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JANUARY 19TH, 1903.

DIVISIONAL COURT.

LUDLOW v. BATSON.

Slander—Words not Actionable per se—Profit of Special Damage—Loss of Consortium of Wife—Loss of Boarder.

Motion by plaintiff to set aside nonsuit entered by STREET, J., at the trial at Brantford in an action for slander, and for a new trial. One Olive Batson, niece of plaintiff's wife, whose parents had died when she was quite young, had lived with plaintiff and his wife for twelve years, plaintiff receiving an allowance for the child's board from her father's executors, of from $2.50 to $3 a week. The defendant was a brother of Olive Batson, and the allegation was that defendant said that plaintiff put in an account to William Campbell (one of the executors) for candies, oranges, Sunday school collections. The innuendo in the statement of claim was, that plaintiff made up a fictitious account and by false pretences obtained payment thereof from Campbell, and was therefore guilty of an indictable offence. At the trial plaintiff's counsel admitted that the words were not capable of the meaning charged, but contended that the words were actionable upon proof of special damage. The special damage charged was that plaintiff's wife left him because of these statements made by defendant. The trial Judge held that the words sworn to were not actionable, even if the special damage alleged were proved, and he rejected evidence thereof.

W. S. Brewster, K.C., for plaintiff.

J. Harley, K.C., for defendant.

FALCONBRIDGE, C.J.—Any words are actionable by which the party has a special damage: Moore v. Meagher, 1 Taunt. at p. 44; Odgers on Libel, 3rd ed., 95, 96, 97; Ratcliffe v. Evans, [1892] 2 Q. B. 524, 527. Inquiry in this case is, therefore, limited to the question whether this alleged special damage is such as the law will recognize as being the natural and resonable result of defendant's words, or whether it ought to be deemed too remote. It cannot be considered the fair and natural result of the speaking of these words. If

plaintiff's wife left her husband's home on this account, she plainly acted without reasonable cause. As well might she assume to leave her husband because some other woman made uncomplimentary remarks about his personal appearance. See Mayne on Damages, 6th ed., pp. 47, 48, 63.

BRITTON, J.—The motion should be dismissed solely upon the ground that the special damage claimed, and which plaintiff was prepared to prove at the trial, namely, that plaintiff's wife left him, and that Olive Batson ceased to board with him, on account of the words complained of, are too remote. It cannot be said that such words, falsely spoken by friend or foe, are likely to cause, as a natural or reasonable result, the separation husband and wife or the loss of a boarder. Lynch v. Knight, 9 H. L. C. 600, discussed. The consequences alleged could not fairly and reasonably have been anticipated or even feared. As the point upon which the defendant now succeeds was not taken at the trial, or in the statement of defence, there should be no costs of this motion.

Motion dismissed with costs.

MEREDITH, J.

JANUARY 20TH, 1903.

WEEKLY COURT.

RE DOUGHTY AND JOHNSON.

Will—Construction—Devise to Widow—Estate during Widowhood—Estate in Fee—Residuary Devise.

Motion under the Vendors and Purchasers Act by the vendor for an order declaring that she has a good title under the will of William Henry Johnson to lands in the county of Hastings. The vendor is the widow of the testator. At the time of his death he was possessed of the south-west quarter of lot 12, but by his will he devised (by mistake, as alleged) to the vendor the south-east quarter of lot 12. He devised other lands to his sons, and one parcel to the vendor during widowhood, and devised and bequeathed all the residue of his estate to the vendor.

F. E. O'Flynn, Belleville, for the vendor.

No one appeared for the purchaser.

MEREDITH, J.—Under the earliest clause of the will the widow took probably only an estate *durante viduitate* in the lands therein described, though it may perhaps be open to contention that the restriction contained in the words "so long as she remains my widow" does not apply to the gifts of the lands. But, however that may be, under the residuary clause of the will, together with the first clause, the widow took all the estate and interest of the testator, at the time of his death, in the lands in question. If, under the first clause,

an estate during widowhood only is conferred, that is enlarged by the residuary clause; and if, by reason of misdescription of one of the parcels mentioned in the first clause, no estate in it passed under that clause, that the residuary clause corrects. It gives, devises, and bequeaths to the widow all the residue of the testator's estate not in the will before disposed of. So, as to both parcels, the widow took title under the will subject to the payment of the just debts, funeral and testamentary expenses, and the legacy mentioned in the will.

BOYD, C. JANUARY 21ST, 1903.

TRIAL.

LAMB v. SECORD.

Chose in Action—Assignment of Legacy—Rights of Assignee for Creditors of Legatee—Interpleader.

Interpleader issue, tried at Hamilton. The plaintiff, F. H. Lamb, as assignee for the benefit of creditors of one Lawrason, affirmed, and the defendant, Melvin A. Secord, denied, that the plaintiff was entitled as against defendant to $1,226,78 paid into Court in an action by the plaintiff against the executors of the will of Thomas W. Thompson to recover that sum as a legacy to Lawrason, the defendant also claiming the amount by virtue of another assignment.

A. B. Aylesworth and W. S. McBrayne, Hamilton, for plaintiff.

S. F. Washington, K.C., for defendant.

BOYD, C., remarked that a more unsatisfactory case than this in every way he does not remember to have had. He had puzzled over it with the utmost care, but found it impossible to reach any conclusion with confidence. It would take too long to write out all the incongruities and contradictions to be found in the materials; but, in brief, the least unsatisfactory result was to support the assignment of the legacy to defendant to the extent of $500, and this much of the fund in Court is to be paid out to defendant, and the balance to plaintiff as assignee for Lawrason's creditors. The defendant to bear his own costs, and the plaintiff to get his out of the fund or estate.

MEREDITH, J. JANUARY 22ND, 1903.

CHAMBERS.

RE KEATING.

Will—Legacy—Direction for Payment at Age of Twenty-five—Right to Receive at Majority—Declaration—Summary Application for.

Application by Charlotte Brown Wallbridge for an order directing the Toronto General Trusts Corporation to transfer

to the applicant her share of the estate of James Keating, late of the township of Enniskillen, deceased, the corporation being the executors and trustees under the will of the deceased. The applicant was 22 years of age, and under the residuary clause of the will she was not entitled to her share until she arrived at the age of 25.

A. R. Clute, for the applicant.

J. B. Holden, for the corporation.

MEREDITH, J.—This is not the proper method of enforcing a claim. But it may be proper for the executors to obtain in this manner the advice or opinion of the Court, by motion in Chambers. Dealt with in that way, all that can be said is, that, if the applicant is entitled absolutely to the specific sum of money in question in any event, and is of age and otherwise competent to give a release of her right, the executors may pay over to her the money, notwithstanding that she has not attained the age of 25 years. Nothing more definite can be said without considering the whole will, which was not before me. Probably nothing more definite is desired; but, if so, it must be sought in the usual and regular manner.

MACMAHON, J.

TRIAL. JANUARY 22ND, 1903.

LONDON STREET R. W. CO. v. CITY OF LONDON.

Street Railways—Extension of Lines—Municipal By-laws—Changes in Lines—Validity—Mandatory Order—Injunction — Meeting of Council — Resignation of Member — Sufficiency of Resolution Accepting—Filling Vacancy under Statute.

Action tried without a jury at London. Action to have it declared that by-laws 2099, 2100, and 2101, passed by the council of defendants on the 21st July, 1902, are invalid, and for an injunction restraining defendants from enforcing any of such by-laws; also for a mandamus to compel the mayor of the defendants to sign and execute by-law 2083 passed on the 23rd June, 1902. This by-law was passed in accordance with a resolution of the council of the 29th April, 1902, authorizing the plaintiffs to extend their tracks on certain streets in the city. The plaintiffs did work on the strength of this by-law and resolution. By the subsequent by-laws the routes were changed and obligations imposed upon plaintiffs.

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiffs.

T. G. Meredith, K.C., for defendants.

MacMahon, J., held that by-law 2083, not having been signed by the mayor, who was the presiding officer at the meeting at which it was passed, was inoperative: R. S. O. ch. 223, sec. 333; Canada Atlantic R. W. Co. v. City of Ottawa, 12 S. C. R. 379; Wigle v. Village of Kingsville, 28 O. R. 378. Until a by-law was passed and formally accepted by plaintiffs by an agreement binding on them, they were acting without authority in building a line of railway and running cars thereon. The plaintiffs were, therefore, not entitled to the mandatory order asked for to compel the mayor to sign the by-law.

The plaintiffs asked leave to amend so as to claim, in the alternative, a mandamus to the council to pass a by-law in accordance with the resolution of 29th April. It was urged that, as the council had passed the resolution providing for the building by the plaintiffs of the new lines, and as the plaintiffs had proceeded with and built some of the lines in accordance with the resolution and with the sanction of the city engineer, who furnished the grades for the lines on Beaconsfield avenue and Woodley road, the defendants were bound. It was held, however, that the engineer could not bind defendants by giving the grades; the manager of plaintiffs obtained the grades from the engineer, and proceeded with the building of the lines, taking his chances of the resolution being ratified by by-law. The amendment should not be allowed, as, upon the facts, plaintiffs are not entitled to the mandamus.

It was also held, that the council had authority to pass by-law 2099, changing and varying the routes, and by-law 2100, regulating the speed and service of the cars on the various routes, was also valid. As to the by-law No. 2101, requiring plaintiffs to lay down a new line and extend the existing lines to the extent of 7,380 feet of track, it was held that, having regard to the taking into the city of London of the village of London West, with its additional street railway mileage, the defendants are not entitled to all the tracks mentioned in by-law No. 2101, and that by-law is bad.

Upon one question arising in the case, judgment was given as follows:—

The mayor, on the 21st June, 1902, caused a special meeting of the council to be summoned to consider the street railway by-law, 2083, at which meeting the by-law as amended was (under the emergency clause of the city's by-laws) read a first, second, and third time. The by-law was carried by a vote of six yeas to five nays, Alderman Pritchard voting with the yeas.

Counsel for the city urged that the by-law was not duly passed because John H. Pritchard had been declared entitled

to succeed to the office of alderman, and had taken the declaration of office and had voted as a member of the council before a majority of the members of the council present had consented to the acceptance of the resignation of Alderman Beatty being received.

At that meeting, on the 21st June, the mayor announced that Alderman Beatty had placed in his hands his resignation as a member of the council. The resignation was then read and filed.

The city clerk thereupon stated that in accordance with the statute of 1901 Mr. John H. Pritchard, being next in succession to the office, had taken the necessary declaration of qualification and of office.

On the minutes of the council, and immediately after the above statement of the city clerk, appears the following: "Alderman Campbell, seconded by Alderman Winnett, moved that this council hereby places on record its high appreciation of the services rendered by Alderman Beatty to his fellow citizens while a member of this council, and that upon the occasion of his resignation as such member we now wish to convey to him our sincere desire for his future welfare and happiness.

"Carried by standing vote of the members."

This is, I consider, a sufficient compliance with the requirements of sec. 210 of the Municipal Act, R. S. O. ch. 223, which provides that "any mayor or other member of the council may, with the consent of the majority of the members present, to be entered on the minutes of the council, resign his seat in the council."

The resolution refers to Alderman Beatty as having been a member of the council, of his having resigned his seat, and it is carried without a division. This is an ample consent by the council to the resignation: see Biggar's Municipal Manual, p. 228.

Judgment for plaintiffs declaring that by-law 2101 is invalid and of no effect. Judgment for defendants declaring that by-laws 2099 and 2100 are valid and subsisting by-laws, and awarding defendants a mandatory order (asked for in their counterclaim) compelling plaintiffs to run their cars in accordance with the provisions of the by-laws, and compelling them immediately to replace the tracks and works illegally removed from Rectory street, restraining them from running their cars on Beaconsfield avenue and Wortley road, and compelling plaintiffs to remove their tracks and works from these streets. Plaintiffs to have so much of the costs of the action as relate to by-law 2101; and defendants to have the costs of the action except those relating to by-law 2101.

WINCHESTER, MASTER. JANUARY 23RD, 1903.

CHAMBERS.

MERCHANTS BANK v. IRVINE.

Summary Judgment—Action on Promissory Notes—Defence of Fraud —Notice—Costs of Motion where Dismissed.

Motion by plaintiffs for summary judgment under Rule 603. The defendants alleged that the promissory notes sued on were obtained by fraud, and that they notified the plaintiffs of this fact shortly after the dates of the notes, and previous to the full payment of the proceeds by them to their customer for whom they discounted the notes.

G. L. Smith, for plaintiffs.

W. E. Middleton, for defendants.

THE MASTER held, on the facts disclosed by the cross-examination of parties on their affidavits, that the action must go to trial; also, that the motion should not have been made in view of Farmer v. Ellis, 2 O. L. R. 544, and Fuller v. Alexander, 47 L. T. N. S. 443, and the costs of the motion other than of the examinations should be costs to defendants in any event. The examinations to be considered as examinations for discovery, without prejudice to further examinations after pleadings are delivered if the parties so desire.

MEREDITH, J. JANUARY 23RD, 1903.

CHAMBERS.

RE WILLIAMS.

Will—Construction—Bequest to "all my Children"—Representatives of Deceased Child.

Motion by James Ailles, one of the executors of the will of Arscott Williams, for an order construing the will and determining whether Bertram E. Webster, Henry A. Webster, Ida M. Webster, and Ernest Webster (an infant), the children of Annie Webster, who was a daughter of the deceased and died before the execution of the will, are entitled between them to a one-fifth share or interest in the estate of the deceased, under his will, as the heirs of their mother. The testator died on the 26th June, 1893. The will, so far as material, was as follows: "I direct that after my death all my property, real and personal, of whatsoever nature and wheresoever situated, be sold as soon as may be done without loss in the opinion of my executors, and that the proceeds be invested for the sole and only benefit of my wife during her lifetime. I direct that after her death the principal money so invested be divided amongst all my children in

equal parts." The widow died on the 21st January, 1899. The testator had five children, all of whom but Annie Webster, were living.

D'Arcy Tate, Hamilton, for executor and children of testator.

T. Hobson, Hamilton, for adult grandchildren of testator.

F. W. Harcourt, for infant grandchild.

MEREDITH, J., held that, the testator's words being plain, there being no ambiguity, patent or latent (Higgins v. Dawson, [1902] A. C. 1), the grandchildren cannot take directly. Nor can they take under sec. 36 of the Wills Act of Ontario: see In re Harvey, Harvey v. Gillow, [1893] 1 Ch. 567, and In re Coleman and Jarrom, 4 Ch. D. 165. In re Smith's Trusts, 5 Ch. D. 497 n., distinguished, and doubted in view of In re Musther, Groves v. Musther, 43 Ch. D. 569. The gift (as a question of interpretation of the will) must be held to be to persons capable, or at least supposed to be capable, of taking. No one, with or without a knowledge of the Act and of such cases as Mower v. Orr, 7 Hare 483, would make a gift to a dead person in order that his child or children might take; the gift would be to the child or children, or child or children, if any; and the word "all" has no contrary signification. Christopherson v. Naylor, 1 Mer. 320, referred to. The dead child is not included in the words "all my children," and so her children take nothing under the will. Order accordingly; costs out of the estate as usual.

JANUARY 23RD, 1903.

DIVISIONAL COURT.

COBBAN MFG. CO. v. LAKE SIMCOE HOTEL CO.

Mechanics' Liens—Judgment for Defendant in Action to Enforce—Costs—Percentage of Sum Claimed.

Appeal by plaintiff from judgment of the Judge of the County Court of Simcoe in an action to enforce a mechanics' lien for work done and materials supplied in repairs and improvements to a hotel in the town of Barrie. The plaintiffs claimed $277.85, $57.85 being for extras outside the contract. The Judge disallowed the extras and deducted a sum for incomplete work, and therefore found that there was nothing due to plaintiffs, and gave judgment for defendants with costs. The plaintiffs appealed as to the extras and the deductions, and also contended that the defendants' allowance for costs should be based upon the amount

claimed by the statement of claim by which the action was begun, and not upon the amount claimed in the lien registered, there having been a payment of $800 after lien registered, and before statement of claim.

J. A. Worrell, K.C., for plaintiffs.

A. E. H. Creswicke, Barrie, for defendants.

THE COURT (MEREDITH, C.J., and FALCONBRIDGE, C.J.), dismissed the appeal with costs, upon a consideration of the evidence, but varied the judgment by limiting defendants' costs to 25 per cent. of the amount claimed by the statement of claim.

JANUARY 23RD, 1903.

DIVISIONAL COURT.

RE HOOKER AND MALCOLM.

Landlord and Tenant—Overholding Tenants Act—Right of Landlord to Re-enter for Non-payment of Rent—Set-off—"Clearly."

Motion by the tenants to set aside a summary order of the Judge of the County Court of Brant, under the Overholding Tenants Act, awarding possession of demised premises to the landlord, on the ground that the lease under which the tenants were in possession had not expired or been determined at the time the proceedings were taken under the Act. The tenants were in originally under a lease for six months, and continued in possession after its expiry, paying rent. The landlord gave notice to quit, but served a demand of possession, claiming the right to re-enter for non-payment of rent.

L. F. Heyd, K.C., for the tenants contended that no rent was due because they had a set-off, and that it was not necessary that the set-off should be undisputed; it was sufficient to oust the jurisdiction under the Overholding Tenants Act, that there should be a bona fide assertion of the right to a set-off.

W. S. Brewster, K.C., for the landlord, contra.

THE COURT (MEREDITH, C.J., and FALCONBRIDGE, C.J.) held that the case was "clearly one coming under the true intent and meaning" of sec. 3 of the Act, as it clearly appeared that there was rent due at the time when the landlord claimed to enter. Motion dismissed with costs.

OSLER, J.A.

JANUARY 24TH, 1903.

TRIAL.

CLERGUE v. PRESTON.

Amendment—Addition of Defendant after Trial—Specific Performance —Terms—Parties.

Motion by plaintiff (heard at Sault Ste. Marie as if at the trial) for leave to amend by adding one Heath as a party defendant. The case had been tried out. There was great delay in proceeding with the action, the writ not having been served until a year after its issue had all but elapsed. No application to amend was made at the trial, although the objection to Heath's absence from the record was taken there.

N. Simpson, Sault Ste. Marie, for plaintiff.

W. H. Hearst Sault Ste. Marie, for defendants.

OSLER, J.A.—Prima facie Heath is not shewn to be a purchaser pendente lite, as his deed is dated prior to the issue of the writ, and, even if it was not executed till the 29th May (the date of swearing the affidavit of execution, as well as that of the issue of the writ), it may have been actually prior in point of time to the latter act. There appears, however, to have been some business connection between Heath and defendant Preston, and it is not unreasonable on the whole that plaintiff should have leave to prove, if he can, that the former had actual notice of the alleged contract between Preston and plaintiff, specific performance of which is sought in this action, or that it was not made for valuable consideration, or was in fact made pendente lite. Heath's presence in the action would be necessary in any event, as he is the holder of the legal estate. As a condition of the relief, plaintiff must pay Preston's costs of the trial at Sault Ste. Marie, and he must determine within two weeks whether he will amend on these terms. If the parties desire it the case will be tried out when ripe for trial against Heath. If leave to amend is not accepted the action will be disposed of on that being intimated to me. The defendant Annie McKay should not have been made a party, and as against her the action may now be dismissed with costs.