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HIGH COURT DIVISION.

BOYD, C. NOVEMBER 21ST, 1916.

HUTCHINSON v. STANDARD BANK OF CANADA.

Illegal Combination—Action to Set aside Agreement, Conveyance, and Mortgages—Failure of Proof.

This action was brought by Lillian Maud Hutchinson against the Standard Bank of Canada and H. T. McMillan for a declaration that certain mortgages and an agreement and conveyance made by the plaintiff were void and should be delivered up to be cancelled—the plaintiff alleging that the defendant McMillan combined with two other persons to obtain the execution of the instruments by her, she being without independant advice and incapable of understanding the nature and effect of the instruments.

The action was tried without a jury at Toronto.
W. R. Smyth, K.C. and J. F. Boland, for the plaintiff.
R. McKay, K.C. for the defendants.

THE CHANCELLOR:—The plaintiff's attack fails on lines of combination. I do not assume that the defendants ask for costs. I hope to give reasons later.

Endorsed on the record were the words: "Let judgment be entered dismissing action. J. A. Boyd."

[The pathetic hope was not realised. The learned and venerable Chancellor died two days after the above words were penned by his own hand. Nothing better illustrates his single-hearted devotion to duty than this his last official act, performed on his death-bed.]

FALCONBRIDGE, C.J.K.B. NOVEMBER 27TH, 1916.

RE CHAMBERS.

Will—Construction—Specific Bequests Followed by General Bequest—Modification or Revocation—Lapsed Legacy—Residuary Bequest—Devise of Real Estate Subject to Legacies—Executors—Sale of Land—Public Auction.

Motion by the executors, upon originating notice, for an order determining questions arising upon the will of Mary Elizabeth Chambers, deceased.

The clauses of the will upon which the questions arose were as follows:—

(1) I desire my executors hereinafter named to pay all my just debts funeral and testamentary expenses as soon as convenient after my decease.

(2) I will devise and bequeath unto my beloved niece Lillian Flindall . . . my household furniture bed and bedding and knick-knacks absolutely.

(3) I will devise and bequeath unto my said niece Lillian Flindall my real estate (which shall be sold to the best advantage by my executors) subject to the legacies hereinafter mentioned.

(4) I will devise and bequeath unto my niece Bessie (formerly Bessie Casey) the sum of $1,000 absolutely.

(5) I will devise and bequeath unto the children of my deceased sister Sarah Platt my personal estate subject to the legacies hereinafter named.

Then followed a number of specific bequests of personalty, one of which, a bequest of $200 to Alice Ward, had lapsed on account of her predeceasing the testatrix.

The questions submitted were as follows:—

1. Is the bequest in clause (2) of the will revoked or governed by clause (5)?

2. Is the real estate bequeathed in clause (3) subject to all the legacies mentioned thereafter in the will or only to clause (4)?

3. Is the bequest of $1,000 in clause (4) revoked or governed or affected by clause (5)?

4. Are not the children of Sarah Platt the residuary legatees?

5. Tenders having been called for by the executors for the real estate, and none having been received, are the executors now justified in selling the same by public auction?

6. Who is entitled to the lapsed share of Alice Ward?

The motion was heard in the Weekly Court at Ottawa.
W. McCue, for the executors.
H. A. O'Donnell, for Lillian Flindall.
J. E Madden, for the children of Sarah Platt.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that questions 1, 3, and 5 did not appear to present any difficulty and should be answered as follows: 1. No; 3. No; 5. Yes.

Question 2 was not so easy of solution; but, the Chief Justice said, he had come to the conclusion that he must give effect to the words as appearing on the face of the will. He could not see anything in the circumstances surrounding the making of the will from which he could draw any inference that the testator really intended the real estate to be subject only to the payment of the one legacy. The words were clear—"subject to the legacies hereinafter mentioned"—and they ought to be given their full and ordinary meaning. The answer to this question was, Yes.

Question 4 should be answered, Yes. The gift to the children of Sarah Platt was a gift of the residuary personalty; and, the legacy of $200 to Alice Ward having lapsed, those children should get the benefit. This answer also covered question 6.

The learned Chief Justice said that he had been asked by counsel for the executors to answer another question regarding the purchase by the deceased in her lifetime of some property at Swift Current; but he did not feel that he could give an answer to that question on the material at present before him.

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

MASTEN, J. NOVEMBER 27TH, 1916.

RE PHERRILL.

Will—Devise of Property not Owned by Testatrix—Benefits of True Owner under Will—Election—Compensation of Disappointed Devisees—Equitable Interest in Land — Subrogation.

Motion by the executors of the will of Hannah Pherrill for the advice and direction of the Court in regard to two questions arising upon the will.

The motion was heard in the Weekly Court at Toronto.
K. F. Mackenzie, for the executors and for Thompson David

Pherrill and Hannah Walton, assignee of Archibald George Pherrill.

W. J. McLarty, for James Albert Pherrill.

MASTEN, J., in a written judgment, said that all parties concurred in stating that James Albert Pherrill had acquired a good title by adverse possession to the whole of the six acres parts of which were devised by the testatrix to Thompson David Pherrill and Archibald George Pherrill. By the will certain benefits were conferred upon James; and the two questions were: (1) Is James put to his election? (2) If so, on what basis is the compensation to be awarded to the disappointed devisees to be computed?

It was contended on behalf of James Albert that, while he had acquired a title by possession to the whole of the six acres, the testatrix died possessed of an equitable interest therein, because she had in 1911 paid off the mortgage which was then standing against the six acres, and which was then discharged and not assigned to her, and that the devise to Thompson and Archibald must be taken to be of that equitable interest only. As to this contention, the learned Judge said that it was clear that what was devised by the will was not an equitable interest, but a certain specific two-acre lot to Thompson and a certain specific two-acre lot to Archibald. The testatrix, therefore, assumed to devise something to which (as agreed by all parties) she was not entitled; and consequently James was put to his election.

James electing against the benefits accruing to him under the will, those benefits were in equity to be treated as a fund out of which compensation must be made to the disappointed beneficiaries Thompson and Archibald.

The learned Judge declined to determine the basis of compensation upon the material before him; but expressed the opinion, upon the facts so far as they appeared, that the compensation due to Thompson and Archibald should be nothing less than the full value of the two acres devised to each of them.

The executors asserting no title to the six acres, and undertaking to remove any cloud on the title created by them, there should be a declaration that James is put to his election under the will, and that, if he elects against the will, Thompson and Archibald are each entitled to compensation out of the share coming to James under the will.

No costs of the application as between the contending parties; the executors to have their costs out of the estate.

CLUTE, J. NOVEMBER 28TH, 1916.

RE HONSBERGER.

Insurance—Life Insurance—Designation of Beneficiary—Alteration by Will—Construction of Will—Executors—Payment of Debts—Insurance Act, R.S.O. 1914 ch. 183, secs. 171 (3), 179 (1).

Motion upon originating notice by the executors of the will of John A. Honsberger, deceased, for an order determining questions arising as to the proper construction of the will in the administration of the estate.

The motion was heard in the Weekly Court at Toronto.

A. W. Marquis, for the executors.

J. A. Keyes for the widow.

F. W. Harcourt, K.C., for the infants.

CLUTE, J., in a written judgment, said that the deceased, on the 7th November, 1893, received a certificate of insurance for $1,000 in the incorporated Canadian Order of Foresters, in which certificate he designated his wife as beneficiary for one-third and directed that the remaining two-thirds of the insurance money should be paid to his executors.

His will contained the following clause: "I direct my executors to pay all my just debts, funeral and testamentary expenses, as soon as may be conveniently done after my decease. The balance of my estate, after my debts are paid, which consists of one thousand dollars, life insurance policy in the Canadian Order of Foresters, one roan mare, waggon, harness, and whatever personal property I may own, I bequeath to my daughter Carrie and my son Archie to be divided between them equally."

The testator died on the 15th May, 1914, leaving him surviving his widow and nine children, of whom five were infants under the age of twenty-one years. The two beneficiaries Caroline and Archibald were respectively nine and twelve years of age.

On behalf of the widow it was urged that, upon the true construction of the will, she was entitled as beneficiary to one-third of the $1,000 insurance; that this formed no part of the testator's estate, and was not intended to be bequeathed. Under the wording of the will, the learned Judge said, he could not take this view. He was of opinion that, according to its natural and true meaning, the two children Caroline and Archibald took the estate

subject to payment of the debts. The debts were not more than $200.

Under the Insurance Act, R.S.O. 1914 ch. 183, secs. 171 (3) and 179 (1), the testator had a right to alter the provision made for the wife and to limit the benefits of the insurance to the two children. Had the debts amounted to more than two-thirds of the insurance, it would have been necessary to consider whether there could have been any encroachment upon the one-third of the insurance, a trust having been created in respect of that in favour of a preferred class; but that question did not arise, on account of the small amount of the debts. See Re Wrighton (1904), 8 O.L.R. 630.

Costs out of the fund.

MULOCK, C.J.Ex., IN CHAMBERS. NOVEMBER 29TH, 1916.

*REX v. McEVOY.

Ontario Temperance Act—Conviction for Offence against sec. 42—Receiving Order for Liquor for Beverage Purposes—Effect of Transmission of Order to another Province—Sec. 139—Agent for Sellers of Liquor in another Province.

Motion by the defendant to quash a conviction made by the Police Magistrate for the City of Toronto for the offence of receiving an order for intoxicating liquor for beverage purposes, contrary to sec. 42 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Section 42 provides: "Every person, whether licensed or unlicensed, who, by himself, his servant or agent, canvasses for, or receives, or solicits orders for liquor for beverage purposes within this Province, shall be guilty of an offence against this Act and shall incur the penalties provided in section 59 of this Act."

James Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MULOCK, C.J.Ex., in a written judgment, said that the Distillers Distributing Company conducted in the city of Montreal, in the Province of Quebec, the business of receiving and filling orders for the sale of intoxicating liquor; and one Convey obtained and kept in his shop in the city of Toronto blank forms of

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

orders for the purchase of liquor. On the 7th October, 1916, one Bruce called at Convey's shop and asked McEvoy, the defendant, who was in charge, for a bottle of MacKenzie's Scotch whisky at 85 cents. Thereupon McEvoy produced one of the blanks and asked Bruce to sign it at the foot, which he did. McEvoy then filled in the blank with Bruce's order for the bottle of whisky and directed it to the Distillers Distributing Company. As filled up, the order read: "Please find $ for which deliver to me the following through E. J. Convey, carter . . . 1 qt. MacKenzie's Scotch mild, price 85 cents." Bruce paid McEvoy 85 cents for the whisky, 2 cents for the revenue stamp on an express order for 85 cents, and 3 cents for postage. McEvoy enclosed the order on the company and the express order for the money in an envelope addressed to the company, and gave it to Bruce, who posted it. McEvoy had signed the express order as agent for the Dominion Express Company. On the 11th October, the Canadian Express Company delivered to Bruce, in Toronto, a box, which had apparently come from Montreal, containing a bottle of whisky.

The learned Chief Justice said that the magistrate was right in holding that in receiving the blank from Bruce, signed by him, and filling it up, the defendant was guilty of the offence of receiving an order for liquor for beverage purposes within this Province.

This was not a "bona fide transaction in liquor between a person in the Province of Ontario and a person in another Province," within the meaning of sec. 139 of the Act. The offence was complete when the defendant received the order from Bruce; that he intended to send it to another Province to be filled did not undo the previous occurrence—the giving and receiving of the order.

Even if the defendant was acting as agent for the Distillers Distributing Company, he was still, within the meaning of sec. 42, a person receiving an order for liquor.

Motion dismissed with costs.

SUTHERLAND, J., IN CHAMBERS. NOVEMBER 30TH, 1916.

REX v. KNIGHT.

Criminal Law—Police Magistrate—Issue of Warrant of Commitment—Imprisonment of Defendant—Habeas Corpus—Motion for Discharge—Absence of Conviction—Minute of Adjudication—Suspended Sentence—Criminal Code, secs. 242A, 1081.

The Inspector of Children's Aid Societies for the County of Essex, on the 9th October, 1914, laid an information before the Police Magistrate for the Town of Kingsville, wherein it was sworn that on the 8th October, 1914, "and previous divers dates," the defendant "did unlawfully and wilfully neglect, and by reason of his drunkenness and disorderly habits did cause to be neglected, his two children Lulu Dodge and Delbert Dodge, both under the age of 16, he having the custody, charge, and care of the same, contrary to the form of the statute in such case made and provided."

The defendant was tried by the same magistrate for the offence so charged; he appeared before the magistrate, but was not defended by counsel, and no testimony was given on his behalf.

The magistrate found the defendant guilty, and endorsed on the information the following minute: "1 yr. in Central Prison with hard labour to take effect in 30 days unless you dispose of your property and move out of the community, also undertake to deliver the children to John Dodge for care." This was signed by the magistrate and dated the 9th October, 1914. The magistrate afterwards wrote under this minute the words "Sentence suspended."

No formal conviction was ever drawn up. On the 26th September, 1916, the same magistrate issued a warrant of commitment, reciting that the defendant had been convicted and adjudged to be imprisoned—"sentence being suspended until present date"—and directing that the defendant should be taken to gaol, etc.

Upon this warrant the defendant was arrested and imprisoned at the gaol in the town of Sandwich.

On the 31st October, 1916, he obtained a writ of habeas corpus, and on the return moved for his discharge.

J. H. Fraser, for the applicant.

Edward Bayly, K.C., for the Crown.

SUTHERLAND, J., in a written judgment, said that numerous grounds for discharging the defendant were urged.

The information should be considered to have been laid under sec. 242A of the Criminal Code (see 3 & 4 Geo. V. ch. 13, sec. 14).

The evidence before the magistrate was sufficient to warrant a conviction; but among the proceedings forwarded by the magistrate there was no conviction upon which the warrant of commitment could properly be based; and upon this ground alone the defendant should be released from custody.

The magistrate had no power to enter into such an arrangement or stipulation with the defendant as was disclosed by the minute of adjudication, and the disposition thus made of the case could not be considered an effective conviction.

If the suspension of sentence could be considered as having been made under sec. 1081 of the Criminal Code, the magistrate had not called upon the defendant to appear and receive judgment, and the warrant was prematurely and improperly issued.

Reference to Rex v. Siteman (1902), 6 Can. Crim. Cas. 224; Rex v. Taylor (1906), 12 Can. Crim. Cas. 244; Rex v. Robinson (1907), 14 O.L.R. 519; Robinson v. Morris (1909), 19 O.L.R. 633; Rex v. Harris (1911), 18 Can. Crim. Cas. 392; Rex v. Chitnita (1914), 22 Can. Crim. Cas. 344.

Order discharging the defendant from custody, with a clause protecting the magistrate.

LATCHFORD, J. NOVEMBER 30TH, 1916.

HISLOP v. CITY OF STRATFORD.

Assessment and Taxes—Assessment Roll—Area of Land—Duty of Assessor—Assessment Act, R.S.O. 1914 ch. 195, secs. 22, 43, 133—Local Improvement By-law—Validity—Municipal Act, 1903, sec. 672 (1).

Action for a declaration that certain assessments of the plaintiffs' lands in the city of Stratford for the year 1916 were invalid and void; that no taxes could be claimed thereunder; and that the taxes demanded of the plaintiffs by the defendants formed no charge or lien upon the plaintiffs' lands.

The action was tried without a jury at Stratford.

T. Hislop, for the plaintiffs.

R. S. Robertson, for the defendants.

LATCHFORD, J., in a written judgment, after setting out the facts and referring to secs 22, 43, and 133 of the Assessment Act, R.S.O. 1914 ch. 195, found that there had been in the assessment of the plaintiffs' property a substantial compliance with the requirements of the Act. The acreage of the portions of park lots 428 and 429 included with the house which the plaintiffs used as a private hospital was not stated in the assessment roll; but there was no evidence that the area was known to the assessor. It could not be accurately ascertained from a blueprint which was in evidence. An approximation could be arrived at, but only after determining by the use of a scale-rule the distances unstated on the plan and then making laborious computations of the numerous irregular areas. No such duty is cast upon an assessor. The particulars he is required to set down are such as are obtainable "according to the best information to be had after diligent inquiry." The assessor did all that the statute required him to do.

The plaintiffs also attacked a local improvement by-law, contending that the frontage and special rates were not set out in the by-law, but only in a schedule thereto; but the schedule was part of the by-law. The by-law was passed in 1910, under sec. 672 (1) of the Municipal Act of 1903, 3 Edw. VII. ch. 19, and it complied with all the material requirements of the Act.

There was a valid assessment for the general rate and for the local improvement.

Action dismissed with costs.

SUTHERLAND, J. DECEMBER 1ST, 1916.

ROCK & POWER MACHINERY LIMITED v. KENNEDY MACHINERY AND ENGINEERING CO.

Writ of Summons—Service out of the Jurisdiction—Contract—Place of Making — Place of Performance — Co-defendant Resident in Jurisdiction not Served — Rule 25 (e), (g) — Non-disclosure of Facts—Judgment—Proceedings Set aside—Costs.

Motion by the defendant company to set aside an order made by the Master in Chambers on the 12th January, 1916, allowing the plaintiffs to issue a concurrent writ of summons for service out of the jurisdiction on the defendant company, and to set aside the writ issued pursuant thereto, the service thereof upon the

defendant company, and all subsequent proceedings, including a judgment obtained by the plaintiffs against the defendant company by default, upon the ground that the defendant company is a foreign corporation carrying on business out of Ontario, and has no place of business or property therein, and that leave to serve process upon the defendant company was not authorised by any of the clauses of Rule 25, and upon other grounds.

One Renaud (resident in Ontario) was made a defendant as well as the company. The plaintiffs' claim against the defendant company for which the judgment was obtained was for $20,408 as a commission pursuant to an alleged contract.

The motion was heard in the Weekly Court at Toronto.

H. S. White, for the defendant company.

A. C. McMaster, for the plaintiffs.

SUTHERLAND, J., in a written judgment, stated the facts and said the order for service out of the jurisdiction could not be maintained under clause (*g*) of Rule 25, for it had not been shewn that Renaud, the defendant within Ontario, had been served. The only other clause which could be applied was clause (*e*), permitting service out of Ontario where the action is founded upon a breach within Ontario of a contract, wherever made, which is to be performed within Ontario. But the original contract, so far as disclosed, was made in New York, and the contract to pay commission was also apparently made there. There was nothing to justify a belief in the statement made on behalf of the plaintiffs when the first order was obtained, that payment of the commission was to be made at Toronto.

Reference to Phillips v. Malone (1902), 3 O.L.R. 47, 492; Weyande v. Park Terrace Co. (1911), 202 N.Y. 231.

The full facts were not disclosed to the Master when he made the order of the 12th January, 1916; nor to the Judge who heard the motion upon which judgment was obtained.

It was not a case in which the defendant company should merely be allowed in to defend as an indulgence, upon terms; the defendant company was entitled to have the proceedings set aside.

Reference to Collins v. North British and Mercantile Insurance Co., [1894] 3 Ch. 228; J. J. Gibbons Limited v. Berliner Gramophone Co. Limited (1913), 28 O.L.R. 620; Bain v. University Estates Limited and Farrow (1914), 6 O.W.N. 22.

Order made setting aside the order for service out of the jurisdiction and the subsequent proceedings, including the judgment, with costs payable by the plaintiffs to the defendant company.

MIDDLETON, J., IN CHAMBERS. DECEMBER 2ND, 1916.

*MAPLE LEAF LUMBER CO. v. CALDBICK AND PIERCE.

Security for Costs—Sheriff Executing Writ of Fi. Fa.—Person Fulfilling Public Duty—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 16.

Appeal by the plaintiffs from an order of the Master in Chambers requiring the plaintiffs to give security for the costs of the action of the defendant Caldbick, the Sheriff of the District of Temiskaming.

P. E. F. Smily, for the plaintiffs.
H. M. Mowat, K.C., for the defendant Caldbick.

MIDDLETON, J., in a written judgment, said that the action was for damages and to set aside a sale under execution; and that the sole question argued was the right of the defendant sheriff to security for costs under sec. 16 of the Public Authorities Protection Act, R.S.O. 1914 ch. 89, giving protection to any person sued "for any act done in pursuance or execution or intended execution . . . of any public duty."

It was determined in Creighton v. Sweetland (1898), 18 P.R. 180, that a sheriff executing a writ of fi. fa. is not an officer or person fulfilling a public duty within the meaning of R.S.O. 1897 ch. 89, sec. 1.

By a statute passed in 1899 (62 Vict. (2) ch. 7, sec. 3), it was declared that "a sheriff shall be deemed an officer" within the meaning of the Act—but the new Act did not interfere with the decision in the Sweetland case, for it did not declare that in the execution of a writ of fi. fa. the sheriff should be deemed to fulfil a public duty. It was never held in any reported decision that this amendment had any other than its plain effect, i.e., that in the discharge of his public duties, as distinct from his private duties, the sheriff was entitled to invoke the Act.

In the statute as now revised, R.S.O. 1914 ch. 89, a sheriff acting under an execution is to be deemed to be acting in the discharge of a public duty for the purposes of sec. 13 (see sub-sec. 4), so that any action must be brought within six months after the act complained of, but he is not afforded the further protection of security for costs under sec. 16.

Appeal allowed and motion for security for costs dismissed with costs to the plaintiffs against the defendant Caldbick in any event of the action.

MOFFATT v. BEARDMORE—BRITTON, J.—NOV. 27.

Contract—Conveyance of Land—Oral Agreement to Account for Proceeds of Land when Sold—Failure to Prove—Absence of Fraud—Account—Statute of Frauds—Limitations Act.]—The plaintiff, being the owner of certain lands, and being in debt to the defendants Beardmore & Co., conveyed these lands to them. He alleged that the lands were to be managed and sold, and the proceeds to be applied in payment of the debt owed by him, and upon such payment being made the balance of the proceeds were to be paid to him. The plaintiff claimed an accounting. The action was tried without a jury at Toronto. In a written judgment, the learned Judge said that no such bargain as was alleged had been proved. There was no fraud on the part of the defendants or any of them. In the absence of fraud, and in the absence of any such express or implied agreement, the Statute of Frauds and the Statute of Limitations barred the way to opening up the transactions of which the plaintiff complained. There was no evidence that the defendants possessed any knowledge of any facts unknown to the plaintiff. The action should be dismissed as against all the defendants, but, in the circumstances, without costs. R. H. Holmes, for the plaintiff. H. D. Gamble, K.C., for the defendants the Royal Trust Company. T. S. Elmore, for the other defendants.

COUNTY COURT OF THE COUNTY OF ONTARIO.

McGILLIVRAY, Co.C.J. NOVEMBER 27TH, 1916.

CITY OF TORONTO v. MORSON.

Assessment and Taxes—Income Tax—Exemption—Salaries of Federal Officers—Action for Taxes Amounting to Less than $200—Costs—Scale of—Assessment Act, R.S.O. 1914 ch. 195, sec. 95 (2).

This action came before a Divisional Court of the Appellate Division upon a reference by the Judge of the County Court, and was remitted to the County Court for determination on the 9th June, 1916. See 37 O.L.R. 369 and 10 O.W.N. 322.

The action was then tried in the County Court without a jury.

S. W. Graham, for the plaintiffs.

Robert A. Reid, for the defendant.

McGILLIVRAY, Co.C.J., in a written judgment, said that the plaintiffs sought to recover from the defendant $126.98 for municipal taxes for 1912 and 1914 upon the income received by the defendant as a Judge of the County Court of the County of York.

The defendant did not dispute the amount, but contended that the income derived from his office was exempt from taxation.

After full consideration, the learned Judge said, he felt that he should follow the decision in Abbott v. City of St. John (1908), 40 S.C.R. 597.

Under the provisions of sec. 95 (2) of the Assessment Act, R.S.O. 1914 ch. 195, the action might have been brought in a Division Court.

There should be judgment for the plaintiffs for $126.98 and costs on the Division Court scale, with the right to the defendant to set off his costs of defence, as between solicitor and client, to be taxed on the County Court scale.