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BRITTON, J. APRIL 27TH, 1903.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. TENNANT.

Writ of Summons—Renewal—Efforts to Ascertain Whereabouts of Defendant—Statute of Limitations—Order for Renewal— Application to Set aside—Discretion.

Appeal by defendant from order of Master in Chambers (ante 277) dismissing motion by defendant to set aside ex parte order for renewal of writ of summons, the renewed writ, and the service thereon upon defendant.

J. H. Tennant, for defendant.

D. L. McCarthy, for plaintiffs.

BRITTON, J., affirmed the Master's order and dismissed the appeal with costs.

MACMAHON, J. APRIL 27TH, 1903.

TRIAL.

BAWTINHEIMER v. MILLER.

Will—Construction—Devise—Event—"Or"—"And"—Executory Devise over—Proof of Will—Registration—Death of Witnesses.

Action to recover possession of land from defendant Miller, and to have it declared that a conveyance of the land by Smith Bawtinheimer to the defendant Sealey, and a deed by Sealey to defendant Miller, and a mortgage by Miller to Sealey, are clouds on the title which should be removed.

The plaintiff was a son of James M. Bawtinheimer, who died in 1849, leaving a will, by which he devised his farm in Dumfries to his eldest son, Levi, subject to support the family, etc.; to his son Smith and his heirs testator devised his farm in Nelson (the land in question)—"the said farm is to be kept

let or rented, the rentage to be applied for the use of the family until my said son shall arrive at the full age of 21 years, when he shall be put into possession of said farm." The testator charged this farm with certain legacies to his daughters, and he made provision for a third son, James, the plaintiff. He then provided that "should any of my sons die before becoming of age or without having lawful children, in any of these cases the property bequeathed to such shall be equally divided betwixt the surviving sons," etc. Smith Bawtinheimer entered into possession of the farm devised to him in April, 1857, and attained his majority in June of that year. He was married in 1861, and died in 1894, without leaving any children. He occupied the farm until 1864, when he leased it. On 1st December, 1881, he sold and conveyed the farm to defendant Sealey for $5,000. Sealey stated that during the 17 years he owned it, he made permanent improvements to the value of about $2,000. Sealey sold and conveyed to defendant Miller in February, 1899, for $4,000.

After the death of Smith neither of the brothers made any claim to the farm until 1901. On 3rd October, 1901, Levi quitted claim in the 100 acres to James, who thereupon brought this action.

G. F. Shepley, K.C., and G. F. Mahon, Woodstock, for plaintiff.

E. D. Armour, K.C., and W. T. Evans, Hamilton, for defendant Sealey.

W. W. Osborne, Hamilton, for defendant Miller.

MacMahon, J.—There was produced by plaintiff at the trial, from the registry office of Brant, a copy of what was called "a memorial to be registered pursuant to the statutes in that behalf of a will written in words following." Then follows a verbatim copy of the will of James M. Bawtinheimer. There is attached to this copy of the will a copy of a certificate of the Judge of the County Court of Brant, dated 4th October, 1876, "that I am satisfied from the proof adduced by Levi Bawtinheimer, being the evidence of Thomas Turnbull . . . who states under oath that he knew the above named testator and the witnesses respectively of the above will . . . and the handwriting of the said testator and the said witnesses respectively, and that the signatures of the said testator and of the said witnesses are the proper handwriting of the parties respectively, and that the testator and the said witnesses are all dead, with the due execution of the above will and codicil; the said Levi Bawtinheimer being a devisee under the said will." . . . The will was not registered till 8th June, 1880.

This is not a memorial of the will. Had it been, it would have required the affidavit of one of the witnesses to the will before it could be registered. The words "a memorial to be registered," etc., are merely surplusage. . . .

There was produced at the trial from the registry office of Halton a copy of the certificate of the Judge of the County Court of Halton, dated 29th November, 1880, similar in effect to the certificate above quoted. Attached to this certificate is a copy of the will, to which is attached an affidavit of one Knowles stating that he had compared the copy intended to be deposited in the registry office with the original will, and that it was a true copy. . . .

The widow of Smith Bawtinheimer said that her husband told her he owned the farm, and had registered the will in Milton; that the will was kept by her husband in a desk, and it was there at the time of his death; and five years after he died she was sorting some letters and papers in the desk, and, thinking the will was of no more use, had burned it.

The witnesses to the will being dead long prior to the year 1880, the only way in which Smith Bawtinheimer could secure registration thereof was under sec. 47 of the then Registration Act, R. S. O. 1877 ch. 111. . . .

When this will was registered in Milton on the 29th November, 1880, the Act R. S. O. 1877 ch. 111, sec. 63, required that every will should be registered at full length by the production of the original will and the deposit of a copy thereof with an affidavit sworn to by one of the witnesses to the will proving the due execution thereof by the testator, etc.

The plaintiff gave notice under sec. 41 of the Evidence Act, R. S. O. 1897 ch. 73, that he intended to give in evidence as proof of the devise to Smith Bawtinheimer, the letters of administration with a copy of the will annexed. . . . The letters of administration were not issued until the 29th November, 1902; the will and codicil had been destroyed in 1899; the letters recite their destruction and that copies had been presented to the Surrogate Court.

[Reference to Sugden v. Lord St. Leonards, 1 P. D. 154; Baxendale v. DeValmar, 57 L. T. N. S. 556; Fairfield v. Morgan, 2 B. & P. (N. R.) 38; Wright v. Marson, 44 Sol. J. 67; Hauer v. Sheetz, 2 Binn. (Pa.) 537; Doe d. Forsythe v. Quackenbush, 10 U. C. R. 148.]

The present case is, I consider, governed by the authorities to which I have referred, and I hold that the word "or" must be read "and," and the double event of Smith Bawtinheimer dying before the age of 21 years and without lawful children,

must have happened before the executory devise over could take effect. . . .

Judgment dismissing action with costs.

APRIL 27TH, 1903.

DIVISIONAL COURT.

BISNAW v. SHIELDS.

Master and Servant—Injury to Servant—Death—Negligence of Master—Evidence—Res Ipsa Loquitur.

Appeal by plaintiff from judgment of MEREDITH, C.J., dismissing action brought by widow of Joseph Bisnaw to recover damages for his death, which she alleged was caused by the negligence of defendants.

The deceased had been for some years in the employment of defendants at a derrick used by them for hoisting coal out of vessels on the river St. Lawrence and loading it upon cars. The deceased was going down a ladder when he was struck on the head and killed by a piece of coal which fell from some part of the derrick.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. M. Clark, K.C., for plaintiff.

E. E. A. DuVernet and J. J. Mahaffy, Streetsville, for defendants.

STREET, J.—Assuming the fact to be that this derrick had been worked for 15 years with the same appliances and in the same condition, and that during that time no coal had fallen over the platform until the fall of the piece by which the plaintiff was killed, is there reasonable evidence of negligence on the part of defendants? The Chief Justice has said that these facts negative any negligence. With great respect, I feel bound by authority to come to the opposite conclusion: Scott v. London Dock Co., 3 H. & C. 596; Kearney v. London, Brighton, etc., R. W. Co., L. R. 6 Q. B. 759. . .

There was also, I think, evidence of negligence in another respect. The opening in the platform through which the coal was shot from the upper hopper into the lower one was marked and scored all around its edges by the coal striking as it passed down; and witnesses for defendants also stated that pieces of coal occasionally escaped on to the platform, instead of passing through the opening, although they said the pieces were not large. Now, the edge of the platform was only 3 feet 9 inches from the nearest edge of the opening, and there was nothing to prevent a piece of coal which

had escaped to the platform in falling from the hopper from rolling over the edge of the platform if it rolled that far. The facts, it seems to me, therefore, put defendants into this difficulty. If the derrick was safe with ordinary care, without any fence along the edge of the platform, then there must have been a lack of ordinary care on the part of defendants or their servants for which defendants are liable. On the other hand, if coal was liable to escape even with the exercise of ordinary care, defendants were negligent in not having a fence along the edge of the platform to prevent it from falling down.

Appeal allowed with costs, and judgment to be entered for plaintiff for $1,000 with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

APRIL 28TH, 1903.

DIVISIONAL COURT.

HARRISON v. HARRISON.

Contract—Construction—Agreement to Farm on Shares—Account—Appeal—Contradictory Evidence—Findings of Fact—Costs—Discretion.

Appeal by defendant from judgment of County Court of Prince Edward in favour of plaintiff for $50.29 with County Court costs.

Plaintiff was the son of defendant, and had rented from him on shares a farm and some stock and implements. Plaintiff and defendant disputed afterwards as to what were the terms of their bargain, and as to certain matters of account, and this action was brought to determine the dispute. There was also a counterclaim by defendant. The case was tried without a jury, and the evidence was contradictory.

The appeal was heard by STREET and BRITTON, JJ.

P. C. Macnee, Picton, for defendant.

C. H. Widdifield, Picton, for plaintiff.

THE COURT refused to interfere with the findings of the Judge of the County Court, and also declined to interfere with his discretion in awarding the plaintiff County Court costs, although the amount recovered was within the Division Court jurisdiction, and in giving no costs of the counterclaim; but varied the final judgment so as to make it correspond with the findings of the Judge; and, subject to this variation, dismissed the appeal without costs.

APRIL 28TH, 1903.

DIVISIONAL COURT.

PUTERBAUGH v. GOLD MEDAL CO.

Libel—Proof of Publication—Letter Given to Clerk to Copy—Privilege—Amendment—New Trial.

Motion by defendants to set aside verdict and judgment for plaintiff in an action for libel tried before MACMAHON, J., and a jury, and for a new trial, or to dismiss the action. The action was first tried before MEREDITH, C.J., and a jury, but the jury disagreed, and the trial Judge refused a motion by defendants for judgment: 1 O. W. R. 250.

The plaintiff was employed by defendant company, and defendant Abra was acting manager of one of the departments of the company's business. Abra discharged plaintiff for misbehaviour, and was informed a day or two afterwards that plaintiff when leaving had taken away with him certain patterns belonging to the company. Thereupon he drafted a letter to plaintiff demanding their return, pointing out that their removal was a threat, and threatening prosecution if they were not returned. He gave the draft letter to a clerk, who wrote it out on a typewriter and sent it to plaintiff. This was the only publication of the letter.

Defendant company denied that the letter was written with their authority. Defendant Abra pleaded, in effect, that the occasion was privileged, that there was no malice, and that the statements were true.

The motion was heard by STREET and BRITTON, JJ.

F. C. Cooke, for defendants.

J. E. Jones, for plaintiff.

STREET, J.—The occasion of the writing of the letter complained of was a privileged occasion. Abra was in charge of the department in which plaintiff was employed. . . . In writing a letter and demanding a return of the property taken, he was clearly performing a duty he owed to the company, and if the letter were written without malice, no action would lie in respect of it.

My brother MacMahon appears, however, to have ruled that the publication of the letter . . . did not come within the privilege, and took it away, upon the authority of Pullman v. Hill, [1891] 1 Q. B. 524.

The later cases . . . have, however, introduced distinctions which have cut down to narrow limits the effect of that decision; and Boxsius v. Goblet, [1894] 1 Q. B. 842, is authority for the position that the publication by Abra to

his typewriter, in the ordinary course of the correspondence of the company, did not take away the privilege, but was entirely consistent with its existence.

The result of the ruling seems to have been that the case went off upon the question of the authority of Abra to write the letter and his plea of justification, and that the defence of privilege was not gone into. . . . Plaintiff's case against the company is founded upon the assertion that they authorized Abra to write the letter, and the jury have so found, and, if the finding is correct, the privileged occasion pleaded by Abra should be a protection to them. In order to save complication, they should have leave to amend by pleading privilege. . . . There was evidence to go to the jury sufficient to sustain the finding that the letter was their letter.

Judgment for plaintiff set aside without costs, and new trial ordered without costs, with leave to defendant company to amend.

BRITTON, J., gave written reasons for the same conclusion, referring to Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 20; Harper v. Hamilton Retail Grocers' Assn., 32 O. R. 295; and Nevill v. Fine Arts, etc., Co., [1895] 2 Q. B. 156.

CARTWRIGHT, MASTER. APRIL 29TH, 1903.

RE SMITH AND BENNETT.

Interpleader—Application for Order—Executor—Adverse Claims to Estate—Failure to Obtain Probate—Delay in Applying—Discretion—Other Remedy.

Motion on behalf of one Kipp for an interpleader order.

Harriet E. Wilcox died on the 22nd October, 1902, leaving a will dated 6th August, 1902, in which the applicant and one E. L. Moore were named as executors. The latter renounced, and Kipp applied for probate of the will, but did not proceed with his application because one Mae Smith claimed the whole estate of the testatrix under a trust deed made in June, 1901. The estate was also claimed by creditors and legatees under the will. In consequence of the conflicting claims, the property being in the hands of Kipp, he applied for an interpleader order.

W. A. Dowler, K.C., for applicant.

E. Meek, for Mae Smith.

F. W. Harcourt, for infant.

A. G. F. Lawrence, for E. L. Moore.

J. H. Spence, for Dr. Bennett.

THE MASTER.—It is to be borne in mind that the order of interpleader is not in any sense a matter of right. The granting of such an order is always in the discretion of the Court. That it is not in every case of conflicting claims that the order will be granted, is shewn by such cases as Farr v. Ward, 2 M. & W. 884; James v. Pritchard, 7 M. & W. 216; Randall v. Lithgow, 12 Q. B. D. 525. Now, in this case has not Mr. Kipp been the cause of his own difficulty? At present the estate of Mrs. Wilcox is without any personal representative. It was open to Mr. Kipp to have proceeded with his application for probate. So far there has been no suggestion of any opposition to the issuing of the letters probate. Once they were issued he would have been entitled to have retained all the assets of the testatrix in his hands, and these would have given him ample indemnity for any costs occasioned in resisting the claims of either Mae Smith or E. L. Moore, while he would have been enabled to settle with claims of the creditors, which are not very large. . . . Six months have gone since the death of Mrs. Wilcox, yet the applicant has neither taken out probate, nor renounced so that some one else could do so. The motion for an order of interpleader should always be made promptly. But in this case there is unexplained delay. . . . At the beginning of November Kipp was notified of the terms of the trust deed. The applicant was then in possession of all the knowledge he has now; and for this reason, if for no other, the order should be refused, even if he were otherwise entitled to this relief. I refer to Flynn v. Cooney, 18 P. R. at p. 325.

On a consideration of the undisputed facts, I am of opinion that the motion fails, and must be dismissed with costs. It was entirely unnecessary, and can only have been made under a misconception. The applicant's duty was to have taken out probate, and more promptly than ever on learning of the claim of Mae Smith. He could then have obtained a judgment for administration under Rule 950, and in the Master's office all the conflicting claims would have been investigated and the rights of all parties adjusted, with full protection to himself.

CARTWRIGHT, MASTER. APRIL 30TH, 1903.

CHAMBERS.

CAYLEY v. GRAHAM.

Judgment—Default—Application to Set aside—Delay — Discovery of Defence after Three Years—Condition of being allowed to Defend —Payment into Court—Invalidity of Proposed Defence.

Motion by defendant to set aside a judgment entered

7th December, 1899, upon default of appearance, and for leave to appear and defend.

C. Evans-Lewis, for defendant.

T. D. Delamere, K.C., for plaintiffs.

THE MASTER.—The facts of the case are not in dispute. The action was to recover the amount due on a mortgage made by defendant on 4th March, 1889. Subsequently defendant sold the mortgaged premises to one Hall, who on 4th May, 1892, conveyed the same to W. B. McMurrich as a trustee for the Rathbun Company. By deed of 4th February, 1898, McMurrich conveyed to the plaintiffs, the mortgagees. One of the plaintiffs made affidavit that this deed was never registered, but only held as an escrow, to be used for the purpose of making title in case of exercising the power of sale. . . .

At the time of the service of the writ of summons, in November, 1899, defendant thought he had no defence, and allowed judgment to go by default. He has since become aware of the existence of the unregistered instrument executed by McMurrich, and has been advised that the effect of that instrument was to release him from all liability under the mortgage as effectually as if it had been discharged by plaintiffs. His counsel stated at the argument that it would be impossible to give security for the judgment, if that were made a term of being allowed in now to defend. . . .

There are, in my opinion, three fatal objections to the motion.

First, it is clear under McVicar v. McLaughlin, 16 P. R. 450, that no relief could be given unless defendant were able to pay into Court a substantial part, if not the whole, of the amount due on the judgment.

Second, that under the previous case, and the authorities cited therein, the delay has been too great. To the same effect is . . . McLean v. Smith, 10 P. R. 145.

Third, the proposed defence was stated to be based on certain statements in the opinions of the Judges in Scarlett v. Nattress, 23 A. R. 297. . . . The facts in that case distinguish it from the present case. There was no undertaking by McMurrich to assume the mortgage in question. . . . Bourne v. O'Donohoe, 17 P. R. at p. 524, referred to.

Motion dismissed with costs.

MORSON, JUN. CO.J. APRIL 28TH, 1903.

TENTH DIVISION COURT, YORK.

WICKETT v. GRAHAM.

Division Courts—Attachment of Debts—Remuneration of Alderman—Debt Due or Owing—Statutory Obligation—Time of Service—Public Policy.

This was an action on a promissory note for $100 and interest and notarials, made by J. J. Graham, the primary debtor, in favour of Hector Lamont, and by him indorsed over to S. R. Wickett, the primary creditor. The corporation of the City of Toronto were made garnishees, and the remuneration due the primary debtor as alderman, was attached in their hands.

M. H. Ludwig, for the primary creditor.

H. L. Drayton, for the primary debtor, did not dispute his liability on the note, but contended that his aldermanic remuneration was not garnishable, on two grounds: (1) Because it is not a debt due, within the meaning of the Division Courts Act. (2) Even if it were, it is exempt on the ground of public policy.

MORSON, JUN. CO.J.—By sec. 179 of the Division Courts Act, to entitle a primary creditor to judgment against a garnishee, there must be at the time of the service of the summons on the garnishee, a debt due or owing from the garnishee to the primary debtor; and by sec. 192 of the same Act, there must be an amount owing from the garnishee to the primary debtor. Now, the word "owing" implies a debt, and a debt in law is, whatever one owes, or a sum of money due by virtue of an agreement, express or implied; so that in order to entitle the primary creditor to succeed in this case against the garnishees, the corporation of the city of Toronto, he must shew that there was a debt of this nature due by the corporation to the primary debtor at the time of the service of the garnishee summons upon them. By 57 Vict. ch. 50, sec. 3, in cities having a population of 100,000 or over, the right is given the city council, by by-law, to remunerate the aldermen in an annual amount not exceeding $300. In pursuance of this Act, the council of the city of Toronto, on the 4th June, 1894, duly passed a by-law (No. 3255) by which the aldermen are allowed and paid $300 per annum in equal quarterly payments on the last days of March, June, September, and December in each year. It is the remuneration under this by-law that is now garnished.

Is this, then, a debt such as I have described, arising out of a contract, express or implied? It clearly is not,—but is only an obligation to pay, arising out of, and by force of, the

statute and by-law referred to; in other words, a statutory obligation, and not a contractual one,—not one arising out of a contract express or implied, and therefore not a debt within the meaning of the Division Courts Act, and so not garnishable: see Central Bank v. Ellis, 20 A. R. 364. Even if it was a debt within the meaning of the Division Courts Act, it was not earned at the time of the service of the summons upon the corporation, because the service was made three days before the remuneration was payable under the by-law. Salary or wages not fully earned is not garnishable: Wilson v. Fleming, 1 O. L. R. 601, and cases therein referred to. It becomes now unnecessary for me to decide the other contention, that the remuneration is exempt on the ground of public policy. I must, therefore, hold that the remuneration due the primary debtor as alderman is not garnishable, for the reasons I have stated, and I give judgment against the primary debtor, on the note, with costs, and dismiss the claim as against the garnishees without costs.

CARTWRIGHT, MASTER. MAY 2ND, 1903.

CHAMBERS.

HISEY v. HALLMAN.

Venue—Change of—County Court Action—Convenience—Number of Witnesses — Prejudice — Fair Trial — Undertaking to Pay Additional Expense.

Motion by defendant to change venue from Toronto to Berlin in a County Court action.

J. E. Jones, for defendant.

H. J. Martin, for plaintiff.

THE MASTER.—By Rule 1219 power is given to change the venue in County Court actions "according to the practice in force in the High Court." What this is, I had occasion to consider in Meiers v. Stern, ante 392. . . . This action is brought on an agreement under seal made 21st December, 1893, by defendant with one Daly, and assigned by Daly to plaintiff. At the foot of the agreement is a memorandum in pencil, written, as it would seem, by defendant himself, and signed with his initials, which seems to be intended to guard against the setting up of the defence of fraud on which defendant now seeks to escape. This is really the sole issue in the action. . . . The defendant has had the courage to swear to the necessity of 18 witnesses at the trial to support this defence. . . . In his examination . . . he admits his signature to the agreement and to the pencil memorandum at the foot, and states that no one was present at the execution except his wife, the witness Payne, who was Daly's agent, and some one else whose name he cannot remember. . . . The defendant denies the right of plaintiff to bring

this action, and it will therefore be necessary for the latter to prove his status. On the other hand, plaintiff, with comparative moderation, avers that he will require several (9, I think) witnesses, who all reside in Toronto, to prove his case. Probably defendant will be willing to make such admissions in regard to publication and circulation as will render most of these unnecessary. This will reduce the 9 to 3 or 4. . . . Plaintiff is also willing to pay any extra expense occasioned to defendant by the trial taking place at Toronto. Defendant makes a similar offer, if the motion is granted. . . .

Plaintiff and his solicitor swear "that articles of an inflammatory nature denouncing John J. Daly and contracts which he obtained from the farmers have been published in the Plattsville newspaper having a large circulation throughout the county of Waterloo." This fact is not in any way denied by defendant. I think that it may not unfairly be said that this is likely to cause serious prejudice to plaintiff, and that he certainly should not be compelled to have his action tried at Berlin.

I therefore dismiss the motion, with costs to plaintiff in the cause; plaintiff undertaking to pay such amount as the trial Judge may consider reasonable to meet the extra expense (if any) caused by the trial taking place at Toronto, as was first ordered in McArthur v. Michigan Central R. Co., 15 P. R. 77.

FALCONBRIDGE, C.J. MAY 2ND, 1903.

WEEKLY COURT.

EDGEWORTH v. EDGEWORTH.

Judgment—Default—Opening up—Terms—Alimony.

Appeal by plaintiff from order of local Judge at Windsor setting aside judgment for plaintiff by default in an action for alimony and allowing defendant in to defend.

C. A. Moss, for plaintiff.

S. White, Windsor, for defendant.

FALCONBRIDGE, C.J.—The excuses given by defendant for his acts of default or omission are unsatisfactory. There is no slip or mistake of a solicitor, but only the client's ignorance and neglect. The terms upon which relief was granted to defendant (payment of costs and an early trial) are insufficient, and the additional term of payment, within the time limited by the order, of $100 by defendant to plaintiff to enable her to prepare for trial, and of the costs of this application (fixed at $10), should be imposed. Should there be any question of jurisdiction of the local Judge, or if for any other reason it is so desired, his order as varied may be treated as a substantive order made by me.