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FALCONBRIDGE, C.J. NOVEMBER 14TH, 1902.

TRIAL.

COBURN v. HARDWICK.

Negligence—Playing Dangerous Game on Public Highway—Permitting Infant of Tender Years to Engage—Injury to Infant—Liability of Person Directly Causing the Injury—Contributory Negligence.

Action on behalf of Alexander Coburn (an infant of tender years, residing with his father at Falls View, in the township of Stamford), by his father and next friend, to recover $1,000 damages for personal injuries received by reason of the defendant, a wholesale coal merchant residing at the town of Niagara Falls, throwing a large iron ball which struck plaintiff on the right hand, lacerating the flesh and breaking a finger bone.

G. Lynch-Staunton, K.C., and F. W. Griffiths, Niagara Falls, for plaintiff.

T. D. Cowper, K.C., for defendant.

FALCONBRIDGE, C.J.—Two or three acquaintances of defendant were amusing themselves one afternoon in June last, by standing on the sidewalk on a public street in the village of Niagara Falls, and throwing or "putting" an iron ball or shot weighing about 23 pounds, across the road. They were able to "put" the ball some 30 odd feet before it would reach the ground; then the ball would naturally continue its course across the remainder of the street and the boulevard and sidewalk. There was no sharp or perpendicular kerb at the boulevard, but only a gentle rise of ground from the travelled highway to the further limit of the street, which was about 60 feet wide. The plaintiff was one of the usual attendant crowd of small boys, of whom there were eight or ten present, and these boys, as soon as the ball would strike the ground, would run to field or stop it, and bring it back to the men. The defendant came along and engaged in the pastime, putting or throwing two or three balls, the last of which, while the plaintiff was endeavouring to stop it, crushed and lacerated his

finger against a hydrant. A man named Cook was standing on the east or further side of the road to see how far the different competitors would throw the ball, and he swore that he warned the boys more than once to keep away or they would get hurt. But he did not drive the boys away or otherwise prevent their touching the ball.

It was plain upon the evidence, notwithstanding the warning which Cook said he gave, that the boys were permitted, if not encouraged, to stop and bring back the ball to the players. The plaintiff denied having heard any warning from Cook, and said that the other men asked the boys to stop the ball. The plaintiff is a bright boy of ten. He is of sufficient age and discretion to be capable of some care of his own safety, but, having regard to the degree of capacity of which he is possessed, to the natural curiosity and officiousness of a boy, and to the surrounding circumstances, I find him not guilty of contributory negligence. I find the defendant guilty of negligence causing the accident. It was negligent and improper of him to indulge in such a pastime on the public street, and to encourage or allow a small boy, who was lawfully thereon, to meddle with the ball.

I refer to Smith v. Hayes, 29 O. R. 292; McShane v. Toronto, Hamilton, and Buffalo R. W. Co., 31 O. R. 186; Ricketts v. Village of Markdale, 31 O. R. 628; American and English Encyc. of Law, 2nd ed., vol. 7, p. 409; Merritt v. Hepenstal, 25 S. C. R. 150; Jewson v. Gatti, 2 Times L. R. 441; Powers v. Harlow, 53 Mich. 507, 51 Am. R. 154; and article on the "Allurements of Infants," 31 Am. Law Review, p. 891.

Judgment for plaintiff for $175 and County Court costs, without any set-off of costs by defendant. Money to be paid into Court or to the official guardian, to be paid out to, or for the benefit of, the infant plaintiff by or under the discretion of the official guardian.

MEREDITH, C.J. OCTOBER 24TH, 1902.

CHAMBERS.

HARRIS v. HARRIS.

Pleading—Statement of Claim—Action for Declaratory Judgment—Statement of Reasons for Seeking Relief—Embarrassment.

An appeal by plaintiff from the order of the Master in Chambers (ante 684) striking out paragraphs 6, 7, 8, and 10 of the statement of claim.

The plaintiff alleged a lawful marriage and asked a declaration of validity of it, on the ground that in an action in the High Court, to which she was not a party, it had been determined that the marriage was not lawful. The Master

held that the setting out in the statement of claim of the reasons for which she asked to have her marriage declared lawful was embarrassing, and struck out certain clauses.

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

D. L. McCarthy, for defendant Elizabeth Harris.

MEREDITH, C.J., said that he could not conceive what good purpose was served by making such an application as this; there would be no embarrassment in having these clauses on the record, and no additional expense would be occasioned except by this application; the Master dealt with the matter on a wrong principle; there is nothing improper in the plaintiff putting upon the record a statement of the reasons why she has come to the Court seeking a declaratory judgment without any consequential relief.

Appeal allowed, and motion dismissed. Costs here and below to be costs in the cause.

NOVEMBER 15TH, 1902.

DIVISIONAL COURT.

KELLY v. POLLOCK.

Pledge — Bailment of Animal — Pasturage — Subsequent Advances— Distinction between Pledge and Chattel Mortgage.

Appeal by Kelly, the judgment creditor, from a decision of the Judge presiding in the 1st Division Court in the county of Lambton in favour of the claimant, McGregor, in an interpleader issue, and from the Judge's order refusing a new trial. The appellant under an execution against the judgment debtor, Pollock, had seized a mare called "Pigeon" and her foal, and another mare called "Silver," all in the possession of McGregor, who claimed to be entitled to hold them as against the judgment creditor. The Judge below decided in favour of the claimant as to all the goods in question, holding that there was a valid pledge of them to the claimant by the judgment debtor

J. H. Moss, for appellant.

D. L. McCarthy, for claimant.

The judgment of the Court (STREET, J., BRITTON, J.) was delivered by

STREET, J.:—The appellant abandoned upon the argument his claim to "Pigeon" and her foal and insisted only on his claim to "Silver." The facts were, that the judgment debtor placed "Silver" with the claimant to be pastured at a fixed price per month, for which it was agreed that

the claimant should be entitled to hold her. After some months the judgment debtor obtained an accommodation note for $60 from the claimant upon the understanding that he was to hold the mare as security for the payment of the note as well as of the pasturage, and with the further express understanding that if the claimant should be called on to pay the note, the mare was to be his.

The distinction between a mortgage and a pledge of chattel property is well recognized: Ex p. Hubbard, 17 Q. B. D. 690; Hilton v. Tucker, 39 Ch. D. 669. The essential distinction is, that in a mortgage there is a transfer of the property, but not necessarily of the possession; in a pledge, the possession must pass, but there is no transfer of the property in the goods; if both the property and the possession pass, the transaction is a mortgage: Story's Eq. Jur., sec. 1030.

In this case there was no idea in the original transaction as to the pasturage that the property in the mare should pass, but only the possession, and the transaction with regard to the note did not involve any change in this respect. The stipulation as to the change of ownership in the event of default in payment of the note affords quite as strong an argument in favour of the view that the entire ownership was to remain in the judgment debtor meantime, as of any other deduction which might be drawn from it. The transactions between the judgment debtor and the claimant took place at a period sufficiently long before the judgment creditor's rights were brought into question, to do away with any suspicion of a lack of good faith. The Judge below was correct in holding the transaction to have been one of pledge.

Appeal dismissed with costs.

NOVEMBER 15TH, 1902.

DIVISIONAL COURT.

BIRNEY v. TORONTO MILK CO.

Company—Hiring of Manager—Company not Going into Operation—Absence of By-law or Contract under Seal—Claim for Payment for Services—Appointment of Director as Manager—Salary—Necessity for Confirmation by Shareholders.

Appeal by defendants from judgment of LOUNT, J., who tried the action without a jury at Toronto, in favour of plaintiff for $495 and costs, the amount claimed by plaintiff for salary as manager of defendants' business for the first 18 weeks. The defendants denied any contract binding upon them. The company never went into operation, but plaintiff alleged that he subscribed for $12,000 of the stock of the company

and that it was paid up by commission for his services, and that he earned his salary as manager by his efforts to induce certain milkmen to go upon the board and to advance the money necessary to enable the company to begin business.

The appeal was heard by a Divisional Court composed of STREET, J., BRITTON, J.

J. B. O'Brian, for defendants.

J. M. Godfrey, for plaintiff.

STREET, J.:—The plaintiff is not entitled to recover upon a contract with the company, because no by-law for his appointment as manager of the company was passed, and no contract was made with him under the seal of the company. The Ontario Companies Act, R. S. O. 1897 ch. 191, sec. 47, contemplates that such appointment should be made by by-law, and, apart from the statute, whatever latitude may be allowed to trading corporations in the manner of appointment of mere servants, or in the case of casual or temporary hirings, appointments of an important character, such as that of the manager of a company, in order to be binding must be under seal: Re Ontario Express Co., 25 O. R. 587; Tunston v. Imperial Gaslight Co., 3 B. & Ad. 125, 132; Church v. Imperial Gas. Co., 6 A. & E. 861; Young v. Leamington, 8 App. Cas. 517; Lindley on Companies, 6th ed., p. 269 *et seq.*

The plaintiff is further prevented from recovering by the effect of sec. 48 of R. S. O. ch. 191, which requires a by-law for the payment of a director—and plaintiff was a director—to be confirmed by a general meeting. This section requires the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves, whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company. . . . The section should be given a broad and wholesome interpretation, and should be held wide enough to prevent a president and board of directors from voting to themselves or to any one or more of themselves any remuneration whatever for any services rendered to the company without the authority of a general meeting. Dictum in Re Ontario Express Co., supra, as to this, not followed.

BRITTON, J.:—There was no properly authorized contract under the seal of the corporation, and this is not a case in which plaintiff can succeed upon an executed consideration. The plaintiff as promoter was endeavouring to enable the company to become a going concern. That was all he

did, and for this he received the paid-up stock. The company never was in a position to require the services of a manager, and plaintiff knew this. Until the company was ready to buy, sell, and deal in milk, there was to be no actual hiring of plaintiff.

Appeal allowed with costs and action dismissed with costs.

BOYD, C. NOVEMBER 17TH, 1902.

TRIAL.

FARLEY v. SANSON.

Landlord and Tenant—Lease—Renewal—Arbitration—Lessee—Naming Arbitrator under Protest—Landlord Appointing Sole Arbitrator.

Action by the lessee under a lease from defendants, the Rector and Wardens of Trinity Church, Toronto, for a declaration that plaintiff is not obliged to take a renewal of the lease, and to restrain defendants from proceeding with an arbitration by a sole arbitrator.

Delamere, K.C., for plaintiff.

A. E. O'Meara, for defendants.

BOYD, C.:—The plaintiff contended that there was no right to arbitrate as to the new lease on account of the conduct of the lessors, and was unwilling to arbitrate till this was determined. The defendants, however, urged on the preliminaries for the purpose of having arbitrators appointed, and to this plaintiff responded by naming an arbitrator under protest so as to save his rights in regard to his contention. This nomination defendants refused to accept and proceeded to appoint a sole arbitrator, proceeding as if plaintiff had made no appointment. In my opinion the defendants had no power to appoint a sole arbitrator, and the Court had jurisdiction to restrain the prosecution of the matter by the sole arbitrator. The arbitration might have proceeded in the ordinary form of three arbitrators, notwithstanding the protest of the plaintiff, who might at the end have had the benefit of his legal objection: Ringland v. Lowndes, 17 C. B. N. S. 514; Direct Cable Co. v. Dominion Telegraph Co., 28 Gr. 648; Kills v. Moore, [1895] 1 Q. B. 252; North London v. Great Northern R. W. Co., 11 Q. B. D. 30; Beddow v. Beddow, 9 Ch. D. 89; Farrar v. Cooper, 44 Ch. D. at p. 327.

Judgment declaring that plaintiff is obliged to take a renewal of the lease and restraining defendants from proceeding before the sole arbitrator. No costs.

MacMahon, J. November 18th, 1902.

CHAMBERS.

Re McKENZIE.

Will—Construction—Annuities—Setting apart Fund for—Deficiency of Income — Encroaching on Principal — Rights of Residuary Legatees.

Motion by way of originating notice under Rule 938, by Catharine McKenzie and Isabella Henderson, annuitants under the will of William McKenzie, who died on 3rd January, 1894, at the village of Morrisburg, having made his will on the 6th September, 1893, for a summary order declaring the construction of the will.

The testator made specific bequests of money and personal property to relatives and friends, and also devised certain lands in fee to his brother James, to his sisters Isabella Henderson and Janet McKenzie, and to his nephew James McKenzie. Then, after devising to his sister Janet a life estate in part of the west half of lot 31 in the 1st concession of Williamsburg, the testator gave the remainder in that land and all the residue of his property, real and personal, to his executors "in trust to provide means to pay the expense of administration, to pay my debts and liabilities, and to pay the bequests hereinafter made . . . to deposit at interest . . . or invest . . . any balance that may be on hand at any time to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each of my sisters, Janet, Margaret, Isabella, and Catharine, $250 a year, or if there be not so much available in any year, then to divide equally between them what may be available, and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than to the others, and a greater sum than $250, as in the opinion of the executors may be fit. After sufficient funds have been invested to keep up the payments to my sisters as aforesaid, then the executors to pay . . . (certain legacies) . . . And to pay to the children of my brother James McKenzie whatever may remain of the estate, share and share alike, and so that the child or children of such as may be dead will take his, her, or their parent's share." Janet died in 1897 and Margaret in 1901. The testator's brother James died on 15th March, 1902, leaving six children, who were all of age and the only residuary legatees under the will. The estate was valued for probate at $81,127.43. After providing for prior bequests, the income of the estate was not sufficient to pay the applicants $250 a year each.

A. H. Marsh, K.C., for the applicants, contended that the capital should be applied to make up the deficiency.

E. D. Armour, K.C., for the residuary legatees and others.

J. R. Meredith, for the executors.

MacMahon, J.:—The language of that part of the will providing for the creation of a fund to meet the annuities indicates that the testator intended that the whole fund so created should be available to pay the annuities. The fund out of which the yearly payments are to be made is a fund directed to be formed from the various sources specified in the will. There is no direction that the annuities are to be paid out of the income derived from the fund. But, even had such a direction been contained in the will, it would not have deprived the annuitants of the right to resort to the corpus to meet any deficiency in the annuities: Mason v. Robinson, 8 Ch. D. 411; Illesley v. Randall, 50 L. T. 717; Birch v. Sherratt, L. R. 2 Ch. at p. 649; Carmichael v. Gee, 5 App. Cas. 588; Jones v. Jones, 18 Gr. 317.

Order made declaring that the applicants, Isabella Henderson and Catharine McKenzie, are entitled to be paid the annuities of $250 each and arrears by payment out of the corpus of the testator's death, and that any balance of their annuities remaining unpaid at the death of Janet and Margaret respectively should be paid to their personal representatives. Costs of all parties out of the estate; those of the executors as between solicitor and client.

Boyd, C. November 18th, 1902.

TRIAL.

HIME v. TOWN OF TORONTO JUNCTION.

Assessment and Taxes—Action to Set aside Tax Sale—Prior Tax Sale—Purchase by Municipality—Lien—Redemption—Costs—Interest.

Action to set aside a tax sale.

J. B. Clarke, K.C., and C. Swabey, for plaintiffs.

W. E. Raney, for defendant corporation.

A. Mills and G. Grant, for the other defendants.

Boyd, C.—No question arose as to the validity of the sale as against defendants, for the purchasers were willing to forego all claims on being recouped the amounts paid by them at the tax sale. There was a sale de facto, and there was a legal assessment for the years 1898, 1899, 1900, in respect of which the sale now under consideration was had. True, the town had under the statute, R. S. O. ch. 224, sec. 183,

become purchaser of the lots in question for prior taxes, for which the earlier sale was held, in respect of the taxes up to 1897; but the time for redemption was current till 19th October, 1900, and no title was in fact vested by conveyance in the town till 9th April, 1901. So that it was competent for the tax officers to assess taxes validly on these lots for the years 1898-1900: sec. 192. These lots were not exempt under the statute when the assessments were made in the years 1898-1900; at the outside the lots did not belong to the town till after 15th October, 1900, before which that year's taxes had been imposed. There is no valid reason why the purchasers should not have the full benefit of sec. 218 of the Act, which, being read with sec. 222, declares that anyone who purchases at any sale under colour of any statute authorizing sales of land for taxes in arrear shall have a lien on the lands for the purchase money paid and interest, to be enforced against the lands. As against plaintiffs, that is the measure of relief to which all the tax purchasers are entitled.

Judgment for payment of that amount, with interest at ten per cent. and costs of suit, to be paid within a month; otherwise to be realized out of the sale of the lots respectively according to the amount chargeable on each as to each purchaser. No costs to be taxed as to those purchasers who are noted in default.

The proper construction of the agreement and dealings between plaintiffs and the town corporation does not require the latter to intervene for the purpose of paying these taxes and saving plaintiffs harmless therefrom.

Action dismissed with costs to the defendant town corporation.

BOYD, C. NOVEMBER 19TH, 1902.

CHAMBERS.

RE PHELAN.

Will—Devise—Restraint on Alienation—Validity—Case Stated—Reference to Divisional Court—Res Judicata.

Case stated by the Master of Titles. The question arose upon the will of D. T. O'Sullivan, which, after devising certain lands to his nephews, provided that: "Neither of my said nephews is to be at liberty to sell his half of the said property to anyone except to persons of the name of O'Sullivan in my own family. This condition to attach to every purchase of the said property." Ellen Phelan, a married sister of one of the nephews (both O'Sullivans), applied to be registered as owner of the lands under the Land Titles Act.

The Master asked whether the provision in the will was valid, and if not, whether the applicant was entitled to be registered as owner free from the condition.

W. A. Skeans, for the applicant.

F. W. Harcourt, for infants interested.

BOYD, C.—In my opinion, the restriction attempted to be imposed by the testator on the power of alienation is void, but, owing to the contrary decision in O'Sullivan v. Phelan, 17 O. R. 730, effect can not be given to this judgment, and the question must be referred to a Divisional Court. I express no opinion as to whether or not the question is res judicata.

BOYD, C. NOVEMBER 19TH, 1902.

TRIAL.

SWAYZIE v. TOWNSHIP OF MONTAGUE.

Municipal Corporation—Drainage—Flooding Private Lands—Culvert—Increase in Rapidity of Flow of Water—Cause of Action.

Action for damages to the plaintiff's land and crops by flooding, alleged by him to have been caused by the defendants making a junction of two drains, known as the Carroll and Guthrie drains.

BOYD, C.—There was in fact no junction. The only act of the defendants which could have given the plaintiff a right to recover against them was the putting in of a new culvert at a place where there had previously been a means of escape for water, and one was necessary. The water found its way from the Carroll drain into a swamp and thence into the Guthrie drain, and the only effect of the culvert was that, by increasing the rapidity, though not the volume, of the flow, the amount of water in the swamp was increased for a few days. As to the damage resulting from this increased rapidity of flow, there was no evidence. For any damage caused by the Guthrie drain the defendants were not liable.

Action dismissed with costs.