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MEREDITH, J. MARCH 21ST, 1902.

CHAMBERS.

RE GREENWOOD v. BUSTER.

County Court—Jurisdiction—Consent does not Give—Prohibition.

Motion for prohibition to the Judge and clerk of the County Court of Frontenac and the defendant in action in that Court, to prohibit them from enforcing a pretended judgment pronounced in 1893 by Richard T. Walkem, one of Her late Majesty's counsel, sitting as County Court Judge, at the request of the Judge, who was ill, but without the authority of a commission as deputy-judge or otherwise, dismissing the action with costs upon a regular trial, after the plaintiff had consented to a trial by Mr. Walkem. The plaintiff moved before the Judge of the Court to set aside the nonsuit, and the motion was dismissed with costs. The defendant taxed the costs under the judgment, and had execution in the sheriff's hands ever since. Recently an alias writ had been placed in the sheriff's hands, and a seizure of the plaintiff's goods was threatened.

D. L. McCarthy, for plaintiff.

T. D. Delamere, K.C., for defendant. The plaintiff is estopped from taking advantage of the irregularity: Mayor of London v. Cox, L. R. 2 H. L. 239; Archibald v. Bushey, 7 P. R. 304; Robertson v. Cornwell, *ib.* 297; Shortt on Mandamus and Prohibition, p. 445.

MEREDITH, J.—There was a total want of jurisdiction, and consent could not confer jurisdiction. Delay could make no difference. Rose, J. (29th Nov., 1895), in a similar case of Re Innes v. Gates, tried before Mr. Walkem, granted prohibition; see also Deadman v. Agriculture and Arts Association, 6 P. R. 176.

The order will go, but without costs.

WINCHESTER, MASTER. MARCH 24TH, 1902.

CHAMBERS.

DOMINION PAVING AND CONTRACTING CO. v. MAGANN.

Summary Judgment—Payment into Court of Amount Admitted to be Due—Payment out to Plaintiffs—Without Prejudice to Defendant's Rights.

Kane v. Mitchell, 13 P. R. 118, referred to.

Action for return of moneys overpaid to defendant on an account. The defendant, upon being served with the writ of summons, paid $1,081.66 into Court, under Rule 419, in full satisfaction of plaintiffs' claim. The plaintiffs moved for judgment under Rule 603 for the amount claimed by the writ. The defendant, in an affidavit, admitted the claim to the extent of the amount paid into Court, but disputed the balance.

G. H. Kilmer, for plaintiffs.

J. D. Falconbridge, for defendant.

THE MASTER IN CHAMBERS:—Plaintiffs' counsel asks for judgment for the amount paid into Court. I do not think the plaintiffs entitled to judgment as asked. The Rules under which the defendant has paid what he admits to be due give the defendant some benefits that would be useless if judgment were given for plaintiffs as asked. I think justice will be done to the parties by directing the amount in Court to be paid out to plaintiffs, the defendant admitting same to be due to the plaintiffs in his affidavit. This payment will be without prejudice to whatever rights the defendant may be entitled by reason of his paying same into Court under the Rules. I would refer to the opinion of the late Master in Chambers in Kane v. Mitchell, 13 P. R. 118. Costs in the cause.

Kilmer, Irving, & Porter, Toronto, solicitors for plaintiffs.

Johnston & Falconbridge, Toronto, solicitors for defendant.

MACMAHON, J. MARCH 24TH, 1902.

TRIAL.

McCALLAM v. SUN SAVINGS AND LOAN CO.

Company — Shares — Subscription — Misrepresentation — Agent — Settlement Pending Action, Induced by Threats, Set Aside.

Action for the cancellation of the application for 1 share of permanent stock of the defendant company, signed by the plaintiff Margaret McCallam, and of the certificate

and the repayment of the $100 paid by her therefor, and the cancellation of the application for 10 shares of said stock, signed by the plaintiff Samuel McCallam, and the repayment of $80 paid by him on account thereof, and by amendment, to set aside an agreement of settlement made after the commencement of the action.

C. D. Scott, for plaintiffs.

H. H. Dewart, K.C., for defendants.

MacMahon, J.—Dealing first with the question of the alleged settlement of this action. Without imputing to Mr. Henderson anything else than forgetfulness of what took place on that occasion, he, no doubt with the desire to bring about what he says he considered a fair settlement, then told S. McCallam that unless a settlement was effected that night it could not be settled at all, and if not settled that night he (Henderson) would bring an action to recover $5,000 damage for slander alleged to have been uttered by McCallam on his examination for discovery, and that defendants would keep it in litigation for years. When McCallam urged that the case should be submitted to his solicitor, Henderson made the above threat. This threat was the inducing cause of McCallam's signing the offer of settlement, and he says he signed under fear of the prosecution. Under the circumstances it is a settlement amounting to coercion not persuasion: Ellis v. Barker, 25 L. T. N. S. 7; Jackson v. G. T. R. Co., 25 O. R. 64-66. The agreement, however, is only an offer, and did not become an agreement until assented to by defendants, and plaintiffs' solicitors repudiated the settlement and withdrew the offer the same day. The manager of the defendants agreed to the settlement on the day after it was made, the 7th January, 1902, the president on the 8th January, and the board on the 20th January. The assent of the board was too late, but it does not matter owing to the coercion adopted. . . . I find that Mr. Henderson stated that the Imperial Trust Company was behind defendants, and had guaranteed a dividend of six per cent. upon the stock subscribed for, and that through the trust company the plaintiffs could get the amount of their principal at any time. These statements were untrue. The plaintiff S. McCallam is, therefore, entitled to have his application for 10 shares of defendants' stock cancelled and to a refund of the $100 he has paid thereon, and his wife, the co-plaintiff, though she has received dividends on her 1 share, for which she paid in full, is, as she is in a position to return the stock, entitled to do so and receive back her money: Clarke v. Dickson, E. B. & E. 148.

The defendants must pay the plaintiffs their costs.

Scott & Scott, Toronto, solicitors for plaintiffs.

Dewart, Young, & Maw, Toronto, solicitors for defendants.

FALCONBRIDGE, C.J. MARCH 25TH, 1902.

TRIAL.

CLARK v. WALSH.

Sale of Mining Land—Agreement to Incorporate Company to "Handle and Acquire"—Specific Performance — Foreign Incorporation—Amendment.

Action for specific performance of an agreement dated 16th November, 1900, whereby plaintiff Clark undertook to deposit the sum of $2,000, part of the consideration, to credit of defendant in the Ontario Bank at Port Arthur, on the 1st January, 1901, and by said date incorporate a company with a capital of $500,000 in fully paid shares, to handle and acquire certain mining locations near Sapome Lake, Rainy River District, belonging to defendant, and to assign to her 100,000 fully paid shares, and to do certain work in developing the property. After the agreement the defendant's husband, J. J. Walsh, contracted with plaintiff Clark to and did sink a shaft, and then assigned his claim for the work done, to the defendant, who counterclaimed for its value. At the trial the plaintiffs asked leave to amend by alleging, *inter alia*, that it was agreed and understood that foreign incorporation was to be obtained.

A. B. Aylesworth, K.C., and N. W. Rowell, for plaintiff.

R. C. Clute, K.C., for defendant.

FALCONBRIDGE, C.J.:—The incorporation in the State of West Virginia of a company having its principal office or place of business at Buffalo, U.S., with the enormous powers and purposes set out in the agreement and certificate of incorporation, was not in numerous material respects the company "to be incorporated to handle and acquire the property," within the meaning of the memorandum of agreement of the 16th November, even if plaintiff were entitled to any variation or modification of that agreement by reason of any contemporaneous verbal discussions on the subject. And this West Virginia company, whose corporators live in Massachusetts and New York, did not obtain a license authorizing it to carry on business in this Province until 11th June. Moreover, the dealing with and manipulations of the stock were not at all of such a character as to convey the idea that defendant's $100,000 thereof would be of any value to her. Action will therefore be dismissed and the proposed amendment to the statement of claim not allowed.

Defendant does not insist on retaining the whole of the $2,000, but only so much thereof as is sufficient to satisfy J. J. Walsh's claim, assigned to her, and her costs. This she is entitled to do, apart from the question of defendant's right to sue plaintiffs for the cause of action so assigned. There will therefore be judgment for defendant on the counterclaim for $975 and costs. Plaintiffs will be entitled to the balance of the $2,000 after deduction of $975 and defendant's costs of action and counterclaim.

T. A. Gorhan, Port Arthur, solicitor for plaintiffs.

W. McBrady, Port Arthur, solicitor for defendant.

FALCONBRIDGE, C.J. MARCH 25TH, 1902.

TRIAL.

DAVIS v. RIDEAU LAKE NAVIGATION CO.

Principal and Agent—Liability of Company—Holding out of Person as General Manager—Costs.

Action to recover $1,217.42, balance due plaintiffs in respect of rebuilding and repairing steamer "James Swift," and repairs to steamer "Rideau Queen;" tried at Kingston.

E. H. Smythe, K.C., for plaintiffs.

J. L. Whiting, K.C., for defendants.

FALCONBRIDGE, C.J.—Notwithstanding the alleged holding out of defendant Noonan as general manager of defendant company, there are too many elements of notice to plaintiffs to look to Noonan for payment, and of election of plaintiffs so to do, to entitle them to recover against the company. The company and Noonan defended by the same solicitor, and there are other good reasons why in dismissing plaintiffs' action as against the company costs should not also be imposed on plaintiffs.

Judgment granted against defendant Noonan for $1,217.04, and interest from 17th October, 1901, and costs. Plaintiffs to credit $15.50 paid into Court by defendant company. Action, as against defendant company, dismissed without costs.

Smythe & Lyon, Kingston, solicitors for plaintiffs.

J. L. Whiting, Kingston, solicitor for defendants.

BOYD, C. MARCH 26TH, 1902.

WEEKLY COURT.

CENTAUR CYCLE CO. v. HILL.

Sale of Goods—Action for Price—Counterclaim for Damages—Report of Referee—Varying on Appeal—Further Directions—Costs.

An appeal by the plaintiffs and cross-appeals by each of the defendants from the report of James S. Cartwright, an

official referee, upon the trial by him of an action for the price of bicycles sold and a counterclaim for damages in respect of the quality of the bicycles. Also a motion by plaintiffs for judgment on the report.

G. F. Shepley, K.C., and N. W. Rowell, for plaintiffs.

E. B. Ryckman and C. W. Kerr, for defendant company and defendant Hill.

G. G. Mills, for defendant Love.

THE CHANCELLOR dealt with the facts of the case at considerable length, and varied the report of the referee in some particulars. He also pronounced judgment in accordance with the report as varied, and upon the question of costs.

FALCONBRIDGE, C.J. MARCH 26TH, 1902.

TRIAL.

MANN v. G. T. R. CO.

Deed—Construction—Gravel—Subsequent Deposit.

Action tried at Cayuga, brought for damages for conversion by defendants of a quantity of gravel taken by defendants from certain lands of the plaintiffs. This was the second trial of the action. The facts appear in the reports of the decision upon previous trial, 32 O. R. 240, and in appeal, 1 O. L. R. 487.

J. H. Moss, for plaintiffs.

H. S. Osler, for defendants.

FALCONBRIDGE, C.J.—The questions of law have been settled for me on the former trial and appeal. I find the issues joined in favour of the plaintiffs, and assess the damages at $350, with costs on the High Court scale, and grant an injunction restraining defendants from further interfering with the deposit of gravel.

W. D. Swayze, Dunnville, solicitor for plaintiffs.

Bell & Biggar, Belleville, solicitors for defendants.

FALCONBRIDGE, C.J. MARCH 27TH, 1902.

CHAMBERS.

RE McALLISTER.

Will—Construction—Estate Tail.

Originating notice under Rule 938.

By his will, dated in 1872, Robert McAllister, who died in 1876, devised certain land to the applicant, A. R. Chatterson, in the following terms:—"I give and bequeath unto

my beloved grandson Almanzer Robert Chatterson all that certain tract or parcel of land lying and being lot 3 in the second range of the township of Brantford, together with twenty-one acres, more or less, being rear part of number 2, conveyed to me by Daniel McDermid and his wife Margaret McDermid by deed bearing date the 15th of July 1847, whereon I now live, with all the appurtenances thereunto belonging, for and during his natural life, his heirs (if any) to inherit according to the present primogeniture law of Canada. If my said grandson should die without heirs of his body, then the aforementioned lands shall be divided between my beloved granddaughter Arrinthea Chatterson and the wife of Almanzer Chatterson if he should be married."

J. E. Jones, for executor and for applicant. The words "according to the present primogeniture law of Canada," may be rejected as having no meaning since 1852. The use of the words "without heirs of his body" excludes sec. 32 of the Wills Act, which defines the words "die without issue," because they are apt words to create an estate tail: Jarman on Wills, 5th ed., 1322; Harris v. Davis, 1 Coll. 416. The death was in 1876, and the will was made in 1872, and therefore sec. 32 does not apply in any case.

FALCONBRIDGE, C.J., held that the grandson took an estate tail.

Kelly & Porter, Simcoe, solicitors for executor.

Heyd & Livingston, Brantford, solicitors for A. R. Chatterson.

The other parties did not appear, though duly notified.

FALCONBRIDGE, C.J. MARCH 29TH, 1902.

TRIAL.

NORTHMORE v. ABBOTT.

Will—Action to Set Aside—Application for Probate—Withdrawal of Caveat—Burden of Proof—Want of Testamentary Capacity—Undue Influence.

Action for a declaration that a certain document dated 8th August, 1894, purporting to be the last will of Hannah E. Fenwick, deceased, whereby the defendant was appointed executor, was not the true will of the deceased. The document had been admitted to probate and the defendant was in possession of the estate. The plaintiff, who was a sister of the deceased, alleged undue influence and want of testamentary capacity.

The action was tried without a jury at Kingston.

A. B. Cunningham, Kingston, for plaintiff.

J. L. Whiting, K.C., and F. M. Brown, Kingston, for defendant.

FALCONBRIDGE, C. J.—Defendant applied about 8th September, 1900, to the Surrogate Court for probate of the alleged will of Hannah Fenwick, whereupon Barnabas Dawson, a brother of deceased, and John Pope, husband of a deceased sister, lodged a caveat. Then an arrangement was arrived at whereby the defendant paid them $1,500 as consideration for their withdrawing the caveat and agreeing to place no barriers in the way of the defendant's obtaining quiet possession of the estate. There were ten sets of heirs or next of kin, including Dawson and the children of Pope; the estate was worth about $5,000; so that Dawson and Pope got each $250 more than Dawson, or Pope as representing his children, would have received upon an intestacy. By this selfish and suspicious arrangement defendant obtained probate of the document and possession of the estate; but he is not in any better position by reason of the probate thus obtained, as regards onus of proof or otherwise, than if he were now originally propounding the will.

The evidence against the capacity of deceased to make a will on 8th August, 1894, rather preponderated over that offered for the defence. But on the facts and the authorities there is a clear case of undue influence. The will was drawn by a magistrate. . . . There is the significant fact that he drew and caused to be signed by Hannah Fenwick and the defendant (at the same time as the alleged will was signed) an agreement bearing even date with the alleged will, whereby deceased, "in consideration of her maintenance during her natural life and other valuable considerations," granted and assigned to defendant all her money on deposit, notes, mortgages, and furniture, being all or practically all her property. Such a paper was never prepared by any one really acting in the interest of deceased, and it sheds light on the circumstances attending the execution of the alleged will. . . .

Judgment declaring the alleged will to be void and of no effect, with costs.

A. B. Cunningham, solicitor for plaintiff.

F. M. Brown, solicitor for defendant.