The

Ontario Weekly Notes

VOL. XIX. TORONTO, NOVEMBER 12, 1920. No. 9

HIGH COURT DIVISION.

HOLMESTED, REGISTRAR IN BANKRUPTCY. OCTOBER 28TH, 1920.

RE SHAW.

Bankruptcy—Practice—Official Trustee Asking for Approval of Composition Agreement—Application to Appoint Time for Hearing—Bankruptcy Act, 1919, sec. 13 (5), (7), (8)—Application by Trustee in Person—"Party to the Proceeding"—Solicitors Act, secs. 3, 4.

An application by Mr. Weatherbe, an official trustee under the Dominion Bankruptcy Act, 1919, 9 & 10 Geo. V. ch. 36, for an order appointing a time for hearing an application to approve of a composition and extension of time arrangement, agreed to by a majority of the creditors of an authorised assignor.

THE REGISTRAR, in a written judgment, said that the Act expressly authorised the trustee to apply to the Court to approve of the agreement: see sec. 13 (5). This was the first application of the kind; and the question whether the trustee may apply in person, or whether he must apply by solicitor, where he does not happen himself to be a practising solicitor, arose.

It is to be noted that the application is not a mere matter of form, but involves the exercise of judicial discretion. Before approval, the report of the trustee as to the terms of the agreement, and as to the conduct of the debtor, and any objections which may be made on behalf of any creditor (sec. 13 (7)), have to be considered; and, if the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, or in any case where circumstances are proved which would require the Court to refuse or suspend a discharge to a bankrupt, the application to sanction the proposal must be refused: see sec. 13 (8).

The learned Registrar had already held in Re X. (1920), ante 12, that an official trustee who is not a solicitor cannot file a petition in bankruptcy. But this application involved different considerations. The Solicitors Act, R.S.O. 1914 ch. 159, secs. 3 and 4, forbids any person acting as a solicitor in any Court who is

not duly qualified, and exposes any person contravening the Act to punishment "unless himself a party to the proceeding." The question therefore arises: can a trustee in bankruptcy be said to be "a party to the proceeding," in an application of this kind in which he is the official trustee? He is the person in whom the estate in question is vested; and, in the opinion of the learned Registrar, Mr. Weatherbe may be said to be "a party to the proceeding," within sec. 4 of the Solicitors Act, and as such entitled to make the present application. At the same time it would appear to be advisable that such applications—and especially contentious applications—should be made by a solicitor; in many cases there might be a saving of time and expense if a solicitor were employed.

The Registrar, therefore, appointed a time for the hearing of the application as asked.

LOGIE, J. NOVEMBER 5TH, 1920.

RE FANNING.

Will—Construction—Legacies Payable out of Particular Fund—Insufficiency of Fund—Demonstrative Legacies—Encroachment on Residue—Costs of Construction.

Motion by the executors of the will of C. B. Fanning, deceased, for an order determining a question as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.
R. R. Hall, for the executors.
T. A. O'Rourke, for the residuary legatee.
G. N. Gordon, for the brothers Fanning.
E. G. Porter, K.C., for Jennie Madens.

ORDE, J., in a written judgment, said that the paragraph of the will under consideration read as follows:—

"To my brother George Henry Fanning I bequeath the sum of $5,000. To my brother Arden Wesley Fanning I bequeath the sum of $5,000. And to my sister Mrs. Jennie Madens I bequeath the sum of $1,000. The above amounts to be taken from Victor (sic) bonds."

The Victory bonds owned by the deceased were insufficient to pay the above legacies in full, and if the legacies were demonstrative the balance must be made up out of the residue.

A demonstrative legacy is a legacy which is in its nature general, but which is directed to be satisfied out of a specified fund or part of the testator's property.

The above legacies fell clearly under this definition, so clearly that resort should not, in the learned Judge's opinion, have been made to the Court.

For this reason, he refused to saddle the residuary legatee with the costs—each party should bear his own costs.

LOGIE, J. NOVEMBER 5TH, 1920.

RE McCULLOUGH.

Will—Construction—Legacies Payable out of "Cash or Moneys"—Whether Negotiable Bonds Included—Indicia in Will—"Other Property"—Residuary Bequest—Class of Residuary Legatees—Oldest Child of each Brother and Sister of Testator—Bequest to "Protestant Orphans Home"—Indication of Institution Intended—Costs—Remuneration of Executor—Will Unskilfully Drawn by Executor.

Motion by the executors of Robert McCullough, deceased, for an order determining certain questions as to the meaning and effect of the will.

The motion was heard, as in Weekly Court, at a sittings for trials in Brockville.

W. B. Carroll, K.C., for the executors.

J. A. Hutcheson, K.C., for the L.O.T.B. Orphanage and Children's Shelter, Brockville.

J. A. Jackson, for Lansdown Cemetery.

M. M. Brown, for the Official Guardian.

LOGIE, J., in a written judgment, said that the deceased by his will gave a number of legacies. Unless certain Victory bonds were resorted to, there was not sufficient money to pay these legacies in full—if the bonds fell under the words "cash or moneys" in the paragraph hereinafter set forth, there was ample to pay all.

The first paragraph giving difficulty was as follows:—

"At my decease should I not possess sufficient cash or moneys to cover the cash bequeaths (sic) mentioned in this my will, the said bequeaths (sic) is (sic) to share the percentage of such

bequeaths (sic) as remains (sic) but in no way shall my real estate or other property be held responsible for any cash bequeaths" (sic).

At first sight the words "the said bequeaths is to share the percentage of such bequeaths as remains" appeared to be a farrago of nonsense. But the intention of the testator was clear. His intention was that, if there were not sufficient "cash or moneys" to pay all legacies in full, resort should not be made to his realty, but the legacies should abate pro rata.

Two Victory bonds for $500 each, one purchased before and the other after the making of the will, were, if to be regarded as "cash or moneys," available to pay legacies.

Reference to In re Cadogan (1883), 25 Ch. D. 154; In re Buller (1896), 74 L.T.R. 406; In re Skillen, [1916] 1 Ch. 518, at p. 521.

The provision for payment of debts might necessitate the sale of Victory bonds: the expression "cash when in hand of my executors" contemplated an influx of cash from some source not immediately coming under the description "cash in hand," and not immediately available to the executors as cash. The very phrase "cash or moneys" shewed a distinction drawn in the testator's mind, and was not mere tautology.

These indicia induced the learned Judge to think that the word "moneys" in this will was not to be restricted to its narrow sense, but that it included something which, in the testator's opinion, might in the future be reduced to cash, namely, among other things, the Victory bonds; and it should be so declared.

With regard to the words "other property" in the last clause of the paragraph quoted, it was not necessary to do more than point out that these words, if strictly construed and given effect, would nullify the bounty of the testator, rendering inoperative the gifts of the pecuniary legacies, and were irreconcilable with the general context. This could not have been the intention of the testator, and these words must be rejected.

The next paragraph giving difficulty was the residuary clause. "All the residue . . . I give . . . unto the oldest living member of my brother and sisters family one of each family to share and share alike."

Falsa grammatica non nocet. The deceased left one brother and seven sisters, each of whom had a child or children. The meaning of this clause was, that the residue was to be divided into 8 equal shares, the oldest child of each brother and sister to take one share.

There remained only the question whether the L.O.T.B. Orphanage in the township of Hallowell, in the county of Prince Edward, adjoining the town of Picton, took the bequest of $500 to the "Protestant Orphans Home at Picton, Prince Edward

County, Ont." There was no other Protestant Orphans Home in the county; the deceased was an Orangemen, knew of this Home, and was interested in it. It satisfied the description, and was the only institution which did or could so answer. There should be a declaration accordingly.

Costs of all parties, those of the executors as between solicitor and client, out of the estate.

As this application had been rendered necessary by the ignorance and ineptitude of the executor who drew the will, a country conveyancer without knowledge of grammar or law, it was proper that in fixing his remuneration the Surrogate Court Judge should take into consideration the costs to which the estate had been put by reason of his undertaking a task which he never should have attempted.

FERGUSON, J.A., IN CHAMBERS. NOVEMBER 6TH, 1920.

MACKAY v. MERCHANTS BANK OF CANADA.

Parties—Joinder of Defendants and Causes of Action—Rule 67—Claim against Bank for Dishonouring Cheque—Claim against Individual for Malicious Prosecution—Trial—Jury—Connected Transactions.

Appeal by the bank, the original defendant, from an order of the Local Judge at Brockville adding John C. Carruthers as a party defendant, directing that (unless otherwise ordered by the trial Judge) there shall be separate trials of the respective claims against the two defendants, and postponing the trial until the next sittings for the trial of actions with a jury at Brockville after the 2nd November, 1920.

H. S. White, for the defendant bank.

W. Lawr, for the plaintiff.

FERGUSON, J.A., in a written judgment, said that this case did not, in his opinion, fall within Rule 67. The plaintiff's cause of action against the bank was complete when it failed to honour his cheque. The plaintiff's cause of action against Carruthers arose out of circumstances which were a sequence to the refusal of the bank and out of events which happened after the cause of action against the bank was complete.

Even if it was lawful, it was not expedient, to direct that the two claims should be joined in the one action. The claim against the bank arose out of a breach of contract, and was in its nature

an ordinary commercial action that some Judges might think would be better tried by a Judge alone than by a Judge and jury. The claim for malicious prosecution must be tried with a jury. In the action against the bank, the question whether evidence can be admitted of the subsequent prosecution by Carruthers must be determined. The action against Carruthers is founded in tort, and an essential to the maintenance of that action is the establishment of malice. Its foundation in law and in fact seems to be entirely distinct from that of the cause of action against the bank, and the measure of damages is different.

The appeal should be allowed with costs and the order of the Local Judge set aside with costs.

HODGINS, J.A. NOVEMBER 5TH, 1920.

TORONTO AND HAMILTON HIGHWAY COMMISSION v. KLAINKA.

Highway—Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, sec. 13 (3)—Regulations Made by Commission—Distance of Buildings from Centre Line of Roadway—Addition to Existing Building—Encroachment upon Highway—Application of Regulations to Towns and Villages—Interim Injunction—Motion to Continue—Terms—Speedy Hearing—Motion for Judgment.

Motion by the plaintiffs to continue an interim injunction restraining the defendants from constructing or erecting any addition to any building or buildings within a distance of 53 feet from the centre line of the roadway of the Toronto and Hamilton Highway.

The motion was heard in the Weekly Court, Toronto.
J. W. Pickup, for the plaintiffs.
F. Morrison, for the defendants.

HODGINS, J.A., in a written judgment, said that the plaintiffs, under sec. 13 (3) of the Toronto and Hamilton Highway Commission Act, 5 Geo. V. ch. 18, on the 27th June, 1917, passed regulations fixing the distance at which buildings or fences might be erected, as follows:—

"1. No building or fence shall be placed at a distance less than 53 feet from the centre line of the roadway."

"3. The word 'roadway' in this by-law shall have the same meaning as it has in the Toronto and Hamilton Highway Commission Act."

The defendants have a brick garage in the town of Burlington which fronts on the roadway of the Commission for a distance of 48 feet 9½ inches. The new addition would front on the highway, in continuation of the brick garage's front wall, for a distance of 17 feet 8 inches.

Additional material had been filed since the argument, under which it was contended that the erection complained of encroached on the highway itself for a distance of 1 foot 11 inches on the west and 1 foot 8½ inches on the east, and that the brick garage encroaches on the highway to the same extent.

The questions to be determined in the action, as matters stand, are: (1) Is an addition made to an already existing building covered by the words of the by-law? (2) Does the addition actually encroach upon the highway?

Apart from the question of actual encroachment, the action appeared to be an oppressive one, as the small building now being put up merely continued the already existing wall fronting on the highway for a short distance.

If the by-law is applied to sections of towns and villages through which the highway passes, where buildings are already erected on the street-line, so as to prevent any further additions, it will extend the purpose of the by-law so as to restrict the rights of property-owners to the further beneficial use of their property in so far as that use necessitates the erection of anything which can be termed a building on the street-line.

The material filed on behalf of the defendants indicates that the enforcement of this by-law will be a considerable hardship to them, while the additions will cause no detriment to the plaintiffs, inasmuch as the by-law is evidently intended to preserve the appearance of the highway by providing clear spaces on each side of it—a condition applicable only to country parts, and not to villages or towns where buildings already abut on the highway.

The kerb of the cement roadway opposite the defendants' garage appears to be 35 feet from the garage; and the town clerk of Burlington swears that the corner nearest to the garage is a business-corner situated at the intersection of the two main streets of the town, both of which are used for business purposes.

It is not, however, the practice of the Court to decide the questions in issue between the parties on the application for an interim injunction or for its continuance. The injunction should be continued until the hearing, on condition that the plaintiffs undertake to bring the action down to trial at the Hamilton non-jury sittings beginning on the 29th November, 1920. If the

parties agree to have the issues disposed of upon a motion for judgment, the learned Judge will dispose of them on that basis.

An order continuing the injunction until the hearing, on the conditions mentioned, will issue on the 10th November, 1920, unless the parties before that date have agreed to have it disposed of upon motion for judgment.

RE COMMERCIAL AGENCIES LIMITED—KELLY, J., IN CHAMBERS —NOV. 3.

Company—Winding-up—Petition for Order—Statement of Petitioner—Evidence—Insufficiency.]—Motion on behalf of E. J. Bennett for an order for the winding-up of a commercial company under the Dominion Winding-up Act. KELLY, J., in a written judgment, said that the petition was not verified; that the resolution on which the petitioner chiefly relied as a ground for winding-up was passed by the directors and not by the shareholders; that the unverified material stated, or was intended to shew, that the company was solvent; and that the only evidence of service of the petition was an affidavit of service upon a person who was not shewn to represent or in any way to be associated with the company. The winding-up order could not be made upon the material. Motion refused. F. Regan, for the petitioner.