THE

ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM MARCH, 1918, TO THE 2nd AUGUST, 1918.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

VOL. XIV.

Editor:

Edward B. Brown, K.C.

1918:
CANADA LAW BOOK CO., LTD.
LAW BOOK PUBLISHERS
TORONTO

CASES NOTED.

(Cases marked * are reported or to be reported in the Ontario Law Reports.)

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CASES CITED.

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The
Ontario Weekly Notes

VOL. XIV. TORONTO, MARCH 15, 1918. No. 1

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. MARCH 4TH, 1918.

*RE CALEDONIA MILLING CO. v. JOHNS.

Division Courts—Jurisdiction over Indian—Order for Committal of Indian under Judgment Debtor Procedure—Contempt of Court—Execution—Division Courts Act, R.S.O. 1914 ch. 63, sec. 190 et seq.—Indian Act, R.S.C. 1906 ch. 81, sec. 102—Exemption of Property of Indian from Seizure—Powers of Provincial Legislature—British North America Act, sec. 91 (24).

Motion by the defendant in a Division Court action for an order prohibiting further proceedings against him in the Division Court, as a judgment debtor, on the ground that he was an Indian owning no property outside his reserve.

A. L. Baird, K.C., for the defendant.
H. Arrell, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that on the 4th March, 1917, judgment was pronounced against the defendant in the Division Court for $164.22; on the 23rd November, he was examined as a judgment debtor; and, on the 12th December, the Division Court Judge, being of opinion that the defendant had sufficient means and ability to pay the debt, though his property was not liable to seizure, by reason of the provisions of sec. 102 of the Indian Act, R.S.C. 1906 ch. 81, made an order for his committal to gaol for 40 days.

This was in effect getting at exempt assets in an indirect way. If the proceedings were in any way regarded as based on contempt, there could be no contempt in withholding that which was by law exempt from seizure.

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

If the proceedings (see sec. 190 et seq. of the Division Courts Act, R.S.O. 1914 ch. 63) were in the nature of execution against the person, the execution creditors were again in trouble. The Indian Act had not given any right to take the person of an Indian in execution. Certain of his property might be taken; but the Indian was, by the British North America Act, sec. 91 (24), subject to the legislation of the Dominion, and a ward of the Dominion Government, and could not be taken under the laws of the Province.

These provisions of the Division Courts Act were not to be construed as applying to Indians.

Order made for prohibition; costs of the motion to be set off pro tanto against the debt.

MIDDLETON, J. MARCH 4TH, 1918.

RE MITCHELL.

Will—Construction—Gifts to Children—Gifts over in Event of Children Dying without having Received their Portion—Contest between Executors and Children of Deceased Child of Testator—Effect of Divesting Clause.

Motion by the executors of the will of William J. Mitchell, deceased, for the opinion and advice of the Court as to the disposition of moneys which had come to their hands as part of the estate of James Mitchell, the deceased father of William J. Mitchell.

The motion was heard in the Weekly Court, Toronto.

David Henderson, for the applicants.

A. G. F. Lawrence, for the children of William J. Mitchell.

F. W. Harcourt, K.C., Official Guardian, for the grandchildren of William J. Mitchell and all those interested in upholding the contention that William J. Mitchell, and not his children, took under the will of James Mitchell.

MIDDLETON, J., in a written judgment, said that James Mitchell, who died in 1887, by his will directed, in certain events, a division of his estate among his children, and provided that, in case any one of his children should die without having received his portion, the issue of the child so dying should take the parent's share.

William J. Mitchell died on the 29th October, 1907, leaving issue. Since his death, his father's executors had paid over to

his (William's) executors $24,500 (the money in question) as part of his share in his father's estate.

By the will of William, his children (subject to certain minor provisions) take a life interest only, and the estate is to be divided among his grandchildren per stirpes.

The children of William now contend that they take under the will of James, and that the money in question ought not to have been paid to the executors of their father.

James, by his will, set apart his dwelling-house as a home for his wife and family, and then devised all his estate to his executors in trust to convert and use for the maintenance of his wife and family and to pay certain sums to his sons, "and at such time after the expiration of five years from and after my decease as may seem to them advisable to equally divide apportion pay over and convey to all of my children" (naming them) "all and singular my real and personal estate share and share alike" save such portion as the executors may retain to provide from the interest for the wife and family residing with her in the homestead, any balance of income being divided yearly among all his children.

On the death of the widow, the income shall be divided "until the time appointed by this my will for my executors . . . to divide apportion or pay over to my several children in equal proportions the whole of my real and personal estate."

"And I order and direct that in case any of my children should die without having received his or her portion . . . and leaving issue . . . surviving at the time a division of my estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue . . . surviving the share or portion herein bequeathed to such child shall revert to and become part of my estate and be equally divided among all my surviving children."

The widow of James survived William, and died recently.

Reference to Kirby v. Bangs (1900), 27 A.R. 17; Gaskell v. Hannan (1805), 11 Ves. 489, 497; Minors v. Battison (1876), 1 App. Cas. 428; Johnson v. Crook (1879), 12 Ch. D. 639; In re Goulder, [1905] 2 Ch. 100.

In this case, the testator (James) gave full discretion to the executors. He probably did not contemplate his wife surviving beyond the five years, for he directed the income to be divided during the period which was to elapse between the death of the wife and the division of his estate; but the executors are to divide after five years "at such time as may seem to them advisable;" and the gift over is, "if any of my children should die without

having received his or her portion." The executors, in pursuance of the dominant idea of the will, kept the estate intact during the life of the widow, and the son died during her life.

It appeared clear to the learned Judge that, in the events that had happened, the testator's will was that the property (the moneys now in question) should go to his grandchildren.

Order declaring that the grandchildren take, and not the executors of William; costs out of the fund.

MIDDLETON, J., IN CHAMBERS. MARCH 5TH, 1918.

GENTLES v. BYRNE.

BYRNE v. GENTLES.

Costs—Action for Trespass Brought against Agent of Real Trespasser—Judgment for Costs Recovered against Defendant—Motion for Order for Payment of such Costs by Principal—Election to Sue Agent—Irrevocability after Judgment.

Motion on behalf of one Whittlesay for payment out of Court to him of the balance of $200 paid into Court by him as security for costs in the action of Byrne v. Gentles, after paying the defendant's costs of that action, which had been taxed, upon a discontinuance, at $70.20; and cross-motion on behalf of Gentles for payment by Whittlesay of $718.20, the taxed costs in the action of Gentles v. Byrne, upon the theory that Whittlesay was the real defendant in that action, and for payment out to Gentles of the money in Court on account of such costs.

R. S. Robertson, for Whittlesay.
Harcourt Ferguson, for Gentles.
W. S. Montgomery, for Byrne.

MIDDLETON, J., in a written judgment, said that, taking it for granted that Byrne was an agent for Whittlesay, and was acting for him in the trespass which was the foundation of the first action, Gentles had the right to sue either Byrne or Whittlesay or both. He elected to sue Byrne, and recovered judgment against him for an injunction, for damages, and for costs. This was final, and Gentles could not now change his election and seek to make the principal liable for the costs of the action brought against his

agent. While the action was pending, it possessed a flexibility which was lost once judgment was pronounecd; and, while an order might have been made before judgment adding parties, this was in effect an attempt to add a defendant after judgment for the purpose of execution only.

Re Sturmer and Town of Beaverton (1912), 25 O.L.R. 190, 566, was the case of an applicant who was a man of straw put forward by the real authors of the litigation. The respondent had no choice and made no election.

Upon this short ground, the motion against Whittlesay failed; and, for the same reason, his motion succeeded. He had assigned the money to Mr. D. H. Stewart, and the money in Court might be paid out to Stewart.

No costs.

MIDDLETON, J., IN CHAMBERS. MARCH 5TH, 1918.

*RE HUGHES.

Trusts and Trustees—Mortgage Held by Trustee Corporation as Trustee for Beneficiaries under Marriage Settlement—Vested Interest of Beneficiaries—Right to Take Property in Specie—Assignment of Mortgage to Accountant of Court—Compensation of Trustee—Costs.

Motion, by all persons beneficially interested, for an order directing the Toronto General Trusts Corporation to assign a mortgage for $260,000, now held by it, as trustee under a settlement, to the Accountant of the Supreme Court of Ontario, to be held by him for those beneficially interested.

A. W. Ballantyne, for the adult beneficiaries.

F. W. Harcourt, K.C., Official Guardian, for the infant beneficiaries.

W. N. Tilley, K.C., for the Toronto General Trusts Corporation.

MIDDLETON, J., in a written judgment, said that, under a marriage settlement made in 1876, certain land was settled in trust. By an order made in 1901, the Toronto General Trusts Corporation was appointed trustee in place of the survivor of the original trustees. Early in 1917, an advantageous offer to purchase the land was received; and it was arranged that the sale

be carried out under the Settled Estates Act, and that the proceeds should be held by the trustee corporation upon the trusts of the settlement, without prejudice to the contention that the estate had vested and was immediately divisible. This arrangement was authorised by an order of the Court of the 17th February, 1917. It was determined by the Court on the 5th May, 1917, that the shares of the beneficiaries under the settlement were vested and not subject to be divested.

The mortgage for $260,000, representing part of the price realised upon the sale of the land, was made by the purchasers in favour of the trustee corporation; and as yet no commission had been allowed to the corporation in respect of this mortgage.

The contention of the beneficiaries was, that, their shares being vested, they could elect to take the property in specie.

The learned Judge said that the beneficiaries had the right to demand the property in specie and to have it transferred to the trustee of their choice.

An order should be made so declaring and directing a transfer to the Accountant, and referring to the Master in Ordinary the fixing of the compensation proper to be allowed to the trustee corporation in respect of the mortgage, including proper remuneration for services in making the transfer.

The trustee corporation should have costs as of an uncontested motion out of the fund, and the parties beneficially entitled should have their costs from the same source.

MIDDLETON, J. MARCH 5TH, 1918.

RE KILLORIN.

Will—Construction—Devise to Son—Direction to Son to Give Widow and Family Home with him—Personal Obligation, not Estate in Land Devised.

Motion by the executors of the will of John Killorin for an order determining questions arising upon the will.

The motion was heard in the Weekly Court, Toronto.

W. S. Herrington, K.C., for the applicants.

W. G. Wilson, for Ellen Breault.

MIDDLETON, J., in a written judgment, said that the testator died on the 30th January, 1910. By his will he gave certain land

to his son James, and later in the will there was this clause: "I devise and will that my wife and family have their home and maintenance with my son James."

This did not give the wife and family any estate in the lands. When James accepted the devise, he gave his assent to the provision of the will, and undertook to give to the widow and "family" *i.e.*, the infant children not forisfamiliated, a home with him either on the land or wherever his home might be, but on his death there was no obligation which would pass to his estate. His obligation was purely personal, and died with him.

In each case it is a matter of interpreting the will. This is much more like Re Pringle (1911), 3 O.W.N. 231, than Re Nestor (1916-7), 11 O.W.N. 220, 438. In the latter case the homestead was to be maintained as a home for all the children, and this, in the view of the Court, was a right given to the children lasting during their lives.

The crucial point here was, that the obligation was personal upon the son, and not an estate in the land.

MASTEN, J., IN CHAMBERS. MARCH 5TH, 1918.

REX v. CROSS.

Criminal Law—Keeping Common Bawdy House—Magistrate's Conviction—Criminal Code, sec. 225 (6 & 7 Edw. VII. ch. 8, sec. 2)—No Evidence to Sustain Conviction—Order Quashing.

Motion to quash a conviction of Emma Cross, by the Police Magistrate for the Town of Simcoe, "for that she . . at the town of Simcoe . . . in or about the month of January, 1918, did keep a disorderly house, to wit, a common bawdy house, by keeping and maintaining a certain house . . . in the said town of Simcoe for the purpose of prostitution, contrary to sections 773, 774, and 781 of the Criminal Code."

J. E. Jones, for the defendant.

J. R. Cartwright, K.C., for the magistrate and the complainant.

MASTEN, J., in a written judgment, said that he could find nothing in the evidence to indicate that the defendant was the keeper of a bawdy house as defined by the Code.

The learned Judge had not omitted to consider the terms of the amendment to sec. 225 of the Criminal Code by sec. 2 of the amending Act of 1907, 6 & 7 Edw. VII. ch. 8. Section 225 now reads: "A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes."

The defendant's house was kept primarily for the purposes of a residence, not of prostitution. Before he went to the war, the premises were rented by the husband of the defendant, and he and she lived there. Since the husband's departure, the defendant had lived there with her mother and brother. The mother appeared to be in control, for she ejected the defendant. No money was paid by the only man who resorted to the place to fornicate. In that aspect of the case, there was no evidence that the house was a bawdy house or that the defendant was the keeper.

Reference to Rex v. Weller (1917), 40 O.L.R. 296; Rex v. Jackson (1917), *ib.* 173; Regina v. Rehe (1897), 1 Can. Crim. Cas. 63; Rex v. Osberg (1905), 9 Can. Crim. Cas. 180.

The conviction should be quashed without costs; the magistrate should be protected.

MIDDLETON, J., IN CHAMBERS. MARCH 6TH, 1918.

LOCKHART v. WOODWARD.

Settlement of Action—Motion Made after Lapse of 8 Years to Dismiss Action for Want of Prosecution—Determination by Local Judge that no Settlement Made—Reversal on Appeal—Motion Made in Bad Faith—Costs of Motion and Appeal.

Appeal by the plaintiff from an order of a Local Judge dismissing the action with costs, for want of prosecution.

A. A. Macdonald, for the plaintiff.
A. E. Knox, for the defendant.

MIDDLETON, J., in a written judgment, said that the action was begun in April, 1911, and an appearance was entered by the defendant on the 11th May, 1911. Nothing more was done, so far as shewn by the Court records, until this motion was made in January, 1918.

The plaintiff said that, after the commencement of the action, it was arranged that the action should drop, each party paying his own costs. The defendant denied this in an affidavit; but he had been cross-examined upon it; and the correct finding of fact should be that the action was settled.

The learned Local Judge had taken the contrary view; but he had before him the same material as was now before the Judge in appeal, and that only; and the Judge hearing the appeal was in as good a position as the Local Judge to form a conclusion, and must give effect to his own views.

The learned Judge reviewed the evidence and said that, in face of all the circumstances, the affidavit of the defendant could not be accepted.

Regret was expressed at the great expense gone to in seeking to obtain $5, the full amount of costs incurred in entering the appearance and defence. There were now costs of a motion, affidavits, cross-examination, and appeal. Each party should be left to bear his own costs, were it not abundantly plain that the motion was not made in good faith.

The appeal should be allowed with costs, and an order should be made, reciting that it appeared that the action had been settled between the parties and that the motion was unnecessary and improper, and dismissing the motion with costs to be paid by the defendant to the plaintiff.

FALCONBRIDGE, C.J.K.B. MARCH 8TH, 1918.

*FOXWELL v. POLICY HOLDERS MUTUAL LIFE INSURANCE CO.

Insurance (Life)—Lapse of Policy by Non-Payment of Premium—Acceptance by Agent of Insurance Company of Amount of Premium after Lapse—Condition as to Certificate of Health not Complied with—Official Receipt—Waiver—Evidence—Onus—Insured in Articulo Mortis when Premium Paid—Endeavour to Return Payment in Specie.

Action by the widow of Walter E. Foxwell, deceased, to recover the amount for which his life was insured in her favour, by a policy issued by the defendants.

The action was tried without a jury at Toronto.

D. W. Saunders, K.C., and E. C. Ironsides, for the plaintiff.

H. R. Frost, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defence was, that the policy lapsed and became void by reason of the non-compliance of the insured with the terms of the policy, in failing to pay the premium due thereunder on the 15th July, 1917, or within one month thereafter, and also in subsequently failing to produce evidence satisfactory to the company that he was in good health, in addition to tendering the amount of the overdue premium to the agent of the defendants.

After setting out the material provisions of the policy, the learned Chief Justice said that the insured died on the 22nd August, 1917, having been ill for one week. On the day before his death, the plaintiff paid to one Marsh, city manager and district agent of the defendants, $3.32, an amount which had been overdue since the 15th July, 1917, and Marsh gave her a written receipt (signed by himself) for the amount, "being premium for months July and August, official receipt to follow." The plaintiff said that Marsh made no objection. She denied that he said anything about a declaration that her husband was in good health. She said she had never read the policy. Marsh was called and said that he told the plaintiff that she must furnish a certificate of good health. The learned Chief Justice accepted the plaintiff's statement.

On the morning of the 22nd, the book-keeper of the defendants sent the official receipt, signed by the manager. By it, the company acknowledged the receipt of $3.32, "being the amount of two months' premium on the above-mentioned policy"—the particulars of the policy being stated in the body of the receipt, which contained this clause: "Agents are not authorised to receive premiums after the expiration of the 30 days of grace. Any person making such payment does so on the agreement that the acceptance thereof by the company shall not be claimed or regarded as evidence of waiver of any of the terms or conditions of the policy."

The defendants endeavoured to return the $3.32, but the plaintiff would not take it.

Even giving the plaintiff the benefit of the finding of fact above noted, the learned Chief Justice was of opinion that she could not recover. The policy had lapsed, and the onus was on the plaintiff to shew that it was revived, and she was confronted with abundant notice of the conditions upon which alone it could be revived.

The defendants could not waive the forfeiture without notice or knowledge of the fact that the insured was then in articulo mortis. See Smith v. Excelsior Life Insurance Co. (1912), 3 O.W.N. 1521.

The money never "got home" to the defendants, in the sense that it was accepted by them and went regularly through their books. It was entered in the cash-book only, but not on the policy-card, and it did not form part of the bank deposit of that day. It remained in an envelope until Marsh, who went away soon after he had received the money, should return; and then efforts were made to return the money in specie.

Reference to Whitehorn v. Canadian Guardian Life Insurance Co. (1909), 19 O.L.R. 535; Horton v. Provincial Provident Institution (1888-9), 16 O.R. 382, 17 O.R. 361; Wells v. Independent Order of Foresters (1889), 17 O.R. 317; Bissell v. American Tontine Life Insurance Co. (1871), 2 Bigelow's Life and Accident Insurance Cases 150; Handler v. Mutual Reserve Fund Life Association (1904), 90 L.T.R. 192, 193; Frank v. Sun Life Assurance Co. (1893-4), 20 A.R. 564, 23 S.C.R. 152, note; Knights et Maccabees v. Hilliker (1899), 29 S.C.R. 397.

Action dismissed without costs.

CLUTE, J. MARCH 9TH, 1918.

*MURPHY v. CITY OF TORONTO.

Workmen's Compensation Act—Contractor—Assessment—Estimate of Pay-roll—Authority of Officer of Board—4 Geo. V. ch. 25, sec. 78 (3)—Adoption of Assessment by Board—Costs.

This action was tried on the 7th November, 1917, and judgment was given for the plaintiff on the 24th November, 1917, for $2,230.20 (13 O.W.N. 212), with a stay for a month to enable the parties, with the sanction of the Workmen's Compensation Board, if that could be obtained, to ascertain and adjust the differences between them.

The case was reopened at the instance of the defendants, and further evidence was taken on the 4th February, 1918. (See 13 O.W.N. 340.)

F. J. Hughes, for the plaintiff.

Irving S. Fairty, for the defendants.

CLUTE, J., in a written judgment, said that the plaintiff claimed $2,230.20 under a contract for the construction of cer-

tain public works. The defendants admitted the amount, but asserted that it had been paid over, under the Workmen's Compensation Act, to the Board, upon a demand by the Board for that amount as due by the plaintiff to the Board under the Act. The plaintiff replied that he was not indebted to the Board as alleged.

The case turned entirely upon whether or not this amount had in fact been assessed by the Board against the plaintiff under the Act. There was no official record of an assessment having been made by the Board. The question was, whether what was done amounted to a valid assessment under the provisions of the Act.

After referring to many of the provisions of the Act, the learned Judge said that no pay-roll had been furnished by the plaintiff, and Mr. Giles, an officer of the Board, made some inquiry and estimated the amount of the pay-roll at $75,000. The Board, as such did not fix any sum as the probable amount of the pay-roll. The Board, in fact, never acted or assumed to act under sec. 78 (3) of the Act. The Board could not be said to have made the assessment. The amount of the plaintiff's assessment was ascertained by applying the rate of 3 per cent., duly fixed by the Board, to what Mr. Giles considered should be the amount of the pay-roll.

The learned Judge examined the evidence in detail, and referred to some authorities, including Halsbury's Laws of England, vol. 8, para. 769.

He then said that, having regard to the law applicable to a corporation such as this, whose function was largely judicial, the Board could not delegate its authority to fix the amount of the roll upon which the Board might act. With some doubt, he had reached the conclusion that, although the assessment made by Mr. Giles on the pay-roll as fixed by him was not binding on the plaintiff, yet the question having been opened at the plaintiff's request and the Board having confirmed what Giles had done, that was an act of the Board which cured the defect and rendered the assessment valid.

The action should be dismissed. The costs should remain as fixed by the order allowing further evidence—that is, no costs of the first hearing. The plaintiff should have the costs of the rehearing to judgment.

AFFIDAVITS TAKEN OVERSEAS.

The attention of solicitors is directed to an amendment of the Ontario Evidence Act, by which certain officers of the Canadian Expeditionary Forces on active service, out of Canada, are permitted to administer oaths and affirmations for use in Ontario.

The amendment is contained in sec. 13 of the Statute Law Amendment Act, 1916, 6 Geo. V. ch. 24, as amended by sec. 68, of the Statute Law Amendment Act, 1917, 7 Geo. V. ch. 27.

Section 13, as amended, reads as follows:—

> 13. In addition to the classes of persons named in section 38 of the Evidence Act, an oath, affidavit, affirmation or declaration for use in Ontario, may be administered, sworn, affirmed or made out of Ontario by a Colonel or Lieutenant-Colonel or Major of the Canadian Expeditionary Forces on active service, out of Canada, and shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if it had been administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits therein or other competent authority of the like nature.

Solicitors who send to soldiers overseas documents to be executed should instruct them to go to these officers for the purpose. The ordinary notarial charges in England are high.