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HIGH COURT OF JUSTICE.

BRITTON, J., IN CHAMBERS. NOVEMBER 29TH, 1909.

RE BENNETT, BENNETT v. PHILP.

Will — Construction — Provision for Lunatic — "Permanently Cured" — "May be Placed in her Possession" — Executors—Discretion—Administration Order.

Motion for administration of the estate of George Bennett, deceased.

G. N. Weekes, for Maggie Bennett.

J. O. Dromgole, for the executors.

BRITTON, J.:—The will of George Bennett, so far as material for the purpose of this motion, is as follows: "I give devise and bequeath to my executors hereinafter named all the real and personal property of what nature soever of which I may die possessed, for the sole and only benefit of my adopted daughter, familiarly known by the name of M. B. . . . That is to say, provided that my said adopted daughter M. B. remain in the asylum for the insane, the amount shall be invested for her benefit and the interest accruing from time to time paid to her if necessary. If at any time my said adopted daughter should be dismissed from the asylum and be pronounced permanently cured, the entire amount may be placed at once in her possession. If not pronounced permanently cured, it is my desire that the interest only be paid her, or such additional amount as my executors deem advisable."

The will was made on the 1st July, 1903. The testator died on the 22nd August, 1903. M. B. was placed in the asylum for the insane at London on or about the 10th October, 1902. There was no finding or declaration of her lunacy. On the 11th February, 1903, she was allowed to leave the asylum "on probation," as it was termed. She was therefore out "on probation" at the time of the making of the will. She afterwards returned to the asylum,

and was dismissed therefrom on the 14th August, 1903, as cured. She has not been "pronounced permanently cured." Probably no such pronouncement could be made by the medical superintendent of the asylum or by any one else. The medical superintendent and other medical men say she is cured. She is not now a person who should be in an asylum, and she is dismissed as cured—no longer at present in need of treatment, and that, I think, is what the testator intended in the use of the words "permanently cured." That being so, is M. B. now entitled as of right to have the whole amount paid over to her by the executors? The words are, "the entire amount may be placed at once in her possession."

I am of opinion that the word "may" does not necessarily mean "must." The power to transfer the administration of the estate is a discretionary one, and in this case, upon reading the affidavits and upon reading the letters of M. B., I do not think the discretion should be exercised in favour of granting an administration order. It will be in the best interests of M. B. that the money should be in the hands of the executors for investment and for payment over in such wise and prudent way as the executors deem advisable, not only the interest, but such additional amount as may be necessary for the comfortable living and maintenance of M. B. It may be that as to part of this money the rate of interest received is too small. The executors, willing as they say they are to act in the best interest of M. B., and at very little expense, should advise with M. B. and her solicitor, so that the most may be realised and at the least expense.

Motion dismissed. Costs of all parties to be paid by executors out of the estate, and I fix the executors' costs at $10.

BRITTON, J. NOVEMBER 29TH, 1909.

RE MULHOLLAND AND MORRIS.

Will—Devise—Legacies Charged on Land—Executors—Statute of Limitations—Vendor and Purchaser—Requisitions on Title—Waiver by Taking Possession.

An application by John Mulholland, the vendor, under the Vendors and Purchasers Act, R. S. O. 1897 ch. 134, for an order requiring the purchaser, John Morris, to complete his purchase of lot 10, Barrie street, in the city of Kingston, by paying the purchase money and interest, and declaring that the legacies mentioned in the will of Bridget Mulholland had ceased to be a charge on the land, and that, as the purchaser had taken possession of the land,

he was not entitled to insist that certain requisitions as to title should be complied with.

The lot was owned by Bridget Mulholland. She made a will on the 14th December, 1893, and a codicil on the 4th January, 1894, and died on the 2nd May, 1894.

By the will she devised this lot to the vendor, but subject to a charge of certain legacies. "Said six legacies . . . I hereby charge on my said lot on Barrie street, and I exempt all the rest of my estate real and personal from the same. On said lot I also charge the payment of my just debts, funeral and testamentary expenses, and I exempt the rest of my estate real and personal from all liability as to same. For the purpose of paying the sums charged on my said lot . . . and also my debts, funeral and testamentary expenses . . . I give my said executors full power to mortgage or sell said lot as they may think proper."

The vendor and two others were appointed executors.

By the codicil certain changes were made in the legacies.

No probate of the will was obtained.

One of the executors, Michael Brennan, died about 1896.

The surviving executors, of whom the vendor was one, as such executors, on the 24th May, 1899, conveyed this lot to the vendor, and he took possession and remained in possession thereof till the purchaser took possession.

The contract between the vendor and purchaser was made on the 24th December, 1908.

The purchaser required registration of releases of the legacies named in the will. The vendor answered that these legacies were barred by the Statute of Limitations.

The purchaser, about the 24th May, 1909, during negotiations about this and other requisitions, took possession and made changes in and improvements to the property.

H. W. Mickle, for the vendor.

G. M. Macdonnell, K.C., for the purchaser.

BRITTON, J.:—As to legacies being barred by the Statute of Limitations, an executor is not, as such, an express trustee: Lightwood on Time Limit, p. 172. . . .

Here the executors were not named as trustees, nor was the devisee-executor named as such. . . . There has been no assent to any legacy and no setting apart of any sum. "Where the money representing a legacy has not been actually raised, but is charged on land and secured by an express trust, the trust does not prevent the operation of the statute, and it is recoverable only within the same period as if there was no trust:" Lightwood, p. 173, and authorities

cited. Accepting the affidavit of the vendor, the legacies in question are barred. . . . The legatees are not before the Court, and consequently they are not bound by any decision upon that point. See also Re Davis, Evans v. Moore, [1891] 1 Ch. 119.

Whether the legacies are barred or not, the vendor has the right to sell; and the purchaser is not, in my opinion, bound to see to the distribution of the purchase money . . .: Re Henson, Chester v. Henson (1908), 77 L. J. N. S. Ch. 598, 601. . . .

There is a direct conflict between the purchaser and the vendor as to how or why the purchaser did take possession. I must deal with it as if the purchaser went into possession without any consent, or under any agreement, express or implied. . . . The purchaser, having taken possession and altered the property, is not entitled to insist that the requisition as above mentioned should be complied with.

The purchaser must complete his purchase by paying the purchase money and interest thereon at 5 per cent. per annum from the 24th May, 1909. . . .

The purchaser must pay the costs of this application.

As to possession, see Calcraft v. Roebuck, 1 Ves. Jr. 221.

DIVISIONAL COURT. NOVEMBER 30TH, 1909.

HORRIGAN v. CITY OF PORT ARTHUR.

Municipal Corporations—Contract with Hydro-Electric Power Commission—Powers of Council—Submission of Question to Electors—Invalidity—Necessity for Existing By-law—Statutes.

Appeal by the defendants from the decision of CLUTE, J., ante 169.

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

I. F. Hellmuth, K.C., for defendants.

H. Cassels, K.C., for plaintiff.

MEREDITH, C.J., after stating the facts, said that, according to the provisions of sec. 11 of the Power Commission Amendment Act, 9 Edw. VII. ch. 19 (O.), it is only when a question has been submitted to the electors of the municipality pursuant to paragraph 1a of sec. 533 of the Consolidated Municipal Act, 1903, and the amendments thereto, including the amendment made during the present (1909) session, as to a supply of electric power from the Commission, and the electors having voted in favour of a supply from the

Commission, that the council may authorise the entering into, and the corporation may enter into, the contract with the Commission, without submitting a by-law approving it for the assent of the electors, as provided by sub-sec. 1 of sec. 13 of the Power Commission Act.

A necessary pre-requisite to the taking of a vote of the electors under paragraph 1a is the passing of a by-law by the council providing for the submission of the question intended to be submitted, and no such by-law was passed with regard to either of the votes taken.

The vote of the 7th January, 1907, was upon a by-law submitted, as the preamble recites, under the Power Commission Act, 6 Edw VII. ch. 15, and the by-law purported to authorise the entering into of a contract with the Commission pursuant to that Act. This by-law was admittedly, as the law then stood, insufficient for the purpose for which it was passed, but the vote upon it was relied on as sufficient to bring the case within sec. 11 of the Act of 1909.

It is plain . . . that this contention cannot prevail. When the vote was taken there was no by-law in existence providing for the taking of the vote on the question with which the by-law deals. The course adopted with regard to this by-law was that provided by the Consolidated Municipal Act, 1903, with regard to by-laws requiring the assent of the electors, viz., to submit the by-law for the vote of the electors before it is finally passed (sec. 338), and the by-law, having been read a first and second time on the 12th December, 1906, was voted on on the 7th January, 1907, and was not finally passed until the 14th of that month. So that when the vote was taken—assuming that it otherwise might be treated as a vote within the meaning of sec. 11—there was no by-law in existence authorising the taking of a vote, but only a proposed by-law which did not become a completed by-law until it was finally passed.

For the same reason, the vote of the 4th November, 1909, cannot assist the defendants. There was no by-law passed pursuant to paragraph 1a, providing for the taking of that vote, and indeed what is relied on as being such a by-law has not yet become a by-law, for it has not yet been passed and authenticated as required by sec. 333 of the Consolidated Municipal Act, 1903.

Appeal dismissed.

TEETZEL, J., wrote an opinion to the same effect.

RIDDELL, J., referred to the words of sec. 11 of 9 Edw. VII. ch. 19, and said that the sole question was, "Does the by-law 881 answer the description?" On its face it does not. It purports to be submitted under 6 Edw. VII. ch. 15, and not under sec. 533

(1a) of the Consolidated Municipal Act, 1903. The reasoning of Clute, J., was wholly satisfactory, and there was only this to add: it might very well be that at the time by-law No. 881 was submitted many voters refrained from voting because it was apparent that the by-law, if passed, must be a mere nullity.

The learned Judge also stated that he was not to be taken as dissenting from the reasons for judgment given by the other members of the Court.

Appeal dismissed with costs.

MULOCK, C.J.Ex.D. DECEMBER 2ND, 1909.

ABBOTT v. TOWN OF TRENTON.

Municipal Corporation—Contract for Transfer of Water Power and Right to Supply Electricity to Company—By-law of Town—Invalidity—Necessity for Submission to Ratepayers—Municipal Act, 1903, sec. 565—9 Edw. VII. ch. 75, sec. 2 (1)—Public Utility—Prior Contract—Injunction.

Action by a ratepayer, on behalf of himself and all other ratepayers, of the town of Trenton, against the town corporation and the Trenton Electric Light Co., to set aside an agreement of the 26th July, 1909, entered into between the defendants, and also to set aside a by-law of the municipal council of the town authorising the making of the agreement, and for an injunction to restrain the defendant company from erecting the works contemplated by the agreement.

The town corporation erected a dam on the river Trent within the limits of the town, and the water obtained thereby was developed for the purposes of supplying the inhabitants of Trenton with electric power. By virtue of certain prior agreements, the defendant company became entitled to such water power, together with the right, within the town limits, to continue to develop therefrom electrical energy and to sell and distribute it to the inhabitants of Trenton.

The Dominion Government, for navigation purposes, decided to erect a dam on a site occupied by the first mentioned dam, and also to erect another dam, called No. 2, farther down the river, but still within the limits of the town; and, the town having entered into negotiations with the Dominion Government for the acquisition by lease of the right to the surplus water of dam No. 2, an order in council was passed on the 26th March, 1909, authorising such lease; and the Ontario legislature, by 9 Edw. VII. ch. 126, assented to 13th April, 1909, authorised the town corporation to enter into

such lease; but a lease had not at the time of the action been executed.

Under the authority of the by-law in question the town corporation entered into the agreement now attacked.

The agreement recited that the town corporation desired to have the surplus water derivable from dam No. 2 utilised in the generation of electricity in order that the corporation and the inhabitants might be able to obtain a supply of electricity; but did not desire to undertake the construction of the works necessary therefor; and provided for a transfer to the defendant company of the lease, in so far as it referred to dam No. 2, and the surplus water derivable therefrom, upon the terms and conditions set forth.

The plaintiff alleged that the town corporation had no power to enter into the agreement.

S. Masson, for the plaintiff.

R. McKay, for the defendant town corporation.

W. C. Chisholm, K.C., for the defendant company.

MULOCK, C.J., held that, irrespective of the Ontario Act 9 Edw. VII. ch. 75, it was not competent for the town, without the assent of the ratepayers, to transfer to the company their rights in the surplus waters of dam No. 2, when acquired under the contemplated lease from the Dominion Government to them. . . . In substance the town contracted to sell to the company their water privilege from dam No. 2, retaining no interest whatever therein, so that at no time thereafter should the town have any right or interest therein. Such a transaction comes within the provisions of the Consolidated Municipal Act, sec. 565. . . . No by-law having been submitted to the ratepayers, it was not competent for the corporation to sell. . . .

The by-law was also attacked on the ground that in contravention of the provisions of 9 Edw. VII. ch. 75, sec. 2, sub-sec. 1, requiring the assent of the ratepayers, which had not been obtained, it purported to grant to the company the right to construct and operate, within the limits of the town, light, heat, and power works or similar works, and to supply the town with power. . . .

The effect of sub-sec. 1 of sec. 2, as applied to the matters in issue here, is to prohibit the municipality granting to any individual or company the right (a) to construct any public utility in the municipality; (b) to operate the same; and (c) to supply to a corporation, for the purposes thereof, water, gas, electric light, heat, or power—unless and until a by-law setting forth the terms and conditions has received the assent of the electors.

Assuming that the defendant company are a company authorised by a general or special Act or by letters patent of the province of Ontario to operate the works contemplated by the agreement . . . such works are a public utility within the interpretation given by sec. 1 . . . and the provision of the agreement purporting to grant to the company the right to construct or operate such public utility, within the limits of Trenton, without the previous assent of the electors, is contrary to the provisions of sub-sec. 1 of sec. 2. . . .

The company take the position that, notwithstanding its language, the agreement of 26th July, 1909, conferred no right upon them to construct or operate such works or to supply the corporation with power, but that the company already possessed such rights under the agreement of the 1st March, 1899. . . .

Whatever were the rights of the parties prior to the agreement of 26th July, 1909, the town by that agreement purported to confer certain rights upon the company. Are the clauses conferring those rights meaningless, in effect null and void simply because perhaps without them the company might have been otherwise entitled to such rights? I think not. Parties may enter into a new agreement which in no way modifies an existing one; but, nevertheless, the new agreement constitutes a binding contract between them. So here, irrespective of the rights subsisting between the company and the town under the prior agreements, the two parties entered into the agreement in question, which, but for the statute, would constitute a valid agreement between them, and entitle the company to construct and operate a public utility in the town and to supply the town with power. If a ratepayer were to seek to prevent the company doing any of these things, they could plead the agreement in justification, which, if valid, would be a bar to the action. . . .

I think the agreement invalid, and it should be set aside, and the by-law of the council authorising its execution should be quashed, and the injunction should be made perpetual, but not to affect any rights of the company enjoyed irrespective of the agreement in question. The company to pay the plaintiff's costs.

LIDDELL, Co. C.J. OCTOBER 16TH, 1909.

BLONDIN v. SEGUIN.

Sale of Goods—Diseased Animal—Caveat Emptor—Examination and Inspection—Implied Warranty.

The action was brought in the 12th Division Court in the united counties of Stormont, Dundas, and Glengarry to recover damages for breach of warranty.

A cow was bought by the plaintiff from the defendant in June, 1909, after an examination and inspection of the animal by the plaintiff; when slaughtered, it was discovered that the animal had tuberculosis, and the carcass was confiscated by the government inspector as being unfit for food.

The sale was without any express warranty as to quality or condition.

LIDDELL, Co. C.J., referred to Emmerton v. Mathews, 7 H. & N. 858; Burnby v. Bollett, 16 M. & W. 644; Ward v. Hobbs, 4 App. Cas. 13; Benjamin on Sale, 7th Am. ed., p. 691, and American cases there cited; and said that he had come to the conclusion there was no implied warranty of the quality or condition of the animal sold, or that the meat was wholesome and fit for food, but that the purchaser buying, as the plaintiff did in this case, after examination and inspection, and without any express warranty, was affected by the doctrine of caveat emptor, and without an express warranty could not recover back his money as for a consideration that had failed.

Judgment for the defendant, but without costs.

KELLY v. ROSS—MASTER IN CHAMBERS—NOV. 26.

Pleading — Libel.] — Motion by the defendants for leave to amend their statement of defence: see ante pp. 48, 142. Leave was now given to add a defence of privilege. Leave was also given to add a paragraph stating in mitigation of damages that the plaintiff's character and reputation we not such that they would be injured by the publication complained of, which would be notice of the defendants' intention to give general evidence of reputation; but the defendants were not allowed to spread on the record the facts which they said supported the allegation as to character and reputation: Scott v. Sampson, 8 Q. B. D. 503, 507; Maughan v. Wright, 78 L. J. K. B. at p. 889; Moore v. Mitchell, 11 O. R. at p. 24; Wood v. Earl of Durham, 21 Q. B. D. 501; Odgers on Libel, 4th ed., pp. 377, 597, 735, 736. If it was sought to give evidence of facts in mitigation, this should be by notice under Con. Rule 488; if the general character or reputation of the plaintiff was to be brought in question, a defence should be put on the record. H. M. Mowat, K.C., for the defendants. W. R. Wadsworth, for the plaintiff.

BENNIE v. VERRALL—TEETZEL, J.—NOV. 26.

Master and Servant—Negligence.]—Action for damages for injuries sustained by the plaintiff, a servant of the defendant, while engaged in chopping hay with a machine provided by the defendant, by reason of alleged defects in the machine, which was nearly new and made by a reputable manufacturer. The trial Judge held that the plaintiff failed to establish that the machine was defective or unnecessarily dangerous, or that his injury was attributable to any negligence of the defendant; the injury was attributable to the plaintiff's own want of care in feeding the machine. If there was any defect in the machine, it was not brought to the knowledge of the defendant. No machine of this class is free from danger to a man who is not careful, but the employer is liable for the consequences not of danger but of negligence. Action dismissed, and with costs if asked for. D. O. Cameron and S. W. Burns, for the plaintiff. J. W. Curry, K.C., and H. C. Macdonald, for the defendant.

LECKIE v. MARSHALL—MACMAHON, J.—NOV. 26.

Contract—Option—Construction—Forfeiture.]—An action for a declaration of the forfeiture of an option contained in an agreement dated the 6th May, 1908, for the sale by the plaintiff Leckie to the defendant Marshall of certain mining properties in the Sudbury district for $250,000, of which $12,500 was paid in cash, and, among other payments, $37,500 was to be paid on the 6th May, 1909. By a subsequent letter of extension signed by the parties, 60 days' grace were allowed for the payment of each instalment of principal. The trial Judge construed the agreement and letter of extension as meaning that the option continued to exist and the $12,500 was not forfeited so long as the instalments stipulated for by the agreement and the letter of extension were paid as they matured; and, accordingly, the instalment of $37,500 was payable not later than the 5th July, 1909, and being tendered on that day on behalf of the defendants and refused by the plaintiff, the defendants were not in default. Action dismissed with costs. The $37,500 and any interest earned thereon to be now paid into Court, to be paid out to the party entitled. A. W. Anglin, K.C., and Glyn Osler, for the plaintiffs. G. F. Shepley, K.C., for the defendant Marshall. W. Nesbitt, K.C., and G. Bell, K.C., for the defendants the Grey's Siding Development Co. J. A. Worrell, K.C., for the defendants the Royal Trust Co.

MOFFAT V. GLADSTONE MINES LIMITED—MASTER IN CHAMBERS—NOV. 29.

Pleading — Amendment.] — The defendants were allowed to amend their statement of defence by alleging that, since its delivery, the settlement of an action brought by the plaintiff against W. had released the defendants and discharged them from any liability for the wrongful use and misuse of the plaintiff's report in question in this action: Con. Rule 312. Costs in the cause, Con. Rule 294 being applicable. R. C. H. Cassels, for the defendants. G. H. Kilmer, K.C., for the plaintiff.

MAZZA V. CITY OF PORT ARTHUR—DIVISIONAL COURT—DEC. 1.

Street Railway—Injury to Passenger—Negligence—Reference —Judgment—Report.]—Appeal by the defendants from the judgment of the Judge of the District Court of Thunder Bay after trial of the action before him under a reference directed by MAGEE, J. Instead of making a report, as required by 9 Edw. VII. ch. 27, sec. 3 (O.), the referee directed judgment to be entered. Counsel agreed that the direction of the Judge should be treated as a report, and the appeal was heard as an appeal from a report. The plaintiff, a passenger on the defendants' railway, was injured while alighting from a car, and brought this action to recover damages for his injuries, alleging negligence. The Court (MEREDITH, C.J.C.P., TEETZEL and RIDDELL, JJ.), thought there was sufficient evidence to warrant the conclusion that there was an invitation to the plaintiff to get off at the place where he attempted to alight, and that the defendants' servants were guilty of negligence in increasing the speed of the car and causing the jerk which threw the plaintiff off, and that that negligence was the cause of the accident. Appeal dismissed with costs. Featherston Aylesworth, for the defendants. T. D. Delamere, K.C., for the plaintiff.

REX V. MAJOR—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—DEC. 2.

Liquor License Act—Conviction—Motion to Quash—Remedy by Appeal—Refusal of Magistrate to Adjourn.]—Motion to quash a conviction under the Liquor License Act, for unlawfully selling intoxicating liquor in quantities exceeding the amount allowed to be sold under a hotel license, and so unlawfully selling without the

license therefor required. The motion was dismissed, but without costs, on the ground that the defendant's right to certiorari was taken away by statute, and so his right to move summarily under the new procedure: Rex v. Cook, 18 O. L. R. 415. The case was similar to Rex v. Lamphier, 17 O. L. R. 244; and there was nothing in that case to impair the decision in Rex v. Cook. If the Chief Justice had been at liberty to consider the objection that the magistrate unreasonably and without just cause refused the application for an adjournment, he would have considered this case, in its facts, more like Rex v. Luigi, ante 182, than Rex v. Lorenzo, ante 179. R. C. H. Cassels, for the defendant. J. R. Cartwright, K.C., for the Crown.

FELKER v. MCGUIGAN CONSTRUCTION CO.—MASTER IN CHAMBERS —DEC. 3.

Pleading—Embarrassing Reply.]—Action for trespass to the plaintiff's land arising out of the construction of a transmission line for the Hydro-Electric Commission. The defendants pleaded leave and license; that the trespasses were committed under a contract with the Hydro-Electric Commission; that the Commission was entitled under its statutory powers to enter upon the plaintiff's lands, and that the defendants were authorised by the Commission; and that the Commission was a necessary party. By her reply the plaintiff raised questions as to the rights of the Province of Ontario over the Niagara river. The Master considered that the paragraphs of the reply raising these questions were irrelevant, and therefore embarrassing, and ordered them to be struck out; costs in the cause. Reference to Smith v. City of London, 12 O. W. R. 675, 677; Florence Mining Co. v. Cobalt Lake Mining Co., 18 O. L. R. 275. R. H. Parmenter, for the defendant company. A. W. Ballantyne, for the other defendants. J. H. Moss, K.C., for the plaintiff.