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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MARCH 12TH, 1918.

RE HEAL.

Will—Construction—Bequest of Income to Daughter—Death of Daughter before Death of Testator—Residuary Devise to Daughter—Declaration against Lapse—Wills Act, sec. 37.

Appeal by Elizabeth Keyes and cross-appeal by Carrie Heal and Laura Heal from the order of SUTHERLAND, J., 13 O.W.N. 285, determining questions arising as to the distribution of the estate of James Heal, deceased, upon the terms of his will.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

G. W. Morley, for Elizabeth Keyes.

W. J. Tremeear, for Carrie Heal and Laura Heal.

W. H. Harris, for the executors.

E. C. Cathanach, for the Official Guardian.

THE COURT allowed the main appeal and made an order declaring that the residuary gift to the testator's daughter Mary Jane Hickey did not lapse by reason of her death in the lifetime of the testator, but took effect as if her death had happened immediately after the death of the testator, a contrary intention not appearing by the will: Wills Act, R.S.O. 1914 ch. 120, sec. 37. The cross-appeal was dismissed. Costs of all parties were directed to be paid out of the estate.

FIRST DIVISIONAL COURT. MARCH 14TH, 1918.

WALMSLEY v. HYATT.

ROBERTSON v. HYATT.

Principal and Agent—Sale of Goods—Action for Damages for Non-delivery—Contract—Authority of Agents—Ratification.

Appeals by the plaintiffs and cross-appeals by the defendants from the judgment of KELLY, J., 12 O.W.N. 412.

The appeals and cross-appeals were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

R. McKay, K.C., for the plaintiffs.

R. Wherry, for the defendants.

THE COURT dismissed the appeals with costs.

FIRST DIVISIONAL COURT. MARCH 15th, 1918.

DOMINION NATURAL GAS CO. LIMITED AND UNITED GAS AND FUEL CO. OF HAMILTON LIMITED v. NATIONAL GAS CO. LIMITED.

Contract—Supply of Gas—Covenant—Exceptions—Breach—Injunction—Damages—Appeal—Variation of Judgment—Costs.

Appeal by the defendants from the judgment of MIDDLETON, J., 13 O.W.N. 254.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

George S. Kerr, K.C., for the appellants.

George Lynch-Staunton, K.C., and A. M. Harley, for the plaintiffs, respondents.

THE COURT amended the injunction granted by the judgment below by adding to the exception "and such persons in Hamilton as by the Hamilton by-law they are obliged to supply;" and by adding a cluse providing that the defendants shall pay to the plaintiffs 40 cents per thousand for gas supplied to the National

Machinery and Supply Company Limited; and by striking out the clause directing a reference as to damages. No costs of the appeal.

HIGH COURT DIVISION.

KELLY, J.: MARCH 11TH, 1918.

BABAYAN v. PHŒNIX INSURANCE CO.

Insurance (Fire)—Proofs of Loss—Overestimation of Value of Stock of Goods Destroyed or Damaged—False Statements not Amounting to Fraud or Dishonesty—Actions on Policies—Time for Commencement—Lapse of 60 Days after Completion of Proofs—Failure to Separate Damaged from Undamaged Goods—Assessment of Loss—Reduced Estimate—Costs of Actions.

This action and four other actions, each against a different insurance company, were brought by the same plaintiff, to recover for loss and damage by fire to a stock of goods owned by the plaintiff and contained in a warehouse in Toronto, upon five policies issued by the defendant companies respectively.

The actions were tried together, without a jury, at Toronto.
R. S. Robertson and G. H. Sedgewick, for the plaintiff.
D. L. McCarthy, K.C., for the defendants.

KELLY, J., in a written judgment, said, after stating the facts, that the chief defences were the following: (1) that the plaintiff did not comply with the Ontario Insurance Act, R.S.O. 1914 ch. 183, and the statutory conditions, in that he refused to separate the damaged from the undamaged property; (2) that he did not comply with the demand of the defendants to be furnished with better proofs of loss than those which he delivered; (3) that the actions were brought prematurely, in that 60 days had not elapsed after completion of the proofs of loss; (4) that the plaintiff's statements in his declaration of the 30th March, 1916, were false and fraudulent, and that, under statutory condition 20, his claim was vitiated and void; (5) that the statements in the plaintiff's declaration of the 7th July, 1916—that the account accompanying it was just and true, that he did not know the cause of the fire, and that the fire did not occur by any wilful act or procurement

or contrivance of his—were false and fraudulent, and in consequence the claim was vitiated and void.

The evidence did not establish that the plaintiff was himself responsible for the fire.

Upon the question of false statements, overvaluation of the goods destroyed or damaged, the learned Judge referred to Harris v. Waterloo Mutual Fire Insurance Co. (1886), 10 O.R. 718, 725; Hiddle v. National Fire and Marine Insurance Co. of New Zealand, [1896] A.C. 372; Nixon v. Queen Insurance Co. (1894), 23 S.C.R. 26; North British and Mercantile Insurance Co. v. Tourville (1895), 25 S.C.R. 177; and said that he was not satisfied that, with the knowledge the plaintiff possessed, the part he played in submitting a claim for an amount extravagantly in excess of the real loss, would not have been sufficient to establish fraud vitiating the claim, but for a recent decision to the contrary: Adams v. Glen Falls Insurance Co. (1916), 37 O.L.R. 1, 12, 16.

Had the plaintiff himself been the author or designer of the claim in the form in which it was made, or had he alone been responsible for the statement of exaggerated value, the conclusion would be that the estimate could not be attributable to an error in judgment, but was dishonest. He was not blameless; but, taking into consideration the part the adjuster played, and the dependence which the plaintiff placed upon him, and other circumstances, there should not be a finding of fraud and dishonesty wholly vitiating the claim.

The fact that the damaged goods were not separated from the undamaged turned out to be unimportant, because substantially every article in stock had been subjected to fire, smoke, or water.

The objection that 60 days from the completion of the proofs of loss had not elapsed when the actions were commenced was not, in the circumstances, entitled to prevail. The actions were begun on the 12th September, 1916; amended proofs of loss had been submitted on the 7th July, 1916; and what was done after that was the producing by the plaintiff of his books, invoices, and records for inspection—objection as to overestimation having been made by the defendants.

The plaintiff's loss, on a reasonably liberal scale of calculation, did not exceed $5,350.

Judgment for the plaintiff for $5,350 against the five defendant companies, in the proportion of the amounts of their several policies, with costs.

MASTEN, J. MARCH 13TH, 1918.

*RE BARNES.

Gift—Parent and Child—Construction of Documents—Gift or Loan —Death of Parent (Donor)—Duty of Executors—Intention of Parent—Evidence of, from Documents.

Application by the executors of the will of Elizabeth A. Barnes for the advice and direction of the Court in respect of a sum of $1,500 lent by the testatrix to her daughter.

The application was heard in the Weekly Court, Toronto.

A. M. Dewar, for the executors.

H. R. Frost, for the daughter.

F. W. Harcourt, K.C., the Official Guardian, for the infants and (by order) for all others interested.

MASTEN, J., in a written judgment, said that when the loan was made, on the 8th July, 1913, the daughter executed a written receipt for the amount "as a loan to be used as a first payment upon the house" (describing it). The receipt went on: "I also hereby agree to pay you interest at the rate of 6 per cent. per annum on the said loan . . . and further agree that the said loan is to be a lien upon my equity in the said house until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me as long as I pay interest and provide for the aforesaid lien or give equivalent security satisfactory to you."

By a writing executed by the testatrix on the same day, she directed that, notwithstanding any testamentary disposition made or to be made, the sum of $1,500 lent to her daughter "is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and I expressly provide that the said gift of $1,500 is not to be considered a part of my estate or subject to any condition of my will."

The testatrix died on the 24th March, 1917. No interest on the money lent was ever paid by the daughter.

The question submitted was, whether the advance made in 1913 to her daughter formed part of the estate of the deceased, which it was the duty of the executors to collect.

The documents made it clear that it was the intention of the testatrix that at her death, if she predeceased her daughter, there

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

should be no claim of her estate upon the daughter for the money; and the Court should, if possible, give effect to that intention.

The learned Judge referred to Strong v. Bird (1874), L.R. 18 Eq. 315; In re Griffin, [1899] 1 Ch. 408; In re Applebee, [1891] 3 Ch. 422; In re Stewart, [1908] 2 Ch. 251; In re Innes, [1910] 1 Ch. 188; but based his decision on Re Goff (1914), 111 L.T.R. 34.

It was to be observed that the intention to give was plainly manifested and absolute; that it was formally communicated to the daughter; and that the intention to give continued until the death of the testatrix. It was "donatio in præsenti tradenda in futuro."

Order declaring that the daughter was not a debtor to the estate in $1,500 or any part thereof or in any interest in respect thereof. Costs of all parties out of the estate—those of the executors as between solicitor and client.

MIDDLETON, J. MARCH 14TH, 1918.

*REX v. WELFORD.

Ontario Temperance Act—Offence against sec. 51—Conviction of Physician—Prescription for Intoxicating Liquor—Evasion of Act—Evidence of other Prescriptions—Admissibility—Bona Fides—Motive—"Actual Need"—Finding of Magistrate.

Motion to quash the conviction of the defendant, a physician, by the Police Magistrate for the City of Woodstock, for an offence against sec. 51 of the Ontario Temperance Act, 6 Geo. V. ch. 50, by giving to one Thomas Mitchelson a prescription for one pint of alcohol in evasion and violation of the Act and for the purpose of enabling and assisting him to evade the Act and to obtain intoxicating liquor for use as a beverage.

J. W. Bain, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the defendant on the 10th January, 1918, gave Mitchelson a requisition reading: Required for Thomas Mitchelson . . . 1 pint alcohol for medicinal purposes only for the patient above named who is suffering from bathing. A. B. Welford."

Mitchelson was a witness at the trial before the magistrate and said that on the 10th January he saw the defendant and asked for some medicine for his (Mitchelson's)mother. He asked for

alcohol for bathing purposes, "did not say who for." The defendant gave him two prescriptions, one for the mother; the other was the one quoted above. The witness said that he asked for alcohol because he wanted it; drank some of it. The defendant asked if the witness wanted it for bathing purposes, and the witness said "yes." He paid the defendant 50 cents for each "certificate." The witness got drunk on the alcohol which he obtained from a druggist upon the defendant's prescription.

The defendant testified in his own behalf. He said that Mitchelson said the alcohol was for his mother, and that he (the defendant) wrote out the prescription in Mitchelson's name because he realised that Mitchelson could not sign his mother's name, and must get the alcohol for her, she being very ill. On Mitchelson's representation, the defendant deemed the alcohol necessary for the mother—it was prescribed for bathing and for no other purpose. He had never seen the mother.

The druggist to whom the requisition was addressed testified that between the 22nd December and the 10th January he had filled, on the requisition of the defendant, 47 requisitions for alcohol for bathing and 12 for liquor; and another druggist testified that he had, in the same period, received from the defendant 13 requisitions for alcohol and 5 for liquor; then, all in one day, 10 for alcohol and 2 for liquor.

The question of bona fides being involved, the motive might be shewn, and this evidence was admissible for that purpose: Makin v. Attorney-General for New South Wales, [1894] A.C. 57.

The form prescribed and used calls for the name of the patient and the nature of the illness. The statute was not complied with.

The necessity for the liquor must depend on the judgment of the physician, but only in cases of "actual need." A real duty was cast upon the defendant to see that there was a mother and that she needed the remedy.

The magistrate had concluded that there was an absence of bona fides, and his finding could not be reviewed. It would scarcely be possible to find a magistrate who would have come to any other conclusion.

Motion dismissed with costs.

KELLY, J. MARCH 15TH, 1918.

SAWYER v. TOWNSHIP OF SHERBORNE.

Highway—Township By-law Authorising the Taking of Land for Road—Validity—Presumption—Title to Land in Crown—Subsequent Crown Grant not Recognising Land Indicated by By-law as Road-allowance—By-law Ineffective also because Requirements of Municipal Act not Complied with—Dedication—User—Acquiescence—Evidence—Title of Plaintiff—Action for Trespass—Damages—Injunction.

Action for damages and an injunction in respect of trespass upon the plaintiff's land in the township of Sherborne.

The action was tried without a jury at Bracebridge.

A. B. McBride, for the plaintiff.

A. M. Fulton, for the defendants.

KELLY, J., in a written judgment, said that the trespass complained of was the entry upon the plaintiff's land of workmen and servants of the defendants, the township corporation, breaking down fences, cutting timber, etc., for the purpose of constructing a road through the land.

The defendants asserted a right to enter and open a road, on the strength of a by-law passed by their council on the 31st August 1898, and upon dedication and user; and also set up want of title in the plaintiff by reason of defects in his registered title.

The learned Judge was of opinion that the by-law was ineffective because, when it was passed, and for several years afterwards, the title to the lots said to be now vested in the plaintiff was in the Crown; and, when the Crown grant was made, in 1907, it did not recognise the road alleged to have been laid out and established by the defendants, but reserved, for the purpose of a roadway, other parts of the same lots, and also because the requirements of the Municipal Act in force in 1898, with reference to the passing of such by-laws, were not complied with.

On the ground of dedication and user, the defendants also failed. The learned Judge was unable to say from the evidence that the land which the defendants, in 1916 and 1917, attempted to take possession of and open up as a road, through the lands occupied by the plaintiff, was the same part of the lots which they intended to include in their by-law of 1898, or the land which, same witnesses said, was marked out as a roadway soon after the by-law was passed.

If there was any user, it was by the plaintiff's permission as a neighbourly accommodation.

Both the by-law and the evidence as to the alleged user were insufficient to shew the location of a defined public roadway.

There was some evidence of statute-labour having been done upon some parts of the plaintiff's lots, but it did not support the position which the defendants took.

The alleged acquiescence of one Fuller in the defendants' attempt to lay out the road was of no effect as a dedication, the lands then being unpatented: Rae v. Trim (1880), 27 Gr. 374. He was only a squatter, and never received a patent. The grant afterwards made under the Free Grants and Homesteads Act was not made to him.

No presumption in favour of the validity of the by-law arose, as in Dickson v. Kearney (1888), 14 S.C.R. 743, and other cases. The procedure in passing the by-law was irregular, the notice required by the statute admittedly not having been given.

The plaintiff had proved a title sufficient to support his action.

The damage was trivial.

Judgment for the plaintiff for $10 and for an injunction, with costs.

ROSE, J. MARCH 15th, 1918.

FRUCHTENAN v. GUROFSKY.

Trusts and Trustees—Purchase of Land at Mortgage Sale—Agreement to Hold in Trust for Owner of Equity of Redemption—Evidence—Failure to Establish Trust—Conspiracy—Failure to Prove.

Action for damages for a conspiracy to defraud the plaintiff, and for a declaration of a trust in favour of the plaintiff.

The action was tried without a jury at Toronto.

J. P. MacGregor, for the plaintiff.

M. H. Ludwig, K.C., for the defendant Gurofsky.

Charles Beach, for the defendant Gordon.

ROSE, J., in a written judgment, said that the plaintiff, being in 1915 the owner of the equity of redemption in a vacant lot of land in Toronto, agreed to sell it for a sum in cash and some land in Buffalo, which he had never seen, and the value of which was

not established. The purchaser registered the agreement against the plaintiff's lot; but, as the plaintiff said, his wife refused to proceed with the transaction, and, as the purchaser would not release him from his bargain, he attempted to find a person who would buy as trustee for him (the plaintiff) at a sale by the third mortgagee under the power of sale in his mortgage. The plaintiff had communications with the two defendants about the matter. The defendant Gurosfsky bought the property; and the plaintiff alleged a conspiracy between the defendants to defraud him.

The learned Judge was of opinion that there was no evidence upon which it could be found that the defendant Gordon conspired with his co-defendant.

The plaintiff also alleged an agreement with the defendant Gurofsky that the latter would buy as trustee for him (the plaintiff). Such an arrangement must be proved with clearness and certainty: Hull v. Allen (1902), 1 O.W.R. 151, 782; McKinnon v. Harris (1909), 14 O.W.R. 786, 1 O.W.N. 101. Gurofsky admitted that there was an agreement; but said that it was that he should buy the property if, upon investigation, he thought well of it; and that, if a purchaser was found, and a sale completed, within three months, he would divide the profits with the plaintiff. He did buy the property, but no purchaser was found within the three months. The plaintiff had not proved that Gurofsky agreed to do any more that Gurofsky admitted. The trust was not established.

Action dismissed with costs.

RE O'ROURKE—ROSE, J.—MARCH 14.

Evidence—Claim against Estate of Deceased Person—Corroboration—Claim for Boarding and Lodging Deceased—Ascertainment of Amount Due—Rate Charged per Week—Reversal of Finding of Surrogate Court Judge—Executors.]—An appeal by Daniel Brunette from an order or certificate of DUNN, Co. C.J., sitting as Judge of the Surrogate Court of the County of Carleton, finding the appellant entitled as a creditor of the estate of James Edward O'Rourke, deceased, to $125, the object of the appeal being to increase the amount. The claim was for boarding and lodging the deceased in a hotel kept by the appellant. The appeal was heard in the Weekly Court, Ottawa. Rose, J., in a written judgment, said that there was sufficient corroboration of the appellant's evidence that the deceased had board and lodging in the appellant's hotel during 1914, 1915, and 1916, and owed

something in respect of it; but it was difficult to ascertain the exact amount, upon the evidence—the main uncertainty being as to the rate charged per week. Upon a close examination of the evidence, the learned Judge was of opinion that the amount allowed should be that claimed by the appellant, deducting items for money lent and a bar-account. Appeal allowed with costs, and amount at which claim allowed increased accordingly. J. E. Caldwell, for the appellant. E. P. Gleeson, for the executors, respondents.

MACDONELL v. KEEFER—LATCHFORD, J.—MARCH 16.

Mortgage—Action on—Title of Mortgagee—Failure to Impugn—Evidence—Amount Due—Interest.]—Action on a mortgage for $9,000 made by the defendant to the original plaintiff, Eleanor Macdonell, who died in April, 1917. The action was continued in the name of Angus J. Macdonell, her sole executor, as plaintiff. The defendant admitted the execution of the mortgage, and was recognised as entitled to credit for $1,740.43. No other moneys were at any time paid on account of the mortgage. There was due upon it when the action was begun, in July, 1916, the sum of $11,882.22; and, if the mortgage was valid, the plaintiff was entitled to recover that amount from the defendant with subsequent interest. The action was tried without a jury at Kingston. LATCHFORD, J., in a written judgment, said that the defences were numerous, peculiar, and involved. In effect, the defendant disputed the title of the mortgagee. Transactions extending back to 1888 were set up by the defendant. The learned Judge reviewed the evidence and said that no defence was established. Judgment for the plaintiff for $11,882.22, with interest at 7 per cent. from the 3rd July, 1916, and costs. J. L. Whiting, K.C., and J. M. Farrell, for the plaintiff. Peter White, K.C., for the defendant.