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MOSS, J.A. MARCH 22ND, 1902.

C.A.-CHAMBERS.

EVANS v. EVANS.

Will—Construction—Leave to Appeal.

Leave to appeal from order of a Divisional Court, ante p. 69, refused.

MEREDITH, J. APRIL 3RD, 1902.

WEEKLY COURT.

GODBOLD v. GODBOLD.

Executor—Insolvency—Administration of Estate by Court—Motion for—Undertaking to Pay into Court—Costs.

Motion by plaintiffs for an order for administration of the estate of Sylvanus Godbold the elder, or, in the alternative, for a receiver of the estate, upon the ground that the defendant Sylvanus Godbold the younger, the sole executor of the will of the senior, was insolvent and not a proper person to be left in sole control of the estate, which was of the value of about $17,000.

W. E. Raney, for plaintiffs.

E. F. B. Johnston, K.C., and D. T. Smith, for defendant executor.

B. N. Davis, for defendants Harriman and Sarah J. Godbold.

MEREDITH, J.—Upon the executor undertaking to pay into Court, from time to time, forthwith after receiving them, all moneys, proceeds of the estate in question, received by him, this motion is to be dismissed; costs of all parties, as of a simple motion to compel payment into Court by the executor of moneys of the estate admitted to have come to his hands, to be paid out of the estate in question; costs of all parties other than the plaintiffs, over and above such as are to be paid out of the estate, to be paid by the plaintiffs forthwith after taxation. No other order upon this motion; but, if the executor decline to give the undertaking, the matter may be mentioned again.

McDOUGALL, CO. J. DECEMBER 26TH, 1901.

COUNTY COURT OF YORK.

RE MACPHERSON AND CITY OF TORONTO.

RE HAMILTON AND CITY OF TORONTO.

Assessment and Taxes—Personal Property—Exemptions—Trustees —Non-resident Beneficiaries—Income of Trust Estate.

Appeals by the trustees of the Macpherson and Hamilton estates from the decisions of the Court of Revision for the city of Toronto in respect of the assessments made upon the estates respectively.

J. T. Small, for the trustees of the Macpherson estate.

W. A. H. Kerr, for the trustees of the Hamilton estate.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, CO. J.—In the Macpherson and Hamilton estate appeals the effect of the amendment made in 1900 to sec. 46 of the Assessment Act must be again considered. The Macpherson estate is administered in Toronto. The will was proved in this county, and several of the trustees reside here. Some of the beneficiaries reside in this Province, and others reside out of the Province. The income of the estate is collected at Toronto; the annual accounting is made by the trustees here, and the various annual shares of the income payable to the beneficiaries is distributed from this point, the shares of the non-residents being transmitted to them out of the Province. It is conceded that the shares of those resident in the Province are liable to assessment, but it is contended that the shares of the non-residents are not so liable. Section 46 of the Assessment Act was a section which, before amendment, contained a provision only as to the manner of assessment of personal property vested solely in third persons, trustees, guardians, executors, or administrators, namely, that such property could be assessed in the name of such third persons, trustees, etc., alone. This provision obviated the necessity of the assessor ascertaining who the cestuis que trust were, and of placing their names on the assessment roll. The amendment directs that the assessment shall be made in the name of such person, trustee, etc., alone, in cases only where, if the personal property were in possession of the beneficiary, the same would be liable to taxation. The amendment does not define any new principles of assessment or exempt any particular class of personal property from taxation. It does not qualify the general direction contained in sec. 7 that "all property in the Province shall be liable to taxation," nor does it affect the further direction contained in sec. 38 that all personal property within the Province owned by non-residents shall

be assessed like the personal property of residents, nor the further provision in sec. 38 that such personal property of a non-resident may be assessed in the owner's name as well as in the name of the agent or trustee who may have the property in his possession or control or in his hands on behalf of such non-resident owner. It might happen that personal property in the hands of an agent or trustee would in his hands be liable to assessment for the full amount, while if assessed to the owner the assessment value might be largely reduced by the application of certain of the exemption clauses contained in sec. 7. Take, for instance, the case of a stock of goods vested in and assessed to an agent; such agent could not claim the deduction from the invoiced value of the said goods of the debts due in respect thereof by the real owner allowed by sub-sec. 24 of sec. 7 in respect of such goods, because he, the agent, did not owe the debts; whereas, if the goods were assessed in the true owner's name, such allowance would have to be made. In the case of an income received by a trustee for and on behalf of a beneficiary, and assessed in the trustee's name, such trustee could only claim the $400 exemption allowed by sub-sec. 26 from income. Take a trustee who collected the income of a large estate amounting to say $4,000 per annum, and by the terms of his trust was to distribute it equally amongst ten beneficiaries, who possessed no income from any other source beyond this distributive share of $400; the ten persons, the true owners of the income, would not be liable to any taxation whatever in respect of their several shares, since the total income of each would not exceed the $400 exempted. If the whole income is taxed in the hands of a trustee, it is not necessarily treated as income in his hands, but might be assessed as so much personal property belonging to others and liable to taxation for the full amount of $4,000, or, as I have said before, should it be treated as income, it will be liable to the one exemption of $400 only. I take it, therefore, that the only force to be attributed to the amendment is this, that the personal property standing in the trustee's hands is to be considered as split up into distributive portions belonging to the several beneficiaries, and if such several sums, or one or more of them, would, if assessed in the name of the beneficiary, not be liable to taxation by reason of any exemption clause, then to the extent of such an amount the same is not to be assessed in the name of the trustee. I do not think the question of residence or non-residence of the beneficiary enters into the consideration of the matter at all.

Section 38 of the Assessment Act reads as follows:

"38. (1) All personal property within the Province, the owner of which is not resident in the Province, shall be

assessable like the personal property of residents, and whether the same is or is not in the possession or control, or in the hands, of an agent or a trustee on behalf of the non-resident owner; and all such personal property of non-residents may be assessed in the owner's name, as well as in the name of the agent, trustee or other person (if any) who is in the possession or control thereof.

"(2) The property shall be assessable in the municipality in which it may happen to be.

"(3) This section shall not apply to dividends which are payable to, or other choses in action which are owned by, and stand in the name of, a person who does not reside in the Province. . . ."

It is thus seen that the personal property of a non-resident is declared to be assessable like the personal property of a resident, whether the same is or is not in the hands of an agent or trustee on behalf of a non-resident owner. I do not think the words of the amendment, "which if in the possession of the beneficiary would be liable to taxation," alter the force of sec. 38 as to the incidence of taxation. I think the fair meaning is, that personal property is only exempt in a case where, if the same were assessed in the name of the owner, it would not be liable to taxation. It would require much more definite words of exemption to repeal the express liability to taxation of the personal property of non-resident owners created by sec. 38. What I take to be the object of the amendment was to remedy what appeared to be an injustice, namely, that a non-resident owner entitled to a sum of money by way of income should have that sum taxed before it reached his hands, while, if he had been entitled to collect it himself, it would not have been taxable at all. In his own hands he would be entitled to have an account taken of income and proper outgoings, and, should such an account shew no surplus, there would be no amount liable to taxation. It never could have been contemplated by the Legislature, in my opinion, to change the whole policy of the law which made personal property situate in the Province, though owned by non-residents, liable to taxation, by the simple method of interposing a trustee; in other words, that the personal property of a non-resident owner standing in his own name or that of an agent should be taxable, while the same property, vested in a trustee, would not be taxable, because the true owner was a non-resident. In the latter case the personal property would be viewed as being in the actual possession and following the person of the owner, and, therefore, as property situate out of the Province, while in the former case it would be treated as situate within the Province and as not following

the person of the owner. The words, "and which if in the possession of the beneficiary or beneficiaries," I think, must be taken to mean or to be equivalent to the words, "as if the same were assessed in the name of the beneficiary or beneficiaries himself or themselves," that is, the fact of the same being vested in a trustee is to be disregarded in considering its liability to taxation. If the beneficiary was a non-resident, the amount coming to him would be treated precisely in the same manner as the personal property of other non-resident owners and liable to taxation, *sub modo*, under the provisions of sec. 38. If the effect of the amendment is as wide as was contended for, then all personal property of non-resident owners standing in the name of a trustee ceases at once to be taxable because such personal property is to be considered as attached to the person of the owner and treated for assessment purposes as personal property not situate in the Province. The far-reaching effect of such an interpretation of the law would be almost incalculable. Millions of dollars of personal property in the hands of trustees on account of non-resident owners would under such a meaning become exempt.

In the Macpherson estate appeal, then, I am of opinion that, if the sums payable to the non-resident beneficiaries are in the nature of income, it is liable to the same burdens and entitled to the same exemptions as the income of residents of this Province, and the appeal will, therefore, be allowed to the extent above indicated.

The appeal in the Hamilton estate presents some different features upon the facts. In that case the principal part of the estate is in the Province of Quebec, where the testator lived and died. Two trustees reside in Ontario and one in Quebec; the accounting by the trustees is at Quebec, whence the payments to the beneficiaries are made. The sum sought to be assessed is the annual interest, some $5,000, upon investments in Toronto, part of such investments having been made by the testator in his lifetime and part of them made from estate funds by the trustees in Toronto since the testator's death. Two of the beneficiaries live in Ontario, and three out of the Province, and the income, as I understand the statement of counsel, is ascertained at Quebec, and the different shares transmitted to the several persons entitled from that point. For the reasons given in the Macpherson estate appeal, I am of opinion that the interest collected from investments in Toronto is taxable in this municipality subject to the exemption contained in the statute of $400 in respect of each beneficiary.

The appeal will, therefore, be allowed to the extent above indicated.

Henderson & Small, Toronto, and Blake, Lash, & Cassels, Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

McDOUGALL, Co. J. DECEMBER 26TH, 1901.

COUNTY COURT OF YORK.

RE NASMITH AND CITY OF TORONTO.

Assessment and Taxes — Personal Property — Choses in Action — Property not already Assessed—Court of Revision.

Appeals by Mrs. J. D. Nasmith, Miss E. M. Clark, and Miss H. Clark from the decision of the Court of Revision for the city of Toronto, placing their names on the assessment roll in respect of certain personal property.

J. H. Macdonald, K.C., for the appellants.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, Co. J.—In this case the Nasmith Company were assessed upon personalty for $17,000, and appealed to the Court of Revision on the ground that the same was too high, contending that, if the indebtedness in respect of such personalty were deducted pursuant to sub-sec. 24 of sec. 7 of the Assessment Act, the assessable amount would be found to be less than $17,000. When the matter came up before the Court of Revision the appellants proved that they were indebted to the following persons in respect of such personal property: Mrs. J. D. Nasmith, $2,482; Miss E. M. Clark, $1,336; and Miss H. Clark, $1,578: and the Court of Revision reduced the general assessment of the company to $15,000 for personal property. Pursuant to sub-sec. 15 of sec. 71 of the Assessment Act, four days' notice was given to these three creditors, and the Court of Revision then placed their names on the assessment roll for the above several sums as personal property in respect of which they, the creditors, were liable to be assessed. The three creditors appealed, and I allowed their appeal upon the ground that the Court of Revision had not the power to place them on the roll. The property in respect to which the Court of Revision sought to assess them, namely, choses in action, had not been previously assessed at all, and, although the Court has the power to assess A. (upon giving him a four days' notice) for property which had been improperly assessed in B.'s name, yet A. could only be assessed in respect of some portion or all of the property already assessed or purporting to be assessed.

Now, the property of these three appellants had never been in fact assessed at all. Had the department known they possessed personal property in the shape of choses in action or debts due them, the same could have been properly assessed to them. What had been assessed was the

personal property of the Nasmith Company. What they did assess in the present case was the property of third persons not theretofore assessed to the Nasmith Company at all. The amounts of such choses in action, belonging to the appellants, it is true, as debts due them by the Nasmith Company, under sub-sec. 24 of sec. 7, were properly allowed to be deducted from the value of the personalty found on the Nasmith premises, but were in no sense part of that property. It will be for the Legislature to amend the Act, if it sees fit, to allow property of third persons, discovered by reason of the investigation into the affairs of a ratepayer who appeals from his own assessment, to be assessed, upon such terms as it may impose, but, in my opinion, the statute as it now stands does not permit this to be done. If the Nasmith Company had some personal property upon their premises which belonged to a third person, but the value of which was included in the assessment of their own personal property, I have no doubt, the true owner being ascertained, that he could, upon being given the statutory notice of four days, be assessed therefor, but, in my judgment, these choses in action do not come within the present provisions of the section. The appeals will, therefore, be allowed.

Maclaren, Macdonald, Shepley, & Donald, Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

McDOUGALL, Co. J. DECEMBER 26TH, 1901

COUNTY COURT OF YORK.

RE LEADLEY AND CITY OF TORONTO.

Assessment and Taxes—Exemptions—Personal Property Owned out of Province—Cash in Banks—Trustees.

An appeal by the trustees of the Leadley estate from the decision of the Court of Revision for the city of Toronto in respect of an assessment of the estate.

J. W. St. John, for the appellants.

J. S. Fullerton, K.C., for the city corporation.

McDOUGALL, Co. J.—The appeal in this case is in reference to certain personal property standing in the names of the trustees of the Leadley estate, and consisting of certain amounts of cash deposited in banks in the city of Montreal, and in the city of Winnipeg. It is claimed by the assessment department to be liable to assessment in Toronto, where the trustees reside, and where the chief assets of the estate are situate, and where the estate is being administered. I have ruled that the same is exempt from taxation under sub-sec. 23 of sec. 7 of the Assessment Act, as being personal property owned out of the Province.

I refer to the decision, and particularly to the judgment of Burton, J.A., in Nichol v. Douglas, 37 U. C. R. 51 .

The appeal is allowed, and assessment reduced to $43,000.

St. John & Ross, Toronto, solicitors for the appellants.

T. Caswell, Toronto, solicitor for the respondents.

MEREDITH, J. . APRIL 3RD, 1902.

TRIAL.

GRANT v. McPHERSON.

Landlord and Tenant—Agreement for Lease—Incomplete Contract—Nature of Tenancy—Possession.

An action to recover possession of a house in the city of Toronto and for mesne profits, the defendant having become tenant to the plaintiff under a supposed agreement for a lease.

W. M. Douglas, K.C., and J. E. Jones, for plaintiff.

E. D. Armour, K.C., for defendant.

MEREDITH, J.—Upon the whole evidence it cannot be found that there was any agreement for a lease. The parties were agreed upon most of the terms of the lease, but, as to some essential terms, there was a misunderstanding, and no agreement. . . . The defendant, among other defences, sets up the agreement as he understood it, and seeks specific performance of it. There cannot of course be specific performance, the parties never having been at one upon some of the essential terms of it. But the relationship of landlord and tenant, in some form or other, obviously existed between the parties: the one question is, what was the nature and extent of it? And that is purely a question of fact. At the end of the second year the plaintiff became entitled to possession, and he has done nothing to waive that right. . . . I have found no case in point; those decided under the Statute of Frauds are different at the beginning in this, that the statute expressly provides that the lease shall operate as a tenancy at will, though after payment of rent in such cases there seems to be no substantial difference between those cases and this. Lennox v. Westney, 17 O. R. 472, differs from this case in the essential feature that in that case no rent had been paid; there was no recognition of any relationship of landlord and tenant after the incomplete negotiations for a lease. The cases under the statute are collected in the note to Doe d. Regge v. Bell, 2 Sm. L. C. 1342, and Clayton v. Blakey, *ib.* 1347. See Sourwine v. Truscott, 17 Hun 432; Fullerton v. Dalton, 58 Barb. 236; Mayor of Thetford v. Tyler, 8 Q. B. 95; Smith v. Widlake, 3 C. P. D. 10.

Judgment for possession without costs.

DuVernet & Jones, Toronto, solicitors for plaintiff.

J. M. Clark, Toronto, solicitor for defendant.

APRIL 7TH, 1902.

DIVISIONAL COURT.

CLERGUE v. McKAY.

Discovery—Production — Privilege — Letters between Solicitor and Client—Nature of, must be Set Forth in Affidavit.

Decision of STREET, J., *ante* 178, affirmed by a Divisional Court (BOYD, C., FERGUSON, J., MEREDITH, J.)

W. M. Douglas, K.C., for defendant Preston, appellant.

A. B. Aylesworth, K.C., and R. U. McPherson, for plaintiff.

FALCONBRIDGE, C.J. APRIL 7TH, 1902.

WEEKLY COURT.

STEPHENS v. O'CONNOR.

Liquor License Act—Transfer of License to New Premises—Notice—Report of Inspector—Injunction.

Motion for judgment, heard at Ottawa. The motion was originally to continue an interim injunction restraining the defendants, who are the license commissioners of the city of Ottawa, from permitting the transfer of the bar license for the Globe Hotel in Sparks street to other premises in the same street. The motion was turned by consent into a motion for judgment.

J. L. McDougall, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendants.

FALCONBRIDGE, C.J.—The action and motion were probably unnecessary or premature, inasmuch as it was not to be assumed that the board of license commissioners would do anything contrary to the law. But the Legislature has not required that public notice shall be given of an application for a transfer to premises within the same sub-division. See Sinclair's Liquor License Act, p. 32 *n.* The board will, doubtless, not grant, or assent to, the transfer without the report of the inspector under sec. 11, sub-sec. (1), of R. S. O. ch. 245, unless there are valid reasons under sub-sec. 4 for dispensing with the same. The circumstances of the case do not bring it within the mischief dealt with in East v. O'Connor, 2 O. L. R. 355. Injunction dissolved and action dismissed with costs.

Latchford, McDougall, & Daly, Ottawa, solicitors for plaintiff.

MacCraken, Henderson, & McDougal, Ottawa, solicitors for defendants.

BRITTON, J. APRIL 7TH, 1902.

CHAMBERS.

HUFFMAN v. HULL.

Pleading—Statement of Claim—Particulars—Mortgage—Sale under Power—Conspiracy—Account.

Application by the defendant Hull to compel the plaintiff to amend paragraphs 5, 7, and 8 of statement of claim, or for particulars.

The plaintiff alleged that he and defendant Hull were the owners of certain land, subject to a mortgage to one Harris; that by the result of an action between plaintiff and defendant Hull, plaintiff became sole owner, subject to the Harris mortgage.

(5) That under the power of sale in the Harris mortgage the land was sold, and the defendant Allen became the purchaser in trust for plaintiff, and Allen now holds the land as trustee for plaintiff.

(7) The defendants contrived and conspired together to defraud the plaintiff and deprive him of the value of the land over and above the mortgage under which it was sold.

(8) That as between plaintiff and defendant Hull, plaintiff is entitled to all the moneys which may be found due by defendant Allen in connection with the lands, in priority to defendant Hull.

Plaintiff claimed an account.

The Master in Chambers refused the application as regards paragraphs 5 and 8, but ordered particulars under paragraph 7 to be delivered after defence and after examination of defendants for discovery.

The defendant Hull appealed.

H. E. Rose, for appellant.

A. C. McMaster, for plaintiff.

BRITTON, J.—I think the plaintiff might well have been more full and specific in his statement of claim, but I do not think the defendant Hull need be at all embarrassed in regard to his statement of defence. If the plaintiff has any claim such as indicated, Hull can easily meet it as a matter of pleading. I do not think I should interfere with the order made by the Master. Appeal dismissed. Costs in cause.

Brewster, Muirhead, & Heyd, Brantford, solicitors for plaintiff.

A. S. Ball, Woodstock, solicitor for defendant Hull.