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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 21ST, 1917.

FLEXLUME SIGN CO. LIMITED v. GLOBE SECURITIES LIMITED.

Practice—Order Staying Action—"Event" of Similar Action Proceeding to Trial and Appeal—Determination by Court of Last Resort—Costs.

Appeal by the defendants from the order of MIDDLETON, J., in Chambers, ante 138.

Leave to appeal was refused by FALCONBRIDGE, C.J.K.B., ante 196.

The defendants appealed without leave, maintaining that the order appealed from was one finally disposing of the whole action (Rule 507 (1)).

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

I. F. Hellmuth, K.C., for the appellants.

A. C. Master, for the plaintiffs, respondents.

THE COURT varied the order by providing that judgment in this action shall be eventually entered in accord with the judgment which shall be eventually entered in the action of Flexlume Sign Co. Limited v. Macey Sign Co. Limited. No costs of appeal.

SECOND DIVISIONAL COURT. MAY 21ST, 1917.

*RE CITY OF HAMILTON AND UNITED GAS AND FUEL CO. OF HAMILTON LIMITED.

Contract—Natural Gas Company—Municipal Corporation—Supply of Gas—By-law—Rates to be Charged—Minimum Monthly Charge—Breach of Contract—Order of Ontario Railway and Municipal Board—Jurisdiction—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 21—Appeal.

Appeal by the company (by leave) from an order of the Ontario Railway and Municipal Board of the 22nd March, 1917, directing the company to carry out its agreement with the city corporation, contained in a certain by-law, and forbidding the company to require from each applicant for gas a contract binding such applicant, in breach of the terms of the by-law, to pay a minimum monthly or quarterly charge.

The Board held that it had jurisdiction to determine the question raised, under sec. 21 of the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186; and that the minimum charge made by the corporation was in breach of the by-law (No. 400, 26th September, 1904), which provided, among other things, that the company should "supply gas, at the prices hereinbefore mentioned, to the city corporation and to all inhabitants along such mains desiring to be supplied, upon such applicants tendering to the company a contract to pay the rates aforesaid."

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Christopher C. Robinson, for the appellant company.

F. R. Waddell, K.C., for the respondent corporation, was not called on.

THE COURT dismissed the appeal with costs.

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

HIGH COURT DIVISION.

MASTEN, J., IN CHAMBERS. MAY 22ND, 1917.

WHIMBEY v. WHIMBEY.

Discovery—Alimony—Production of Documents by Defendant to Shew Assets—Preliminary Question of Liability—Trial of, before Quantum of Alimony Ascertained—Reference.

Appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff for a better affidavit of documents from the defendant in an action for alimony.

C. W. Plaxton, for the plaintiff.
E. E. Wallace, for the defendant.

MASTEN, J., in a written judgment, said that the particular documents production of which was sought, were mortgages shewing the defendant's assets.

The learned Judge had considered the case of Allin v. Allin (1916), 9 O.W.N. 411; but it seemed to him that each case of this kind must depend on its particular facts, and the discretion of the judicial officer as to how it can be most conveniently determined. In a simple case, and where the means of the parties and the assets of the husband are slight, he subscribed fully to the method of procedure outlined in Allin v. Allin. But it seemed to him that in the present case, as there was a grave question to be tried as to the right of the plaintiff to any alimony, and as the assets of the defendant were considerable, the more advantageous course would be, first to try the preliminary question of the defendant's liability to pay alimony, and then leave it to the Master to fix the amount if the plaintiff was found entitled.

Appeal dismissed. Costs in the cause to the defendant.

Reference to Hick v. Hick and Kitchin (1864), 12 W.R. 444, n.

MASTEN, J. MAY 23RD, 1917.

*RE STEACY.

Will—Construction—Direction to Pay Debts—Specific Devise of whole of Real Estate—Insufficiency of Personal Estate to Pay Debts—Sale by Executors of Land Specifically Devised—Disposition of Balance of Proceeds after Payment of Debts—Pecuniary Legatees—Marshalling of Assets.

Motion by the executors of the will of John Steacy, deceased, for an order determining certain questions arising upon the will as to the administration of the estate of the deceased.

The material parts of the will were as follows: "I direct all my just debts funeral and testamentary expenses to be paid and satisfied by my executors . . . as soon as conveniently may be after my decease. 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 son William George Steacy I give all my land consisting of . . ."

William George Steacy died, leaving his widow Eliza Jane Steacy and four infant children entitled to the lands specifically devised to him.

The personal property was insufficient to pay the debts; after the personalty had been exhausted, the real estate was sold in order to provide funds for payment of debts. After payment of debts, there remained in the hands of the executors about $4,156, what was left of the proceeds of the realty specifically devised to William George Steacy.

The general pecuniary legatees sought to have the doctrine of marshalling applied to this fund and to have their legacies paid out of it, thereby diminishing the moneys which would otherwise come, as proceeds of the devised land, to the widow and children of William George Steacy.

The motion was heard in the Weekly Court at Toronto.

W. A. Lewis, for the executors.

M. H. Ludwig, K.C., for the legatees, including (by appointment) the infant legatees.

F. W. Harcourt, K.C., for the infant children of William George Steacy.

MASTEN, J., set out the facts in a written judgment, and said that, upon the best consideration he could give, he was of opinion that the claim of the legatees could not be maintained.

Reference to Seton's Forms of Judgments and Orders, 7th ed., p. 1607; Smith's Principles of Equity, 5th ed., p. 609; Snell's Equity, 17th ed., p. 263.

Marshalling, if applied to the circumstances of this case, would consist in preventing a person who has two funds for payment of his claim from coming upon one of them so as to disappoint another claimant who has that fund alone to resort to. But, in order that this may be done, the claimant who asserts the right to marshal must be of rank equal or superior to the other claimant in the order of administration of assets as laid down in the decisions (see Seton, p. 1604; sec. 5 of the Devolution of Estates Act, R.S.O. 1914 ch. 119).

Reference to Theobald on Wills, 7th ed., p. 855; In re Tanqueray-Willaume and Landau (1882), 20 Ch. D. 465, 476; Re Stokes (1892), 67 L.T.R. 223; Rickard v. Barrett (1857), 3 K. & J. 289; In re Roberts, [1902] 2 Ch. 834; In re Kempster, [1906] 1 Ch. 446.

A devisee is as much an object of the testator's bounty and as much to be favoured as a legatee; and, where the testator has manifested no intention to prefer the legatee to the devisee, the usual order of administration ought to be followed.

The legacies payable to the several legatees mentioned in the will are not payable out of the moneys in the hands of the executors.

No case has arisen for the marshalling of the assets of the deceased so that the legatees are entitled to the payment of their legacies.

The widow and children of William George Steacy are entitled to the fund in the hands of the executors.

Costs out of the estate—those of the executors as between solicitor and client.

FALCONBRIDGE, C.J.K.B. MAY 25TH, 1917.

BELLAMY v. WILLIAMS.

Promissory Notes—Action by Money-lender—Usury—Denial of Signature by Maker—Expert Evidence—Finding of Fact—Renewal Notes—Consideration—Unauthorised Alteration by Payee of Notes after Signature—Accommodation Maker—Knowledge—Surety—Extension of Time Granted to Principal Debtors—Successful Defences Raised by Amendment—Stale Demand—Costs.

An action upon two promissory notes alleged to have been made by the defendant.

The action was tried without a jury at Chatham.
J. M. Pike, K.C., and J.C. Stewart, for the plaintiff.
O. L. Lewis, K.C., and W. G. Richards, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was described in the statement of claim as a retired farmer, but was in truth a usurious money-lender, and the worst opinion possible of him as a witness was formed at the trial. Shifty and unreliable, his evidence generally should not be accepted where it is contradicted—this without reference to his record in the Courts, since turned up: Bellamy v. Porter (1913), 28 O.L.R. 572; Bellamy v. Timbers (1914), 31 O.L.R. 613.

Nevertheless, the defendant was mistaken when he said that the signatures to the notes sued on were not his. The Chief Justice had not been trying cases, civil and criminal, involving questions of disputed handwriting, for about 30 years, without thinking that he is nearly as good an expert as most of the gentlemen who give evidence before him.

Experts (reaching the limit as to number) gave evidence in the plaintiff's favour, and the defendant's only witness on this line, a gentleman of experience and respectability, rather fell down on cross-examination.

If the transaction were in other respects unimpeachable, the renewal of the old notes—and other circumstances—would constitute good consideration, without any advance of money at the time of taking these notes.

But it must be found that the notes sued on were altered after

signature, and without the authority of the defendant, by the plaintiff, or by his procurement, by changing the place of payment; also that the plaintiff must have known from the whole course of business, and in fact did know, that the defendant was only an accommodation maker for Aitken and King, and the plaintiff gave time to the principal debtors without the authority of, or reference to, the defendant.

The defendant should have leave to amend his statement of claim by setting up these two defences.

It was significant that the plaintiff brought this action on the eve of the earlier note sued on being barred by the Statute of Limitations. He rested for years without making any demand on the defendant for payment.

The defendant succeeded on matters not originally pleaded by him. The action should be dismissed, with costs fixed at $100.

CLUTE, J. MAY 26TH, 1917.

RE McLELLAN.

Will—Construction—Devise to Son and his Heirs—Subsequent Clause of Will Containing Devise over in Event of Son Dying without Issue—Estate Tail—Wills Act, R.S.O. 1914 ch. 120, sec. 33.

Motion by the executors of the will of William Norman McLellan, deceased, for an order determining a question arising upon the language of the will.

The motion was heard in the Weekly Court at Toronto.

E. C. Cattanach, for the executors.

A. W. Langmuir, for John Norman McLellan.

Grayson Smith, for a class, the brother and sisters of the testator.

CLUTE, J., in a written judgment, said that William Norman McLellan, having made his will, died in 1884, leaving a son, John Norman McLellan, born in 1876, married in October, 1916, who is still living.

The testator gave to his son, John Norman McLellan, "from and after the time he arrives at the full age of 21 years," certain

lands and premises described, and also "all the rest residue and remainder of my real estate to have and to hold to him and his heirs for ever." By the 5th paragraph, the testator gave to his executors the residue of his estate to make provision for certain legacies, and the maintenance of his son, John Norman McLellan, until he should be 18 or 21 years of age, as the executors might think advisable, and when he arrived at the age of 21 years to pay $100 to each of his five sisters. In the next paragraph he gave and devised the real estate devised to his son, from the time of his decease until the son arrived at 21 years, to the executors, with power to rent the same and receive the rents on trust as mentioned in the previous paragraph with liberty to permit the son to have possession of the farm on his arriving at the age of 18 years.

Paragraph 7: "In the event of the death of my son John Norman McLellan without lawful issue I give and bequeath all my estate to my executors with power to sell the same and divide the proceeds amongst all my brothers and sisters."

The question submitted was: "Did John Norman McLellan, under the paragraph referred to, take absolutely upon his becoming 21 years of age all of the property therein set out, or was the vesting of such property contingent upon the said John Norman McLellan having lawful heirs?"

Up to the present time John Norman McLellan had no children. It was clear that, under the first clause referred to, clause 4 of the will, the son took an estate in fee simple upon his becoming 21 years of age, unless that estate was modified by para. 7.

Order declaring that John Norman McLellan took an estate tail upon his becoming 21 years of age: Re Brown and Campbell (1898), 29 O.R. 402, and cases cited; sec. 33 of the Wills Act, R.S.O. 1914 ch. 120.

Costs of all parties out of the estate, the executors' as between solicitor and client.

ROSE v. ROSE—KELLY, J.—MAY 22.

Promissory Note—Price of Work Done—Excessive Charge—Acceptance of—Renewal of Note—Action on Renewal—Defence—Failure to Establish.]—Action on a promissory note, alleged by the plaintiffs to have been given for a balance due by the defendant for printing, for the price of which, after the work was performed (they said), a note was given, which was renewed many times, ending with the note now sued upon. The defendant alleged that the original note was given by way of accommodation only, and that neither it nor any of the renewals had anything to do with the account for printing. He admitted some liability on the printing account, and said that there was a definite contract for part of the work at $250, and that for the balance he was chargeable for its proper value only. Evidence of that value was submitted at the trial, which was held at Toronto, without a jury. KELLY, J., in a written judgment, said that in 1904 the defendant employed the plaintiffs to do printing for him, and made them a payment of $225 on account. The price was not agreed upon. The note was not given as accommodation, but in respect of the printing work referred to. In support of his position, the defendant submitted evidence to shew that the amount of the note was out of all proportion to the value of the work done. He had succeeded in proving that the price charged was greatly in excess of the value of the work; but the original note was given for the balance of the amount the plaintiffs charged against him for the whole work; and, though the charge was excessive, he, without objection, accepted the situation in so far as the giving of the note had that effect. The plaintiffs in strictness were entitled to judgment for the amount sued for and costs. The suggestion that they should take into consideration the excessive charge for the work was not unreasonable. J. J. Maclennan, for the plaintiffs. L. F. Heyd, K.C., for the defendant.

CRONK v. CRONK—KELLY, J.—MAY 22.

Infant—Custody—Separation of Parents—Dispute between—Interests of Infant—Determination in Favour of Father—Costs.]—An issue directed to be tried, "to determine the rights of the parties as to the custody of their child, Kenneth Cronk," three years of age, now in the possession of the defendant (the husband) and the defendant's mother—the defendant residing with his mother. The plaintiff, wife of the defendant and mother of the child, claimed custody and possession. The issue was tried without a jury at Toronto. KELLY, J., in a written judgment, set forth the facts, and stated his finding as follows: "The best interests of the infant are of prime consideration, and not simply the gratification of the desires or whims of one or other of the contending parties; and, having weighed well the whole evidence, I can come to no other conclusion than that the best interests of the infant will be served by allowing him to remain with his father in his present surroundings, rather than allowing him to be delivered over to the plaintiff, whose prospects of providing him with the surroundings which he should have are, to say the least, precarious and uncertain. It may be to the advantage of the plaintiff and may help to bring both of the parties to the realisation of the advisability of re-establishing, if possible, a proper home for them and their child, that she should have opportunities of seeing the child from time to time. That question was not introduced during the trial or in the argument, but if so desired counsel may speak to me about it. Costs should follow the event, if the defendant insist on costs." W. K. Murphy, for the plaintiff. T. N. Phelan, for the defendant.

CAIN v. STANDARD RELIANCE MORTGAGE CORPORATION.—FALCONBRIDGE, C.J.K.B.—MAY 23.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance—Interest—Costs.]—Motion by the plaintiff for judgment in an action for specific performance of an agreement for the sale of land to the plaintiff. The motion was heard at the Ottawa Weekly Court. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the only questions at issue were: (1) subsequent interest; and (2) costs. The plaintiff had been in possession of the premises, and ought to pay interest on $500.91, or on so much of it as represented principal, from the 15th September, 1916. In all the circumstances, there ought to be no costs of the action or of this motion. Judgment accordingly. W. C. Greig, for the plaintiff. G. S. Hodgson, for the defendants.