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OSLER, J.A. SEPTEMBER 18TH, 1902.

C. A.-CHAMBERS.

RE WEST WELLINGTON PROVINCIAL ELECTION.

PATTERSON v. TUCKER.

Parliamentary Elections—Petition—Deposit—Payment out — Petition Abandoned before Service—Grounds of Abandonment—Affidavits Denying Collusion.

Motion by solicitors for the petitioners for an order to pay out of Court the sum of $1,000 paid in as security for costs of the petition. The application was supported by the written consent of the three petitioners, verified by affidavit; by the affidavit of one of the solicitors for the petitioners; and by a consent signed by solicitors who described themselves as solicitors for the respondent, to the order applied for. From the affidavit of the solicitor for the petitioners it appeared that the petition was presented to the Court on the 27th June, 1902, by being filed in the office of the local registrar at Guelph, and that the $1,000 as security for costs was paid in on or about the 2nd July, 1902. Then it was stated that after the deposit had been paid into Court "those persons interested in the promotion of the petition, including the petitioners," were of opinion, "that it was not wise to proceed further with the petition," and the deponent's firm was accordingly instructed to do nothing more, and the petition was not served upon the respondent, and no further steps were taken in regard thereto.

E. G. Long, for the applicants.

OSLER, J.A.:—It may be assumed, though the petition was not before me on this application, that it was accompanied by the affidavit of the several petitioners, as required

by law, that they presented it in good faith, and that they severally had reason to believe and did believe the statements contained in the petition to be true in substance and in fact. This is not an application for leave to withdraw a petition, as the petition, though presented, was not served. The course which has been adopted put an end to the petition, and effectually stood in the way of the appearance of any intervener, and also of the taking of proceedings by any other person to set aside the election on the grounds believed by those who thus abandoned the petition to be true in substance and in fact. Under these circumstances, I am not bound to make an order for payment out of the deposit on the materials presented, and am entitled to be judicially informed of the grounds on which it was deemed by those interested in the prosecution "not wise" to proceed further. Affidavits are, therefore, to be filed stating those reasons, and by the petitioners and their solicitors and the solicitors for the respondent, who appears to have solicitors in the matter, although he was not served with the petition, denying all collusion, to the same extent and in the same manner as on a motion for leave to withdraw the petition. Should there be any difficulty in obtaining these affidavits or any of them, the matter may be mentioned again.

BOYD, C. SEPTEMBER 22ND, 1902.

CHAMBERS.

RE YATES.

Legacy—Charge on Land—Interest—Legatee also Administrator with Will Annexed—Statute of Limitations.

A testator died on 8th November, 1892. By his will $300 was charged on land devised to his daughter Harriet, to be paid to his daughter Maria six months after his death. The daughter Harriet was made executrix, but she predeceased him, on the 1st May, 1892. Thereupon letters of administration with the will annexed were granted to the other daughter, the legatee, on 12th December, 1892. This daughter did not sell the estate to pay herself the legacy charged on the land, but held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties.

A motion was made under Rule 938 on behalf of the infant child of the deceased devisee for an order determining whether the legacy to the daughter Maria should be paid with interest.

J. Hoskin, K.C., official guardian, for the applicant.

D. W. Saunders, for the legatee.

Boyd, C.—The question is, whether the legacy should be paid with interest from the date of six months after the death of the testator to the present time. Where the hand to pay and the hand to receive are the one and the same, the Statute of Limitations has no application. The claim for the $300 subsists, and therewith interest as an accessory for the period till the fund is in hand for payment: Binns v. Nichols, L. R. 2 Eq. 256; Seagram v. Knight, L. R. 2 Ch. 628.

Boyd, C. September 22nd, 1902.

CHAMBERS.

FAIRFIELD v. ROSS.

Administrator ad Litem—Appointment of—Rules 194, 195, 196.

Motion by the plaintiff for an order appointing an administrator ad litem to the estate of M. Fairfield, deceased.

H. L. Drayton, for plaintiff.

R. C. Clute, K.C., for defendants.

Boyd, C.—The action is to recover the estate of a person deceased, who died without will, and who conveyed the estate in question to the defendants before death. The action is brought by the sole next of kin—no personal representative having been appointed. The application was to appoint the plaintiff by summary order under Rule 194. For reasons given in Hughes v. Hughes, 6 A. R. 380, upon the original of this Rule, I am precluded from making such an order, as the case does not fall within the provisions of the Rule. Nor do I think that an order under Rule 195 would help the plaintiff. That authorizes no more than the grant of limited administration ad litem; but the object of this suit is substantially to get in the whole estate—it involves general administration according to the practice of the court: Dowdeswell v. Dowsdeswell, 9 Ch. D. 306; Rule 196. The very frame of the Rule indicates that it is not applicable to the case of a plaintiff who, without right or title, has commenced an action, and then seeks to legalize his illegal act by an order of the Court. The Rule applies to a case where "in an action," i.e., an action validly begun by a competent plaintiff, "representation of an estate is required" as a condition for its effective prosecution, and thus in a proper case an administrator ad litem may be appointed.

Application refused with costs.

MACLENNAN, J.A. SEPTEMBER 22ND, 1902.

C. A.—CHAMBERS.

McAVITY v. MORRISON.

Appeal—Court of Appeal—Leave—Excision of Pleadings,

Motion by plaintiffs for leave to appeal from the order of a Divisional Court affirming an order of LOUNT, J., in Chambers (ante 552), dismissing plaintiffs' motion to strike out parts of the defence and counterclaim as improper, irrelevant, embarrassing, and tending to prejudice the fair trial of the action, and because the claims by way of counterclaim are not properly so made and are contrary to the rules of practice.

D. L. McCarthy, for plaintiffs.

G. H. Watson, K.C., for defendants.

MACLENNAN, J.A.—It is only in a very plain case of impropriety that the Court ought to order pleadings or paragraphs thereof to be struck out. This is not such a case, and that view having been taken by LOUNT, J., and by a Divisional Court, the discretion conferred by sec. 77 of the Judicature Act ought to be exercised by refusing the leave.

Motion refused with costs.

OSLER, J.A. SEPTEMBER 23RD, 1902.

C. A.—CHAMBERS.

MIDDLETON v. SCOTT.

Appeal—Court of Appeal—Leave—Mortgage—Redemption—Tender.

Motion by plaintiffs for leave to appeal from an order of a Divisional Court (ante 536) affirming order of STREET, J., on defendant's appeal from the report of a Master. The action was by mortgagors against mortgagee for redemption. One question was whether a valid tender had been made of the amount due before action, or whether a tender had been dispensed with. Another was as to the rate at which interest should be computed after the principal fell due. It was held both by STREET, J., and the Divisional Court, that the tender was not sufficient, and that plaintiffs had not by words or conduct dispensed with the necessity for a legal tender. This only affected the question of the costs of the action.

M. Wilson, K.C., for plaintiffs.

W. E. Middleton, for defendant.

OSLER, J.A.—Two Courts, one of them of plaintiffs' own choosing, having passed against them, and considering what is now at stake in the action, viz., costs only, it would be a wrong exercise of discretion to grant leave to bring a further appeal, even assuming, as the plaintiffs very strongly urge, that the judgments below are open to criticism as having proceeded upon some misconception of the facts or wrong view of the law. The case is just such a one as, even if possibly wrongly decided, ought not, under all the circumstances, such as the subject matter and amount involved, the nature of the dispute, its origin, etc., to be further litigated. The Divisional Court have placed the right construction upon the judgment at the trial and the Rule of Court in holding that, in the event which has happened, of failure by the plaintiffs to prove tender, or dispensation of tender, the defendant became entitled to the costs. Had the question of costs been reserved by the original judgment, it is quite probable that the evidence would have justified the disposition which Street, J., made of them, i.e., giving them to neither party.

Motion refused with costs.

OSLER, J.A. SEPTEMBER 23RD, 1902.

C.A.—CHAMBERS.

PEGG v. HAMILTON.

Appeal—Court of Appeal—Leave—Mortgage—Payment—Reference.

Motion by plaintiff for leave to appeal from order of a Divisional Court (ante 418) affirming judgment of ROBERTSON, J., at the trial, dismissing the action, which was brought on a covenant contained in an old mortgage made by defendants to plaintiff, and was begun on the last or next to last day on which it could have been begun to save the running of the statute. The writ was not served on the defendants for nearly a year afterwards. The defence was payment. The amount involved was not quite $1,000. The main question was in regard to the application of certain moneys which had undoubtedly been paid to plaintiff by defendants. If these were applied on the debt represented by the mortgage, plaintiff had no further claim. No question of law arose in respect of the application. It was entirely a question of fact. It was contended that the trial Judge should have referred the case, instead of trying and disposing of it himself.

A. B. Armstrong, for plaintiff.

S. B. Woods, for defendants.

Osler, J.A.—The trial Judge had the right to dispose of the case. It is not suggested, even if that would now have been of any avail to plaintiff, that there really is any further information to be obtained of tangible value. The staleness of the claim and all the circumstances surrounding it, emphasized in the judgment of the Divisional Court, point strongly to the probability that there is no merit in it, and there being two concurrent findings to that effect, with which no possible fault can be found, leave to prosecute a further appeal should not be granted.

Motion refused with costs.

Boyd, C. September 25th, 1902.

WEEKLY COURT.

Re ALLEN AND TOWN OF NAPANEE.

Municipal Corporations—Resolution of Council—Trimming of Trees in Streets—Towns and Villages—Powers of Council—Necessity for By-law.

Motion by Allen for a summary order quashing a resolution of the town council of Napanee, that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed." The Municipal Act, R. S. O. ch. 223, sec. 574, sub-sec. 4, relating to the planting and trimming of trees on or adjacent to streets, purports to confer jurisdiction to pass by-laws thereupon to the councils of cities, towns, and villages having a population of 40,000 or more. There are no towns and villages in Ontario with such a population. Yet sec. 575 contemplates that by-laws for cutting and trimming and removal of such trees on streets may be passed by towns and villages. Napanee is a town of 3,200 inhabitants.

C. R. W. Biggar, K.C., for the applicant, contended that the resolution was ultra vires, and that a by-law was at all events necessary.

W. E. Middleton, for the town corporation, contra.

Boyd, C.—I incline to think the proper construction of sec. 574 (4) is that towns and villages may pass by-laws authorizing some officer appointed for that purpose by the council to trim all trees, whether on or adjacent to the streets, whereof the branches extend over the streets. That is to say, power is conferred on the municipality to provide that these trees do not by their growth and extension of branches

"obstruct the fair and reasonable use of the thoroughfare." These quoted words are from the Tree Planting Act, R. S. O. ch. 243, sec. 2 (1), and are there applied to the tree itself as first planted, and the section in hand appears to be fairly readable as supplemental to that, so as to provide for the case of a tree rightly planted and by growth no obstruction as a whole, but yet becoming objectionable by its sweep and droop of branch.

Taking it that jurisdiction exists, yet the power of general supervision must be exercised by by-law. The power to interfere is conferred by the Municipal Act, and is to be brought into operation as that Act provides by sec. 325. Indeed sec. 575 expressly indicates that trimming is to be done under the provisions of a by-law. I refer to Waterous v. Palmerston, 20 O. R. 411, 19 A. R. 47, 21 S. C. R. 556.

Order made quashing resolution for informality, but, as its validity on the merits is favoured, without costs.

SEPTEMBER 25TH, 1902.

C. A.

GABY v. CITY OF TORONTO.

Appeal—Court of Appeal—Motion to Quash—Third Party—Appeal against Defendants—Making Plaintiff a Party,

A motion by the plaintiff to quash the appeal of the third party as against the plaintiff was heard at the same time as the appeal of the defendants against the judgment in favour of the plaintiff and the appeal of the third party as against both plaintiff and defendants. See the former reports, ante 440, 606.

J. H. Lennox and S. B. Woods, for plaintiff.

A. F. Lobb and W. C. Chisholm, for defendants.

J. Bicknell, K.C., and J. W. Bain, for third party.

The judgment of the Court (OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) was delivered by

OSLER, J.A., holding that the motion to quash was a useless proceeding, as plaintiff was brought into Court on defendants' appeal, and both appeals were heard together. The third party was not wrong in making both defendants parties to the appeal. It was at all events a convenient course.

Motion dismissed with costs to be paid by plaintiff to third party.

STREET, J. SEPTEMBER 26TH, 1902.

CHAMBERS.

REX EX REL. McFARLANE v. COULTER.

Appeal—To Judge of High Court—From Order of County Court Judge Quashing Quo Warranto Proceedings—Right of Appeal—Power to make Order.

Appeal by relator from order of County Court Judge of Essex setting aside the fiat, the relation, and all proceedings taken thereon. On 21st January, 1902, upon the application of the relator, the Judge granted a fiat giving the relator leave, upon entering into the proper recognizance, to serve a notice of motion upon James A. Coulter, under sec. 20 of the Municipal Act, to set aside his election as reeve of the township of Colchester North. The proceedings were taken and styled in the County Court of Essex, and the recognizance was duly entered into and filed, and notice of motion served on the respondent on 21st January. On 10th March, 1902, respondent, by leave of the same Judge, gave a notice of motion, returnable before him on the 11th March, 1902, to set aside the fiat, notice of motion under it, and all the proceedings in the relation. On 21st March respondent's motion to set aside all the relator's proceedings was heard and judgment reserved. On 1st August the motion was granted, and the order in appeal made, setting all proceedings aside with costs.

W. M. Douglas, K.C., for the appellant, the relator.

J. H. Rodd, Windsor, for the respondent.

STREET, J.:—The appeal must be dismissed upon the ground that no appeal lies from the order appealed against to a Judge in Chambers. The proceedings were intituled and carried out in the County Court of Essex, and appeals from County Courts lie in ordinary cases to a Divisional Court. Under the Municipal Act of 1892, 55 Vict. ch. 42, sec. 187, sub-sec. 3, for the first time an appeal was given from the decision of the Judge trying the matter, to a Judge of the High Court. Such appeal is not from any interlocutory proceedings, but from the decision of the Judge in the matter upon the merits.

I express no opinion as to whether the County Court Judge had any power to make the order appealed against. No such power is expressly given him, and unless he have it by implication, which the Court of Appeal in Regina ex rel. Grant v. Coleman, 7 A. R. 619, thought he had not under the laws as it then stood, his duty was to go on and try the matter

on the merits. The change in the law effected by the statute of 1892 is such as to render the decisions referred to in that case no longer binding. The further change by 2 Edw. VII. ch. 1, sec. 15, does not seem to affect the present application, which was launched before that statute was passed.

BOYD, C. SEPTEMBER 26TH, 1902.

WEEKLY COURT.

QUIRK v. DUDLEY.

Injunction—Repetition of Slander—Public Entertainment—Pretended Supernatural Revelations—Imputation of Murder—Pending Inquest.

Motion by plaintiff to continue injunction granted by local Judge at Brantford restraining defendant from continuing, in the course of entertainments given at Brantford, to make slanderous reflections upon the plaintiff in connection with the death of her husband.

J. H. Couch, for plaintiff.

M. F. Muir, Brantford, for defendant.

BOYD, C.:—The complaint of plaintiff, as it comes before the Court on the affidavits, is uncontradicted by any evidence for defendant; it stands confessed that there has been an outrageous attack upon the character of plaintiff, ventured upon at a public entertainment by means of suggestions that she has been privy to the violent death of her husband. The defendant, posing as a mind reader, assumes, when in a state of so-called trance, to have before her mind's eye, visualized, the panorama of the assumed tragedy, and tells forth the details bit by bit. Some interesting additions appear to be reserved for future exhibitions or entertainments, and to restrain these the intervention of the Court is sought. Jurisdiction undoubtedly exists in libel or slander actions to restrain repetition of the defamatory words, whether written or oral. This case appears to be perfectly atrocious. In the most sensational manner, and to gather in a little filthy lucre in the way of admission fees, the public are given to understand that plaintiff is mixed up in some way with the murder of her husband. The mischief is enhanced by the fact that the revelations are published in the newspapers at Brantford, and all the while proceedings are pending concerning the manner of the husband's death before a coroner's jury impanelled in the same city, the inquest having been adjourned till 2nd December.

Monson v. Tussauds Limited, [1894] 1 Q. B. 671, and Hermann Loog v. Bean, 26 Ch. D. 306, followed.

Injunction continued until the trial or further order.

LOUNT, J. SEPTEMBER 26TH, 1902.

TRIAL.

ANDERSON v. ELGIE.

Dower—Reference as to Damages—Arrears.

Judgment, ante 550, corrected by directing that no damages are to be allowed for arrears of dower.

FALCONBRIDGE, C.J. SEPTEMBER 26TH, 1902.

TRIAL.

GUENOT v. GIRARDOT.

Promissory Note—Agent for Collection—Power to Compromise—Striking out Claim for Wages.

Action upon a promissory note and for wages, tried at Sandwich.

F. D. Davis, Windsor, and A. F. Healy, Windsor, for plaintiff.

J. L. Murphy, Windsor, and J. E. O'Connor, Windsor, for defendant.

FALCONBRIDGE, C.J.:—I find as a fact that the note sued on was indorsed by plaintiff and handed by him in November, 1901, after it became due, to Albert Guenot for collection as the agent of plaintiff, and that Albert Guenot never had any authority from plaintiff to make any settlement except to receive payment of the whole amount due thereon, and Albert Guenot subsequently handed back the note to plaintiff, who was and is the holder thereof. I find further that, if Albert Guenot had had authority to make any settlement for less than the face amount of the note, no settlement was in fact finally arrived at. Defendant never received back the note sued on, and of the $50 which he paid to one Gignac, he has received back $30, and can get the balance of $20 when he wants it. The evidence about the claim for a balance of wages not being very satisfactory, I strike that claim out of the present suit, leaving it to be dealt with, along with defendant's claim on the two Guenots for rent, by the appropriate tribunal.

Judgment for plaintiff for amount of note and interest, with costs.