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CARTWRIGHT, MASTER. JUNE 15TH, 1903.

CHAMBERS.

HOLME v. McGILLIVRAY.

Judgment Debtor—Examination of Transferee—Evidence of Transfer —Depositions—Affidavits.

Motion by plaintiffs for an order under Rule 903 for the examination of the defendant's wife as a transferee of property of defendant, against whom plaintiffs had a judgment for the recovery of money.

A. R. Clute, for plaintiffs.

R. S. Waldie, for defendant and wife.

THE MASTER.—The material consists of: (1) the usual affidavit of a member of plaintiffs' firm and the examination of the defendant as a judgment debtor; (2) affidavits of defendant and wife in answer; (3) affidavit of R. S. Holme in reply; (4) affidavit of D. L. Robb filed by defendant.

The plaintiffs also wished to use a copy of the depositions of defendant when examined as a witness last April in an action brought by the above named Robb against one Samis. To this Mr. Waldie objected, relying on the observations of Osler, J.A., in Ray v. Port Arthur, Duluth, and Western R. W. Co., ante 345, 347. I think the objection must prevail, and that this evidence cannot be looked at on this motion. . . .

The depositions of defendant . . . are amazing, and I shall certainly consider them incredible until some Court has been found to have accepted them. He states that, though he manages the whole business of McGillivray & Co. (which he says is his wife), and signs cheques in his own name, and looks after business for other incorporated com-

panies, yet he gets nothing for any of these services, even working for the companies, as he says himself, "for love."

Now, the importance of this is, that Mr. Holme in his second affidavit states that Mr. Robb had told him that the defendant had got $800 due him for services transferred to his wife, instead of himself. The affidavits of defendant and wife may be strictly correct, but they are identical in language, and do not refer in any way to this point. The only answer they have made is by filing an affidavit of Mr. Robb. . . . He . . . admits that defendant's wife "subscribed for $800 stock of the Daisy Petroleum Company, which was issued to her as the consideration for certain services rendered the company by the defendant, acting, I believe, for her." How this is to be reconciled with defendant's statements, I do not attempt to consider. One thing seems clear. If he rendered the services, as Mr. Robb states, and if he was not being paid anything by his wife, the transfer of the $800 stock to the wife must have been purely voluntary. Mr. Robb carefully refrains from saying that Mrs. McGillivray paid anything for the stock.

Under these circumstances, and looking at the undisputed facts, there can be no question that plaintiffs are entitled to the order.

[Gowans v. Barnet, 12 P. R. at p. 335, referred to.]

STREET, J. JUNE 15TH, 1903

CHAMBERS.

RE BRAY.

Will—Construction—Devise—" Heirs "—Estate in Fee Simple—" Or " —" And "—Condition in Terrorem.

Motion by Frances Bray, widow of Joseph Bray, for an order declaring the construction of his will, so far as his real estate was concerned, and whether an annuity given by the will was a charge on the real estate if the personalty should be insufficient.

Joseph Bray died on 17th January, 1902, leaving a will dated on the same day, which was admitted to probate. He bequeathed to his mother an annuity of $250, and as to the remainder of his estate his will was as follows: "To my wife, or to her heirs, as long as she remains my widow, all the remainder of my real and personal estate; and on her death or

her marrying again, in case of no heirs, the property is to revert to my brothers and sisters equally."

W. M. Douglas, K.C., for the widow.

F. W. Harcourt, for the infant.

G. E. Bray, Listowel, for the executor.

G. F. Macdonnell, for brothers and sisters of the testator.

STREET, J.—There is no authority for construing the word "heirs" in the devise as "children," without a much stronger context than is found here; "heirs" must receive its technical construction, and the word "or" must be read "and," with the result that the widow takes an estate in fee simple; the provision as to her marrying again must be treated as merely in terrorem, and the devise over to the brothers and sisters, being a remainder after a fee simple, and not an executory devise, fails. The annuity to the mother is not charged upon the real estate, but is to be paid out of the personalty.

Order accordingly. The widow to pay her own costs and those of the infant and of the brothers and sisters of the testator. The executor to have his costs between solicitor and client out of the personal estate.

CARTWRIGHT, MASTER. JUNE 17TH, 1903.

CHAMBERS.

LAWRENCE v. SMITH.

Costs—Refusal of Motion for Summary Judgment—Cross-examination on Affidavits—Substitution as Discovery.

Motion for summary judgment under Rule 603.

H. M. Mowat, K.C., for plaintiff.

W. D. McPherson, for defendant.

THE MASTER.—At the argument I held that the motion could not succeed in the present position of the authorities. But I reserved the question of costs until I could examine the material. Having done so, I think the costs should be to defendant in any event. See Warner v. Bowlby, 9 Times L. R. 13.

The cross-examinations on this motion can stand as the examinations for discovery. They seem to cover the whole ground on both sides.

CARTWRIGHT, MASTER. JUNE 17TH, 1903.

CHAMBERS.

MARSH v. McKAY.

Security for Costs — Defamation — Unmarried Woman — Trivial or Frivolous Action—Defence on Merits.

Motion by defendant for security for costs under R. S. O. ch. 68, sec. 5. in an action brought by an unmarried woman against the publisher of a newspaper. It was admitted that plaintiff was not good for costs.

S. B. Woods, for defendant.

T. H. Lloyd, Newmarket, for plaintiff.

THE MASTER.—The action is certainly not trivial or frivolous. Of the words complained of it cannot, in my opinion, be said that they are not capable of being used in the sense attributed to them in plaintiff's affidavit. The only question, therefore, is: Does defendant shew a good defence on the merits?

Here there can neither be a denial of publication nor a claim of privilege. Nor is there any possibility of a justification. . . . The motion fails.

Swain v. Mail Printing Co., 16 P. R. 135, Lennox v. Star Printing Co., ib. 493, and Paladino v. Gustin, 17 P. R. 553, referred to.

CARTWRIGHT, MASTER. JUNE 17TH, 1903.

CHAMBERS.

EVANS v. CLANCY.

Attachment of Debts—Assignment of Fund Garnished—Money Payable on Contingency—Validity of Assignment—Ascertainment of Fund before Attachment.

Motion by judgment creditor to make absolute an attaching order.

It was shewn that, prior to the service on the Ontario Jockey Club, the garnishees, the judgment debtor had assigned to the claimant all "prizes, stakes, purses, and moneys (if any) to which he should become entitled from the Ontario Jockey Club for winnings by any or all of (several horses) at a race meeting commencing 23rd May." This assignment was dated 16th May, and was received by the secretary of the club on 22nd May or thereabouts.

The attaching order was made on the 3rd June and served on the 5th June.

G. Grant, for the judgment creditor, contended that the assignment was void as being of property that was not in existence, and which might never come into existence.

W. N. Ferguson, for the claimant, contended that if the assignment would not have been good at law, it was a good equitable assignment.

A. W. Ballantyne, for the garnishees.

No one appeared for the judgment debtor.

THE MASTER.—In In re Clarke, Coombe v. Carter, 36 Ch. D. 348 (followed and approved by the House of Lords in Tailby v. Official Receiver, 13 App. Cas. 523) the Court of Appeal, without deciding that a general assignment of all future-acquired property could take effect, held that an assignment such as the present was good and could be enforced whenever the property came into existence and could be identified.

In the present case everything sought to be garnished had come into existence and been clearly ascertained before the attaching order was made. . . . It would seem, therefore, that the right of the assignee had become vested before plaintiff had even moved in the matter.

The order must be discharged with costs.

JUNE 17TH, 1903.

DIVISIONAL COURT.

REX v. COULTER.

Criminal Law—Procuring Person to Commit Personation—Liquor Act, 1902—Ontario Election Act—Summary Conviction—Validity.

Motion by defendant to make absolute a rule nisi quashing his conviction for an offence against sec. 168 of the Ontario Election Act by procuring one Rayner to vote in the name of another person at the voting upon the Ontario Liquor Act, 1902.

The motion was heard by BOYD, C., FERGUSON, J., MACMAHON, J.

J. Haverson, K.C., for defendant.

J. R. Cartwright, K.C., for the Crown.

Boyd, C.—The provisions of the Ontario Election Act as to corrupt practices are made to apply to the taking of the vote upon the question "Are you in favour of bringing into force the Liquor Act, 1902?" See sec. 91 of 2 Edw. VII. ch. 33 (O.)

The offence here charged and convicted of is, that defendant did on 4th December, 1902, induce and procure another person (Rayner) to vote at a polling place in the city of Toronto for the taking of that vote before Pim, deputy returning officer thereat, defendant well knowing that Rayner had no right to vote at the said time and place upon the said question.

The justification for the conviction is under sec. 168 of the Election Act, R. S. O. ch. 9, by which every person who induces or procures another to vote at an election, knowing that the other has no right to vote thereat, shall be guilty of a corrupt practice.

Reading this mutatis mutandis, as directed by sec. 91 of the Act of 1902, it will be seen that a person who procures another to vote upon the said question, knowing he has no right to vote thereon, shall be guilty, etc.

As I understand the objection, the conviction is argued bad because it is said that Rayner had a right to vote upon the question, though not a right to vote at the particular polling place, and therefore (it is said) this wrongdoing is not hit by the statute.

Examine, however, who has a right to vote upon the question. By the Act of 1902, sec. 2, "the persons entitled to vote upon the said question" are all whose names appear in the voters' lists. . . . as entitled to vote at a general election. . . . and whose names are duly entered on the poll books to be used for the purpose of voting under the Act.

Under sec. 10 different polling places are to be fixed by the returning officer for each subdivision of the municipality, and by sec. 20 a poll book for each subdivision containing the names of all persons entitled to vote therein shall be furnished for every polling place.

Section 24 provides for the appointment of a deputy returning officer for each polling subdivision, who is to open and hold the poll and to record in the voters' list in the poll book the particulars relating to electors voting at the polling places as by the Act directed.

By sec. 36 it is enacted that no person shall be admitted to vote unless his name appears on the list in the poll book (i.e., at each subdivision).

Section 38 indicates how the poll books are to be made up by the clerk of the peace, i.e., by entering in the poll book for each subdivision from the proper list of voters the name of every person appearing therefrom to be entitled to vote within the subdivision for which the said poll book is required.

By sec. 47, in case the name of a person entitled to vote is entered on the list of voters for more than one polling subdivision, he shall vote only at the polling place for the subdivision in which he resides.

These and other like sections indicate that the person entitled to vote upon the question must have his name appear upon the voters' list to be used in the particular subdivision where he tenders his vote, and without this he is not entitled to vote and is not to be admitted to vote upon the question.

That is what is struck at by sec. 168; the man who brings forward another, and induces him to vote at a polling place where he has no right to vote, the former knowing that the latter has no such right, is guilty of a corrupt practice.

MacMahon, J., gave reasons in writing for the same conclusion.

Ferguson, J., also concurred.

Rule nisi discharged with costs.

Cartwright, Master. June 18th, 1903.

CHAMBERS.

NORTHERN ELEVATOR CO. v. NORTH-WEST TRANSPORTATION CO.

Security for Costs—Compliance with Order for—Renewal of Stay of Proceedings—Payment into Court—Notice of—Effect as to Time for Delivering Defence—Rules 1204, 1207.

Motion by defendants to set aside the noting of the pleadings as closed for default of defence.

The statement of defence was due on the 9th June. On the previous day defendants' solicitors, who resided at Sarnia, instructed their agent at Sault Ste. Marie, where the proceedings were being carried on, to issue on præcipe an order for security for costs, which the agent did. On the following day, the 9th, the plaintiffs complied with the order

by paying $200 into Court. On the 10th June at 5.30 p.m. the plaintiffs notified defendants' solicitors that they had complied with the order. Defendants' solicitors at once telegraphed to their agent at Sault Ste. Marie to file a statement of defence which had been in his hands for a week awaiting instructions. The telegram was received at Sault Ste. Marie at 10.15 a.m. on 11th June. In the course of the forenoon the agent for defendants' solicitors attended at the office of the local registrar to file the statement of defence. and found that the pleadings had been noted closed about an hour before.

C. A. Moss, for defendants.

W. E. Middleton, for plaintiffs, contended that Rule 1204 must govern, and that as soon as security was given the stay was removed.

THE MASTER.—I think the motion must be allowed. As I read the Rules applicable to this question, as soon as the order was issued on the 8th, a stay took place. Service of notice of payment into Court was not made until after 4 p.m. on the 10th, which was only equivalent to service on the 11th. If I were obliged to take that position, I would hold that defendants had all the 12th on which to file their defence. At any rate plaintiffs acted prematurely in noting the pleadings closed at 10.10 a.m. on the 11th. To hold otherwise would render nugatory the direction in Rule 1207 requiring service of notice of payment into Court. The reason of this is plain. The party taking out the order is entitled to a reasonable time to ascertain if this has really been done or not, and been done correctly, as well as to proceed with due diligence in the action; and for that purpose he should at least have one day. Otherwise, and if the contention of plaintiffs is correct, cases of unnecessary hardship might constantly be occurring. . . . It would be idle to direct service of a notice unless it was to have some effect.

The motion must be allowed, and plaintiffs must pay the costs of their experiment in any event.

MACMAHON, J. JUNE 19TH, 1903

TRIAL.

CARPENTER v. PEARSON.

Promissory Note—Action on — Defence — Misrepresentations—Stock Transactions—Margins—Absence of Fraud.

Action to recover $1,446.58, balance due on a promissory note made by defendant, dated 15th May, 1901, for $1,600,

payable to plaintiffs or order one month after date. The plaintiffs (Carpenter & Son) were stock and grain brokers in Toronto, and they alleged that they were, at the time the transactions leading up to the giving of the note were entered into, acting as agents for F. L. Camp & Co., who carried on a brokerage business in Buffalo up to the 30th April, 1901, when they failed. The defence was that defendant gave plaintiffs a number of orders to purchase and sell certain shares of stocks and bushels of grain, and plaintiffs informed him that they had purchased and sold in accordance with such orders; that in April, 1901, plaintiffs reported that in the transactions which were then outstanding there had been a large loss, and that a large sum of money was necessary to re-margin the transactions; that defendant, relying on such representations, gave the note in question as a security for margins in respect of such transactions, and not as an acknowledgment of any definite indebtedness to plaintiffs; that he subsequently discovered that the representations of plaintiffs that the transactions were actually made, were not true, and he then demanded back his note. He now counterclaimed for delivery up of the note and a return of moneys paid, etc.

G. Lynch-Staunton, K.C., for plaintiffs.

W. R. Smyth, for defendant.

MacMahon, J., held, upon the evidence, that Camp & Co. were simply acting as plaintiffs' agents in receiving orders for the purchase and sale of stocks; that the chief losses on defendant's account occurred in respect of a purchase of 10,000 bushels of May wheat at 77 cents and a purchase of 20,000 bushels of May wheat at $76\frac{5}{8}$ cents, alleged to have been made on the 18th March, 1901, in respect of which plaintiffs, at the request of defendant, remitted to their agents in Buffalo from time to time large sums in order to re-margin these purchases; that, although the margins sent by plaintiffs to Camp & Co. were narrow, and seemed to suggest bucket-shop dealings, it could not be found on the evidence that plaintiffs were aware that Camp & Co. had bucketted the orders given for the wheat; that defendant, when he gave the order for the purchase of the grain, knew it would have to be transmitted to a broker in Buffalo or Chicago, and he admitted that it was on a "keep good" order, that is, that plaintiffs were to advance the money to keep the deal good as the margins were called for. Therefore. that. unless it could be said that plaintiffs did not believe the transactions were bona fide and valid, and so were guilty of fraud in re-

mitting on behalf of defendant the money to re-margin the deals, the defence failed. Judgment for plaintiffs for $1,446.58 with interest and costs. Counterclaim dismissed with costs.

MacMahon, J. June 19th, 1903.

TRIAL.

McFADYEN v. McFADYEN.

Will—Action to Set aside—Want of Testamentary Capacity—Undue Influence—Findings of Judge—Costs out of Estate—Conduct of Testator.

Action for a declaration that a certain document dated 2nd September, 1902, purporting to be the last will of Angus McFadyen, of the township of Fenelon, farmer, should not be admitted to probate because of undue influence and want of testamentary capacity. This will gave the bulk of testator's property, worth about $3,000, to his nephew, the defendant John S. McFadyen. The testator died on the 14th September, 1902, being then about 70 years old. His wife died in the preceding June. They had been married at least forty years. There were no children of the marriage. In 1884 he made a will giving his wife a life estate in all his property, with a devise in remainder to his step-daughter.

G. H. Watson, K.C., and G. H. Hopkins, Lindsay, for plaintiffs.

E. E. A. DuVernet and J. McSweyn, Lindsay, for defendant John S. McFadyen.

H. O'Leary, Lindsay, for the other defendants.

MacMahon, J., found upon the evidence that the testator, when he executed the will of September, 1902, had full testamentary capacity and understood the contents of the will, and that he was not unduly influenced. But the conduct of the testator between the 21st and 29th August was somewhat strange, and that, coupled with the fact that he was an inmate of John S. McFadyen's house from the 29th August until his death, may have provoked the litigation, and it was not wholly unjustified. Costs of plaintiffs out of the estate. See Orton v. Smith, 3 P. & D. 23.

STREET, J. JUNE 20TH, 1903.

TRIAL.

McMILLAN v. ORILLIA EXPORT LUMBER CO.

Chose in Action—Assignment of—Action by Assignee—Defective Notice of Assignment—Costs.

Action and counterclaim tried at Sault Ste. Marie. After hearing the evidence the learned Judge dismissed the counterclaim and all of the plaintiff's claim, except his claim of $184.93, being a sum of money owing by defendants to one James Hurdle, which plaintiff alleged had been assigned to him, as to which judgment was reserved. The facts with regard to it were as follows. One Hollway was an inspector and salesman for defendants, and before 22nd July, 1902, he had purchased from Hurdle a quantity of timber for defendants, and they were indebted to Hurdle in $184.93 for it. On 22nd July, 1902, Hurdle made out his account against defendants in detail, and at the foot of it signed an order, addressed to defendants, "Pay to order of J. W. McMillan (plaintiff) above amount, $184.93." Plaintiff a few days afterwards drew on defendants for the full amount of his claim in the present action, $541.46, including the Hurdle claim. This draft was presented to defendants on 1st August, 1902, and they wrote on the same day to plaintiff to say that they could not reconcile the amount with their figures, and to ask for a detailed statement. The plaintiff sent defendants a statement, part of it being, "To amount of Jas. Hurdle, order for lumber bought of Hollway, $184.93." The statement was enclosed in a letter to defendants, dated 7th August, 1902, in which plaintiff said: "I attached a copy of account to draft and also an order which I had from Jas. Hurdle, from whom Mr. Hollway bought oak lumber to the amount of order given me." It appeared from the detailed account of Hurdle against defendants that only $124.80 of the amount was for oak lumber, the balance being for basswood lumber.

STREET, J., held, on the evidence, that, if Hurdle's order was ever attached to the draft on defendants, it was not so attached at presentation, and the only notice to defendants of its existence was the mention of it in the account which defendants received from plaintiff in the letter of 7th August and the reference to it in that letter. The order amounts to an equitable assignment of Hurdle's claim against defendants: Hall v. Prittie, 17 A. R. 306; but plaintiff did not

before action give express notice in writing to defendants so as to give himself the right to sue without joining Hurdle as a party. To enable the assignee to sue alone, the notice must be express notice, and it must be in writing; there should be nothing equivocal about it, nothing to leave the debtor in doubt as to whether the whole or only a part of it had been absolutely assigned. Therefore, this part of the action must also be dismissed, but without prejudice to the right of plaintiff to bring another action to recover the amount.

Two actions were brought upon the different causes of action which were considered at the trial and in the present judgment. These actions were both begun in the District Court of Manitoulin. After issue joined they were consolidated by order and removed into the High Court and directed to be tried at Sault Ste. Marie, defendants agreeing to pay the additional witness fees incurred by change of venue from Gore Bay. One of the actions related only to the Hurdle debt. Defendants should recover their costs of defence as if the only action had been one upon the Hurdle claim, and these costs should be taxed on the District Court scale. The costs of the motion to consolidate, etc., should be taxed to them on the High Court scale. Their witness fees should be no greater than if the action had been tried at Gore Bay, and plaintiff may set off the amount of the increased expense of taking his witnesses to Sault St. Marie. No order as to the costs of the other causes of action or the counterclaim.