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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. DECEMBER 20TH, 1909.

JEWELL v. BROAD.

Infant—Contract—Fraudulent Representation as to Age—Benefit Obtained dehors the Contract—Equitable Relief—Estoppel.

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex.D., 19 O. L. R. 1, dismissing an action brought by the mother of an illegitimate child against the father, to recover moneys which the defendant, by an agreement in writing, covenanted to pay to the plaintiff for the child's maintenance.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

M. Houston, for the plaintiff.

O. L. Lewis, K.C., for the defendant.

FALCONBRIDGE, C.J., said that, in his opinion, the trial Judge had correctly distinguished the cases where it had been said that the infant was liable in equity for falsely representing himself to be of full age. . . . If he had obtained property on such a representation, he might be ordered to re-deliver it: Clarke v. Cobley, 2 Cox Eq. 173. But this obligation is not an obligation to perform the contract . . .

[Reference to Pollock on Contracts, 5th ed., p. 74; Lempriere v. Lange, 12 Ch. D. 675.]

Appeal dismissed with costs.

BRITTON and SUTHERLAND, JJ., agreed in the result.

DIVISIONAL COURT. DECEMBER 20TH, 1909.

RE PERKINS AND DOWLING.

Mines and Minerals—Working Conditions—Certificate of Record—Appeal from Mining Commissioner—Jurisdiction—8 Edw. VII. ch. 21, sec. 78 (4) (O.)

Appeal by the claimant Perkins from the decision of the Mining Commissioner for Ontario, dated the 16th October, 1909, by which he affirmed the validity of a certificate of record issued by the Mining Recorder of the Gowganda mining division to the respondent Dowling in respect of a mining claim in that division. The appellant asked that the certificate should be set aside, and that the respondent's claim should be declared forfeited for non-performance of the working conditions required by sec. 78 of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

The appeal came on for hearing before MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

J. M. Ferguson, for the respondent, took the preliminary objection that no appeal lay from the decision of the Mining Commissioner confirming the validity of the certificate of record issued by the Mining Recorder, citing sub-sec. 4 of sec. 78 of the Act, which provides that "the Recorder, if satisfied that the prescribed work has been duly performed, may grant a certificate. . . but he may first, if he deems proper, inspect or order the inspection of the work, or otherwise investigate the question of its sufficiency, and his decision thereon shall be final unless appeal is made to the Commissioner, whose decision shall be final."

R. A. Reid, for the appellant, argued that the decision of the Commissioner was not final unless he had made an inspection or investigation under the above provisions of the Act.

At the conclusion of the argument on the question of jurisdiction, the judgment of the Court was delivered by MEREDITH, C.J., dismissing the appeal, on the ground that the decision of the Commissioner was final, whether or not any inspection or investigation had been made by him before giving his decision.

As the point was a new one, no costs were awarded.

BOYD, C. DECEMBER 27TH, 1909.

RE KARRY AND CITY OF CHATHAM.

Municipal Corporations—By-law Regulating Victualling Houses —Sunday Closing—Powers of Council—Municipal Act, 1903, sec. 583 (34)—Reasonable Restrictions—Licensed Hotels — Duty of Innkeepers to Provide Entertainment for Travellers.

Motion by James Karry, a restaurant-keeper of Chatham, for an order quashing by-law No. 369, passed on the 26th July, 1909, intituled "A by-law for regulating victualling houses and other places for refreshment or entertainment of the public."

The by-law provided that every victualling house, etc., and all other places of like entertainment, should be closed every Sunday from 2 p.m. till 5 p.m. and also from 7 p.m. on Sunday till 5 a.m. on the following Monday.

J. M. Ferguson, for the applicant.

H. L. Drayton, K.C., for the city corporation.

BOYD, C.:— . . . The Court is not to sit in judgment upon the propriety or alleged unwisdom of the by-law, if it admits of reasonable justification. These local public representative bodies (such as the municipal council) are now regarded as having a free hand in dealing with subjects committed to their jurisdiction by the legislature, and they are usually the best judges to determine what is expedient under existing circumstances and conditions. . . .

"It is difficult to see how the council can make efficient by-laws for such objects as . . . regulating places of amusement . . . providing for the general health . . . not to mention others, unless they have substantial power of restraining people, both in their freedom of action and in their enjoyment of property:" Lord Hobhouse in Slattery v. Naylor, 13 App. Cas. 446, 449, 450.

These places of public entertainment, by whatever name called . . . are proper subjects of municipal license. In this we have followed English precedent: see Muir v. Keay, 40 J. P. 120; Kelleway v. Macdougall, 45 J. P. 207; and Howes v. Board of Inland Revenue, 1 Ex. D. 385. The power to license involves the power to regulate, and the power to regulate involves the consideration of considerations and times of restriction in the working of the licensed premises. The Municipal Act, 3 Edw. VII. ch.

19, sec. 583, No. 34, gives direct and express power to cities to pass by-laws as to the licensing, limiting the number of, and regulating these victualling houses. If "regulation" means, as I think it does, the power to limit the time within which business may be carried on, or to specify the hours in which business shall be suspended on Sundays, and this is exercised in a reasonable way, no serious objection can be made to the by-law in hand. . . .

[Reference to In re Campbell and City of Stratford, 14 O. L. R. 184; State v. Freeman, 38 N. H. 426.]

It appears to me that it is no undue interference with private rights, and no undue restraint upon business, to impose such regulations as are here made as to seasonable hours and times for doing this necessary business on Sundays. . . .

There are 14 licensed hotels in Chatham, and these all have been, as a matter of public concern, "instituted for passengers and wayfairing men:" Calye's Case, 8 Co. Rep. 32. However convenient it may be for the hotel-keepers to have a near-by restaurant to which they can turn the belated and hungry traveller of a Sunday night, they cannot so relieve themselves of their proper obligation to provide food, shelter, and protection for travellers. They are required to supply food and accommodation, and have a lien for their charges on the belongings of the guest: R. S. O. 1897 ch. 187, sec. 2. It is their business as public servants to provide lodging and suitable entertainment for all at a reasonable price. The true definition of an inn is a house where the traveller is furnished with everything which he may have occasion for while upon his way: Thompson v. Lacy, 3 B. & Ald. 283, 286-7. . . .

[Reference to Hawthorn v. Hammond, 1 C. & K. 404; Rex v. Ivens, 7 C. & P. 213, 219.]

If the hotel-keepers do not supply midnight travellers, and the source of supply from the restaurant has been taken away by the council, it is for the municipal authorities to see that the hotel-keepers do their duty and preserve their licenses from being imperilled.

All that the Court can now do is to dismiss this application with costs.

BRITTON, J. DECEMBER 28TH, 1909.

RE BAUMAN.

Will—Construction—Residuary Bequest to Children—Right of Grandchildren to Deceased Parents' Shares—Gift of Residue Construed as not to a Class—Condition of Gift—Payment of Interest—Method of Computation—Responsibility of Executors.

Motion for an order determining certain questions arising in the administration of the estate of Wendell H. Bauman, deceased.

The testator died on the 24th April, 1909. His will was dated the 13th October, 1896, and by it he gave certain portions of his real estate to six of his seven children, viz., Joseph S. Bauman, Novah S. Bauman, Wendell S. Bauman, Mary Musselman, Magdalena Ziegler, and Judith Gingrich, mentioning them by name. He also mentioned by name his remaining son, Menno S. Bauman, saying that he had already given that son a deed for his farm. The devise of the homestead farm to his son Noah S. Bauman was "upon the condition that he shall pay unto me or my executors the sum of $2,900 in ten equal successive annual instalments, with interest at the rate of four per cent. per annum:" and there were similar conditions with regard to some of the other devises. The devise of a farm to Mary Musselman was "upon the condition that my said daughter Mary shall have the use of the said farm during her lifetime, and in the event that her husband survives her, he shall have the use thereof during his lifetime from and after her decease. After the decease of my said daughter Mary and her husband, the said farm shall be equally divided between all the children of my said daughter Mary or their heirs, share and share alike."

The residuary clause was as follows: "The residue of my estate shall be equally divided between all my children, share and share alike, and the share of my daughter Mary shall be equally divided between her children, they to pay the interest thereon at the rate of four per cent. per annum unto their mother, and my executors may pay her the interest of her share so long as it remains in their hands, if they think she needs it for her own maintenance."

The seven children named in the will were all alive at its date. Joseph S. Bauman and Noah S. Bauman died in 1896, Judith Gingrich in 1904, and Wendell S. Bauman in April, 1908—each

of them leaving a child or children, who were living at the date of this motion. The other three children, Menno S. Bauman, Mary Musselman, and Magdalena Ziegler, survived the testator, and were living at the date of the motion.

The testator on the 9th May, 1908, executed a codicil, by which he gave to the husband of his deceased daughter, Judith Gingrich, the use of the farm devised to that daughter until their children should all attain majority. He also substituted another son as executor for one of his deceased sons. In all other respects he confirmed his will.

The questions were as follows:—

1. Is the residue of the estate of the testator, which is directed by the residuary clause of his will to be divided amongst all of his children, share and share alike, to be divided into seven shares, one to go to each of the three surviving children and one to the representatives of each of the four children who predeceased the testator, or is such residue to be divided amongst the three children only who survived the testator?

2. Is the interest payable by Noah S. Bauman in respect of lands devised to him to be paid annually upon the whole amount remaining from year to year unpaid, or is the interest payable only on each instalment of principal as such instalment falls due?

3. Are the children of Mary Musselman entitled to unconditional payment to them by the executors of her share of the residue, and are the executors responsible for the payment to her of the interest upon her share after payment of such share or any part of it to her children?

J. C. Haight, for the executors.

Eric N. Armour, for Clara Irving, appointed to represent the adult grandchildren as a class.

E. C. Cattanach, for the infant grandchildren.

BRITTON, J., after stating the facts, referred to and adopted the method of construction propounded by Romer, L.J., in Gorringe v. Gorringe, [1896] 2 Ch. at p. 347, and proceeded:—

In this case no reason has been suggested—apparently there is no reason—why the testator should pass over any of the children of deceased children. It seems to me a case where it can fairly be said that the testator's intention was that the residue should be divided among all of his children, and that the children of any one deceased should get the parent's share. The testator having mentioned all of his children in the preceding paragraphs of the will, he must be considered as speaking of these children

as if he had said, "The residue of my estate shall be equally divided between all my said children share and share alike." That is to say, the will should be read as if it said, "The residue of my estate shall be divided into equal shares, one share for each child just named, but the share of Mary shall be equally divided between her children, they to pay interest to their mother." Construing the gift of residue as a gift to a class would, in the event of Mary's death before the death of her father, have cut off Mary's children, in the face of the clearly expressed intention that these children should take their mother's share. These children were to take in any event. . . .

It was argued that, as the testator at the time of making the codicil had in remembrance the fact of the death of four of his children, leaving issue, had he desired to provide in any way for these grandchildren, he would have then done so. I think the argument stronger that the testator was of opinion that the grandchildren would take their parents' shares, and so were in fact already provided for by his will, which in that respect he confirmed.

Having reached a conclusion as to the testator's meaning, I am bound, so far as in my power, to give effect to it, unless the rules of law and construction which the authorities have laid down compel me to do otherwise. The rule is perfectly clear that in a gift to a class only the members of the class living at the time of the death of the testator can take. To warrant my construction of the will, the gift to the children of the testator must not have been to them as a class. . . .

[Reference to In re Stansfield, 15 Ch. D. 84.]

Here the testator had seven children. He had mentioned these, each by name, and each as son or daughter, immediately before dealing with the residue, and he then said, "The residue of my estate shall be equally divided between all my children, share and share alike, and the share of my daughter Mary shall be equally divided between her children. . . ." On the face of this will, with the knowledge that there were in fact seven chidren, it seems plain to me that the testator intended his residuary estate to be divided into seven shares. The answer made is, that the testator did not say "seven;" did not say "my said children;" did not say "my children hereinbefore named;" and so the rule must be applied. Gathering as I do, not from mere guess, but from the will and the facts before me, leading to absolute conviction that the testator meant in this case that the residuary estate should go to the children he had already named, I

must give effect to it in the same way as if the words were "between my seven children."

In In re Stansfield, Bacon, V.-C., said, "When he speaks of 'my nine children,' that is the same as if he had mentioned them all by name." In the present case the testator did mention all by name, and, because he did, I think the case distinguishable from Re Williams, 5 O. L. R. 345; Re Clark, 8 O. L. R. 599; Re Moffat, 15 O. L. R. 637; Re Moir, 14 O. L. R. 541. See Wisden v. Wisden, 2 Sm. & G. 396. A gift to a class of persons "before mentioned," the persons having been previously named, is not a gift to a class: Theobald, Can. ed., p. 787. If the gift was to the children as persons designated, then sec. 36 of the Wills Act will apply, and under it the children of the deceased children of testator will take.

In answer to the second question, the interest is to be paid annually upon the whole amount that may from time to time remain unpaid. The words "he shall pay the sum . . . with interest" mean the whole interest. The words "equal successive annual instalments" refer only to principal. The amount of money payable each year would vary, whether the interest be paid yearly upon the whole balance or upon each instalment. With each instalment of principal is to be paid the interest, and that means all the interest which has accrued to the date of payment, that is, interest each year on the whole amount that may from time to time remain unpaid.

In answer to the third question, the executors, while the residuary estate remains in their hands, may exercise their discretion as to payment of interest on Mary Musselman's share. If, in the opinion of the executors, she needs the interest for her maintenance, they may pay to her. If the executors, in the exercise of their discretion, pay the money to the children of Mary Musselman, they will not be liable after such payment, such child being of age and competent to receive the money, for the payment of interest to the mother.

Costs of all parties out of the residue of the estate.

RIDDELL, J. DECEMBER 30TH, 1909.

MITCHELL v. SPARLING.

Judgment—Amendment after Passing and Entry—Judgment as Entered not Conforming to Judgment as Pronounced — Practice.

Motion by the plaintiff to amend the judgment and for a commission to take evidence abroad.

J. M. McEvoy, for the plaintiff.

E. Flock, for the defendant.

RIDDELL, J.:—Action for the rescission of certain agreements and for the return of $3,840 paid by the plaintiff pursuant to the agreements. At the trial before me at London in April, 1908, it was made to appear, by the plaintiff himself, that, whatever may have been the improprieties in the first instance, he had, with full knowledge, acted in such a way as to ratify what had been done, and therefore he could not be given his money back. I allowed the plaintiff to amend by claiming a partnership with the defendant, and ordered a reference, reserving all questions of costs, &c.

A block of land of 5,000 acres was mentioned in the pleadings and in the evidence, but the agreement alleged by the plaintiff in evidence was concerning the sale of a balance of 10,000 acres. For the purpose of the trial it was not of importance to consider the amount of land or other property in the partnership, and I did not decide or intend to decide that the partnership property was restricted to the 5,000 acres. In drawing up the judgment the declaration was made that the plaintiff and defendant were partners in respect of the 5,000 acres.

In the reference a difficulty has arisen from the fact that the Master considers that he cannot go beyond the 5,000 acres; and a motion is made to me to amend the judgment.

Ainsworth v. Wilding, [1896] 1 Ch. 673, discusses the prior cases and lays down the rule (inter alia) that "when the Court itself finds that the judgment as drawn up does not correctly state what the Court actually decided and intended," the Court can upon motion interfere after the passing and entering of the judgment: see p. 677. That is the present case, and the judgment will be amended by omitting all reference to the subject matter of the partnership.

This amendment being made, the application for a commission is admittedly proper, and will be granted.

Costs of this application will be reserved to be disposed of with the other matters after the Master shall have made his report.

CHESTERFIELD v. CHESTERFIELD—BRITTON, J.—DEC. 27.

Alimony.]—Action for alimony tried at Sault Ste. Marie. Action dismissed; the defendant to pay the cash disbursements actually and properly made by the plaintiff's solicitor. J. L. O'Flynn, for the plaintiff. W. H. Hearst, K.C., for the defendant.

ROSE v. DUNLOP—BRITTON, J.—DEC. 30.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Mistake as to Quantity of Land—Termination of Contract—Rent.]—Action to compel specific performance by the defendant of an agreement to purchase a house and lot in the city of Peterborough. The defendant had paid part of the purchase money and gone into possession, but, discovering, as she alleged, that the lot was of less extent than the plaintiff had represented, she demanded her money back, refused to pay any further sum, and refused to give up possession. A portion of a lane was enclosed with the lot and appeared to be part of it. Held, that it was not a case for enforcing the agreement, giving the defendant only the land which the plaintiff owned.—The agreement of sale and purchase contained a clause to the effect that upon default in payment of the purchase money the defendant should be treated as a tenant paying rent at $12 per month, and the plaintiff might apply all money paid on account of purchase money as on the rent accrued, and should have the right to determine the holding as a tenancy from year to year. The paintiff pleaded this in reply, and avowed a willingness to accept rent and that the agreement for purchase should be at an end. Held, that, as the plaintiff exercised the option given him, there should be judgment based upon that, the writ of summons being treated as notice terminating the tenancy at the expiration of the year ending on the 29th November, 1909. Judgment for the plaintiff for $45.50 on this

basis, without costs. The defendant to have the right to elect to retain possession. No costs. D. W. Dumble, K.C., for the plaintiff. F. D. Kerr, for the defendant.

GORDON v. J. I. CASE THRESHER MACHINE CO.—MACMAHON, J.—DEC. 30.

Mistake—Payment.]—The plaintiff sought repayment from the defendants of $240 which he alleged that he had paid to the defendants under a mistake of fact, and also claimed interest thereon. MACMAHON, J., found that the plaintiff had full knowledge of all the facts, and voluntarily paid the $240. Action dismissed with costs. W. E. Buckingham, for the plaintiff. C. L. Dunbar, K.C., and E. A. Dunbar, for the defendants.
