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WINCHESTER, MASTER. MARCH 9TH, 1903.

CHAMBERS.

SMITH v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Discovery—Re-examination of Party—Special Circumstances.

Application by defendants for a re-examination of plaintiff for discovery and for postponement of trial in consequence of the absence of a material witness.

H. E. Rose, for defendants.

G. H. Kilmer, for plaintiff.

THE MASTER.—The plaintiff was not candid in stating what he was informed by the master of his barge with reference to the matters in question, although asked to repeat it. It is not usual to require a party to attend for re-examination unless special circumstances are shewn. Special circumstances sufficient to warrant a re-examination have been shewn in this case. The examination will take place immediately, and the other part of the application will stand until that is done. Costs of application to plaintiff in any event.

BRITTON, J. MARCH 9TH, 1903.

WEEKLY COURT.

RE ROSS AND DAVIES.

Will—Construction—Devise—Power of Sale—Executors—Devisee—Trustee Act—Devolution of Estates Act—Vendor and Purchaser—Parties to Conveyance.

Petition by the vendors, the executors of the will of Elizabeth Tyler, for an order under the Vendors and Purchasers Act, R. S. O. ch. 134.

Elizabeth Tyler was the owner of a large amount of real and personal estate. Part of the real estate consisted of property on Queen street in the city of Toronto, which the executors desired to sell and which Robert Davies desired and had contracted to purchase, but on examination objected to the title.

The question of title depended upon the power of the executors or of the devisee, or both, under the will of Elizabeth Tyler, to sell and make a good conveyance.

Elizabeth Tyler died on 29th July, 1902, at Toronto, leaving two children, Violet Mitchell Campbell and George William Parker. She also left brothers and sisters surviving her. Mrs. Campbell had at the date of the petition three children, all living; Parker was an unmarried man.

The material parts of the will were as follows:

"1. I give . . . to my daughter Violet Mitchell Campbell . . . all my jewellery (save a diamond ring . . .) and also all my wearing apparel, furs, etc., for her sole and absolute use.

"2. I further give . . . to my daughter . . . $4,000 to be paid to her by my said son George William Parker within two years after my death, and I hereby charge the payment of the said legacy on the property hereinafter devised to my said son.

"3. All the rest . . . of my real and personal property . . . I give, devise, and bequeath unto and to the sole and absolute use of my said son . . . but charged with payment to my said daughter . . . of the said legacy of $4,000.

"4. And I hereby direct, and it is my will, that in case of the death of either of my said children without issue, then the whole of my said property and estate is to go to the survivor, and in case of the death of both my said children without issue to go to my brothers and sisters equally."

The executors proved the will. The real estate was incumbered, and it was necessary to sell it to pay off the incumbrances and the $4,000 legacy.

D. C. Ross, for the vendors.

A. W. Ballantyne, for the purchaser.

BRITTON, J.—Clause 4 of the will is the one occasioning the difficulty, and it is certainly not an easy matter to understand just what Elizabeth Tyler had in her mind at the time she dictated it. The words are in reference to both Violet and George. "Death without issue." Did she mean "death without leaving issue surviving" or did she mean, death without having had any children? Violet at present has three children. Were she to die leaving children, her death would in no way affect the tenure or estate of George in this property. . . . What is the position of George, who at present, under the will, has the beneficial interest in the estate?

O'Mahoney v. Burdett, L. R. 7 H. L. 388, decides that death without issue means without issue surviving the parent,

and that a gift over in the case of death without children of a previous taker, means death at any time without children, and not death prior to death of testator. See also Woodroope v. Woodroope, [1894] Irish R. 1; Cowan v. Allen, 26 S. C. R. 292.

Under the Devolution of Estates Act, R. S. O. ch. 127, the executors can sell, but only with the approval of the official guardian. Executors under similar circumstances could without the approval of the official guardian have sold before the amendment of sec. 16 of that Act by 63 Vict. ch. 17, sec. 17. The amending section eliminated the words "and there are no debts," and the proviso to sec. 16 now reads, "provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or when other heirs or devisees do not concur in the sale, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian appointed under the Judicature Act; and for this purpose the official guardian aforesaid shall have the same powers and duties as he has in the case of infants." See Armour on Devolution, pp. 165-8.

It is contended by the petitioners that the Trustee Act, R. S. O. ch. 129, secs. 16 and 18, authorize a sale by the executors. I do not think so, as sec. 20 of that Act limits and restricts the operation of secs. 16 and 18. . . . Re Eddie, 22 O. R. 556, commented on.

If the executors cannot sell and make a good title, can the devisee . . . do so? This is not a question of distribution, it is a question of sale. Section 20 confers no power of sale. . . . I am of opinion that the intention of the Legislature was, whether these sections accomplish it or not, to provide for the sale of land for payment of debts or legacies, in every case where so charged. . . . This is the case of the devise of the testator's whole estate, charged with payment of a legacy. I think the devisee can sell, and that a good title can be made. . . .

Reference to Lord St. Leonard's Act, 22 & 23 Vict. ch. 35; Lewin on Trusts, 10th ed., pp. 530, 531, 538; In re Wilson, 34 W. R. 512; Armour on Devolution, p. 291; Bailey v. Ekins, 7 Ves. 323; In re Schnadhorst, [1902] 2 Ch. 234.

I am, therefore, of opinion that the executors and George William Parker and Violet Mitchell Campbell can make a good marketable title without joining the brothers and sisters of the late Elizabeth Tyler in the conveyance.

The costs of all parties should be paid by the estate of Elizabeth Tyler.

WINCHESTER, MASTER. MARCH 10TH, 1903.

CHAMBERS.

RE SOLICITOR.

Solicitor—Agreement with Client as to Payment of Costs—Dispute as to—Order for Delivery of Bill—Parties to Application.

Application by client for the delivery of a bill of costs by the solicitor and for taxation of bill when delivered. No bill had been rendered by the solicitor. An agreement as to the payment of the costs was disputed by the applicant.

J. D. Falconbridge, for applicant.

J. Bicknell, K.C., for solicitor.

THE MASTER.—The applicant has the right to have a bill delivered: Duffett v. McEvoy, 10 App. Cas. 300; In re West, (1892] 2 Q. B. 102; In re Baylis, [1896] 2 Ch. 107. It was contended that the father and mother and also the assignee of the applicant should be parties to this application. The mother has nothing to do with the matter, and the father and assignee are not necessary parties. But, as the applicant's solicitor does not object to the father and assignee becoming parties, upon their signing a consent they will be bound by the order. Upon this being done, an order for delivery of a bill will be made. No order for taxation need be made at present. If the bill when delivered is found satisfactory, no taxation will be required.

MARCH 11TH, 1903.

DIVISIONAL COURT.

DAVIES v. FRIEDMAN.

Bills and Notes—Promissory Notes—Advance on Bill—To Whom Advance Made—Collateral Security.

Appeal by defendant from a judgment in favour of plaintiff in an action tried in the 10th Division Court in the county of York. The action was brought upon two promissory notes made by defendant payable to plaintiff or order for $50 each. The defence was that the notes were made by defendant and for the accommodation of plaintiff and without consideration. Plaintiff had made a loan of $600 to defendant and one Seiffert upon a draft drawn by defendant on and accepted by Seiffert and indorsed to plaintiff. Both Seiffert and defendant were present when this draft was prepared and signed and accepted and indorsed, and plaintiff, who was also present, gave defendant a cheque for the advance, less his discount of $75, which cheque defendant indorsed and upon which he and Seiffert obtained the money. Plaintiff said they told him they were partners; that he had

known defendant for some years, but had never met Seiffert before; that defendant promised that the draft would be paid. Afterwards Seiffert, who lived in Detroit, became bankrupt, and defendant endeavoured to have plaintiff paid out of the estate as much as possible. Finally plaintiff received from Seiffert $300 in cash and Seiffert's note for $300, which was unpaid when the action was brought. Before that note matured, plaintiff asked defendant to give him the two $50 notes sued on, as he wanted money and would discount them. As a matter of fact, plaintiff said, he wanted to get what he could from defendant on account of the debt.

G. Grant, for defendant.

W. W. Vickers, for plaintiff.

STREET, J.—The whole question turns upon whether the original loan was made to Seiffert alone, or to defendant and Seiffert; if the latter, then the conclusion was that the $300 note of Seiffert and the two notes in question were collateral to the unpaid balance of the original loan; but if the original loan was to Seiffert alone, then there was no consideration for the two notes in question; the evidence was in favour of the first hypothesis, and the Judge below having so found, the finding should not be disturbed.

FALCONBRIDGE, C.J., agreed with the opinion of STREET, J.

BRITTON, J., dissented, giving reasons in writing.

Appeal dismissed with costs.

WINCHESTER, MASTER. MARCH 12TH, 1903.

CHAMBERS.

OSHAWA CANNING CO. v. DOMINION SYNDICATE.

Appearance—Action against Partnership—Appearance by Individuals —Form of—Amendment.

Application by plaintiffs to add as defendants certain members of the defendant syndicate. An appearance had been entered in the names of these members, but for the defendant syndicate.

R. W. Eyre, for plaintiffs.

H. L. Drayton, for defendants.

THE MASTER.—The appearance must, under Rule 225, be for the individual partners in their own names. The appearance entered is not altogether of that character. While the names are given individually, the solicitors do not apparently appear for them, but rather for the syndicate. Any one of these persons could say that the appearance was not entered for him. Once the appearance is entered, the action proceeds against the firm in the firm name. The solicitor should

add to his name the words "solicitor for the said W. P. Innes, etc., etc., partners in the above firm, the Dominion Syndicate," and the words "partners" should be used in the appearance instead of the word "members." Upon such an appearance being entered, the motion will be refused, and costs thereof will be costs in the cause.

—— MARCH 12TH, 1903.

DIVISIONAL COURT.

REX v. WALSH.

Constitutional Law—Liquor Act of Ontario, 1902—Referendum—Intra Vires—Creation of Court for Trial of Offences—County Court Judge Acting out of his own County—Adjournment of Trial—Sentence—Summons—Form of.

Rule nisi calling on Archibald Bell, Judge of the County Court of Kent (purporting to act under sec. 91 of the Liquor Act) and D. J. Donahue, clerk of the peace for the county of Elgin, to shew cause why the conviction of defendant by the Judge "for that he (the defendant) did on the 4th December, 1902, at the city of St. Thomas, attempt to put a paper other than the ballot paper authorized by law into the ballot box," should not be quashed. The proceedings were taken under sub-sec. 4 of sec. 91 of the Liquor Act, 1902. The question referred to the electors by sec. 2 of the Act was voted upon throughout the Province on 4th December, 1902. The Crown Attorney for the county of Elgin notified the President of the High Court that he had reason to believe that defendant had committed or attempted to committ the offence of placing or attempting to place unauthorized ballots in the ballot box used in polling sub-division 4 for the city of St. Thomas. Thereupon the President of the High Court designated Mr. Bell, Judge of the County Court of Kent, to conduct the trial of the persons accused. The Judge issued a summons calling on defendant to appear before him on 29th December, 1902, at the court house in St. Thomas to answer the charge that he did fraudulently attempt to put into the ballot box a paper other than that authorized by law. Defendant did not appear in person at the time and place named, but counsel appeared for him and applied for an adjournment. The trial, as appeared by the conviction, was continued on that day and on the 19th and 20th January and 3rd February, 1903; and the Judge, having heard witnesses in support of the charge, as well as for the defence, found defendant guilty and sentenced him to be imprisoned for one year in the common gaol of the county of Elgin.

J. A. Robinson, St. Thomas, for defendant, moved the rule absolute.

J. R. Cartwright, K.C., and D. J. Donahue, K.C., for the Crown, shewed cause.

STREET, J.—The main objection to the conviction was that the Legislature had not properly constituted any court or given to any person the necessary authority to try and convict and sentence persons for infraction of the Liquor Act, 1902. The only provision of the Act which can be said to constitute or authorize a Court to deal with offences is sub-sec. 4 of sec. 91 : "In case a county . . . Crown Attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting . . . he shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a County or District Court of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused, and the procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto. While this language falls far short of what one would expect to find in a section intended to create a new tribunal for dealing with an offence created by the statute of which it forms part, yet there is no doubt that the Legislature did intend to declare that persons committing certain specified acts should be liable to certain prescribed punishments, and did intend by this subsection to create a tribunal with authority to try them. "The President of the High Court at Toronto" may without difficulty be taken to mean "The President of the High Court of Justice for Ontario." If the words "to conduct the trial" are to be read in their strict literal sense, and as meaning merely that the Judge designated is to preside upon the hearing of the evidence for and against the person charged, the result is to make the clause useless, because no other provision is made for bringing the person charged before the Court for trial, or for sentencing him afterwards. Having in view the plain general intention of the Legislature, it is the duty of the Court to struggle to give to the language of the section a construction which will best carry that intention into effect. It may be gathered that the intention was to create a Court consisting of the Judge designated for each case by the President of the High Court of Justice for the trial of the person charged, and to give to the Court so created, under the general power "to conduct the trial," the power to bring the person charged before the Court, to try him for the offence, and to sentence him if found guilty, for all these powers are

conferred upon the Judges in sec. 188 of the Ontario Election Act, which is incorporated by reference into sub-sec. 4 of sec. 91. This construction of sub-sec. 4 is justifiable as being a necessary implication from its expressed intention, and is therefore, no violation of the rule that statutes creating special jurisdictions are to be strictly construed.

It was well within the power of the Legislature to refer the question mentioned in sec. 2 to the vote of the electors. instead of deciding it themselves; they reserved to themselves the power to deal with the question after the vote was taken.

The Judge was not acting as a County Court Judge in the matter, but as a Court specially created by the Act, and the Act intended the Judge who was designated to act out of his own county in holding the actual trial; and there was no reason why he should not issue his summons in his own county or elsewhere.

There was no reason why, having found defendant guilty on 20th January, 1903, the Judge should not adjourn the Court until 3rd February, 1903, as he did for the purpose of sentencing him, nor why he should not sentence him on that day.

The charge in the summons was in the words of sec. 19 (c) of the Ontario Election Act, and was unobjectionable in point of form.

FALCONBRIDGE, C.J., and BRITTON, J., gave reasons in writing for coming to the same conclusion.

Rule nisi discharged. No costs.

STREET, J. JANUARY 30TH, 1903.

CHAMBERS.

RE O'SHEA.

Will—Construction—Devise of Land—Direction to Devisees—Maintenance of Sisters.

Motion by executors of will of Thomas O'Shea, under Rule 938, for order declaring construction of will.

The testator devised his farm to his two sons, share and share alike, and directed that they should be bound to keep their two sisters until they married, in a suitable manner, free of expense.

G. Edmison, K.C., for the executors and some of the beneficiaries.

R. R. Hall, Peterborough, for Susannah O'Shea.

STREET, J., held that the devisees were bound to give their sisters a home, but were not bound to furnish them with money on which to live apart.