The
Ontario Weekly Notes

VOL. XIII. TORONTO, SEPTEMBER 28, 1917. No. 3

APPELLATE DIVISION.

FERGUSON, J.A., IN CHAMBERS. SEPTEMBER 20TH, 1917.

FOX v. BELLEPERCHE.

Appeal—Extension of Time for Appealing to Supreme Court of Canada from Judgment of Appellate Division—Bona Fide Intention to Appeal—Mistake of Solicitor as to Time for Appealing.

Application by the plaintiff to extend the time for appealing to the Supreme Court of Canada from a judgment (12 O.W.N. 275), pronounced by the Appellate Division of the Supreme Court of Ontario on the 12th June, 1917, dismissing the action.

H. S. White, for the plaintiff.
A. W. Langmuir, for the defendants.

FERGUSON, J.A., in a written judgment, said that the material in support of the motion shewed a bona fide intention to appeal, held while the right to appeal existed, and a failure to take the necessary steps to perfect the appeal by reason of the solicitor for the plaintiff being under the erroneous impression that the time for taking the appeal, as fixed by the Rules of the Supreme Court of Canada, was exclusive of long vacation.

The plaintiff had by his material brought himself within the requirements of the rule stated in Smith v. Hunt (1902), 5 O.L.R. 97, and in Canadian Heating and Ventilating Co. Limited v. T. Eaton Co. Limited and Guelph Stove Co. Limited (1916), 11 O.W.N. 176. In the absence of any material controverting the case made out, a reasonable extension should be granted.

The time for completing security in the proposed appeal should therefore be extended up to and including the 1st October; the plaintiff before that time to pay to the defendants the costs of this application and order, fixed at $30.

HIGH COURT DIVISION.

SUTHERLAND, J. SEPTEMBER 17TH, 1917.

CLEMENT v. NORTHERN NAVIGATION CO. LIMITED.

Negligence—Carriers—Waggon Delivered on Government Wharf and Left in Dangerous Position—Injury to Child by Overturning of Waggon—Responsibility of Carriers—Finding of Jury—Nuisance—Finding of Trial Judge.

Action by F. A. Clement and Josephine Clement, husband and wife, to recover damages, under the Fatal Accidents Act, for the death of their infant son, 6 years old, by reason of the negligence of the defendants or of a nuisance for which they were responsible, as the plaintiffs alleged.

The action was tried with a jury at Sault Ste. Marie.

J. E. Irving, for the plaintiffs.

J. L. O'Flynn, for the defendants.

SUTHERLAND, J., in a written judgment, said that on the evening of the 18th July, 1916, the defendants (carriers) landed on the Government wharf at Thessalon, Ontario, a crated democrat-waggon, which they placed thereon at the point on the wharf and in the position indicated by the Government wharfinger. When so placed, it was leaning against the face of the warehouse on the wharf. The wharf was a resort for the people of the locality, and on the following day the plaintiffs, with their child, went upon the wharf for the purposes of rest and recreation. The boy and two other children were attracted to the waggon; they attempted to get upon it, whereupon it overturned and fell, injuring the boy so badly that he died a few days later.

The plaintiffs charged that the defendants were guilty of negligence in that they knew or ought to have known that there was a likelihood of injury resulting to children resorting to the wharf and playing at or upon a democrat thus crated and erected. They said that it was dangerous in itself from the state or position in which it was placed and constitued a danger to those using the wharf, and was in fact a nuisance.

The defendants denied any responsibility for the waggon after it was deposited on the wharf.

Questions were submitted to the jury at the trial. The first was, whether the defendants were guilty of any negligence which

caused the accident in question. This the jury answered "No," and did not answer the other questions.

The learned Judge discharged the jury, and was about to enter judgment for the defendants upon this finding, but delayed doing so in order that some consideration might be given to the question of costs. The plaintiffs afterwards called attention to the third question, which was, "Did the crate from its construction and the position in which it was placed constitute a nuisance?" The plaintiffs contended that there might be a nuisance without negligence, and that the question should have been answered.

Subsequently, by consent, the question was left to be disposed of by the learned Judge himself, upon the evidence.

The learned Judge now stated his opinion that once the defendants unloaded the vehicle from their vessel and delivered it on the Government wharf, at the spot thereon and in the position indicated by the wharfinger, in fact under his supervision, they had nothing further to do with it. If it was negligent to leave it in that position or if (as so left) it constituted a nuisance, damages for injury resulting could not be claimed from these defendants, but only from the owners of the wharf.

Action dismissed, and with costs, if asked.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 17TH, 1917.

RE ROSE.

Will—Construction—Devise and Bequest to Daughter upon Death of Wife—Daughter Predeceasing Wife—Vesting at Period of Death of Testator—Enjoyment only Postponed till Death of Wife.

Motion by the surviving executor of Charles Rose, deceased, for an order determining a question arising upon the terms of the will in the administration of the estate.

The testator died on the 20th February, 1914. By para. 4 of his will, he directed that his wife should be permitted to use and occupy his dwelling-house property and all the chattels therein during her natural life. By para. 7, upon the death of his wife, he devised and bequeathed the said dwelling-house property and chattels to his daughter Clara absolutely, and also bequeathed to her the sum of $8,000 to her own use. By para.

10, he bequeathed to his daughter Saran Jane Byers the sum of $3,000 to her own use. The will contained several further bequests. By para. 13, all the residue of the estate was devised and bequeathed to the daughter Clara in case she should be living at the expiration of 4 months from the date of the death of the testator's wife; in case Clara should not be living at that time, he gave the residue to such of his children as should be then living.

By a codicil he revoked the gift in para. 10 of the will, and substituted for it a gift of $3,000 to Sarah Jane Byers to her own use in case she should be living at the expiration of 4 months from the date of the death of the testator's wife; but, in case of her not being then alive, he directed that the legacy should lapse. In all other respects he confirmed his will.

The widow of the testator died on the 5th January, 1917; the daughter Clara died on the 25th April, 1916, a spinster and intestate.

The executor asked to have para. 7 of the will construed and to have it determined whether, in view of the fact that the daughter Clara died before the widow, the devise and bequest to Clara contained in para. 7 lapsed and fell into the residue or whether they were vested and passed to her representatives.

The motion was heard in the Weekly Court at Toronto.

H. L. Ebbels, for the surviving executor of the testator.

J. Tytler, K.C., for Addie Fox and Nettie Smith.

The solicitor for Charles W. Rose and Sarah J. Byers was notified, but did not consider it necessary to appear.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that, although the matter was not free from doubt, he thought that the devise and bequest to Clara Rose under para. 7 were vested.

He was unable to distinguish the case from the decision in Re Brown (1913), 4 O.W.N. 1401. The enjoyment of the gift was only "postponed to let in" the life-interest of the widow, as was said in Packham v. Gregory (1845), 4 Hare 396. Reference also to Re Ward (1915), 33 O.L.R. 262.

The change made by the codicil as to the gift to Sarah Jane Byers pointed to the same conclusion.

Order declaring accordingly. Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 19TH, 1917.

*NEWCOMBE v. EVANS.

Costs—Security for, by Defendant—Action Removed from Surrogate Court—Plaintiff Propounding Will—Rule 373 (j)—Judicature Act, sec. 2 (r).

Appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff for an order requiring the defendant to give security for the costs of an action removed from a Surrogate Court into the Supreme Court of Ontario. The plaintiff propounded a will in the Surrogate Court, and the defendant filed a caveat against probate.

G. W. Morley, for the plaintiff, contended that the defendant was the real actor; that she had originated the lis by the caveat; and, as she was resident out of the jurisdiction, must give security for costs.

Frank McCarthy, for the defendant, contra.

MIDDLETON, J., in a written judgment, said that there were some decisions in Ireland which lent colour to the plaintiff's contention; but Ward v. Benson (1901), 2 O.L.R. 366, was conclusive against it. See also Moran v. Place, [1896] P. 214. The lodging of a caveat is in no sense the institution of the proceedings in a Surrogate Court.

Where security is sought from one who is named as defendant in an issue, the question is very different. See Rule 373 (*j*) and sec. 2 (*r*) of the Judicature Act, R.S.O. 1914 ch. 56.

Appeal dismissed with costs to the defendant in any event.

MIDDLETON, J. SEPTEMBER 20TH, 1917.

RE HAYS.

Will—Construction—Devise—Life-estate—Remainder to Heirs, Executors, Administartors, and Assigns of Life-tenant—Rule in Shelley's Case.

Motion by the executors of the will of Thomas Hays, deceased, for an order determining a question as to the construction of the will.

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

The motion was heard in the Weekly Court at Toronto.

H. Arrell, for the executors.

J. H. Spence, for the husband of a deceased daughter.

J. W. Bowlby, K.C., for Albert Taylor.

MIDDLETON, J., in a written judgment, said that the question was as to the effect of a clause in the will by which the lands in question were given to the testator's widow for life and at her decease to his daughter for life, "and at her decease . . . to her heirs executors and administrators and assigns to her and their use and behoof forever."

The question was one purely of construction, and the conclusion must be that the words used could have no greater significance than "heirs and assigns." There was no intention on the part of the testator to give the executors or administrators any beneficial interest, and long ago it was determined by Lord Mansfield and Wilmot, J., in Rose v. Hill (1766), 3 Burr. 1881, when land was given to A.B., his executors and administrators, that these words were equivalent to "heirs" and must be so construed.

This being the construction of the will, the case fell within the rule in Shelley's case, and the daughter took in fee.

As this was an old will, costs out of the estate could not be allowed; and no costs should be awarded unless counsel should suggest how they could be paid.

MIDDLETON, J. SEPTEMBER 21ST, 1917.

*SEAGRAM v. PNEUMA TUBES LIMITED.

Fines and Penalties—Action for Penalties—Default of Incorporated Company and Secretary in Making Returns to Provincial Secretary—Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 135—Remission of Penalties—Fines and Forfeitures Act, sec. 6 (1)—Application to Court—Forum—Master in Chambers—Jurisdiction—Judge of Supreme Court Sitting in Court—Rules 205, 207—Terms of Remission—Costs.

Appeal by the defendants from an order of the Master in Chambers refusing, on the ground that he had no jurisdiction, the defendants' motion, under the Fines and Forfeitures Act, R.S.O. 1914 ch. 99, to remit the penalties sued for in this action; and motion in the alternative for an order now remitting the penalties.

The motion was heard in the Weekly Court at Toronto.
J. J. Gray, for the defendants.
George Bell, K.C., for the plaintiff.

MIDDLETON, J., in a written judgment, said that the action was against an incorporated company and its secretary to recover $12,760, the amount of penalties said to have been incurred under the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 135, which requires certain annual returns to be made, and imposes a penalty of $20 per day for every day during which a company is in default in making its returns, upon the company and upon every director, manager, or secretary who wilfully authorises or permits such default. Such penalties are recoverable only by the Crown or by a private person suing on his or her own behalf with the written consent of the Attorney-General.

The company had never reached the stage of active operation. The plaintiff was induced by a broker to invest $3,000 in stock of the company, by fraudulent statements as to its value; and she first brought an action against the broker and the president and secretary of the company to recover her $3,000 or for damages. In that action, the returns were desired by the plaintiff's solicitor to demonstrate the untruth of the representations on which the stock was sold. When the plaintiff ascertained that no return had been made, she applied to the Attorney-General for leave to sue for the penalties. The Attorney-General gave the company and its officers time and opportunity to remedy their default; but no returns were made and no explanation given; and, after more than 3 months' delay, leave to sue was given (10th October, 1916), and on the 8th November, 1916, this action was begun. On the 10th November, the returns were made.

An application was then made by the defendants to the Attorney-General for the rescission of his leave or for remission of the penalties. This application was refused, the Attorney-General leaving the defendants to such relief as they might be able to obtain in the Court.

The Master in Chambers was right in holding that he had no jurisdiction under the statute: Rules 205, 207. The appeal from the Master's order should be dismissed.

The alternative motion for relief was properly made to the Supreme Court of Ontario, at any time after the commencement of the action: sec. 6 (1) of the Fines and Forfeitures Act: and to a Judge in Court: Rule 205.

Relief should be granted, but only upon terms providing for the restoration of the plaintiff to the position in which she was before she was induced to part with her money: she should be repaid the money received from her for stock, with interest at 6

per cent., and her costs as between solicitor and client of the two actions and the proceedings before the Attorney-General.

If the defendants were not content to accept relief upon these terms, the motion should be dismissed with costs.

REX v. YAK KETA—MIDDLETON, J., IN CHAMBERS—SEPT. 18.

Ontario Temperance Act—Offence against—Having Intoxicating Liquor in Possession—Magistrate's Conviction—Motion to Quash —Evidence.]—Motion to quash a conviction of the defendant by the Police Magistrate for the City of Port Arthur. The conviction was for having intoxicating liquor contrary to the Ontario Temperance Act. MIDDLETON, J., in a written memorandum, said that the affidavit filed on behalf of the Crown completely answered the case made by the defendant, and the motion must be dismissed with costs. A. G. Slaght, for the defendant. J. R. Cartwright, K.C., for the Crown.

ROBINSON v. LONGSTAFF—FALCONBRIDGE, C.J.K.B.—SEPT. 19.

Vendor and Purchaser—Contract for Sale of Land—Option—Payment—Question of Fact—Finding of Referee—Appeal—Acceptance of Money Paid—Statute of Frauds.]—An appeal by the plaintiff from the report of DENTON, Jun. Co. C. J. York, acting as a Referee. The appeal was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the evidence preponderated strongly in favour of the Referee's finding that the $500 was paid by the plaintiff in January, 1916, on the land and premises, and not on account of the chattel-mortgage; and that the defendants received the same as a payment on the land, and not on the chattel-mortgage. But the plaintiff contended that, even if the Referee's finding as to this was to stand, the plaintiff was entitled to the return of the $500 as having been paid and received without consideration and by mutual mistake; that the time for exercising the option had expired when the money was paid, and payment of part or even the whole of the purchase-money was not part payment within the Statute of Frauds—citing Fry on Specific Performance, 5th ed., paras. 800, 1103, 560; Kerr on Fraud and Misrepresentation, 4th ed., p. 520; Johnson v. Canada Co. (1856), 5 Gr. 558. The answer to this was that the defendants accepted the money and did not elect to rescind the option; but recognised it as binding. They had executed and tendered a deed, and were still willing to deliver it. The finding should be against the plaintiff as to the other grounds of appeal. Appeal dismissed with costs, fixed at $100. W. E. Raney, K.C., for the plaintiff. A. J. Anderson, for the defendants.