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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JUNE 23RD, 1916.

*CITY OF TORONTO v. TORONTO R. W. CO.

Street Railway—Agreement with City Corporation—55 Vict. ch. 99 (O.)—Exclusive Right to Operate upon Streets—Exception—Restriction—Effect of sec. 1 of Act.

Appeal by the Corporation of the City of Toronto from the judgment of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, Re Toronto R. W. Co. and City of Toronto, 34 O.L.R. 456.

The appeal was heard by a Board composed of LORD BUCKMASTER, L.C., EARL LOREBURN, and LORD SHAW.

The judgment of the Board was read by the LORD CHANCELLOR, who said, in part, after setting out the facts:—Their Lordships consider that the terms of the agreement itself do not, when once the facts are understood, present any real difficulty. It is the manner in which these rights have been confirmed by statute which gives rise to the only question of uncertainty in the case. The statute is 55 Vict. ch. 99 . . . The actual words which give rise to the difficulty are these (sec. 1): "It is hereby declared that under the said agreement the purchasers acquired and are entitled to the exclusive right and privilege of using and working the street railways in and upon the streets of the said city of Toronto, except that portion of Yonge street north of the Ontario and Quebec Railway and that portion of Queen street (Lake Shore road) west of Dufferin street; and that the purchasers acquired

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

and are entitled to such right and privilege (if any) over the said excepted portions of Queen street and Yonge street as the Corporation of the City of Toronto had at the time of the execution of the said agreement power to grant for a surface street railway."

. . .

Their Lordships think that in an Act of this description a provision of the nature mentioned is to be regarded rather by way of explanation and identification of the agreement which has been confirmed, than by way of creation of actual and independent rights. But, even if they were to be otherwise regarded, in their Lordships' opinion the statute merely expresses in clumsy and obscure language exactly the same conditions as those expressed in the original agreement. The right and privilege, if any, over the excepted portion of Queen street, which the Corporation of the City of Toronto, at the time of execution of the agreement, had power to grant, were the rights and privileges which were to commence when the existing franchise ended. It is quite true that, if that franchise ran its full length, apart from the Act of Parliament, there would have been no right or privilege which the corporation could grant at all. But the statute must be read in light of the fact that the agreement was thereby validated, and the right and privilege which the corporation had power to grant at the date of the agreement must be construed as meaning the right and privilege which the corporation had power to grant, assuming—for this was the whole basis of the agreement—that the agreement itself was legalised. The appellants urge strongly that this gave no effect to the words "if any," and that due effect can only be given to these by making the assumption that, in certain circumstances, no such rights or privileges could be enjoyed by the corporation; and this assumption can, they urge, only be satisfied by regarding the grant as one to take effect if the existing grants were void; but, if assumptions are to be made for which there is no warrant in the facts, it would be just as reasonable to assume that the period of the existing grant might cover, or be extended so as to cover, the whole period of thirty years, and in that case the words "if any" would have just as sensible a meaning as on the other hypothesis. In truth, the words are often needlessly used by way of caution, and it would be unreasonable to give them such weight as to destroy the obvious meaning of the statute or document in which they are contained.

Their Lordships expressed their agreement with the decision of the Court of Appeal in City of Toronto v. Toronto R. W. Co. (1905), 5 O.W.R. 130.

Appeal dismissed with costs.

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 12TH, 1916.

*RE KIRKLAND.

Will—Trust—Royalties from Sale of Books of Deceased Author—Life-tenants and Remaindermen — Apportionment between Capital and Income—Unmarketed Company-shares—Apportionment of Proceeds when Sale Effected.

Appeal by Agnes S. Gilchrist and Josephine Thornton, the life-tenants, from the judgment of MIDDLETON, J., ante 226.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. Gilchrist, for the appellants.

Hamilton Cassels, K.C., for the Toronto General Trusts Corporation, the trustees under the will of Jane Todd Kirkland.

F. M. Gray, for Knox College Ministers' Widows and Orphans Fund.

E. C. Cattanach, for the Official Guardian.

HODGINS, J.A., read a judgment in which he said that clause 2 of the will of Jane Todd Kirkland dealt with what she left as her own individual estate. She included what had been derived from income from her husband's estate, paid to her and not expended. This income was, therefore, money reduced into her possession, and it became in the hands of her executors part of the principal or corpus of her estate.

Clause 3 dealt by way of appointment with the rest of her husband's estate which she had not consumed. If there were accruing interest on mortgages or accruing dividends on stock, these would be included as part of the "residue of (her husband's) said estate," as to which she exercises her power of appointment. In the same way, the moneys arising out of the agreements between her husband and his publishers, even if similar payments had been treated as income during his life or her life, became after her death vested in the trust company under her appointment upon a trust to set apart and invest.

The case of Davidson's Trustees v. Ogilvie, [1909-10] Sess. Cas. 294, was not helpful.

The sums payable under the agreements represented the value

of literary works and their copyright. If they had been made payable in periodical and fixed instalments without interest, instead of sums made up of so much a volume in each edition when it came out or on each book sold, they might be treated as comparable to the securities of which In re Earl of Chesterfield's Trusts (1883), 24 Ch. D. 643, afforded an example. And, if so, the agreed mode of payment should cause no difference. But a sale and conversion of these particular securities would have been practically impossible, and they necessarily had to wait realisation in ordinary course.

Therefore, these deferred payments, whether treated as set apart or as assets whose realisation was postponed for the benefit of the estate, were within the rule stated by Street, J., in Re Cameron (1901), 2 O.L.R. 756, followed in Re Clarke (1903), 6 O.L.R. 551.

The appeal should be dismissed; costs of all parties out of the estate—those of the executors and trustees as between solicitor and client.

GARROW, J.A., concurred.

MACLAREN, J.A., was of opinion, for reasons stated in writing, that the royalties paid to the husband during his lifetime were income. They were the proceeds of his labour, and would be assessable as income. So also the moneys received by his widow after his death, from such sources, would be part of her annual income during the year in which she received them. The moneys properly fell within the terms of clause 2 of Mrs. Kirkland's will, by which she gave the income from her husband's estate absolutely to her sisters, and which fully complied with the latter part of sec. 30 of the Wills Act, R.S.O. 1914 ch. 120. Even if clause 2 were not applicable, the moneys would properly fall within clause 3 (k) of the will as being part of the income of the residue of the estate, and as such would properly belong to the life-tenants.

Upon this question the appeal should be allowed, and the whole of the payments under the agreement should be made over to the life-tenants.

Upon the other question raised, concerning the division of the proceeds of unmarketable shares, the judgment appealed from was correct and should be affirmed.

MAGEE, J.A., concurred.

In the result, the Court being divided upon the main question, the judgment of MIDDLETON, J., stood affirmed upon all points.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JULY 12TH, 1916.

RE HOBBS.

Will—Construction—Direction to Executors to Sell Land and Invest Proceeds—Sale of Land by Testator after Date of Will—Will not Revoked—Duty of Executors to Pay over Income from Estate to Widow during Lifetime—Distribution after Death of Widow.

Motion by the widow of Edward Hobbs, deceased, and by two of his sons, George and Robert, for an order determining certain questions arising upon the will.

The motion was heard in the Weekly Court at London.

Leonard Harstone, for the applicants.

P. H. Bartlett, for the next of kin who would have an interest in case of the intestacy of the testator.

J. W. Graham, for the executors.

FALCONBRIDGE, C.J.K.B., read a judgment in which he first set out clauses 3 and 4 of the will, as follows:—

"3. Until the expiration of the lease of my farm I direct my said executors to collect all the rent accruing due therefrom and after payment of interest on mortgage to pay the balance of rent to my said wife Sarah Hobbs during term for which same is leased. After the expiration of said lease I empower my said executors to sell my farm and out of the proceeds to pay off the mortgage on same and any other debts which I may have and the balance of money derived from such sales to invest in good mortgage security and to pay to my wife during her life or so long as she remains my widow the interest accruing thereon and so much of the principal as may be necessary to support and maintain her in the same manner as she was supported and maintained during my lifetime.

"4. After the death or marriage of my wife I direct my said executors to divide any money remaining among my three sons George Hobbs John Hobbs and Robert Hobbs share and share alike but should any of my sons predecease my wife or should any of them die before she remarries (in the event of her marriage) without leaving any children such son surviving then and in such case the money shall be divided between the remainder of my sons hereinbefore named."

Before his death, the testator sold the farm referred to, and took back from the purchaser a mortgage representing the equity which the testator had in the farm, constituting all the estate of the testator, except the subject of a gift and devise to the widow contained in the 6th paragraph of the will.

After the death of the testator, which took place on the 22nd August, 1903, the executors paid the widow yearly the interest on the said mortgage up to 1915, at which time a doubt arose whether they had authority under the will to continue the yearly payments to her.

John Hobbs, one of the sons named in paragraph 4 of the will, died in July, 1904, unmarried.

The questions for decision were:—

"1. Is the said Sarah Hobbs entitled, during her life or so long as she remains the widow of the said Edward Hobbs, to receive the interest upon his estate and so much of the principal as may be necessary to support and maintain her in the same manner as she was supported and maintained during the lifetime of the said Edward Hobbs?

"2. After the death or marriage of the said Sarah Hobbs, is the estate then remaining wholly divisible between George Hobbs and Robert Hobbs share and share alike?

"3. If, after the death or marriage of said Sarah Hobbs, the estate of the said Edward Hobbs is not wholly divisible between the said George Hobbs and Robert Hobbs, among whom and in what proportion is the same divisible?"

It was strongly contended, on behalf of the parties other than the widow and the two surviving sons, that under the authority of Re Dods (1901), 1 O.L.R. 7, the sale and conveyance were *de facto* a revocation of the will as to the land, and that there was therefore an intestacy. That case had been followed in several others; but these cases were distinguishable from the one in hand. There was here no devise of the land—there was only a power to the executors to sell and deal with the proceeds as directed. By his own act, the testator relieved the executors of the duty of selling, but the direction to pay over still remained. He simply relieved them of their duty to this extent, and they were still bound to obey the provisions of the will and continue to pay to the widow just as they did before the doubt arose in 1915.

The answers to the first and second questions should be in the affirmative.

Costs of all parties, fixed at $25 each, should be paid out of the estate.

SUTHERLAND, J. JULY 14TH, 1916.

CANADIAN HEATING AND VENTILATING CO. LIMITED v. T. EATON CO. LIMITED AND GUELPH STOVE CO. LIMITED.

Industrial Design—Registration—Infringement—Want of Novelty—Passing off—Imitation—Evidence—Right of Action against Seller—Trade Mark and Design Act, R.S.C. 1906 ch. 71, Part II., secs. 31, 35, 36, 45.

Action for a declaration that the defendants had infringed the plaintiffs' registered industrial design for a stove of the type of the "Quebec Heater," by manufacturing and selling stoves of the same pattern as the plaintiffs' stoves; for an order directing that all such stoves in the possession of the defendants and the patterns thereof should be broken up and destroyed; and for an injunction and an account.

The action was tried without a jury at Toronto.

H. W. Mickle, for the plaintiffs.

G. W. Mason and F. C. Carter, for the defendants.

SUTHERLAND, J., read a judgment setting out the facts. In Findlay v. Ottawa Furnace and Foundry Co. Limited (1902), 7 Can. Ex. C.R. 338, he said, the defendants had procured one of the plaintiff's stoves and caused a model to be made of it, with some minor alterations chiefly in the ornamentation and manufacture of the stove; and it was found that the weight of evidence went to shew that the defendants' design was an obvious imitation of the plaintiff's. In the present case, the plaintiffs asked that a like finding should be made; but, the learned Judge said, he had come to the conclusion from the evidence that the defendants' stove was not an imitation of or modelled from the plaintiffs' stove, but was an independent attempt by the defendant stove company to improve their own stove, keeping it as distinct as possible from the plaintiffs' and not seeking to imitate, but to differentiate. The defendant stove company had succeeded in doing so. Though there were similarities in size and general appearance, the differences were marked and distinct.

In Part II. of the Trade Mark and Design Act, R.S.C. 1906 ch. 71, dealing with industrial designs, there is no definition of a "design."

Reference to Hecla Foundry Co. v. Walker Hunter and Co.

(1889), 6 R.P.C. 554; Edmund's Law of Patents, 2nd ed. (1897), p. 427; Moody v. Tree (1892), 9 R.P.C. 333; Holden v. Hodgkinson Brothers (1904), 22 R.P.C. 102; Dover Limited v. Nürnberger Celluloidwaren Fabrik Gebrüder Wolff, [1910] 2 Ch. 25.

No specific case of deception or passing off had been proved. The stove was of a common form or type, long in use, to which the plaintiffs could not, by such an industrial design as theirs, and by making slight changes in external appearance and using a different form of grate, acquire an exclusive right under the Act.

So far as outward design was concerned, and apart from the general features of similarity in cylindrical form and colour, the two stoves appeared to the learned Judge to be substantially different in appearance; and he could not think that an intending purchaser of the plaintiffs' stove, who knew what he wanted, could be deceived by the appearance of the defendants' stove into buying it instead.

While, by sec. 45 of the Act, every certificate that an industrial design has been duly registered in accordance with the provisions of the Act shall be received in all Courts of Canada as prima facie evidence of the facts therein alleged, the prima facie case may be rebutted by shewing that there has been no legal registration: Partlo v. Todd (1888), 17 S.C.R. 196, 199.

The part of the description in the plaintiffs' design on which they lay stress is hardly the subject of an industrial design at all; and it certainly lacks novelty.

There has been no deceptive imitation or passing off, and no infringement of the plaintiffs' design.

The action, as against the T. Eaton Company Limited, who were charged only with selling, was dismissed at the trial, on the ground that, under secs. 31 and 35 of the Act, there was no remedy by action against them—the only remedy, if any, would be under sec. 36, the penal clause.

Action dismissed with costs.

MILLS v. FARROW AND LAZIER—SUTHERLAND, J.—JULY 10.

Fraud and Misrepresentation—Purchase of Land—Failure to Prove Misrepresentations—Reliance on Opinion rather than Allegations of Fact—Action for Rescission of Contract or Damages for Deceit.]—Action to rescind a contract for the purchase by the plaintiff of land near Winnipeg, Manitoba, on the ground of misrepresentations, or for damages for deceit. The action was tried without a jury at Toronto. SUTHERLAND, J., in a written judgment, set

forth the facts, and stated his conclusion as follows: "I cannot find that any of the alleged misrepresentations of fact have been proved. I have come to the conclusion that the plaintiff bought the property relying rather on the opinion and judgment of Lazier, whom he knew and regarded as a reliable and experienced friend, than on any of the alleged representations. I think any statements made by Lazier were honestly made and in substantial accordance with the facts." The plaintiff, in his testimony at the trial, did not assert that the defendant Farrow made any misrepresentations. Action dismissed with costs. D. J. Coffey, for the plaintiff. I. F. Hellmuth, K.C., and E. C. Cattanach, for the defendants.

GIRARDOT v. CURRY—KELLY, J.—JULY 10.

Executors—Action against, for Redemption—Oral Agreement with Testator—Evidence—Corroboration—Evidence Act, R.S.O. 1914 ch. 76, sec. 12—Trust—Mortgage—Sale under Power—Irregularities —Possession of Land—Limitations Act.]—Action for redemption of two parcels of land, or, in the alternative, for damages against the defendants the executors of John Curry, deceased, for alleged wrongful acts in disposing of these properties. The defendants Woollatt and the Essex County Golf and Country Club Limited, subsequent to such disposal, became owners of parts of these properties, and the defendant club was in possession of a considerable part of the land in respect of which redemption was sought. Upon sale proceedings under mortgages made by the plaintiffs, John Curry became the purchaser of both parcels. The plaintiffs asserted that the sale proceedings were irregular; and, even if they had been regular, Curry was prohibited by his relations with the plaintiffs from becoming the purchaser; that his purchase was a breach of trust as regarded them; and that he held the two parcels in trust for them, subject to payment of advances made to the plaintiffs. Curry died in March, 1912. The plaintiffs assumed the burden of proving the oral agreement on which they relied, and were obliged to furnish corroboration, the claim being against the executors of a deceased person: Evidence Act, R.S.O. 1914 ch. 76, sec. 12. The action was tried without a jury at Sandwich. KELLY, J., read a judgment, in which he set forth the facts at length, and stated his conclusions as follows: (1) there was no sufficient corroboration of the evidence of the plaintiff Ernest Girardot as to the oral agreement set up by the plaintiffs; (2) the relation between the plaintiffs and the deceased was that of

mortgagor and mortgagee, and not of cestui que trust and trustee; (3) that the sale proceedings were not irregular; (4) that there had been undisputed possession of the premises, adverse to the plaintiffs' title, for such time as to debar the plaintiffs. Action dismissed with costs. J. H. Rodd and F. D. Davis, for the plaintiffs. A. R. Bartlet, for the defendants the executors. G. A. Urquhart, for the defendant club. J. H. Coburn, for the defendant Woollatt.

CANADIAN PACIFIC R.W. CO. v. FOSTER—FALCONBRIDGE, C.J.K.B. —JULY 13.

Promissory Note—Action on—Defence—Failure to Establish—Onus.]—Action upon a promissory note for $1,400 signed by the defendant, tried without a jury at Toronto. The learned Chief Justice, in a written judgment, said that the onus of establishing his defence was upon the defendant; and the defence failed upon the facts. Judgment to be entered for the plaintiffs, after 15 days, for $1,400, with interest at 8 per cent. from the 25th March, 1914, until judgment, and with costs. John D. Spence, for the plaintiffs. G. G. Plaxton and R. O. Daly, for the defendant.

HAYDEN v. THOMPSON—BRITTON, J.—JULY 15.

Landlord and Tenant — Rent Payable in Kind—Distress for Rent—Sum of Money Named in Warrant—Acceleration Clause in Lease—Waiver of Right to Invoke—Excessive Distress—Damage —Chattel Mortgage.]—Action by a tenant against his landlord for wrongful and excessive distress and in trover as to goods and chattels not sold, but kept by the defendant. The action was tried without a jury at Kingston. BRITTON, J., read a judgment in which, after setting out the facts, he said that two important questions arose, but the determination of them might not be necessary.—The first question was, whether distress under a landlord's warrant could legally be made for rent payable in kind, under the special and particular terms of this lease. The defendant was entitled as of right to his share of the crop—he was entitled to have it set apart, and to assist in the division. If the defendant reckoned in money, and arrived at the conclusion that there was due to him for rent the sum named in the distress war-

rant, he did so without the knowledge or consent of the plaintiff. —The second question was, whether there was any rent due on the 10th September, 1915, when the warrant was issued. By the terms of the lease, the rent for the year would not fall due until the end of the year—the 1st October, 1915. The defendant invoked the acceleration clause in the lease by reason of an alleged attempt to dispose of or sell part of the property upon the leased premises, and also by reason of a chattel mortgage given upon part of the property. There was no such attempt to sell as would accelerate the rent coming due, within the meaning of the lease. The chattel mortgage was given with the defendant's knowledge; and there was a waiver by the defendant of any right he had to invoke the acceleration clause.—Dealing with the case, however, as if the defendant had the right to distrain—as if there was some rent due when the warrant issued and when seizure was made—it appeared that the defendant estimated the amount of rent due at $672.20; the property seized was, according to the appraisers, of the value of $884.25. According to the defendant's reconsidered estimate, the rent was only $376.83, so that there was excessive distress. The damages, however, upon this branch, were little more than nominal. But it was not necessary for the defendant to issue any distress warrant; his action was hasty and harsh. The amount of rent, taxes, and costs to which the defendant was entitled at the time of the seizure was $139.15. This was the result of a careful examination of the statements put in. The defendant received from the sale of the plaintiff's goods $213.50. The rent overpaid was, therefore, $74.35. The plaintiff was entitled to recover this $74.35; the value of meals, milk, and threshing, $29.18; damages for conversion of chattels, $383; damages for excessive distress, $25: in all, $511.53. The defendant should recover, on so much of his counterclaim as relates to trees, $25, and $10 for costs. The $35 is to be deducted from the $511.53, leaving $476.53 to be paid by the defendant, with costs on the Supreme Court scale. If there is any chattel mortgage made by the plaintiff and now in force against any of the property for which damages are assessed to the plaintiff, the defendant, upon payment of the amount due on the mortgage, not to exceed the full amount thereof, will be entitled to have the amount paid set off against the amount awarded to the plaintiff. J. L. Whiting, K.C., and J. A. Jackson, for the plaintiff. A. B. Cunningham and W. B. Mudie, for the defendant.