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HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. DECEMBER 11TH, 1916

REX v. WILLIAMS.

Ontario Temperance Act — Magistrate's Conviction for Unlawfully Keeping Intoxicating Liquor—Sec. 41 (1) of 6 Geo. V. ch. 50—Burden of Proof—Sec. 85—Question for Magistrate—Motion to Quash Conviction—Dismissal.

Motion to quash a conviction of the defendant by the Police Magistrate for the City of Hamilton for unlawfully having and keeping intoxicating liquor upon his premises without a license, contrary to sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. G. Farmer, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the language of sec. 41 (1) of the Act was as wide as language could well be; and, by sec. 85, the burden of proving the right to have or keep or sell or give liquor shall be on the person accused of improperly or unlawfully having, etc., such liquor.

This was a question for the magistrate. He had convicted—and it could not be said that there was no evidence on which he could convict.

Motion dismissed with costs.

The Chief Justice, on the 21st December, added this memorandum: "As there seems to be some misunderstanding regarding the judgment in this case, it is proper to state that the decision was based on the particular facts appearing in the evidence, and

that was not intended to lay down any general rule as to the liability of any person to be prosecuted under sec. 41 of the Ontario Temperance Act merely because he was carrying a flask or small bottle of liquor."

BRITTON, J. DECEMBER 18TH, 1916.

OLIVER v. ROBERTSON.

Mortgage — Redemption — Terms — Proviso in Mortgage-deed Equivalent to Covenant Running with Land—Benefit of Assignee of Equity of Redemption—Costs—Contribution.

On the 1st August, 1910, the defendant Robertson mortgaged several lots of land to E. W. Clark and others for $5,000, to be repaid in full on the 17th August, 1915. The mortgage-deed contained a proviso that the mortgagor should have the right at any time to obtain a release of any one of the lots mortgaged upon payment of $360 on account of the principal money.

The defendant Joseph Moyneur became the purchaser of the equity of redemption in the lots, none of which had been released from the mortgage.

In this action for redemption, there was a reference to the Local Master at Ottawa, who found and certified that the defendant Moyneur was entitled to redeem the lots purchased by him on payment of the sum of $360 per lot and costs of the action without further payment.

The defendant Moyneur appealed from the Master's certificate, upon the ground that the payment of the whole costs of the action should not have been a term of his right to redeem.

The defendant Robertson also appealed upon the ground that Moyneur should not have been allowed to redeem except upon payment of a proportionate amount of the whole mortgage-debt and costs of the action.

The appeals were heard in the Weekly Court at Ottawa.

S. R. Broadfoot, for the appellant Moyneur.

A. W. Greene, for the appellant Robertson.

G. D. Kelley, for the plaintiff.

G. McLaurin, for the defendant Calvin Curran.

BRITTON, J., set out the facts in a written judgment, and said that the mortgagee in a redemption action is entitled to all his

costs. Where there are several parcels of land in one mortgage, and the equity is purchased by different persons, it is proper to reserve the right of any purchaser of part to claim contribution when the costs of the action, or part thereof, have been paid by the other purchasers, making a total payment in excess of full costs. In this case nothing of that kind appeared.

The proviso in the mortgage was equivalent to a covenant running with the land, and the purchaser had the right, as the mortgagor had, to obtain a release of the lots upon payment of $360 upon each with the addition of costs.

The appellant Robertson was not prejudiced by the Master's certificate being granted without notice to him.

Both appeals dismissed without costs.

RIDDELL, J. DECEMBER 18TH, 1916.

RE CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO. AND NOBLE.

Railway—Expropriation of Land — Compensation — Quantum — Award—Appeal.

An appeal by Noble under the Railway Act of Canada from a majority award of arbitrators appointed to determine the amount to be paid to the appellant for lands taken for the railway.

D. H. Chisholm, for the appellant.
J. D. Spence, for the railway company.

RIDDELL, J., in a written judgment, said that in the argument it was made to appear that the case was almost on all fours with Re Ruddy and Toronto Eastern R.W. Co. (1915), 7 O.W.N. 796, and in the Supreme Court of Canada (not reported), and it was agreed that the decision upon this motion should be reserved until the disposition by the Judicial Committee of the further appeal which had been permitted in the Ruddy case. The Judicial Committee having now dismissed that appeal, the learned Judge proceeded to dispose of the present appeal. He said that, while he would have given a much larger sum to the appellant—perhaps influenced to a certain extent by a long personal knowledge of the property—it was impossible to allow the appeal consistently with the principles laid down in Ruddy's

case and others, including a very recent case of Re Watson and City of Toronto, in the Appellate Division, 11 O.W.N. 111.

With much reluctance, the learned Judge dismissed the appeal, and with costs.

MIDDLETON, J. DECEMBER 18TH, 1916.

RE LOCKER.

Will — Construction — "Nearest Heirs" — Ascertainment — Evidence — Incompleteness — Notice.

Application, upon originating notice, by the executor of one Locker, deceased, for an order determining certain questions as to the construction of the will.

The motion was heard in the Weekly Court at London.
W. C. Brown, for the executor.
G. S. Gibbons, for the widow.

MIDDLETON, J., in a written judgment, said that the testator gave his lands to his wife for life, and "at her death to my nearest heirs that are alive at her death." The testator died on the 18th December, 1915, leaving a widow but no children. On the argument it was said that he left as his heirs a half-sister and a brother, but that both were now dead; the half-sister left no issue, and the brother left children, all of age.

The learned Judge's view was, that there was a gift to the testator's heirs, i.e., to those who were his heirs at his death, contingent upon their surviving the widow, and an intestacy as to the remainder, which would result in vesting the estate in the heirs (in the events that had happened); and, if the half-sister died intestate, and the brother also died intestate, would vest in the brother's children the remainder expectant upon the life estate, so that a fee simple might be conveyed.

But, unfortunately, the facts did not seem to be as stated. The half-sister was not mentioned in the papers, and it was shewn that there were two children born to the testator's mother and two to his father by earlier marriages (one, no doubt, the half-sister), and all that was said was, "Some of the children as aforesaid or their heirs are now living." It was not said that the half-sister and the brother died intestate. This was probably the case, but it should be shewn.

Notice must be given to the living half-brothers or sisters,

nephews and nieces, issue of those who were dead, other than the children of Thomas, and generally the material must be completed in some satisfactory way before any order could be made.

MIDDLETON, J. DECEMBER 18TH, 1916.

*WILSON v. TOWN OF INGERSOLL.

Municipal Corporations — Local Improvement By-law — Construction of Road — Contract Approved by Town Council — Refusal of Mayor to Sign—Seal Affixed and Contract Signed by Person Appointed by Council—Administrative Powers of Council—By-law Read three Times at one Meeting—Violation of Domestic Rule—Effect of—Unnecessary By-law—Injunction—Discretion of Court.

Motion by the plaintiff, a ratepayer of the town, for an interim injunction restraining the defendants from constructing a road in the town of Ingersoll under a contract between the defendants the town corporation and their co-defendants, the contractors for the making of the road.

The motion was heard in the Weekly Court at Toronto.
J. H. Moss, K.C., for the plaintiff.
Gideon Grant, for the defendants.

MIDDLETON, J., in a written judgment, said that the municipal council and the mayor of Ingersoll did not agree, and the mayor had set himself to the hopeless task of governing the town in opposition to all other members of the council. The plaintiff was a ratepayer in sympathy with the mayor.

By by-law 821 (11th September, 1916), passed under secs. 9 and 11 of the Local Improvement Act, R.S.O. 1914 ch. 193, the council enacted that the works in question should be constructed as local improvements. Tenders were advertised for, and the paving committee reported on the 18th September, and finally on the 2nd October the report was adopted and the tender of the defendant contractors accepted—the mayor dissenting. On the 7th October, the contract, prepared and ready for signature, was presented to the council and approved by resolution. The mayor refused to sign, and again refused after a resolution of the council

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

instructing him to sign. A by-law was introduced appointing an acting mayor to sign the contract. This by-law was put through its three readings and a reference to committee of the whole at one meeting of the council, the mayor opposing at all stages.

The contract was then signed, the contractors notified, and the work begun.

The learned Judge considered the various objections raised by the plaintiff, and ruled as follows—

(1) When there is a by-law for the doing of the work, a by-law approving of the contract is not necessary. The distinction between the legislative and the administrative powers of the council is discussed in Foster v. Reno (1910), 22 O.L.R. 413, 416.

(2) There is no statute requiring the mayor to sign contracts. The corporate seal is the essential thing. The council may by resolution authorise the sealing and delivery with the countersignature of any designated person of any contract within its power—more particularly when the municipal officer whose duty it is to sign refuses to discharge that duty.

(3) The contract as drawn was approved by the council.

(4) That the by-law was put through the council in violation of the general regulation, being read three times at one meeting, was not material, in view of what had been said; but a by-law is not void because passed in violation of some domestic rule or practice of the council: Re Kelly and Town of Toronto Junction (1904), 8 O.L.R. 162; Re Caldwell and Town of Galt (1905), 10 O.L.R. 618.

(5) As a matter of discretion, the Court ought not to interfere with the construction of a work within the competence of the council, save in very exceptional circumstances.

The motion should be turned into a motion for judgment, and the action should be dismissed with costs.

FALCONBRIDGE, C.J.K.B. DECEMBER 20TH, 1916.

BAKER v. GRAND TRUNK R.W. CO.

Release—Claim for Damages for Negligence—Injury to Railway Servant—Validity of Release—Alternative Claim for Damages for Breach of Contract to Employ Plaintiff—Evidence—Dismissal of Action—Costs.

Action to recover damages for injuries sustained by the plaintiff by reason, as alleged, of the negligence of the defendants, in

the course of the plaintiff's employment as a baggageman upon the defendants' railway. The plaintiff made an alternative claim for damages for breach of contract in not giving him employment after he recovered from his injuries.

The defendants set up a release executed by the plaintiff. At the trial at St. Catharines, the issue as to the release was found in favour of the defendants, and judgment was reserved as to the alternative claim.

M. J. McCarron, for the plaintiff.
W. E. Foster, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said, dealing with the alternative claim, that the plaintiff was by no means illiterate (although he might not have had sufficient education to fill one of the positions which he desired to get), and he executed the release. His daughter said that he told McCraw, the claims-agent, when he was writing it, not to forget to put in that the doctor's and hospital bills should be paid by the defendants. It was a pity that he did not insist on having the agreement to employ him also written in. He now asserted that promise as the condition of his signing the release. McCraw denied it. The plaintiff's daughter corroborated her father's statement, but on cross-examination stated that McCraw said he would do his best to get a position for the plaintiff. To the plaintiff's knowledge, McCraw was not the officer who could make the appointment to any of the positions in question.

The correspondence shewed that the defendants did make bona fide efforts to give the plaintiff employment—even after the expiry of six months from the accident.

The learned Chief Justice said that he had re-perused and re-considered all the cases cited by him in Arkles v. Grand Trunk R.W. Co. (1913), 14 D.L.R. 789, 5 O.W.N. 462. They were equally applicable to this claim as to the other part of the case. He thought that no Court could dispose of this issue in favour of the plaintiff, and on this branch also he failed.

The action should be dismissed, in all the circumstances without costs.

MIDDLETON, J. DECEMBER 20TH, 1916.

RE LABATT.

Will—Construction—Distribution of Estate after Death of Wife—Statutory Next of Kin—Per Capita Distribution.

Motion by the executor of the will of one Labatt, deceased, for an order determining a question of construction.

The motion was heard at the London Weekly Court.

N. P. Graydon, for the executor and for certain beneficiaries and an absentee in the same interest.

E. H. Ambrose, for the sisters of the testator.

MIDDLETON, J., in a written judgment, said that the testator died on the 12th June, 1877, leaving a widow, but no children. The widow lived until the 28th June, 1916. At the time of the testator's death, his heirs at law and next of kin were his two sisters, two brothers, and a nephew and niece, children of a deceased brother.

By his will dated the 1st March, 1877, the testator directed his executors to invest the residuary estate, some $35,000, and to pay the income to his wife during her life, and upon her death "to divide and pay all my said residuary estate . . . unto and equally between and amongst the person or persons who at the decease of my said wife would be my next of kin and entitled to my personal estate under the English statutes for the distribution of the personal estate of intestates if I were to die immediately after the decease of my said wife as tenants in common."

During the 39 years that the wife survived, two of the brothers died, one leaving three and the other nine children.

The question submitted was, whether the division was to be per stirpes or per capita?

This was determined in favour of a per capita distribution by the decision in In re Richards, Davies v. Edwards, [1910] 2 Ch. 74. There the direction was, that the estate was to be held "for and equally between" the statutory next of kin. Swinfen Eady, J., held that, as there was no reference to the statutory mode of distribution, but the statute was only referred to for the purpose of defining the class, the word "equally" must have its full effect, and the statutory next of kin would take per capita.

There was nothing in this will to indicate in any way that the

distribution was intended to be in such a way as would follow upon an intestacy. There was no such expression as was regarded as sufficient in Fielden v. Ashworth (1875), L.R. 20 Eq. 410, where the testator directed distribution among his next of kin "as the law directs," and that was regarded as indicating a distribution *per* stirpes and as overriding another direction looking to equality.

It was obvious that the widows of deceased brothers took no share—but that might be declared, if so desired.

Costs should be paid out of the estate.

LATCHFORD, J. DECEMBER 20TH, 1916.

MILLS v. TIBBETTS.

Mortgage—Land Titles Act, 1911, sec. 30—Sale by Plaintiff of Half-interest in Mining Locations—Mortgage or Charge by Purchasers in Favour of Plaintiff for Part of Purchase-money—Enforcement—Release under Seal—Construction—Restriction to Portion of Moneys Charged—Purchasers not Relieved from all Liability—Mortgage Executed by Defendants as Trustees Trustees for Syndicate—Knowledge of Plaintiff—Personal Liability of Defendants—Secret Commission—Finding of Fact—Consideration for Release under Seal Unnecessary—Recovery of Moneys Secured by Charge Less Sum Released—Reduction in Extent of Charge—Costs.

Action to enforce a charge or mortgage, dated the 11th June, 1913, duly made and registered under sec. 30 of the Land Titles Act, 1911, 1 Geo. V. ch. 28, whereby the defendants (Tibbetts and McKenzie) charged all their interest in certain mining claims in the district of Rainy River with the payment of $2,000 and interest at 8 per cent. per annum.

The action was tried without a jury at Fort Frances.

C. R. Fitch, for the plaintiff.

H. A. Tibbetts, for the defendants.

LATCHFORD, J., in a written judgment, set out the facts and said that in August or September, 1915, the plaintiff executed and delivered a release under seal, dated the 31st May, 1915, reciting the purchase by the defendants from the plaintiff of an interest

in the mining claims for $5,000; the payment of $3,000 on account; the securing of the balance by a mortgage (the mortgage or charge now sought to be enforced) executed by the defendants "as trustees for certain beneficiaries, including themselves;" that the defendant McKenzie had paid to the plaintiff $388.22 "in full of his one-sixth interest" in the claims and in payment of his liability under the mortgage; and, for the consideration mentioned, the plaintiff released McKenzie from all claims in respect of the one-sixth interest of McKenzie.

The learned Judge said that it was clear that the plaintiff's intention in executing the release was to free from the operation of the charge the one-sixth share which McKenzie had in his own right in the mining locations, and nothing more. He did not intend to and did not release the remaining five-sixths owned in common by the two defendants, nor to relieve them from their covenants to pay the balance due on the mortgage. The recital was wider in scope, but its general terms were controlled by the clear, definite, and particular words in the operative part of the deed: Rooke v. Lord Kensington (1856), 2 K. & J. 753, 771. The defence that McKenzie had been discharged from all liability in respect of the mortgage had not been established.

Again, the defendants said that, to the knowledge of the plaintiff, they executed the mortgage "as trustees for certain other parties and interests," and were not personally liable. No doubt, the relation of trustee and cestui que trust existed between the defendants and their associates in the purchase and in the ownership of the half interest recorded in the name of the defendants, and the plaintiff was probably aware of the fact. But quoad the plaintiff the same relation did not exist. Upon the charge or mortgage he could have no recourse against the defendants' cestuis que trust. The defendants, as the registered owners of a half-interest in the mining claims, charged that interest with the payment of the mortgage-money and interest, and assumed by their covenants the personal obligation of paying it. They could not derive any advantage from the relation existing between them and their associates, whether that relation was known to the plaintiff or not. That defence also failed.

As a further defence the defendants alleged that the purchase was induced by the payment by the plaintiff of a secret commission to one Maxwell who acted for the defendants and their associates in making the purchase, and they counterclaimed to be repaid the $3,000 they had paid the plaintiff and for the cancellation of the charge. Upon the evidence, the learned Judge found that no commission, secret or otherwise, was paid by the

plaintiff to induce the purchase which the defendants made. The defence and counterclaim based on this ground failed.

The plaintiff set up that there was a total failure of consideration for the release, and that it was, therefore, inoperative. But the release, being under seal, did not require a consideration to support it (Leake on Contracts, 5th ed., p. 654), and the plaintiff could not repudiate it.

Judgment declaring the plaintiff entitled to recover from the defendants the amount claimed, with interest, less $382.22, with a declaration that the charge attaches to five-sixths of the defendants' interest in the mining locations. The plaintiff's costs should be paid by the defendants.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. DECEMBER 21ST, 1916.

YOUNG v. SPOFFORD.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers as to Costs—Motion Made to Another Judge—Judicature Act, R.S.O. 1914 ch. 56, secs. 24, 74.

Motion by the execution creditor for leave to appeal from the order of MIDDLETON, J., ante 232.

R. L. McKinnon, for the applicant.

L. W. Goetz, for the execution debtor and the claimant in interpleader.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the jurisdiction which Mr. McKinnon invoked here, and which was acted on in Re Sturmer and Town of Beaverton (1911-12), 25 O.L.R. 190, 566, to award costs against a person not a party to the proceedings, was found in sec. 74 of the Ontario Judicature Act, which gives to the Court a discretion ever costs and power to determine by whom costs shall be paid. By sec. 24 (amended since Gates v. Seagram (1909), 19 O.L.R. 216, was decided), no appeal shall lie as to costs which by law are left to the discretion of the Court upon any ground except by leave of the Judge making the order.

Motion dismissed. This objection not having been taken in argument, no costs.

SUTHERLAND, J., IN CHAMBERS. DECEMBER 22ND, 1916.

*REX v. LAKE.

Ontario Temperance Act—Conviction for Keeping Intoxicating Liquor for Sale without License—Jurisdiction of Convicting Justices—Mayor and Alderman of City—Ex Officio Justices—Municipal Act, R.S.O. 1914 ch. 192, sec. 350—Offence against sec. 40 of 6 Geo. V. ch. 50—Evidence—Finding of Justices—Motion to Quash Conviction—Relevancy of Testimony—Search-warrant—Insufficiency of Information—Effect upon Conviction.

Motion by the defendant to quash his conviction by two Justices of the Peace for keeping intoxicating liquor for sale upon his premises in the city of London, without a license, in contravention of the Ontario Temperance Act, 1916, 6 Geo. V. ch. 50.

N. P. Graydon, for the defendant.
T. G. Meredith, K.C., for the complainant.

SUTHERLAND, J., in a written judgment, said that the convicting Justices were the Mayor and an Alderman of the city of London, who were, by virtue of sec. 350 of the Municipal Act, R.S.O. 1914 ch. 192, ex officio Justices of the Peace for the city. It was contended that they had no power to hear the case or convict—that, in the contemplation of the Ontario Temperance Act, it is only Justices appointed in the ordinary way under the Justices of the Peace Act, R.S.O. 1914 ch. 87, who have jurisdiction. The learned Judge said that once the Mayor and Alderman made their declarations of office and qualification they became, under sec. 350 of the Municipal Act, ex officio Justices for all purposes incidental to the office.

The conviction appeared to have been made under sec. 40 of the Act. The evidence shewed that when the defendant's dwelling-house was searched by police officers, in pursuance of a search-warrant, a large quantity of intoxicating liquor was found, and two men were drinking porter with the defendant in the cellar. It was urged that there was no evidence to support the conviction; but the learned Judge said that there was evidence which, if believed, would support the conviction. The Justices saw the witnesses and were in a better position to weigh their testimony than a Judge could be.

It was argued that evidence that one Anderson was seen

taking a bottle of whisky away from the defendant's house, and that the defendant's wife was seen trying to hide a case of whisky, should not have been admitted, and not only might have affected but did affect the decision of the Justices. The question was, whether the evidence was or was not relevant to the issue, and that was considered by Clute, J., in Rex v. Melvin (1916), ante 215. In this case, however, considering the nature of the charge, it could not be said that the evidence objected to was not relevant to the issue.

It was contended also that the information upon which the search-warrant was issued did not disclose the facts and circumstances shewing the causes of suspicion that a violation of the Act had occurred: Rex v. Bender (1916), 36 O.L.R. 378. But, even if that were so, the conviction had been made, and its validity would not be affected by the improper issue of the search-warrant: Rex v. Swarts (1916), 37 O.L.R. 103, 108.

Motion dismissed with costs.

BOWERMAN v. STEPHENS—FALCONBRIDGE, C.J.K.B.—DEC. 18.

Contract—Money Demand Arising out of Dealing in Land—Evidence—Weight of—Independent Advice.]—Action for the recovery of money lent and money of the plaintiff had and received by the defendant. The dispute arose out of a land transaction. The action was tried without a jury at Hamilton. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendant was a solicitor, but as regards this transaction he and the plaintiff did not occupy the relation of solicitor and client. The defendant had done some trifling professional work for the plaintiff, but as to the matter involved in this action they were quite on the same plane, and the defendant was dealing with the plaintiff as with a stranger. Even were this not so, the plaintiff presented the appearance of one not easily overreached or misled, not standing much in need of independent advice, and by no means likely to act without independent advice if he thought he required it. It was a case of oath against oath, with the writings not favouring the plaintiff's contention, and the witness Robins contradicting the plaintiff as to one item. The plaintiff failed, and his action must be dismissed with costs. W. S. Brewster, K.C., for the plaintiff. G. Lynch-Staunton, K.C., and H. J. McKenna, for the defendant.

RE MCGREGOR—HODGINS, J.A.—DEC. 22.

Will — Construction — Residue — Charitable Bequests.]—Motion by the executors of the will of Mary McGregor, deceased, for an order determining questions arising upon the will as to the distribution of the estate. The motion was heard in the Weekly Court at Toronto. HODGINS, J.A., pronounced an order declaring that one-half of the residue goes to the Home Mission Board of the Baptist Convention and half for the benefit of the poor in this world's goods who may be found in Baptist Churches as members of the congregation. Upon the Home Mission Board filing an undertaking to administer the one-half of the residue which is for the benefit of the poor, as a separate charity, and for their their benefit, as distinguished from their Home Mission Board work, and a resolution of the Home Mission Board ratifying that undertaking, an order may go for payment to the Home Mission Board of that half of the residue, as well as that which is properly payable to them. It is not necessary to refer the matter to devise a scheme. Costs of all parties as between solicitor and client may be paid out of the estate of the deceased. D. Urquhart, for the executors. A. W. Langmuir, for the next of kin. G. W. Holmes, for the Home Mission Board of the Baptist Convention and the Ministerial Superannuation Board.

CORRECTION.

In NICHOLSON v. ST. CATHARINES COLLEGIATE INSTITUTE BOARD, ante at p. 237, 15th and 14th lines from the bottom, for "completed" read "competitive."