 63. . . .

The land in question, as well as the residue of the 75 acres owned by Alexander McGleddery, was in a state of nature at the time of his death and for 12 years after. No claim for dower was made till after the widow's second marriage. . . . J. Fletcher Cross, on 24th March, 1863, . . . made, for her, a formal demand in writing of dower of one-third of the land called the west half of lot 26 . . . It was shewn that Alexander McGleddery owned only 75 acres, of which the 25 acres now claimed was in fact one-third. This demand comes from the custody of . . . the solicitors for Samuel McGleddery, upon whom, no doubt, it was served. From the same custody there comes an unsigned document . . . an acceptance by Ellen McLellan of the 25 acres in question for her use during her life, in lieu of dower in the 75 acres, and a release of any claim of dower in the residue of the 75 acres. . . . . Unfortunately the formal document was not signed, but that seems to have been the agreement acted upon.. . . . .

Judgment for plaintiff as prayed, with costs. Counterclaim dismissed.

DECEMBER 10TH, 1903.

DIVISIONAL COURT.

SLONEMSKY v. FAULKNER.

Landlord and Tenant—Attornment—Damage to Tenant by Act of Third Party—Negligence—Liability.

Appeal by defendant Mirault from judgment of BRITTON, J., (ante 551), in favour of plaintiff in an action tried without a jury at Ottawa, brought to recover damages for injury caused to plaintiff's stock of goods in a store on the corner of Clarence and Dalhousie streets in the city of Ottawa by reason of the flooding of the premises owing to the bursting of the waste pipe upstairs. BRITTON, J., held that for the purposes of the action the defendant Mirault was the person in possession of and in control of the property at the time of the injury; that he knew that the family who had been living upstairs had moved away; and that it was negligence on his part to leave the upper part of the house unprotected, so that the pipe froze and afterwards burst, causing the injury complained of.

The plaintiff cross-appealed seeking to increase the damages from $300 to $750.

G. F. Henderson, Ottawa, for defendant Mirault.

M. J. Gorman, K.C., for plaintiff.

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

MEREDITH, C.J. (after setting out the facts) :—It may be assumed that the plaintiff was in possession of her shop as tenant to the defendant on the 29th December, 1902, when the escape of water occurred, and it is clear that the pipes which are referred to in the statement of claim were part of a system in operation when the plaintiff became tenant, for supplying water from the city waterworks for domestic use throughout the whole building, and it is not questioned that the pipes were sufficient and in good repair, but the liability of the defendant is rested upon the ground that in the circumstances it was his duty to guard against the freezing of the water and the bursting of the pipes, and that he was negligent in the discharge of that duty.

As I understand the law, the owner of a building who lets the separate storeys of it to different tenants is not answerable for an injury caused to one of them by the negligence of another of the tenants in using the appliances for supplying water to the building which are common to all the tenements,

and if he provides and maintains proper appliances for the purpose of the supply, he has fully discharged the duty which he owes to his tenants, and is not answerable for the negligent user of those appliances by a tenant.

Where the landlord is the occupier of an upper storey, he is, no doubt, answerable both for his omission to provide and maintain proper appliances, and for his negligent user of those appliances, and a liability to the same extent also attaches to him on his regaining possession from his tenant, though he does not himself occupy, and he is answerable for suffering to continue any condition created by his former tenant, which he knows or has reasonable cause to believe may occasion injury to his tenants: Anderson v. Oppenheimer, 5 Q. B. D. 602; Blake v. Woolf, [1898] 2 Q. B. 426; Mendel v. Fink, 8 Ill. App. 378; Green v. Hague, 10 Ill. App. 598; Quigley v. Johns Mfg. Co., 26 N. Y. App. Div. 434; Citron v. Bayley, 36 N. Y. App. Div. 130; Leonard v. Gunther, 47 N. Y. App. Div. 194.

The difficulty in this case is in the application of the law to the facts. . . .

My learned brother Britton was of opinion that . . . defendant was answerable for the damages done to the plaintiff's goods.

I am, with great respect, unable to agree in that opinion. Granting that what was done by the defendant was a taking possession of the property as between him and the trust company,—and that I think is by no means clear,—I do not understand how it can be said that he was in possession of the part of the building which was occupied by the Caseys, so as to make him answerable for not taking steps to prevent the water from freezing in the pipes. Assuming that he had a right to dispossess them—and that is by no means clear, I think, as they or some of them were the heirs-at-law of Mrs. Casey—he did not exercise that right, and was not bound to exercise it, and so long as it was not exercised and they were left undisturbed in their possession, they and not he were answerable for the proper user of the appliances for the water supply, and for the consequence of any negligence in the use of them.

What is the negligence which is to be imputed to the defendant? Why should he have anticipated that they would allow the water to freeze in the pipe? The simple expedient of turning off the water would have prevented any danger from the

water freezing. Why should he have anticipated that expedient would not be adopted?

Apart from these considerations, however, I am of opinion that on the 29th December, 1902, when the escape of the water and the damage to the plaintiff occurred, the defendant had not obtained possession from his vendors, the trust company, of that part of the property which the Caseys occupied, and that he did not obtain possession or control of it until after the injury was done to the plaintiff; and if that be the correct view of his position, he is not, of course, answerable for that injury.

The defendant had, no doubt, obtained permission from the trust company to collect the rents due by the occupants of the property, but no authority to dispossess any one who was in possession, certainly not any one who was in possession adversely to the company—and, even if the effect of his collecting rents from such of tenants as chose to pay him had the effect of creating the relation of landlord and tenant between him and them, how can what was done have the effect of casting upon him the obligation of an owner in possession of the part of building which was occupied by the Caseys?

According to the case made and the testimony adduced by the plaintiff, Donovan's tenancy expired at the end of October, 1902. The tenancies of the tenants who held under him also expired at the same time, and no doubt any of the undertenants who afterwards paid rent to the defendant, became thereby tenants either of the defendant or of the trust company; but, as I have said, the Caseys neither paid rent nor gave up possession, but remained in as they had been before then; and it seems to me therefore to follow that they, and not the defendant, had the possession and control of the upper storey when the wrong of which the plaintiff complains was committed.

In my opinion, the plaintiff's case failed, and her action should have been dismissed, and I would allow the appeal with costs, reverse the judgment appealed from, and substitute for it a judgment dismissing the action with costs.

There is also a cross-appeal by the plaintiff against the amount at which the damages were assessed, but, as the action, in my view, entirely failed, it is unnecessary to say more as to it than that it should be dismissed with costs.

BOYD, C. DECEMBER 11TH, 1903.

WEEKLY COURT.

CANADA FOUNDRY CO. v. EMMETT.

Contempt of Court—Motion to Commit—Breach of Injunction—Master and Servant—Interference with Servants—Incitement to Commit Breach—Employment of Detective—Offer of Money not Accepted—Failure of Proof—Picketting—Vagueness of Charges—Dismissal of Motion—Costs.

Motion by plaintiffs to commit defendants Atkins and Elliott for breach of an interlocutory injunction.

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

J. G. O'Donoghue, for defendants.

BOYD, C.—The first breach alleged was that on 22nd October last these defendants did interfere with plaintiffs' employees George Fisher and F. Hodapp and induce and procure or endeavour to induce and procure these employees to break their contracts of employment with or to leave or quit their employment with plaintiffs and paid money to these employees to induce them to quit their employment and leave the city of Toronto, so that plaintiffs should not be able to obtain their services. On this breach the motion should fail, for two reasons. First, the transaction in question was set on foot by a detective or ex-police officer employed by plaintiffs, who laid a plan by which these two men should lay themselves open to the approaches of defendants with a view of inducing the breach of the injunction. These two men were used as decoys to entrap defendants, and, however such methods may be regarded in criminal law, it is not desirable to encourage them in a Court of equity. To get equitable relief one must come into Court with clean hands (according to the old phrase), and a suitor cannot expect the extraordinary power of the Court exercised by way of injunction and committal to be directed in his favour, if he himself procures or promotes the acts complained of. And the second reason is, that upon the evidence of the two employees it does not appear that defendants have been guilty of the offences complained of. Both men say that they had no written contract with plaintiffs—they could leave at any time. Both of them say that they intimated to the two defendants that they had left the employment of plaintiffs and would go away from the city if they could get money to do so, and in this way, by their own statements, they obtained money and tickets to enable them to go

away. One may suspect the reason of all this generosity on the part of defendants, but there is no such proof of overt acts in contravention of this term of the injunction that commitment should follow.

The next alleged breach was that these two defendants did on 9th October interfere with Wallace and Courtney, two other employees of plaintiffs, and endeavoured to procure them to break their contract of employment or to leave the employment of plaintiffs. The matter, as stated by the two employees, consisted in an offer of money ($20 to Wallace and $50 to Courtney), and a request that they should stop work and go away from the country. . . . The offer was to have been carried out, as the men say, the same night at seven o'clock, but no meeting took place then, and nothing came of it. It is always difficult to prove an offer of money for improper purposes, and the evidence here is not perhaps in equilibrium, but so nearly even balanced that, after a month's delay in moving, it would not be right to turn the scale against defendants when the result would be imprisonment.

The remaining breach alleged was, that these two and other defendants did on various dates and occasions persistently follow about the plaintiffs' employees and beset and watch the factory, houses, shops, or other places where the men were, with a view to compel them to abstain from service with plaintiffs, and conspired and colluded with each other and their co-defendants to do the like things, etc. . . . This charge is too vague and general to proceed upon in a motion to commit. The matters complained of involve not only civil but criminal liability, and by analogy some such precision should obtain in specifying what is complained of as in an information, or other criminal pleading. I decline to wade through the mass of papers in order to find out what may be the residuum of all the facts, conversations, surmises, and information which has been collected from a host of witnesses. Upon the affidavits a prima facie case has not been made out as to any system of picketting with which these two defendants are concerned. The affidavits of the two defendants state that it is not their intention to violate the injunction and that they have not wittingly done so, and, though it would be better that they should abstain from being so much in the company of these workmen who frequent the public houses, they are not called upon to change their habits pending this litigation, because of it.

It cannot be said that the conduct of defendants has not induced the motion, and while it fails because of the grave results involved, it is not a case for costs on either side.

Motion dismissed without costs.

BOYD, C. DECEMBER 12TH, 1903.

TRIAL.

LUNDY v. GARDNER.

Principal and Agent—Purchase of Land by Agent—Proof that Purchase Made for Principal — Parol Evidence — —Statute of Frauds.

Action to compel the defendants to convey to plaintiff certain land alleged to have been purchased by the defendant for the plaintiff. The defendant pleaded the Statute of Frauds.

BOYD, C., held that the evidence proved that the land was bought by defendant as agent for plaintiff, and that plaintiff continued in possession and improved the land on the faith of that engagement with defendant. He paid interest on the purchase money and obtained receipts. It is competent to prove the agency and purchase for another by parol evidence, notwithstanding the Statute of Frauds. Bartlett v. Pickersgill, 1 Cox 15, has been overruled. See McMillan v. Barton, 19 A. R. 602; Barton v. McMillan, 20 S. C. R. 404; James v. Smith, [1891] 1 Ch. 384, 65 L. T. 544; Re Duke of Marlborough, [1892] 2 Ch. 133; Rochefoucauld v. Boudent, [1897] 1 Ch. 196.

Judgment for plaintiff for a conveyance, on paying the price agreed on and all interest, from which may be deducted plaintiff's costs of this action if he desires.

MACLENNAN, J.A. DECEMBER 12TH, 1903.

C.A.—CHAMBERS.

RE NORTH PERTH PROVINCIAL ELECTION.

MONTEITH v. BROWN.

Parliamentary Elections — Controverted Election Petition — —Motion to Dismiss for Want of Prosecution—Pending Motion to Extend Time for Trial—Refusal of Petitioner to Submit to Examination—Contempt of Court.

Motions by respondent to dismiss the petition for want of prosecution and to commit the petitioner for contempt for refusing to be sworn or examined in support of the first motion, or to compel him to attend for examination at his own expense.

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

J. Baird and E. B. Ryckman, for petitioner.

MACLENNAN, J.A., held that the motion to dismiss ought not to have been made and could not succeed while an order extending the time for trial of the petition was in force, even though an appeal from that order was pending. Also, that the petitioner, having obeyed the subpœna and having appeared before the County Court Judge and having respectfully objected to be sworn or examined, on a ground which was well founded, was not guilty of a contempt.

Motions dismissed with costs to petitioner in any event.

MEREDITH, J. DECEMBER 14TH, 1903.

CHAMBERS.

DWYER v. GARSTIN.

Venue — Change of — Convenience — Cause of Action—Witnesses — Expense — Undertaking — Security — Delay in Moving.

Appeal by plaintiff from order of Master in Chambers (ante 879) changing the venue from London to Toronto, upon defendant undertaking to pay the additional expense of a trial at Toronto and paying $100 into Court.

R. S. Snellie, for plaintiff.

J. MacGregor, for defendant.

MEREDITH, J., held that plaintiff is still dominus litis, and that his choice of a venue cannot be interfered with except upon substantial grounds. Defendant says he has 8 witnesses at Toronto, and plaintiff says he has 13 at London. It is impossible to say that plaintiff is wrong and defendant is right, plaintiff not having been cross-examined on his affidavit. So the preponderance of convenience, instead of being against London, is in favour of London. There was great delay in making the application, and that is another reason against granting it. It is not proper practice to make a conditional order such as this. The venue should either be changed upon a clear preponderance of convenience, or it should not be changed.

Appeal allowed and motion refused. Costs in the cause.

OSLER, J.A. DECEMBER 14TH, 1903.

C.A.—CHAMBERS.

RE NORTH NORFOLK PROVINCIAL ELECTION.

Parliamentary Elections—Controverted Election Petition—Extending Time for Trial—Cross-petition.

Motion by the respondent (cross-petitioner) to extend the time for proceeding with the trial of the cross-petition. An order had previously been made extending the time for proceeding to trial on the principal petition, on the usual grounds.

OSLER, J.A., held that the respondent ought to have a similar order in respect of the cross-petition. The petitioner was not in fault for not having moved to have notice of trial given by the Registrar; his opponent was equally blameless in respect of his own petition.

Order made extending time till 31st January, 1904. Costs in the cause.