

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

of the township of D., in the County of P., containing fifty acres more or less, but he is to be known as a sober, steady and industrious man. Thirdly, If, at any time during the period of five years after my death, it appears to my executors hereinafter named, that my said son, J., does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet."

*Held*, That the power of sale in the will was good, and that the certificate of title could only issue subject to such power of sale.

*Clement*, for the petitioner.

Divisional Court.]

[March 21.]

CANADIAN LAND, ETC., CO. v. TOWNSHIP OF DYSART.

*Assessment—Jurisdiction of Court of Chancery to entertain action without appeal from Court of Revision.*

On an appeal from the judgment of FERGUSON, J., in this action (reported *ante* p. 76) to the Divisional Court, the Court was divided and the judgment appealed from was therefore sustained.

*Per* BOYD, C.—The claim of the plaintiffs to the interference of this Court is not one of absolute right, but one resting on judicial discretion, and that discretion was rightly exercised in dismissing the action. The stipendiary magistrate has power to deal with the matters in question in the most ample manner. The statute intends that the value of lands shall be fixed by the municipal authorities, and not until all statutory means have been exhausted should recourse be had to this Court for relief. No authority has been cited for making this Court subsidiary to the appellate tribunal created by Parliament, and making it undertake the duty of disposing of appeals which could be effectually done by the stipendiary magistrate. As to costs the defendants are to blame for not having placed a demurrer on the record, and so had the preliminary question of law decided before the trial, and they should not be allowed to withhold a demurrer and reap large costs which might not have been incurred if they had by their pleadings notified the plaintiffs

that they would object to the plaintiffs' right to litigate. The costs of the motion for injunction should be given to the defendants, and further costs should be given thereafter as if the defendants had successfully demurred; and the costs of this appeal are to be given to the defendants.

*Per* PROUDFOOT, J.—The special act for the territorial division of Haliburton, R. S. O. c. 6, sec. 23, gives an appeal to the stipendiary magistrate against any *decision* of the Court of Revision. The action of the Court was a mere travesty of a judicial proceeding. The function of the Court was judicial, to hear and determine. The action of the Court in deciding in opposition to the only evidence given before them appears to establish that the whole was a fraudulent arrangement by the members of the Court of Revision. To give the stipendiary magistrate jurisdiction the Court of Revision must have given a *decision*. The admission that the action of the Court was fraudulent, in effect determines that there was no *decision*. A judgment is vitiated and void from the corrupt and fraudulent acts of the litigants, and a litigant has much more reason to complain of an unjust judge than he has of an unjust antagonist. It was not intended by the legislature that it should be the duty of the stipendiary magistrate to enquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. In the case of an alleged fraudulent judgment the jurisdiction of the Superior Court is not taken away. The stipendiary magistrate's jurisdiction is confined to an appeal from a *decision*.

If this Court has jurisdiction, as it certainly has where the acts complained of are vitiated by fraud, we cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy.

I agree with the Chancellor as regards the costs.

*S. H. Blake, Q.C., and Cassels, Q.C., for the plaintiffs.*

*McCarthy, Q.C., and Hudspeth, Q.C., for the defendants.*