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HIGH COURT DIVISION.

FALCONBRIDGE, C.J.C.B., IN CHAMBERS. FEBRUARY 4TH, 1918.

NATIONAL MATCH CO. v. THOMAS.

Lis Pendens—Certificate of—Registration—Motion to Vacate—What must be Shewn—Abuse of Process of Court—Delay in Prosecution of Action—Motion to Dismiss.

Motion to dismiss the action for want of prosecution and to vacate the registry of a certificate of lis pendens.

The motion was heard at the London Weekly Court, as in Chambers.

C. F. Maxwell, for the defendant.

J. B. Davidson, for the plaintiffs.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that, the delay being reasonably explained, and the parties agreeing to go to trial at the next Court at St. Thomas, the only question argued was as to discharging the lis pendens.

"A motion to vacate a certificate of lis pendens should not, speaking generally, succeed unless it is made to appear by clear and almost demonstrative proof that the writ is an abuse of the process of the Court:" Sheppard v. Kennedy (1884), 10 P.R. 242; Jameson v. Lang (1878), 7 P.R. 404; Bowers v. Bowers (1915), 34 O.L.R. 463.

This was an action to set aside a conveyance to a wife as being fraudulent, and there was apparently no abuse of the process of the Court.

Motion dismissed. Costs in the cause to the successful party.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 4th, 1918.

*RE CITY OF TORONTO AND TORONTO R.W. CO.

Execution—Order of Dominion Board of Railway Commissioners Directing Payment by Railway Company of Sum of Money to Municipal Corporation—Order Made Rule of Supreme Court of Ontario—Issue of Writ of Fi. Fa. thereon—Jurisdiction of Board—Finality of Order—Railway Act, R.S.C. 1906 ch. 37, secs. 46, 56 (9)—Procedure—Sale of Public Utility under Execution.

MOTION by the railway company for an order staying the writ of *fi. fa.* issued by the city corporation upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, pending the determination of the right of the corporation to receive payment of the money for the levying of which the writ was issued, and for an order directing the trial of an issue to determine such right.

D. L. McCarthy, K.C., for the railway company.
C. M. Colquhoun, for the city corporation.

MIDDLETON, J., in a written judgment, said that in 1906 the Board ordered the construction of a bridge upon the line of Queen street over the river Don and over certain railway tracks upon the bank of the river. The bridge was constructed. The city corporation paid the cost in the first instance; but the ultimate incidence of the cost remained an open question until the 23rd June, 1909, when a decision was given, afterwards embodied in a formal order of the Board, dated the 3rd July, 1909, to the effect that the Toronto Railway Company should pay 15 per cent. of the cost, other railway companies 70 per cent., and the city corporation the remaining 15 per cent.

While this order was final in its nature, it contained no definite direction to pay; and matters were allowed to remain in an unsettled shape until 1917, when, on the 30th November, an order was made for payment by each of the other contributing companies to the city corporation of a named sum which, in the opinion of the Board, was well within the ultimate sum payable—the payment so directed being without prejudice to the contention of any party as to the correctness of the accounts presented by the city corporation.

* This case and all others so marked to be reported in the Ontario Law Reports.

The amount which the Toronto Railway Company were ordered to pay was $80,000, This order of the Board was the one made a rule of Court, upon which execution was issued.

On the 15th September, 1909, the railway company applied to the Board for leave to appeal to the Supreme Court of Canada from the order of the 3rd July, 1909; the Board refused leave; no application was made to the Supreme Court of Canada or any Judge to permit an appeal; and so the decision of the Board became, by virtue of sec. 56, sub-sec. 9, of the Dominion Railway Act, R.S.C. 1906 ch. 37, final and incapable of being questioned or reviewed.

Reference to British Columbia Electric R.W. Co. Limited v. Vancouver Victoria and Eastern R.W. Co., [1914] A.C. 1067; Toronto R.W. Co. v. City of Toronto (1916), 53 S.C.R. 222.

The liability of the Toronto Railway Company being thus determined by the Board, and the statute giving finality to the decision, its enforcement should not be delayed by directing the trial of an issue already concluded.

It may be that the sheriff cannot take possession of and sell the railway under a *fi. fa.*; but that does not prevent the issue of the writ—it concerns only its execution. There may be assets which can be taken and sold without interfering with a "public utility;" and a writ of *fi. fa.* may be a necessary preliminary to the taking of the appropriate proceedings for realisation.

The procedure provided by sec. 46 of the Dominion Railway Act for the making of the order of the Board a rule of Court was attacked. The Dominion Act makes the Provincial Courts, so far as their executive and ministerial officers are concerned, ancillary to the Court or Board constituted by the Act for the purpose of determining the rights which come within the purview of the statute. This means the adopting by the Dominion of the machinery provided by the Province; but does not give to the Provincial Judges any control over orders of the Board directed to be enrolled and enforced.

While, in one sense, the order is not final, it does finally and unconditionally direct payment of $80,000, and is quite sufficient in form to warrant the issue of execution for that amount.

Motion dismissed with costs.

LENNOX, J. FEBRUARY 4TH, 1918.

*RE WAUGH.

*RE SCOTT AND SCOTT.

Will—Construction—Power of Executor to Sell Lands—Trust for Sale—Surviving Executor—Trustee Act, secs. 2 (q), 44, 49—Devolution of Estates Act, secs. 14, 15, 19, 21, 23—Sale for Purpose of Distribution—Persons Entitled under Will—Brothers and Sisters "or their Heirs"—Period of Ascertainment—Brothers of Half Blood—Heirs Living at Time of Distribution—Per Stirpes Division.

Motion by Henry Scott, surviving executor of the will of Thomas Waugh, deceased, for an order declaring that the applicant was able to make a good title to lands of the deceased, which the applicant had agreed to sell to Andrew H. Scott; and also for an order determining questions as to distribution of the estate, arising upon the terms of the will.

The motion was made under the Trustee Act and the Vendors and Purchasers Act.

The motion was heard in the Weekly Court at London.

R. G. Fisher, for the applicant.

J. M. McEvoy, for the purchaser, and for the brothers and sisters of the wife of the deceased or their heirs.

LENNOX, J., in a written judgment, set out the relevant provisions of the will of Thomas Waugh, deceased, as follows:—

"I hereby will and bequeath to my beloved wife Janet Scott Waugh solely during the entire period of her natural life the whole of my real and personal property . . . that is to say the farm on which I now live and everything pertaining to it as well as all moneys debts or whatever else is mine. . . . For various causes it may be unsuitable for my wife to live on the farm. She may if she deems it to be for her greater convenience with the advice and management of my executors dispose of the whole or part of the farm . . . to invest in other property. Provided always that whether this may be done or not the property belonging to her as coming from me shall at her death be disposed of in any way satisfactory to my executors so that all my brothers and sisters together with all my wife's brothers and sisters or their heirs shall have personally an equal in it share and share

alike." (The word "portion" or "share" was evidently omitted after "equal").

The testator died in 1861; his wife died in September, 1917.

The learned Judge referred to the Trustee Act, R.S.O. 1914 ch. 121, secs. 2 (*q*), 44, and 49; and said that the case was not governed by the Devolution of Estates Act nor dependent upon it; and that the executors had, under the Trustee Act, sec. 44, and the survivor of them had, under sec. 49, power to convey without the concurrence of the beneficiaries. There was a trust for sale.

It was argued that the property vested immediately upon the death of the testator; but the provision of the will that the land could be sold and the proceeds invested in other property, at any time during the life of the widow, was inconsistent with that conclusion.

It was desirable that the title of the purchaser should be as free from doubt as possible; and, although the surviving executor has power to convey independently of the Devolution of Estates Act, R.S.O. 1914 ch. 119, and that this is a case excluded by sec. 14 of that Act, yet for the greater security of the purchaser, and to facilitate subsequent conveyances, it was right that a caution should now be registered—no caution having yet been registered—and an incidental or preliminary order for the registration of a caution should be made under sec. 15 (1) (*d*). And, to secure the additional protection of this Act, and particularly of sec. 23, the purchase should be carried out in the manner authorised by the Act.

The sale appeared to be one "made for the purpose of distribution only" (sec. 21 (1)), and to wind up the estate. An affidavit should be filed shewing that the land is being sold for a fair and reasonable price. The order should dispense with the concurrence of the interested adults (sec. 21 (2)); and, if there were interested infants, should dispense with the consent of the Official Guardian (sec. 19); and might express approval of the sale.

Reference to In re Koch and Wideman (1894), 25 O.R. 262; Farwell on Powers, 2nd ed., p. 457.

As to the distribution of the proceeds of sale, the testator's primary intention was to treat his brothers and sisters (of the whole blood and half blood) and his wife's brothers and sisters as one aggregate and to divide the property into as many shares as there were units in this aggregate. But he contemplated that all the beneficiaries might not be alive at the death of his wife; and, in the expression "or their heirs," "or" should be read

disjunctively. The right of each of these primary beneficiaries to take was not absolute, but contingent upon his or her being alive at the death of the testator's wife. There was a gift to individuals with a substitutionary gift in the case of any of them leaving heirs surviving the testator's wife. The will should be construed as including all brothers and sisters—all the children of the testator's father. The property is to be divided into as many shares as there are brothers and sisters of the testator and his wife then alive, and of any one of these who had died who left heirs surviving the testator's wife; the aggregate of "the heirs" of any deceased "brother or sister" will take only the share the brother or sister would have taken had he or she survived; and this share will be again distributed according to their number and their relationship and to the person for whom they are substituted, under the Statute of Distributions.

The costs of all parties should be paid out of the estate—those of the executor on a solicitor and client basis.

MIDDLETON, J. FEBRUARY 7TH, 1918.

*RE INGRAM.

Will—Construction—Bequest of Residue to Daughter—Small Residue when Will Made—Estate largely Increased before Death of Testatrix—Will Speaking from Death—Wills Act, sec. 27—"Unless a Contrary Intention Appears by the Will"—Evidence to Shew Intention of Testatrix after Increase in Estate—Inadmissibility—Contrary Intention not Deducible from Will—Residue of "Moneys or Securities for Money"—Residuary Legatee Entitled to both—"Or" read as "And."

Motion by the executors of the will of Catharine E. Ingram for an order determining a question arising in the administration of the estate of the testatrix, involving a construction of the will.

The motion was heard in the Weekly Court, Toronto.

H. S. White, for the executors.

E. G. Graham, for Stella K. Ingram.

G. W. Mason and A. G. Davis, for the other adult children of the testatrix.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that the testatrix died on the 10th January, 1917, having made her will on the 18th

January, 1906. Her husband died on the 15th October, 1916; by his will, made in 1902, he left all his property to his wife. At the time (1906) when the wife made her will, her property consisted of a small sum of money, a promissory note, and some chattels, amounting in all to about $400; and this probably remained to the time of her death. From her husband's estate she received some $10,000, including insurance.

By the wife's will she gave her son Clarence $25; her daughter Rose, $50, a shawl, and a set of furniture; her daughter Stella, "all the rest residue and remainder of the moneys or securities for money I may die possessed of" and certain enumerated chattels.

It was argued that the terms of the will pointed to the distribution of the estate which the testatrix had at the date of the will, and did not operate upon the property which was acquired by the testatrix from her husband.

Section 27 of the Wills Act, R.S.O. 1914 ch. 120, provides that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

Reference to Plumb v. McGannon (1871), 32 U.C.R. 8, 16; Everett v. Everett (1877), 7 Ch. D. 428, 433, 434; Vansickle v. Vansickle (1884), 9 A.R. 352, 354; Theobald on Wills, 6th ed., p. 130; Jarman on Wills, 6th ed., pp. 409, 413; Castle v. Fox (1871), L.R. 11 Eq. 542, 551; Georgetti v. Georgetti (1900), 18 N.Z. L.R. 849.

It was pointed out that, when the will was made, the daughter Stella's portion given by it would be only $200, but, if effect were given to the statute, she would receive $10,000; and it was strenuously argued that such a result was not possible. But how could it be said *from the will* that the woman who gave all her property, save two small sums, to her daughter in 1906, did not intend the same daughter to take all her larger fortune in 1916?

Testimony to shew what the testatrix intended in 1916 was inadmissible: the will must speak for itself, and the contrary intention must be shewn on the face of the will.

Finally, it was argued that, on the will, the daughter Stella was put to her election between the "moneys" and the "securities for money" because the word "or" was used. There would be an intestacy if these words were so used that the one or the other only passed. No case can be found in which "or" has not been read as "and" to avoid such a result. It could not be doubted that the intention was, the gift being of the residue of "moneys or

securities for money," that the residue of either and of both, after paying the small legacies, should pass.

Order declaring that the daughter Stella takes the whole of the residue of the estate after payment of the small legacies. Costs out of the estate.

KELLY, J. FEBRUARY 7TH, 1918.

DOMINION BANK v. CAMERON.

Guaranty—Liability of Trading Company to Bank—Bond Executed by Certain Shareholders—Action on—Defence that Bond Executed on Condition that all Shareholders should Sign—Absence of Knowledge of Condition by Bank—Admission of Oral Evidence.

Action upon a bond, dated the 21st March, 1914, whereby the defendants guaranteed the payment to the plaintiffs of liabilities, whether incurred before or after the date of the bond, of the Noble Manufacturing Company Limited, to the extent or $50,000. A specific term in the bond was, that the guaranty should be binding upon every person signing it, notwithstanding the non-execution thereof by any other proposed guarantor.

The defendants were shareholders of the Noble company, and some of them were directors.

The action was tried without a jury at St. Thomas.

W. N. Tilley, K.C., and W. B. Milliken, for the plaintiffs.

C. St. Clair Leitch, for the defendants.

KELLY, J., in a written judgment, after setting out the facts, said that the defendants sought to escape liability on the ground that their execution of the bond was on the understanding that they were not to be bound unless and except on the condition that all the shareholders in the Noble company should execute the bond.

The defendants' right to succeed upon that defence depended upon whether or not there was an understanding to that effect between them and the plaintiffs, or whether the plaintiffs were aware that their execution of the bond was upon that condition.

Upon the whole evidence, there was no bargain by or on behalf of the plaintiffs that all the shareholders should sign or that any

one signing would not be liable until all had signed. No such condition was stated to the plaintiffs or their representative, and they had no knowledge that there was any such condition.

Evidence was offered by the defendants and admitted for the purpose of shewing that the written contract was subject to a condition; and many cases were cited; but all were distinguishable because in them the condition relied upon was agreed upon by the parties or had been stated to the party seeking to enforce the obligation.

Reference to Pym v. Campbell (1856), 6 E. & B. 370; Davis v. Jones (1856), 17 C.B. 625; Murray v. Earl of Stair (1823), 2 B. & C. 82; Pattle v. Hornibrook, [1897] 1 Ch. 25; Long v. Smith (1911), 23 O.L.R. 121; Ontario Ladies' College v. Kendry (1905), 10 O.L.R. 324.

Judgment for the plaintiffs for $37,015.35 and interest at 6 per cent. per annum from the 30th December, 1916, less a credit of $1,289.02 as of the 2nd February, 1917, with costs.

LATCHFORD, J. FEBRUARY 8TH, 1918.

*RE COTTER.

Will—Construction—Legacy Vested in Testator but not Paid until after his Death nevertheless Passing under his Will—"The Whole of my Money of which I Die Possessed."

Application by the Royal Trust Company, administrators de bonis non, with the will annexed, of James Lawrence Cotter, who died in 1887, for an order determining the following question:—

Does the money in the hands of the administrators, proceeds of a legacy of £800, left to the deceased by Mary Ann Kilgour, pass to Frances Cotter, the widow of the testator, or to his son George Sackville Cotter, or is there an intestacy as to such legacy?

The application was heard in the Weekly Court, Toronto.

W. D. Gwynne, for the administrators.

D. T. Symons, K.C., for Agnes Mary Cotter, representing the unmarried daughters of Frances Cotter, now deceased.

R. T. Harding, for George Sackville Cotter.

J. F. Boland, for James Lawrence Rogerson Cotter, representing the heirs and next of kin of James Lawrence Cotter and the persons entitled in remainder under the will of Frances Cotter.

LATCHFORD, J., in a written judgment, referred to an instrument, dated the 28th March, 1882, by which Mary Ann Kilgour directed her trustees to pay a legacy of £800 to James Lawrence Cotter, within 12 months after the death of her sister. Mary Ann Kilgour died in 1885, and her sister on the 27th February, 1915. Some time before the 27th February, 1916, the money was received by the administrators.

By his will James Lawrence Cotter bequeathed to his wife, Frances Cotter, "the whole of my money of which I die possessed to be used by her for the benefit of the family." He then bequeathed certain books to his daughter Agnes Mary, and proceeded: "I bequeath to my eldest son George Sackville Cotter the remainder of my personal effects"—adding particular injunctions in regard to a ring, military decorations, and documents.

The widow, Frances Cotter, died in July, 1912, having made a will by which she bequeathed her property to her executors upon trusts not now material.

The learned Judge was of the opinion that under the words "the whole of my moneys of which I die possessed" the legacy of £800 passed, and was intended to pass, to the widow of James Lawrence Cotter. It did not pass and was not intended to pass to his son George under the words "the remainder of my personal effects." Accordingly there was no intestacy as to the Kilgour legacy.

That legacy was money; it became vested in James Lawrence Cotter upon the death, in his lifetime, of Mary Ann Kilgour, although payment was postponed: In re Bennett's Trusts (1857), 3 K. & J. 280; Re Wood (1880), 43 L.T.R. 730, 732.

The words "of which I die possessed" did not limit the bequest to moneys in the testator's actual possession at the time of his death.

Order declaring that the £800 passed to Frances Cotter by the will of her husband, and that the beneficiaries under her will are entitled to the fund. Costs out of the estate of James Lawrence Cotter.