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HIGH COURT OF JUSTICE.

MIDDLETON, J.

SEPTEMBER 23RD, 1910.

RE RYAN.

Will—Construction—"While he is Unmarried"—Occupation of Residence — License — Termination on Marriage—Residuary Devise Taking Effect upon Marriage—Tenancy in Common—Right of Possession.

Motion by Mary Alice Smith and Alfonso Francis Smith for an order determining whether, in the events which have happened, one John Thomas Ryan, referred to in the will of Margaret Ryan, deceased, has any right or interest in a certain parcel of land and residence in Rosedale referred to in paragraphs 2 to 8 of the will, and, if so, what such right or interest may be.

The will of Margaret Ryan was dated the 29th September, 1900; she died in February, 1904.

Paragraphs 2 to 8 of the will were as follows:—

"2. I hereby devise to my trustees hereinafter named my residence in Rosedale, in the city of Toronto, to hold upon the following trusts namely.

"3. In trust for my son John T. Ryan during his natural life and while he is unmarried but on condition that he do not sell, alienate, convey or lease or let the same or any part thereof or any interest therein or attempt to do so, and on further condition that he will permit and allow my two daughters and my grandson Alfonso Francis Smith while such grandson is unmarried, and each of them, to reside also in the said residence jointly and equally with him, but this right to any daughter of mine to so reside shall be suspended for the time that such daughter shall not be living in the manner that she now lives. By the phrase 'in the manner she now lives' I mean in regard to each daughter during her widowhood or while she is living apart from any present or

future husband so far as residence is concerned, as I do not wish either of my daughters to have as a matter of right the privilege to occupy my said residence with any husband present or future so long as a daughter of mine or son of mine is living therein.

"4. Upon the further trust after the death of the said John T. Ryan that my daughters and the survivor may occupy and reside in said residence during their and each of their natural lives, and while living in the manner they now live as above explained. . .

"5. And upon the further trust, after the death of my said son, for my grandson Alfonso Francis Smith his heirs and assigns absolutely but subject to the said right of occupation and residence with him of my two daughters under paragraph number 4.

"6. The words "my residence" in this my will include all my land and buildings and outbuildings connected with said residence or appurtenant thereto.

"7. If John T. Ryan alienate or for any reason cease personally to enjoy his privilege or rights in respect of said residence the right of my daughters to occupy shall notwithstanding still exist."

Paragraph 14 of the will gave the residuary estate, real and personal, to the two daughters, son, and grandson of the testatrix, share and share alike.

The applicant Mary Alice Smith was the daughter of the testatrix and the mother of the applicant Alfonso Francis Smith, who became of age in April, 1910. John Thomas Ryan was married on the 19th November, 1902, and had issue. His wife was alive at the time of the application. The other daughter of the testatrix was dead.

Glyn Osler, for the applicants.

J. M. Ferguson, for John Thomas Ryan.

MIDDLETON, J.:—A series of cases, most of which are collected by Mr. Justice Swinfen Eady in Re Collyer, 24 Times L. R. 117, shew that the ordinary meaning of the word "unmarried" is "without ever having been married." The context may indicate that the word is used in such a sense as to include a widow or widower, and slight indications in some cases have been regarded as enough to shew that the testator did not use the term in a primary sense.

In this will the expression "while he is unmarried" would readily lend itself to the meaning suggested by counsel for John T. Ryan, namely, that, in the event of his wife dying, he should be at liberty to resume occupation of the homestead along with his sisters, until his death, when the right of the grandson would arise under clause 5.

The wording of the clause relating to the daughters' right of occupation shews that the testatrix discriminated in the language chosen. Her daughters are to be entitled to use the property as a home "during widowhood." The fact that John T. Ryan, if there were issue of his marriage, would not have the right to bring his children to the "home" also weighs against his contention.

Any right conferred upon John T. Ryan by clause 3 of the will came to an end on his marriage.

Clause 5 only gives this property to Alfonso F. Smith on the death of John T. Ryan. This cannot be read as conferring upon him any right upon his marriage.

The provision as to marriage in clause 3 is an interlineation, and possibly the testator would have inserted the words "or marriage" in this clause, had attention been called to the matter. I cannot insert them now as a matter of construction. Subject to the right of Alfonso and his mother (his aunt being dead) to occupy the residence under the provisions of clause 3, upon the marriage of John T. Ryan the beneficial estate in the residence during the remaining years of his life passes as part of the residuary estate to the two daughters, the son, and grandson, under clause 14; the representatives of the dead daughter taking her share. So long as the grandson and his mother live and have the right to occupy the residence (under clause 3), this will be of no real value, but, if they predecease John T. Ryan, then, so long as John T. Ryan may survive, he and their representatives and the representatives of the deceased daughter will take as tenants in common (per stirpes).

It was argued that the right of possession given by clause 3 was in effect a life estate in the surviving daughter and her son, but I think the fact that the will makes John T. Ryan the life tenant of the equitable estate (subject to the termination of his estate on marriage) shews that what was given the others is a mere license to occupy.

If there is residuary estate not distributed, the costs may be paid out of it; if not, no costs.

MIDDLETON, J. SEPTEMBER 23RD, 1910.

RE HUNSLEY.

Will—Construction—Devise — Mistake in Description — Declaration—Life Estate—"Then" Construed as "In that Event"—Remainder—Power of Appointment — Intestacy—Contingent Vested Estate—Settled Estates Act—Sale under.

Motion by the widow of Charles Hunsley, deceased, under Con. Rule 938, for an order determining certain questions arising upon the will of the deceased and for an order for sale of the land passing by the will under the Settled Estates Act.

The will was dated the 14th January, 1889. The testator died on the 4th April, 1903.

The material parts of the will were as follows:—

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—

"To my beloved wife Hannah Hunsley that part or parcel of land being and contained in the south-west quarter of lot 16 and also the north-east 50 acres in lot 17 in the 12th concession of the township of Dereham, during the period of her natural life to be enjoyed by her without let or hindrance upon the following condition that the said Hannah Hunsley shall remain my widow and I further devise that on the death of the said Hannah Hunsley aforesaid the said property shall be equally divided between my daughters Sarah Ann Hunsley and Hannah Jane Howell and in case of the death of either of them then to be divided equally among such children as be lawfully begotten by them and in case that they shall leave no children then to such person or persons as they may devise the same saving always that the children of one daughter shall have no claim on anything bequeathed to the other daughter.

"To my son George William Hunsley I give my farm containing 100 acres, being the south half of lot 17 in the 11th concession of the township of Dereham aforesaid to him and to his heirs to be by them enjoyed as may seem fit to them without any claim or incumbrance from either of my daughters aforesaid their heirs or assigns.

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my wife Hannah to be at her disposal in such way and manner as to her may seem fit."

V. Sinclair, for the widow.

J. R. Meredith, for the infants.

MIDDLETON, J.:—(1) Lot 16 can, I think, be regarded as referring to the land owned by the testator. Let it be declared that the south-west quarter of lot 16 in the 11th concession passed by the devise in question.

(2) The widow takes a life estate under the clause in question.

(3) "Then" in this will means "in that case" or "in that event," and does not refer to time. So read, the will does not require the aid of any cases in its construction.

Upon the death of the widow the property is to be divided between the daughters, if they are then alive. If either of them is dead leaving issue, such issue take; if leaving no issue, the daughter is given power of appointment by will, and her appointee or devisee will take. If the daughter dies without issue and without exercising this power, then there is as to her prospective share an intestacy, and this contingent estate is now vested in the son and daughters as the testator's heirs. This involves the reading of the word "them" as equivalent to "her" and "they" as equivalent to "she," but, in view of the disregard of all grammatical rules and the awkwardness manifested in the entire clause, this can scarcely be regarded as violence, and in no other way can effect be given to what the testator appeared to have intended. Because he had two daughters and intended the provisions to apply to each, he seems to have thought it necessary to use a plural pronoun.

An order is asked permitting sale under the Settled Estates Act. This may go, on the necessary papers being put in, and the consent of William being filed, or notice being given to him. His interest is merely nominal, as the daughters can, by their wills, deprive him of any possible interest, but he cannot be ignored.

The Official Guardian will be appointed to represent any unborn children of the daughters who would take in the event of either daughter predeceasing her mother, and the order can be framed so as to provide for the purchase-price being dealt with as the land is under the will.

Costs out of the estate.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 24TH, 1910.

RE McCARTHY AND TILSONBURG, ETC., R. W. CO.

Railway — Expropriation of Land — Warrant for Immediate Possession—Dominion Railway Act, sec. 217—Absence of Discretion—Hardship.

Motion by the railway company for a warrant for immediate possession under sec. 217 of the Dominion Railway Act.

Angus MacMurchy, K.C., for the railway company.

G. C. Gibbons, K.C., for the land-owner.

MIDDLETON, J.:—It is not denied that immediate possession of the lands in question is required to enable the company to construct their line, and that they are now ready to proceed with this work. This entitles the company to the warrant, and no discretion is given me either to refuse to grant it or to delay or suspend its operation.

The framers of the statute may not have had before them the extreme hardship its provisions produce in some cases. When the land is vacant, the scheme of the Act can be worked out without injustice, but when the property taken consists of a residence, store, or factory, the situation is very different. The land-owner may have all his capital locked up in his factory. Until he receives the compensation he has no means of purchasing another, and, even if he has, he cannot safely purchase another building, as the railway company may desist and leave him with two buildings on his hands.

To mitigate the hardship indicated, the railway company might well agree to pay to the land-owner at least a substantial portion of the price offered without waiting for the award; but I cannot so order, as the Judge can, under the statute, only direct payment in accordance with the award.

CLUTE, J. SEPTEMBER 28TH, 1910.

BRUNDLE v. CITY OF TORONTO.

Municipal Corporations—Contract for Construction of Pavement on Highway—Petition of Frontagers—Signatures—Authority of Husband to Sign for Wife—Names Struck off by County Court Judge—Finality of Decision—Right of Court to Inquire into—Signatures Obtained by Misrepresentations—Evidence—Awarding of Contract by City Council—Powers of Board of Control—Municipal Act, 1903, sec. 277—Guarantee of Life of Pavement—9 Edw. VII. ch. 73, sec. 35—Monopoly—Absence of Fraud—Contract Let without By-law—Opposition to Petition—Rights of Property-owners.

Action to restrain the defendants, the Corporation of the City of Toronto and John McGuire, contractor, from proceeding with the construction of a pavement upon the portion of College street between Manning avenue and Dovercourt road.

In November, 1909, the city engineer recommended, on the "initiative," sheet asphalt pavement for that part of College street. On the 20th December, 1909, a petition for an asphalt block pavement was deposited with the city clerk. On the 14th January, 1910, the clerk certified that the petition was signed by two-thirds in number of the owners of property fronting on that part of College street, according to the last revised assessment roll, and that the two-thirds in number represented at least one-half in value of the properties, and that there was a majority of two over and above the two-thirds. On the 4th February, 1910, the report of the city engineer recommending an asphalt block pavement was passed by the committee of works and the board of control, and on the 14th February, 1910, the report of the board was adopted by the city council. On the 19th February, 1910, the petition was examined by the County Court Judge, and two names removed; and on the 2nd March, 1910, the Court of Revision confirmed the report and assessment. On the 14th July, 1910, the defendant McGuire was awarded the contract for laying the pavement; and on the 19th July this action was begun by owners of land fronting on the part of College street in question.

F. E. Hodgins, K.C., and D. C. Ross, for the plaintiffs.

H. L. Drayton, K.C., and H. Howitt, for the defendant corporation.

W. C. Chisholm, K.C., and Eric N. Armour, for the defendant McGuire.

CLUTE, J.:—Among the names on the petition was that of Mrs. Stewart, wife of Alexander T. Stewart. Her name was essential to make the two-thirds required. It was admitted that she did not sign her name to the petition, and her husband swore positively that he did not sign her name. . . . In my opinion, Stewart did sign his wife's name to the petition. I think he has forgotten the circumstance. He impressed me rather favourably, and by this finding I do not wish to impute an intention on his part to swear falsely. I am further of the opinion that, having regard to his control and management of the property which he and his wife held as tenants in common, he did have authority to act for her in respect of all matters which he considered in the interest of their common property; and I think his signature to a petition of this kind valid and within his authority.

The petition, therefore, in my opinion, was sufficiently signed by the required two-thirds of the property-owners.

Evidence was offered by the plaintiff with a view to attacking other signatures on the petition as having been obtained by misrepresentation. This evidence I refused, taking the view that, the County Court Judge having jurisdiction to deal with the matter, and having been appealed to for that purpose, and having removed two names, this Court would not undertake a similar inquiry as to the validity of the signatures to the petition, even if there was jurisdiction to entertain the question, which I very much doubt.

It was further contended by the plaintiff that, the board of control having refused to approve of the contract with McGuire for the block pavement, the city council had no power to authorise the contract. Both parties relied upon . . . sec. 277 of the Municipal Act, 1903 . . . The section has relation to the duties of the board of control, and provides, amongst other things, that it shall be the duty of the board of control "to prepare specifications for and award all contracts, and for that purpose to call for all tenders for works, materials, and supplies . . . and to report their action to the council at its next meeting. . . . The council shall not, unless upon an affirmative vote of at least two-thirds of the members of the council present and voting, reverse or vary the action of the board of control in respect of such tender and decision of the board thereon, when the effect of such vote would be to increase the cost of the work or to award the contract to a tenderer other than that one to whom the board of control has awarded it."

In the present case the effect of the vote was to increase the cost of the work, because block pavement is more expensive to put down than sheet pavement. . . .

Sub-section 6 provides for referring back to the board of control any report, question, or matter for reconsideration; and it is said here that that, in the circumstances, was the only thing which the council was empowered to do; that, if the council is to be permitted to award a contract where the board of control has refused to award it, the very object of the statute would be defeated.

In my opinion, the construction contended for by the plaintiff is too narrow. The council is expressly authorised to reverse or vary the action of the board in respect of tenders. The language is not limited to contracts awarded. The meaning of the statute, in my opinion, is that, while the board is to take action in the first instance in the awarding of contracts, yet, whatever their action may be, it is subject to review by the council, and in the two cases specified requires a two-thirds vote to reverse or vary it.

It was further urged that, because a guarantee was given by which the contractor was to keep the pavement in repair for five years, this rendered the contract illegal, and Re Medland and City of Toronto, 31 O. R. 243, In re Gillespie and City of Toronto, 19 A. R. 713, 725, were relied upon. The Municipal Act was amended by 9 Edw. VII. ch. 73, sec. 35, which provides that in entering into a contract for the construction of a pavement or sidewalk as a local improvement a municipality may require a contractor to guarantee that he shall so construct the same that it shall for a period not exceeding ten years remain in good condition . . . This objection fails.

It was further urged that, as block pavement is only manufactured by one firm in Canada, although there is no patent for its manufacture, it constitutes a monopoly, and a number of American cases were cited for this position. Upon reference to these cases it will be found that they chiefly turn upon the construction of State statutes which have no application here. The cases are fully collected and the American law summarised in 28 Cyc. 1026 (f) . . . . In the present case, there is nothing to prevent any one manufacturing block pavement if he pleases. The property-owners had asked for this particular kind of pavement. Tenders were called for. Two tenders were put in. The contract was awarded to the lowest tenderer. It was suggested that McGuire merely represented the manufacturing company, and that their tenders were so close in amount as to lead to the conclusion that they were the same. There was nothing in the nature of fraud proven on the part of McGuire. Any one who pleased might have tendered for block pavement, and, in my opinion, nothing in the nature of a monopoly was proven.

It was further urged . . . that secs. 336 and 337 of the Municipal Act, 1903, did not apply, as they have relation to by-laws only, and, as no by-law was . . . passed at the time the contract was let, there was no opportunity to oppose it. It was stated that in cases such as the present contracts are awarded and the work proceeded with before the by-law authorising the imposition of the rate to be levied is passed, and that the practice is to oppose the granting of the petition—as, if the petition does not pass, no by-law will be introduced in pursuance of it. . . . Opposition was made to the petition, and application under sec. 688 was made to the Judge to strike off certain names which were alleged to be improperly upon the petition. . . . There is nothing, I think, to prevent any property-owner from appearing before the council and opposing the passing of the by-law . . . As a matter of convenience, it would appear that this is done at the stage when the petition is before the council, and this was in fact what was done on the present occasion. . . . In my opinion, a convenient remedy for ascertaining the number of names and value of property upon the petition is provided by the statute, and, in the absence of fraud, appeal ought not to be made to this Court to reconsider such action.

In the present case there was, as I find, the required majority in number and value to entitle the petitioners to ask for the asphalt block pavement. By sec. 628, a name having been first affixed to the petition, the signer is not entitled to have the same removed without the consent of the Judge of the County Court. . . . His decision in such case is, I presume, final. It may be that, the contract not having been signed . . . by the city corporation, it is still open to other signers of the petition to apply to the County Court Judge to have their names removed; but upon that point I express no opinion. See In re Robertson and Township of North Easthope, 16 A. R. 214; Gibson v. Township of North Easthope, 21 A. R. 504, affirmed 24 S. C. R. 707. The present case is, I think, distinguishable from either of those cases. At all events the amendment requires that no name shall be removed without the consent of the County Court Judge.

This is a case where the property-owners appear to have been induced to sign the petition upon the representation of proposed contractors who desired to do the work; and the opposition to the petition was commenced, no doubt, by other contractors who desired another kind of pavement to be put down to enable them to compete. I doubt very much if there would have been any trouble or delay in this matter if the city corporation had been permitted by the property-owners to proceed under the first recommendation

of the city engineer. The contractor has stated under oath that he was willing to throw up the contract. The defendants the city corporation have not yet signed the contract. And, while I am of opinion that the plaintiffs' action fails, and must be dismissed, I think, under all the circumstances, it is desirable that the property-owners be given the right by the council to express their unbiassed opinion as to what they desire.

The action is dismissed with costs.

MIDDLETON, J. SEPTEMBER 29TH, 1910.

RE SCANLON.

Will—Construction—Absolute Gift Subject to be Divested—Postponement of Enjoyment—Rights of Possible Issue—Executors—Power of Advancement.

Motion by H. D. Scanlon, beneficiary under a will, for an order determining whether he is entitled to immediate enjoyment of the benefits given by the will.

G. Grant, for the applicant.

F. Slattery, for the executors.

J. R. Meredith, for the Official Guardian representing unborn issue.

MIDDLETON, J.:—When there is an absolute gift, and the testator directs that the enjoyment be postponed till the donee attains a given age, he may nevertheless take immediately on attaining majority: Re Wartman, 22 O. R. 601; Goff v. Strohm, 28 O. R. 553; Smedmore v. Makinson, 6 Com. L. R. 243; Re Williams, [1907] 1 Ch. 180; Re Couturier, [1907] 1 Ch. 470; Re Canadian Home Circles, 14 O. L. R. 322. But none of these, or the other cases to the same effect, authorise payment when the will contains such a provision as that found here in the 14th clause, that in the event of the death of the applicant leaving issue, the share shall go to such issue. In the happening of that event, the absolute gift is divested, and the issue take under this executory gift.

The will was framed by the testator upon the assumption that he had a large estate, which unfortunately is not the case. The whole estate now remaining is $1,800, and, as the applicant is, by reason of his poor health, unable to maintain himself, the executors may well avail themselves of the power to make such advancement as they may deem proper under clause 13. This power is not in any way cut down by the gift to issue in clause 14.

The order may declare that, by reason of the provisions of clause 14, the applicant is not now entitled to receive any portion of the corpus of the estate unless the executors, by virtue of the power vested in them by clause 13, see fit to make an advancement.

Costs out of the corpus.

MIDDLETON, J. SEPTEMBER 29TH, 1910.

RE GIGNAC AND DENIS.

Will—Construction—Devise to Two—Joint Estate for Life—Survivorship—Remainder—R. S. O. 1897 ch. 119, sec. 11—Title—Vendor and Purchaser.

Motion by the vendor, under the Vendors and Purchasers Act, for an order declaring that the vendor can make a good title and convey in fee.

F. E. Hodgins, K.C., for the vendor.

MIDDLETON, J.:—Jacques Gignac by his will dated the 20th January, 1886, devised the lands in question to his daughters Febronie and Delima "and to the survivor of them, her heirs and assigns forever."

The testator died on the 14th December, 1887, and his daughter Febronie died on the 1st October, 1895. Delima has now agreed to sell the land, and objection is taken to her title.

Unless R. S. O. 1897 ch. 119, sec. 11, makes a difference between our law and that of England, the effect of this devise is to give to the daughters a joint estate during the life of both, and to the survivor a separate estate in remainder after the termination of this joint life estate. The words "and to the survivor, her heirs and assigns," are not merely descriptive of the benefit of survivorship incident to a joint tenancy, but confer a separate estate in remainder upon the survivor.

Vick v. Edwards, 3 P. Wms. 371, 3 Brown Parl. Cas. 104, though subjected to criticism by Fearne (F. Con. Rem. 357), does not seem ever to have been doubted, and is accepted without question in Quarm v. Quarm, [1892] 1 Q. B. 184.

Our statute only operates upon an estate which but for its provisions would be a joint tenancy, and converts it into a tenancy in common. The daughters would, therefore, have under the devise a tenancy in common so long as they both lived, but upon the death of one the estate in remainder in the survivor became effective. In whom that estate was in the meantime vested seems to have puzzled conveyancers. In Ex p. Harrison, 3 Anstr. 836,

it was assumed to be in the heir of the testator—see however the notes to Fearne, loc. cit.

The order will, therefore, declare that, notwithstanding the objection taken to her title, the vendor can convey in fee. No costs.

MIDDLETON, J. SEPTEMBER 29TH, 1910.

McLEAN v. TOWN OF SAULT STE. MARIE.

Municipal Corporations—Local Improvements — Construction of Sidewalks—Necessity of By-law—Municipal Act, 1903, secs. 664-679.

Motion by the plaintiffs to continue an interim injunction, by consent turned into a motion for judgment, restraining the defendants from constructing any granolithic sidewalk on the west side of Spring street, between Queen and Albert streets, in the town of Sault Ste. Marie.

Grayson Smith, for the plaintiffs.

W. E. Raney, K.C., for the defendants.

MIDDLETON, J.:—Assuming, in favour of the municipality, the validity of by-laws 592 and 600, there is yet lacking a by-law authorising the construction of the works in question.

By-law 592 is general in its terms, and provides: (1) that the municipality shall pay one-third of the cost of granolithic sidewalks constructed as local improvements; (2) that two-thirds of the cost—less the cost of street intersections, which is to be borne by the general funds—shall be borne by the property fronting upon the improvement; (3) a mode of assessing corner lots.

The first of these provisions is passed under sec. 678 of the Municipal Act and its sub-clauses. The second under secs. 667, 664 (4), and 665, and, so far as it relates to intersections, under 679. The third under sec. 673 (4).

By-law 600 is a by-law passed by the council, after having been submitted to the ratepayers and approved by them, authorising the issue of debentures for payment of one-third of the cost of certain local improvements (viz., 33 sidewalks), including the sidewalk in question.

No by-law has been passed by the council authorising the construction of the works, and I can find no authority in the municipality to construct the works without a by-law.

There are three ways by which the municipal machinery for the doing of work as a local improvement can be set in motion.

These are provided by secs. 668-9 and enumerated in 672 (4), which provides that no work shall be undertaken unless initiated in one or other of these three methods. When so initiated the work may be undertaken upon a by-law being passed under sec. 664, but such a by-law is always necessary.

Section 677, as amended in 1906 (ch. 34, sec. 38), and in 1908 (ch. 48, sec. 23), is a statutory provision of later origin, and, "notwithstanding any statute," enables a municipal council, by a vote of two-thirds of all its members, to undertake the construction of a pavement as a local improvement, without proceedings being initiated in any of the three ordinary ways, if it is deemed necessary in the public interest; but this section does not in any way dispense with a by-law under sec. 664, and its ancillary provisions. In the cases falling within its provisions, a fourth method of initiation is provided—enabling the work to be undertaken where necessary in the public interest, quite apart from the will of the ratepayers. A by-law is still clearly necessary.

I have not considered the validity of the by-laws in question, as this is not necessary if I am right in the view expressed.

For reasons given upon the argument, I do not think the plaintiffs entitled to any relief upon the question raised as to the location of the sidewalk—this is a question solely for the council.

An injunction will, therefore, go to restrain the construction of the works in question, unless and until a by-law is passed in accordance with the requirements of the Municipal Act authorising their construction.

As a good deal of material relates to the branch of the case on which the plaintiffs fail, while I give them costs, I fix them at $60.

DIVISIONAL COURT. SEPTEMBER 29TH, 1910.

CHRISTIE v. RICHARDSON.

Master and Servant—Injury to Servant — Workmen's Compensation Act—Gangway Widened by Stranger and Left in Unsafe Condition—Absence of Knowledge on the Part of Master—Appeal—Reversal of Finding of Fact.

Appeal by the defendant Webb from the judgment of MEREDITH, C.J.C.P., 1 O. W. N. 689.

The appeal was heard by BOYD, C., LATCHFORD, and MIDDLETON, JJ.

G. H. Watson, K.C., for the appellant.

A. J. Keeler, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The gangway constructed by Webb for the use of the bricklayers was admitted to be sufficient and safe. Richardson, for the purpose of allowing the carpenters (who were permitted to use the same gangway) to bring some large mullions into the building, placed an additional plank beside the gangway. This was done some time between 2 and 5 p.m. On the following morning the plaintiff, going to his work, went up the original gangway, and, when near the top, stepped upon this plank, which had been insecurely fastened, and fell with it into the cellar. In his judgment delivered after the trial, the learned Chief Justice found that Leitch, Webb's foreman, knew that the gangway had been widened, and that it was his duty to see that it had not been rendered unsafe.

A careful perusal of the evidence satisfies us that the finding that Leitch knew of the placing of the additional plank cannot be supported.

Webb had discharged his duty to his employees when he constructed the original safe and sufficient way. This never was altered. Richardson placed beside it an unsafe way for his own purposes, but in such a position as to invite use by any one going into the building. This may have imposed a duty upon Webb, upon his learning of its erection, to inspect it and ascertain its condition—as to this we say nothing—but, in the absence of any knowledge on the part of either Webb or his foreman, there is nothing upon which liability on Webb's part can be founded.

The appeal must be allowed—with costs if demanded. Sympathy will probably induce the defendant to waive costs if the litigation ends here.

ALLEN v. TURK—MASTER IN CHAMBERS—SEPT. 17.

Venue—Change—Fair Trial—Prejudice.]—Motion by the defendant to change the venue from Owen Sound to Toronto. The action was brought to recover $3,700 which the plaintiff alleged he was induced to invest in shares of the Toronto Roller Bearing Co., by the fraudulent representations of the defendant, who was at the time of the alleged misrepresentations the Minister of the First Methodist Church at Owen Sound. Sales of shares in the company named were admittedly made by the defendant to persons in Owen Sound and throughout the county of Grey. In the statement of claim as delivered no place of trial was named, and an order was made allowing Owen Sound to be named, subject to the right of the defendant to move to change. The defendant now

moved upon the ground that such a strong feeling had been raised against him in Owen Sound and throughout the county that it would be impossible to have a fair and impartial trial before a jury of that county. The motion was supported by the production of two letters written in 1909 by members of the Methodist Church in Owen Sound stating reasons for opposing the defendant's being appointed to the pastorate of a church and reflecting on his conduct in reference to the sale of shares. The Master referred to Baker v. Weldon, 2 O. W. R. 433; Shafto v. Bolckow, 35 W. R. 686; Penhallow v. Mersey Dock Co., 29 L. J. Ex. N. S. 2, 21; Cossham v. Leach, 32 L. T. N. S. 665; William Queen v. Appleby, 13 C. L. T. Occ. N. 375; Town of Oakville v. Andrew, 2 O. W. R. 608; Brown v. Hazell, ib. 784; and said that the letters produced seemed to shew that a strong feeling existed in Owen Sound itself and the community generally, which would probably create an atmosphere hostile to the defendant. The Master was of opinion, therefore, that in a case so vital to the defendant he was entitled to have a trial before a jury of some other county. Order made changing the venue to Toronto; costs in the cause. Grayson Smith, for the defendant. S. G. Crowell, for the plaintiff.

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* LOBB v. LOBB—DIVISIONAL COURT—SEPT. 23.

Will—Construction—Gift to "Children"—Exclusion of Legitimate Children.]—Appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., 21 O. L. R. 262, 1 O. W. N. 848. The Court (BOYD, C., LATCHFORD and MIDDLETON, JJ.), dismissed the appeal; costs of plaintiffs and defendant of the action and appeal to be paid out of the estate. H. H. Collier, K.C., for the plaintiffs. E. D. Armour, K.C., for the defendant.

COWARDINE v. COWARDINE—MASTER IN CHAMBERS—SEPT. 24.

Interim Alimony—Order under Deserted Wives Maintenance Act.]—Motion by the plaintiff for an order for interim alimony and disbursements. The motion was opposed by the defendant on the ground that the plaintiff, within a week of the commencement of this action, obtained an order under the Deserted Wives' Maintenance Act, R. S. O. 1897 ch. 167, for payment to her by the defendant of $3 a week—which amount had been regularly paid since the order. The Master said that, on the material, he would not have given any larger sum for interim alimony, and that no order should now be made: Goodheim v. Goodheim, 30 L. J. N.

* This case will be reported in the Ontario Law Reports.

S. P. 162, Holt v. Holt, 37 L. J. N. S. P. 33. Reference also to Re Sims v. Kelly, 20 O. R. 291; Nicholls v. Nicholls, in a note to the Goodheim case. Motion dismissed with costs to the defendant in the cause. E. G. Morris, for the plaintiff. R. A. Reid, for the defendant.

CANADIAN BANK OF COMMERCE v. ROGERS—RIDDELL, J.—SEPT. 24.

Promissory Notes—Actions on—Defences.]—This action and two others by the same plaintiffs against one Hackwell and one Simpson were in part tried at Stratford in May last. The evidence had since been completed. The actions were upon promissory notes made by the defendants respectively. The learned Judge found that no substantial or legal defence had been made out, and gave judgment in each case for the amount sued for, interest, and costs, including the costs of a commission to Manitoba. G. G. McPherson, K.C., for the plaintiffs. R. S. Robertson, for the defendants Rogers and Simpson. F. H. Thompson, K.C., for the defendant Hackwell.

MACKENZIE v. MONARCH LIFE INSURANCE CO.—RIDDELL, J.—SEPT. 24.

Company—Shares—Certificate—Authority of Managing Director—Consideration—Settlement of Action—Agent—Repudiation.]—Action for a declaration that the plaintiff is the holder of twenty-five fully paid-up shares of the capital stock of the defendants, and to compel the defendants to register him as the holder. In 1905 the plaintiff brought an action against the defendants and one Ostrom, the managing director of the defendants, in which the plaintiff alleged that Ostrom had in March, 1904, assigned to one Stevenson a quarter interest in certain copyrights; that Ostrom and Stevenson had agreed to sell the copyrights of certain plans for a large sum and a large number of paid-up shares of the capital stock of the defendants; that the defendants had advertised that they were the exclusive owners of the plans and had procured large sums of money thereby; that Stevenson had assigned to the plaintiff; and that the defendants had refused to account; and the plaintiff accordingly prayed an injunction against the defendants restraining them from advertising, and claimed $5,000 against the defendants and Ostrom for his (the plaintiff's) share. That action was, by consent, dismissed without costs, a settlement having been arranged by which Ostrom was to transfer to the plaintiff twenty-five shares of the defendants' stock. The plaintiff received

a certificate for twenty-five shares, signed by Ostrom as managing director and one Graham as first vice-president. In this action the plaintiff's case was that he received in good faith a share certificate signed by the proper officers of the defendants, and on the faith of it released his action, and that it would not be equitable to revert to the former action, as the copyrights had expired. The defendants denied that they had anything to do with the settlement, or with the delivery of the stock to Ostrom, or with its alleged issue. The settlement of the first action was effected by Mr. K., purporting to act on behalf of the defendants. Riddell, J., said he could find no evidence that anything else was in view than that Ostrom should in some way put himself in a position to transfer the shares to the plaintiff; he hoped to make such an arrangement with the defendants' shareholders, but did not do so. The plaintiff dealt in fact with Ostrom, and not with the defendants, and must be compelled to look to Ostrom only. Ostrom had no paid-up stock to deliver, and the plaintiff, dealing with Ostrom, took at his peril what Ostrom gave him. Ostrom had not the power to bind the defendants by the delivery of a certificate, even though that certificate had the name thereon of the first vice-president also—this without attacking the salutary principle that one dealing with a company, through the company's authorised agents, is not to be held to know the limits of the agents' authority. K. was not an agent, and, while Ostrom was an agent for some purposes, the plaintiff was dealing with him as an individual, and not an agent. Action dismissed without costs. J. W. Bain, K.C., and M. Lockhart Gordon, for the plaintiff. M. Wilson, K.C., for the defendants.

BARTLETT v. BARTLETT MINES LIMITED—MASTER IN CHAMBERS —SEPT. 26.

Particulars—Statement of Claim—Contract of Hiring—Discovery.]—Motion by the defendants for particulars of the 3rd and 4th paragraphs of the statement of claim. By the 3rd paragraph it was alleged that in January, 1909, the plaintiff was employed by the defendants as their mineralogist at a salary of $2,000 per annum; and by the 4th, that the plaintiff continued in the defendants' employment "under the contract of employment above mentioned" during the whole of the year 1909. Payment of $2,000 was, therefore, demanded. The defendants sought particulars of the manner in which and the person or persons by whom the plaintiff was employed as alleged in paragraph 3, and of the employment of the plaintiff as set out in paragraph 4. The de-

fendants stated, on affidavit of their officer, their inability to plead without particulars. The plaintiff asked to have discovery before giving particulars. The Master referred to Turquand v. Fearon, 48 L. J. Q. B. 703, 40 L. T. R. 543; Townsend v. Northern Crown Bank, 19 O. L. R. 480; Odgers on Pleading, 5th ed., p. 178; and said that there did not seem to be any necessity for particulars of the 4th paragraph now; they could be had on discovery; but particulars of the 3rd paragraph should be given in a week, with an extension of time for delivery of statement of defence until eight days after particulars delivered. Costs in the cause. F. R. MacKelcan, for the defendants. J. D. Falconbridge, for the plaintiff.

DAVIS v. WINN—MIDDLETON, J., IN CHAMBERS—SEPT. 26.

Costs—Summary Disposition—Master in Chambers—Jurisdiction—Consent of Parties—Appeal—Con. Rule 616—Incidence of Costs.]—Appeal by the defendant from an order of the Master in Chambers requiring her to pay the costs of the action. The motion before the Master was for summary judgment under Con. Rule 616, but it was dealt with as a motion to determine the incidence of the costs of the action—it being said that the further prosecution of the action for any other purpose was rendered unnecessary by reason of the execution of certain conveyances. The learned Judge said that there was much room for doubt whether the Master in Chambers has jurisdiction to deal with a motion under Con. Rule 616, which amounts to the hearing and determining of the cause. Admissions may be made in pleadings and on examinations which raise matters of the greatest importance and difficulty, and the parties are entitled to have the case disposed of before a forum from which there is an unfettered right of appeal. The Master was, therefore, right in dealing with the motion as one to determine costs only, and the parties so treated it, and, if the defendant's consent was necessary, his solicitor's letter of the 25th August was a sufficient consent. The learned Judge, however, did not, upon the facts, agree with the Master's disposition of the costs. The plaintiff should certainly not receive costs, and perhaps should pay costs; but, on the whole, it would be better to leave the parties each to pay his and her own costs. The appeal is allowed, and, in lieu of the Master's order, it is ordered that, it being admitted that there is no question for adjudication between the parties except that of costs, the action is forever stayed, and it is not deemed proper to make any order concerning the costs of the action or of this appeal. W. E. Raney, K.C., for the defendant. John MacGregor, for the plaintiff.

SCHULER v. MCINTOSH—DIVISIONAL COURT—SEPT. 26.

Contract—Oral Promise—Evidence—Consideration.]—Appeal by the plaintiff from the judgment of SUTHERLAND, J., 1 O. W. N. 436. The Court (MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.), dismissed the appeal with costs, giving leave, however, to the plaintiff to amend by adding his son as a plaintiff and giving the defendant leave to amend by setting up the Statute of Frauds. Featherston Aylesworth, for the plaintiff. H. Cassels, K.C., for the defendant.

CRAIN v. BULL—MASTER IN CHAMBERS—SEPT. 28.

Place of Reference — Motion to Change — Trial — Con. Rule 529 (b)—Convenience—Expense—Costs.]—Motion by the plaintiff to change the place of reference from St. Catharines to Hamilton. The action was, by a judgment of the Court, referred for trial to the Local Master at St. Catharines, but leave to move to change was reserved. The parties both resided in the county of Lincoln, and the cause of action arose at Beamsville, in that county. The Master said that the action had still to be tried, and by Con. Rule 529 (b) the trial must be at St. Catharines unless a very strong case is made out for a change: Pollard v. Wright, 16 P. R. 507; and, upon a consideration of the affidavits as to witnesses and expense, it seemed that the motion should not be granted. If any greater expense should be occasioned by having the reference at St. Catharines instead of Hamilton, that could be brought to the knowledge of the Court on motion for judgment on further directions (a special finding being made in the report) and costs could be dealt with accordingly. Motion dismissed; costs in the cause, unless otherwise ordered by the Court on motion for judgment. S. F. Washington, K.C., for the plaintiff. J. R. Meredith, for the defendant.