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HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. MARCH 6TH, 1916.

*RE COLE.

Insurance—Life Insurance—Contracts Made with Wife of Assured—Absolute Property of Wife—Insurance Act, R.S.O. 1914 *ch.* 183, *secs.* 169, 171, 178—*Contracts for Benefit of Wife—Will of Deceased—Change of Beneficiary within Preferred Class—Life Interest—Remainder—Effective Designation—Sec.* 171 (5)—*Codicil—Effect of—Predecease of Wife—Payment of Incumbrances—Costs.*

Motion by William H. Dingle, executor of Wilmot H. Cole, deceased, and by Cordelia E. Dingle, daughter of the deceased and administratrix of the estate of her mother, also deceased, for an order determining certain questions arising upon the will and codicil of Wilmot H. Cole, in regard to certain policies of life insurance.

The testator died on the 13th December, 1915; his wife predeceased him, dying on the 9th October, 1915. The daughter, Cordelia E. Dingle, a son, George M. Cole, and a son of a deceased son, survived.

There were six policies: (1) a policy for $1,000, dated the 6th January, 1864, effected by the testator's wife on the life of her husband; (2) a policy for $2,000, dated the 21st February, 1871, effected by the testator on his own life for the benefit of his wife; (3) a policy for $5,000, dated the 15th September, 1874, by the testator on his own life for the benefit of his wife; (4) a policy for $2,000, dated the 31st December, 1868, by the testator for the benefit of his wife; in this policy the insurance company "promise and agree to and with the said assured, *her* executors . . . to pay to the said assured, her executors . . . the sum insured;" (5) a benefit certificate for $500, dated the 23rd December, 1883, whereby the benefit society agreed to pay to the wife or her heirs or assigns; but it ap-

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

peared clearly that the agreement was not made with the wife, but with the husband, "the member herein insured;" (6) a policy for $1,000, dated the 21st September, 1883, in terms similar to (5).

By a will made on the 17th October, 1914, the testator gave and devised all his real and personal estate to his executor in trust for the use of the testator's wife during her natural life; "my said executor to collect all the life insurance, rents, interest, and accounts due me at my death and with this money first pay off the incumbrances, if any . . ." The testator then made specific bequests and devises; and then gave all the residue of his estate to his daughter.

After the death of his wife, he made a codicil in which he stated that she was dead, and "the portion of my said will referring to her will no longer be operative."

The questions for determination were whether the will and codicil amounted to a declaration within the meaning of the Ontario Insurance Act, R.S.O. 1914 ch. 183; and, if not, to whom the moneys due under the policies should be paid.

The motion was heard in the Weekly Court at Ottawa.

M. M. Brown, for the applicants.

J. A. Hutcheson, K.C., for the son and grandson of the testator.

FALCONBRIDGE, C.J.K.B., after setting out the facts in a considered judgment, said, as to policies (1) and (4), that both contracts were with the wife, and the insurance moneys belonged to her absolutely; the contracts did not come under secs. 171 and 178 of the Act, but under sec. 169; and the will and codicil did not affect these policies.

Policies (2), (3), (5), and (6) came under secs. 171 and 178, and the same considerations governed them all. Section 178 (2) created, in respect of these, a trust in favour of the wife unless and until a declaration should be made under sec. 171 (3), and in no case could the policy be diverted from the class of preferred beneficiaries except in cases such as are provided for in sec. 178 (7).

The words of the will, "all the life insurance" were sufficient to constitute an effective declaration under the Act: sec. 171 (5); Re Baeder and Canadian Order of Chosen Friends (1916), 9 O.W.N. 462.

The effect of the declaration was to take away from the wife the corpus of the proceeds of the policies and to give her only

a life interest in the proceeds—the corpus not being in terms disposed of. But the deceased created a fund in part composed of these insurance moneys, and disposed of a life interest in it—adding, "all the rest . . . I give to my daughter. . . ."

Reference to Re Edwards (1910), 22 O.L.R. 367.

The declaration by the will was effective to change the beneficiary, so that, had the wife survived, she would have taken for life, and the corpus would have gone to the daughter.

The codicil at most revoked the trust for life of the proceeds of the policies without affecting any other disposition or the rights of any other person.

The attempt of the testator to charge the insurance fund with the payment of incumbrances was wholly ineffective.

The estate of the wife was entitled to the two policies (1) and (4); the daughter was entitled to the other four, without diminution to pay incumbrances.

The case does not come under sec. 178 (7), as the beneficiary who predeceased the testator had only a life estate.

Of the policies belonging to the estate of the wife, the estate of the husband will be entitled to his proportionate part.

Costs of all parties to be paid out of the proceeds of the four policies.

MULOCK, C.J.Ex., IN CHAMBERS. MARCH 10TH, 1916.

RE TOWNSHIP OF MIDDLETON AND TOWNSHIP OF DEREHAM.

Municipal Corporations — Highway — Boundary-line between Townships—Original Road Allowance—Deviation—Cost of Opening up and Maintaining Original Allowance—Arbitration—Order of Ontario Railway and Municipal Board.

Motion on behalf of the Corporation of the Township of Dereham for an order appointing an arbitrator to settle differences which had arisen between the two township corporations.

W. Lawr, for the applicant corporation.

V. A. Sinclair, for the respondent corporation.

MULOCK, C.J.Ex., read a judgment in which he said that Dereham sought to compel Middleton to pay a portion of the cost of opening up and maintaining what was originally a part of the boundary-line road allowance between the counties of Oxford and Norfolk, and to that end was endeavouring to have the matter referred to arbitration under the Municipal Act.

Middleton contended that, because of the adoption by the two counties of a deviation, the portion of the road allowance now called in question ceased to be part of the boundary-line road between the two municipalities, and that therefore it was not now liable to any of the cost of opening or maintaining it.

The two townships adjoin each other, Dereham being situated in the county of Oxford, and Middleton in the county of Norfolk. The original road allowance in question between the two townships was so cut up by streams that it was impracticable to construct upon it a good line of road, and in 1868 the two counties, by by-laws of their respective councils, adopted a deviation as a public highway, and constructed the deviated road, and continuously thereafter, for a period of over 40 years, maintained it at joint expense.

In or about the year 1910, Dereham, being desirous of opening up that portion of the original road allowance in lieu of which the two townships had provided the deviation, sought to compel Middleton to contribute towards the cost, and at the same time ceased to contribute towards the cost of maintaining the deviated road. Thereupon Middleton, in 1911, made application to the Ontario Railway and Municipal Board for an order declaring that the deviated road had, by the two counties, been established, constructed, and maintained in lieu of the original road allowance, and had thus become the county-line between the two townships, in lieu of the original county-line, and that the two townships were jointly liable for its maintenance. Thereupon the Board dealt with the application, and their order, bearing date the 11th September, 1911, declared that the deviated road "is now and has been a deviation of the county boundary-line between the township of Middleton, in the county of Norfolk, and the township of Dereham, in the county of Oxford, in lieu of the original county boundary-line, which was never opened up owing to the difficulties of construction, and this Board doth further order that the said townships of Middleton and Dereham shall keep up and maintain said deviated road in equal proportions."

The action of the respective councils of the counties of Oxford and Norfolk in adopting the deviation in question had the effect of shifting the original road allowance, whereby the deviation became the boundary-line in lieu of the original road allowance. Thus the latter ceased to exist as a road allowance between the municipalities.

Therefore, Middleton was not bound to contribute towards

the cost of opening up and maintaining the original road allowance, and there was nothing to refer to arbitration.

Application dismissed with costs.

LATCHFORD, J., IN CHAMBERS. MARCH 11TH, 1916.

*REX v. GAGE.

Liquor License Act—Conviction for Selling and Keeping Intoxicating Liquor for Sale without a License — Evidence — Amendment—Adjournment — Waiver — Imprisonment in Default of Payment of Fine and Costs—Warrant of Commitment—Habeas Corpus — Jurisdiction of Magistrate—Police Magistrate for City and Southern Part of County—Judicial Notice—Territorial Division Act, R.S.O. 1914 *ch.* 3, *sec.* 2 (15)—*Police Magistrates' Act, R.S.O.* 1914 *ch.* 88, *secs.* 24, 28—*Jurisdiction to Commit—Sec.* 65 *of Liquor License Act — Charges for Conveying to Gaol — Statement in Warrant—Irregularity — Amendment — Criminal Code, secs.* 1121, 1124—*Ontario Summary Convictions Act, R.S.O.* 1914 *ch.* 90, *sec.* 4—*Liquor License Act, sec.* 94—*Power to Amend—Alleged Illegality of Arrest—Objection to Detention.*

Motion on the return of a writ of habeas corpus for the discharge of the defendant from the common gaol of the county of Hastings.

J. B. Mackenzie, for the prisoner.
J. R. Cartwright, K.C., for the Crown.

LATCHFORD, J., said that the defendant was imprisoned under a warrant issued on the 10th August, 1914, by Stewart Masson, who described himself as "Police Magistrate in and for the City of Belleville and one of His Majesty's Justices of the Peace in and for the County of Hastings" and as "Police Magistrate for the southern part of the County of Hastings." The defendant was convicted by this magistrate, on the same day, for two breaches of the Liquor License Act, R.S.O. 1914 ch. 215—selling liquor without a license on the 31st July, 1914, and keeping liquor for sale without a license on the 1st August, 1914. The defendant was not present, but was represented by counsel, who, on the defendant's behalf, pleaded "not guilty" to each charge. It was agreed that the evidence should be taken in both cases

at once and used in both. The information charged a sale on the 1st August, but it was amended by the magistrate to conform to the evidence of a sale on the 31st July. The magistrate imposed a fine of $250 in each case and imprisonment in default of payment of the fines and costs. The defendant did not pay the fines and costs; the warrant under which he was imprisoned was issued, and he was arrested, but not until the 7th February, 1916.

Many objections to the proceedings were taken by counsel for the defendant, and the learned Judge dealt with them in a written opinion, holding as follows:—

(1) That, as counsel for the defendant before the magistrate did not ask for the adjournment which the magistrate was bound to accord, under sec. 92 of the Act, if the amendment really prejudiced the defendant, he must be taken to have waived the right to an adjournment.

(2) That there was ample evidence to sustain the convictions.

(3) That, as the information, conviction, and warrant stated that the offences were committed at the township of Thurlow, in the county of Hastings, and the conviction upon its face stated the jurisdiction of the magistrate, as above, judicial notice could be taken of the undoubted fact that the township mentioned (see sec. 2 (15) of the Territorial Division Act, R.S.O. 1914 ch. 3) is in the southern part of the county. Aliter in England, where boundaries are determined by ancient usage: Rex v. Burridge (1735), 3 P. Wms. 439, 496; Deybel's Case (1821), 4 B. & Ald. 243.

(4) That, apart from judicial notice, the magistrate's jurisdiction to convict sufficiently appeared: by sec. 24 of the Police Magistrates' Act, R.S.O. 1914 ch. 88, he was ex officio a Justice for the whole county, and had, under sec. 28, power to do alone whatever was authorised to be done by two or more Justices. The decision of the Court of Appeal in Rex v. Collins (May 29, 1901), unreported, had no application.

(5) That jurisdiction to convict gave jurisdiction to commit in default of payment of the fines and costs: sec. 65 of the Liquor License Act; but the magistrate was not justified in stating or estimating, on the face of the warrant, the amount of the costs and charges of conveying the defendant to gaol.

(6) That, as the commitment alleged the conviction of the prisoner, and there was a valid conviction to sustain the commitment, and the punishment imposed was not excessive, the war-

rant should not be held invalid for the irregularity: secs. 1121 and 1124 of the Criminal Code, made applicable by sec. 4 of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90; sec. 94 of the Liquor License Act, and sub-sec. 2, giving power to amend the warrant; it should be amended by striking out the words and figures stating the costs and charges of conveying the prisoner to gaol.

(7) That the arrest of the prisoner in another county was not a good ground of objection to his detention: the right to discharge does not depend on the legality or illegality of the caption: Rex v. Whitesides (1904), 8 O.L.R. 622.

Motion dismissed; no costs.

HOOK v. WYLIE—LATCHFORD, J.—MARCH 6.

Motor Vehicles Act—Injury to Child by Motor Vehicle on City Highway — Negligence — Onus — Evidence — R.S.O. 1914 ch. 207, sec. 23 — Findings of Fact of Trial Judge —Damages.]—Action by a boy of 12 and his father to recover damages for injury to the boy and consequent loss and expense to the father by an automobile driven by the defendant in Delaware avenue, in the city of Toronto. The boy was struck by the automobile when sitting in a toy-waggon at the side of the part of the street devoted to vehicles. His left leg was broken. The action was tried without a jury at Toronto. LATCHFORD, J., in a considered opinion, said that, upon facts clearly established, the case fell within sec. 23 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, and the onus of proving that the damage sustained did not arise from his negligence was upon the defendant. That onus the defendant had not discharged—not only so, but there was much to indicate that his negligence caused the damage. Judgment for the plaintiffs for $837.50 with costs—$337.50 for the father and $500 for the boy; the $500 to be paid into Court to his credit. A. A. Macdonald, for the plaintiffs. W. H. Irving, for the defendant.

RE CROWN CHARTERED MINING CO. OF PORCUPINE LAKE LIMITED —CHAMBERS v. CROWN CHARTERED MINING CO. OF PORCUPINE LAKE LIMITED—RIDDELL, J., IN CHAMBERS—MARCH 7.

Appeal—Leave to Appeal from Order of Judge in Chambers —Trust—Parties—Addition of Cestuis que Trust—Refusal of

Leave.]—Motion by the plaintiff in the action for leave to appeal from the order of SUTHERLAND, J., ante 7, refusing to set aside an appointment and subpœna for the examination of the plaintiff. RIDDELL, J., said that, denuded of the vesture afforded by form, the proceeding was an attempt on the part of one who was alleged to be a trustee—and this was not denied—to deal with the property of the trust in a manner which, the cestuis que trust said, was improper—and the plaintiff did not deny it. A technical difficulty arose from the cestuis que trust not being parties to the action, but that might be got over by adding them as parties defendants; and an order so adding them should now be made nunc pro tunc: Liddell v. Deacon (1873), 20 Gr. 70, 72; Day v. Radcliffe (1876), 24 W.R. 844; Payne v. Parker (1866), L.R. 1 Ch. 327; Read v. Prest (1854), 1 K. & J. 183; Jennings v. Jordan (1881), 6 App. Cas. 698. Order accordingly; leave to appeal refused; no costs. W. H. Clipsham, for the plaintiff. H. E. Rose, K.C., for O'Kelly and Sutherland.

CORRECTION.

In the brief note of the Chancellor's judgment in MIDLAND LOAN AND SAVINGS CO. v. GENITTI, 9 O.W.N. 490, 9th and 10th lines from the bottom of the page, strike out the words in parenthesis "(afterwards Master of the Rolls.)" These words are not in the Chancellor's written opinion. The mistake was the Editor's. The Mr. Romilly whose argument in Aldrich v. Cooper (1803), 8 Ves. 382, 383, is referred to, was Samuel Romilly (1757-1818), knighted in 1806, when he became Solicitor-General; he was never on the Bench. His second son, John Romilly (1802-1874), was Master of the Rolls (1851-1873), and was raised to the peerage as Baron Romilly in 1866.