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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 1ST, 1917.

CONWAY v. ST. LOUIS.

Husband and Wife—Household Goods Purchased by Wife out of Savings from Money Paid to her by Husband as Housekeeping Allowance—Married Women's Property Act, R.S.O. 1914 ch. 149—Separate Property of Wife—Chattel-mortgage Made by Husband.

Appeal by the defendants from the judgment of CLUTE, J., 12 O.W.N. 264.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ. A.

J. E. Jones, for the appellants.

F. D. Davis, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. OCTOBER 3RD, 1917.

RE MARCHAND AND TOWN OF TILBURY.

Municipal Corporations—By-laws—Motion to Quash—Municipal Works—Payment to Contractors—Delay—Discretion — Mala Fides of Applicant.

Appeal by John B. Marchand from the order of FALCONBRIDGE, C.J.K.B., ante 14, dismissing a motion to quash two municipal by-laws.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

J. M. Pike, K.C., for the appellant.

O. L. Lewis, K.C., for the respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. OCTOBER 5TH, 1917.

*BRODERICK v. McKAY.

Bastard—Maintenance—Form of Affidavit of Affiliation—"Really" —Illegitimate Children's Act, R.S.O. 1914 ch. 154, sec. 3.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of York, dismissing an action brought by the mother of an illegitimate child against the putative father for necessaries supplied to such child. The action was dismissed by the County Court Judge on the ground that the affidavit of paternity filed by the plaintiff did not comply with the Illegitimate Children's Act, R.S.O. 1914 ch. 154, sec. 3, in that it did not declare that the defendant was "really" the father, but merely that he was the father of the child, following the decision of the Court of Queen's Bench in Jackson v. Kassel (1867), 26 U.C.R. 341.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

C. H. Porter, for the plaintiff, argued that Jackson v. Kassel should not now be followed, as, since it was decided, the Judicature Act, and the Interpretation Act, R.S.O. 1914 ch. 1, sec. 10, had come into force, under which all Acts were to be deemed remedial, and should receive such a fair and liberal construction as would best ensure the attainment of the objects aimed at.

H. H. Shaver, for the defendant, was not called upon by the Court.

At the conclusion of the argument for the appellant, the judgment of the Court was delivered by MEREDITH, C.J.O., who said that, while the plaintiff's counsel had presented his view of

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

the case fully and ably, the Court felt that it should not overrule the decision in Jackson v. Kassel, which was rendered by a strong Court and was exactly in point. It was significant that the Legislature had never seen fit to make any alteration in the statute, so far as the nature of the affidavit was concerned, during the fifty years that had elapsed since that case was decided.

Appeal dismissed with costs.

HIGH COURT DIVISION.

ROSE, J. SEPTEMBER 29TH, 1917.

*RE METROPOLITAN THEATRES LIMITED.

*MAGEE REAL ESTATE CO. LIMITED'S CASE.

Landlord and Tenant—Assignment by Tenant for Benefit of Creditors—Landlord's Preferential Claim for Rent—Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38—Ascertainment of Period for which Rent Allowed—"Three Months Following the Execution of the Assignment"—"Execution" Including Delivery—Intention to Delay Completion after Signing and Sealing of Instrument—Arrears.

An appeal by the Magee Real Estate Company Limited, the landlord, from an order of the Master in Ordinary, in the matter of the winding-up of the Metropolitan Threatres Limited, disallowing part of the claim of the appellant company as landlord of the insolvent company, in the winding-up.

The appeal was heard in the Weekly Court at Toronto.

H. S. White, for the appellant company.

A. C. McMaster, for the liquidator of the insolvent company.

ROSE, J., in a written judgment, said that the rent reserved by the lease was $20,000 per annum, payable in even monthly installments of $1,666.67, in advance, on the *21st* day of each month during the term. The lease contained a provision that if the lessee should make an assignment for the benefit of its creditors or should go into liquidation, the then current month's rent, together with the rent for the 11 months next succeeding, should immediately become due and payable.

On the *21st* February, 1917, the insolvent company signed and sealed an assignment for the benefit of its creditors and left the document with its solicitor—the intention being that some small debts should first be paid, and that the solicitor should then make the assignment effective by giving the document to the assignee on the *22nd*. Owing to some delay or misunderstanding on the part of a clerk of the solicitor, the assignment did not come to the hands of the assignee until the *23rd*. The assignee promptly went into possession. At that time there were distrainable assets sufficient to pay the rent.

The winding-up order was made on the 2nd March, 1917.

The month's rent due in advance on the day of the assignment, the 21st February, was not paid. The landlord claimed a preference for that rent and for the rent for the three months following. The Master held that the preference extended only to the rent for three months, *including* the rent due on the 21st February.

Section 38 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, provides: "In case of an assignment for the general benefit of creditors by a tenant the preferential lien of the landlord for rent shall be restricted to the arrears of rent during the period of one year next preceding and for three months following the *execution of the assignment* . . . ."

The learned Judge said that to his mind it was clear that the assignment was not *executed* on the 21st. In order that a deed shall be effective it must be "delivered"—that is to say, the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein: Halsbury's Laws of England, vol. 10, p. 386, art. 691. While he need not part with the possession of the document, he must intend to be bound by it: Barlow v. Heneage (1702), Prec. in Ch. 210; Evans v. Grey (1882), 9 L.R. Ir. 539; Doe d. Garnons v. Knight (1826), 5 B. & C. 671.

Sometimes the "execution" of a document means the signing or signing and sealing of it; but "execution" in its proper sense means "carrying out some act to its completion;" in the case of a written instrument, the signing, sealing, *and delivery*: 17 Cyc. 875-77.

Nothing in the statute indicates that "execution" is used in any other than its strict legal sense, viz., completion; and there was no evidence of any intention that the assignment should be complete on the 21st.

It was not necessary to determine whether the execution was on the 22nd or 23rd (semble, it was on the 23rd); the rent that fell due on the 21st was in arrear at the first moment of time on the 22nd, and there was never any intention that the assignment should be handed to the assignee until after the commencement of business on that day; so that there was rent in arrear before the hour at which the company intended to become bound by the assignment. The rule as to disregarding fractions of a day had no application: Halsbury, vol. 27, pp. 454, 455, art. 899. Therefore, even if the intention to deliver was treated as equivalent to actual delivery, there were arrears when the assignment was executed.

The appellant company was entitled to the preference claimed, and should have the costs of the appeal.

ROSE, J., IN CHAMBERS. OCTOBER 2ND, 1917.

*REX v. TUGMAN.

Ontario Temperance Act—Conviction for Having Intoxicating Liquor in Motor-car—6 Geo. V. ch. 50, secs. 41, 43, 74, 88—Trial by Police Magistrate—Depositions not Read over to and Signed by Witnesses—Absence of Prejudice—Conviction not Invalidated—Proof of Offence—Onus—Finding of Magistrate.

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Oakville, for unlawfully having intoxicating liquor in her possession, elsewhere than in her private dwelling-house, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

D. O. Cameron, for the defendant.
Edward Bayly, K.C., for the Police Magistrate.

ROSE, J., in a written judgment, said that the defendant had in her possession, in a motor-car, a bottle containing gin. The defence was, that she was carrying it from one place where she might lawfully have it to another such place, and that no use had been made of it en route: sec. 43 of the Act. The defendant also adduced evidence that her physician had advised her always to have some alcoholic stimulant on hand; but she did not give evidence of a written prescription or that the gin had been supplied by a druggist: sec. 51.

It was objected that the depositions were not read over to or signed by the witnesses, as required by sec. 74 of the Act. Assuming that all the facts stated on affidavit by the defendant were regularly established, failure on the part of the magistrate to comply with sec. 74 did not invalidate the conviction: Rex v. Leach (1908), 17 O.L.R. 643; at all events unless it was shewn that the defendant was in some way prejudiced: Rex v. McDevitt (1917), 39 O.L.R. 138; Montreal Street R. W. Co. v. Normandin, [1917] A.C. 170. This objection failed.

The second objection was, that no offence was proved. The defendant had in her possession the liquor in respect of which she was prosecuted, and it was for her to prove that she did not commit the offence with which she was charged: sec. 88. There was nothing to shew whether the magistrate refused to credit her explanation, or, giving credit to it, was of opinion that she had not brought herself within sec. 43, as amended by 7 Geo. V. ch. 50, sec. 14. If the magistrate did not believe the defendant's statement, that was the end of the case: Rex v. Le Clair (1917), 12 O.W.N. 163, 39 O.L.R. 436. The Judge could not assume that the magistrate did believe the statement, but proceeded upon a view of the effect of sec. 43 different from the view put forward on behalf of the defendant. Therefore, the question as to the true construction of sec. 43 did not arise; and the second objection failed.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 3RD, 1917.

*REX v. DAVIS.

Infant—"Neglected Child"—Commissioner of Juvenile Court—Conviction of Person for Contributing to Making Child a "Neglected Child"—Immorality of Mother—Conviction of Adulterer—Absence of Actual Injury to Child—Children's Protection Act of Ontario, R.S.O. 1914 ch. 231, sec. 18 (d)—Powers of Provincial Legislature—Statutory Crime—Creation of Tribunal.

Motion to quash a conviction of the defendant by the Commissioner of the Juvenile Court for the City of Toronto for contributing to the infant child (2 years old) of Katherine Vera Reynolds being or becoming a neglected child.

The conviction was under the Children's Protection Act of

Ontario, R.S.O. 1914 ch. 231, sec. 18 (*d*): "Any person who . . . is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty not exceeding $100 and in lieu of or in addition thereto shall be liable to imprisonment for a term not exceeding one year."

T. N. Phelan, for the defendant.
J. E. Jones, for the informant and the Commissioner.

MIDDLETON, J., in a written judgment, said that the husband of Katherine Vera Reynolds and the father of the child left Canada on the 17th May, 1916, to serve with His Majesty's forces abroad. During the husband's absence, the accused was a frequent visitor at the house where the mother of the child lived, and from June, 1916, had improper relations with her. The husband recently returned on leave; and the wife and the defendant were prosecuted before the Commissioner. The wife admitted the truth of the charge, and was allowed to go upon suspended sentence. Upon her evidence, the defendant was convicted and sentenced to 9 months in gaol.

There was no evidence, apart from the statutory definition of a "neglected child" (sec. 2 (*h*) of the Act), that this child was in any way neglected. There was no suggestion that she was not well-fed, well-clothed, and cared for. The only thing was that the mother and the defendant were guilty of immoral conduct. At the time the offences were committed, the child was asleep; but the defendant was frequently in the house while the child was awake, and it learned to call him by his Christian name.

In Rex v. Owens (1915), unreported, Clute, J., held that there was not, under the statute, any right to punish unless it was shewn that there was an actual injury to the child; and, when the child was of such tender years as to be unable to appreciate the moral quality of its mother's conduct, her immorality did not ipso facto make the child a neglected child within the meaning of the Act; and, consequently, the adulterer could not be convicted of contributing to making the child a neglected child.

The learned Judge felt bound to follow this decision and to quash the conviction upon the ground that the evidence did not disclose an offence against the statute.

The learned Judge also suggested that the Ontario Legislature had probably exceeded its powers in creating a statutory crime and making that crime punishable by a tribunal of its own creation, although the Provincial authority has not power to appoint Judges.

If there should be an appeal from the decision now given, notice should be given to the Provincial and Dominion authorities, in order that the validity of the legislation may be considered.

Order made quashing the conviction; no costs.

MIDDLETON, J. OCTOBER 3RD, 1917.

*RE NOLAN.

Will—Construction—Inconsistent Residuary Gifts—Repugnancy—Effect Given to the Gift Standing Last on Face of Instrument.

Motion by the executors for an order determining a question as to the construction of the will of Thomas Nolan, deceased.

The motion was heard in the Weekly Court at Ottawa.

W. D. Hogg, K.C., for the executors.

G. F. Henderson, K.C., for certain legatees.

M. J. Gorman, K.C., for the Roman Catholic Bishop in whose diocese a place, called "Fermoy" in the will, is situated.

MIDDLETON, J., in a written judgment, said that the will was on a printed form, apparently filled in by the testator without skilled assistance.

After giving many substantial specific legacies, the testator proceeded: "The residue of my estate to go to the deserving poor of Fermoy through the Bishop Roman Catholic."

In the following clause, intended by the framer of the printed form to be used for the naming of the executors only and the defining of their powers, there was inserted this provision: "Balance of my estate divided between those in the will pro rata."

It was not argued that the misplacing of this clause deprived it of its due significance.

The learned Judge referred to Paramour v. Yardley (1579), Plowd. 539, 541; Morrall v. Sutton (1845), 1 Ph. 533, 545, 546; In re Bywater (1881), 18 Ch.D. 17, 20; Sims v. Doughty (1800), 5 Ves. 243, 247; In re Isaac, [1905] 1 Ch. 427, 430; Johns v. Wilson, [1900] 1 I.R. 342; In re Jessop (1859), 11 Ir. Ch. R. 424; Re Spencer (1886), 54 L.T. 597; Kilvington v. Parker (1872), 21 W.R. 121; Davis v. Bennet (1861), 30 Beav. 226; and said that the rule found in Halsbury's Laws of England, vol 28, p. 678—"If there are two gifts in the same instrument, each suffi-

cient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred"—is only a particular application of the general rule, "Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est:" Co. Litt. 112 *b*.

The learned Judge said that he had sought anxiously and in vain for any clue to the testator's intention and for some way in which repugnancy might be avoided, but could find no key to the real intention, and so was driven to apply the general rule and give effect to the last residuary gift as the last intention of the testator.

Order declaring accordingly; costs out of the estate.

ROSE, J. IN CHAMBERS. OCTOBER 4TH, 1917.

*REX v. GRASSI.

Ontario Temperance Act—Magistrate's Conviction for Selling Intoxicating Liquor contrary to sec. 40 of 6 Geo. V. ch. 50—Evidence—Sufficiency—Improper Reception of Evidence of Complaints—Absence of Prejudice—Foreign Defendant—Testimony of Witness not Interpreted into Language Understood by Defendant—Liquor Found on Premises—Presumption—Absence of Search-warrant.

Motion to quash a conviction of the defendant, an Italian woman, made by the Police Magistrate for the City of Hamilton, for selling intoxicating liquor contrary to the provisions of sec. 40 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

M. J. O'Reilly, K.C., for the defendant.
Edward Bayly, K.C., for the magistrate.

ROSE, J., in a written judgment, said that the first objection was, that there was no evidence to justify the conviction; but a perusal of the depositions satisfactorily shewed that the evidence was quite sufficient.

The second objection was, that evidence was improperly received that complaints had been made that intoxicating liquor was being sold in the house of the deceased. Such testimony was received; it was irrelevant, and ought not to have been given;

but, apart from it, the evidence, for the prosecution, of a sale by the defendant to a Pole was conclusive, if believed; and the attempted explanation by the defendant of a large quantity of intoxicating liquor found in her house was absurd; so that it would not be fair to say that the inadmissible statements might have had some influence upon the magistrate's decision, or might have affected his mind in regard to the guilt or innocence of the accused.

The third objection was, that the evidence of a Polish witness, while translated into English, was not translated into Italian, which was said to be only language understood by the defendant. It was not suggested that the defendant's counsel before the magistrate made any request that the statements of the witness should be translated into Italian; so that there was not much ground for saying that the defendant suffered any prejudice in this regard. No effect ought to be given to the objection unless there was a rigid rule that in every case all evidence shall be made intelligible to the accused. There does not seem to be any such rule: Rex v. Meceklette (1909), 18 O.L.R. 408; Rex v. Sylvester (1912), 45 N.S.R. 525; Rex v. Pfister (1911), 3 O.W.N. 440. This objection failed.

The last objection was, that the finding of liquor upon the premises of the defendant did not raise any presumption against her, because the officers had no search-warrant and no authority to enter her house. There was no basis for this objection—the magistrate in convicting did not rely upon any statutory or other presumption; but drew his conclusions from the facts proved.

Motion dismissed with costs.

MASTEN, J. OCTOBER 4TH, 1917.

RE SMITH AND KING.

Will—Devise of Land—Trust—Life-tenant—Remaindermen—Proposed Sale by Executors—Refusal of one Remainderman to Join in Conveyance—Objection to Title—Vendor and Purchaser.

Motion by the executors of the will of Adam Smith, deceased, vendors, under the Vendors and Purchasers Act, for an order declaring invalid an objection to the title to land which they agreed to sell to Frank King, purchaser.

The motion was heard in the Weekly Court at Toronto.
G. S. Kerr, K.C., for the vendors.
J. G. Farmer, K.C., for the purchaser.

MASTEN, J., in a written judgment, said that the vendors' testator had devised the land in question in the following words: "I appoint my son Thomas John Molyneaux and my wife to be executor and executrix respectively of this my will and I give and devise all my property and estate real and personal upon trust to allow my wife to have the use and occupation thereof during her lifetime and upon her decease . . . to divide the residue of my estate unto and equally between my children," naming them.

The widow and the children except one son agreed in the proposed sale by the executors, and were ready and willing to join in a conveyance. The one son objected. The purchaser, though he was a willing purchaser, contended that, in these circumstances, the vendors could not give a good title.

In Farwell on Powers, 2nd ed., p. 147, the result of the cases is stated as follows: "A power which is not to arise until a future or contingent event happens or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled; for until then it has in fact no existence."

That rule was approved and applied by the late Chancellor in the case of Re Rathbone and White (1892), 22 O.R. 550.

The proposed conveyance is not effective unless all parties entitled are sui juris and join in it.

Order accordingly.

WILSON v. WILSON—SUTHERLAND, J.—OCT. 1.

Solicitor—Costs of Litigation—Charging Order—Fund Dealt with by Judgment—Construction of Judgment.]—An application on behalf of the solicitors for the plaintiff for an order charging the sum of $750 mentioned in para. 7 of the judgment in the action, dated the 17th May, 1916, and the balance of the insurance moneys to be paid into Court to the credit of the infant defendant under that paragraph, with the applicants' costs of the action. The motion was heard in the Weekly Court at Toronto. It was contended on behalf of the adult defendant that, under para. 11 of the judgment, these costs were to be paid out of the estate of George S. H. Wilson, deceased. It seemed to the learned Judge, however, that, reading paras. 7 and 11 of the judgment together, and particularly having regard to the last clause of para. 11—"As between the fund set apart for the benefit of the infant and the amount which is payable to the adult defendant out of the said insurance money ($750), the said costs are to be borne proportionately"—the true construction of the judgment was that the costs were to be payable pro rata as between that part of the insurance moneys, namely, $750 payable to the adult, and that part to be paid into Court to the credit of the infant. The learned Judge therefore directed that payment should be made in that proportion, and that the plaintiff's solicitors should have a charge against these moneys for the balance of their costs unpaid, namely, $217.32, together with the costs of this application. P. Kerwin, for the applicants. D. J. Kelly, for the adult defendant. F. W. Harcourt, K.C., for the infant.