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FERGUSON, J. FEBRUARY 24TH, 1902.

TRIAL.

HULL v. ALLEN.

Evidence—Parol Evidence to Establish Trust—Admission of.

This was an action for an account of defendant's dealings with certain properties transferred to him by plaintiff as security for an indorsement, and for other relief.

The plaintiff, among other things, asked for a declaration that the purchase made by the defendant of a lot of land, known as "the Merrill lot," was made by him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust.

W. Nesbitt, K.C., and A. S. Ball, Woodstock, for the plaintiff.

J. P. Mabee, K.C., for the defendant.

FERGUSON, J., *held*, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust.

The authorities are conflicting. Bartlett v. Pickersgill, 1 Cox 15, 1 Eden 515, 4 East 577, Heard v. Piley, L. R. 4 Ch. 548, James v. Smith, [1891] 1 Ch. at p. 387, and Rochefoucauld v. Boustead, [1897] 1 Ch. 196, discussed.

Held, however, that the evidence in this case failed to prove the trust.

As to the claim for damages for the defendant's failure to "bid in" the farm known as "the Hoffman farm," at the sale thereof under the power in a mortgage, in violation

of his alleged promise so to do, the burden of proof was on the plaintiff, and he had failed to sustain it.

Judgment for the plaintiff, for an account except as to the Merrill lot and the Hoffman farm. Reference to Master at Woodstock. Further directions and costs reserved till after report.

A. S. Ball, Woodstock, solicitor for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

STREET, J.

FEBRUARY 24TH, 1902.

WEEKLY COURT.

RE BRADBURN AND TURNER.

Vendor and Purchaser—Will—Charge of Debts—But Estate Charged not Vested—R. S. O. ch. 129, sec. 18—Executors can Make Title—Devisees of Residue After Payment of Debts need not be Parties to Conveyance—Widow—Dower—Election — Purchaser Entitled to a Release of, from Widow, or Declaration, so as to Estop her.

Petition under the Vendors' and Purchasers' Act.

A. P. Poussette, K.C., for vendors.

E. A. Peck, Peterborough, for purchaser.

STREET, J.—The testator, Thomas Bradburn, by his will, dated 12th January, 1900, in the first place appointed his three sons, who were the vendors, to be his executors, directing them to pay all his lawful debts out of his estate. Then followed devises and bequests of real and personal property to various members of his family. These were followed by a clause declaring that all the foregoing property was to be free and clear of every incumbrance whatsoever. The next clause was as follows:—"I do hereby will the following property, subject to the payment of all my just debts; and when all my debts are fully paid, the balance shall be divided amongst my said four children, Thomas, William, Rupert, and Mabel, share and share alike. The property which I will to my children, share and share alike, is situated as follows." Then came a list of the lands referred to in this clause covering the land which was the subject of the petition. Then the will proceeded:—"I would here suggest what I consider the best means of protection for all parties interested in this my will, to make no division of any of my property, but pool it altogether and divide the proceeds share and share alike. . .

The property willed and described herein is intended to go to the parties direct."

The case comes within the provisions of sec. 18 of R. S. O. ch. 129, under which, when a charge for debts is created, but the estate is not vested in any trustee or trustees by the terms of the will, a power of sale is given to the executors, and purchasers are (by sec. 19) relieved from the necessity of inquiring as to the due execution of the power. Therefore, the executors can make title to these lands without the concurrence of any of the devisees. The children's rights are given to them only in the residue after payment of the debts, and the later references in the will must be read accordingly.

The will contains various gifts to the widow, including an annuity of $1,500, payable quarterly, and declares that she is to accept them in lieu of dower. The petition states that after the death of the testator, the widow elected to, and did, accept the provision made for her in lieu of dower, and has since received annually the annuity. I think the purchaser is entitled either to a release from her or to a declaration from her in a form sufficient to estop her as against him from claiming dower, for her receipt of the annuity was only *prima facie* evidence against her, and she might, in spite of it, be let in to claim her dower in case it should appear that she had elected without proper knowledge of the effect of her so doing.

Order declaring accordingly. No costs.

Poussette & McWilliams, Peterborough, solicitors for vendor.

Dennistoun, Peck, & Stevenson, Peterborough, solicitors for purchaser.

LOUNT, J. FEBRUARY 24TH, 1902.

CHAMBERS.

RE DUNCOMBE.

Life Insurance—Preferred Beneficiary—Will—Bequest of Half of Estate, Including Policies—Construction of—Trust.

Application by executors under Rule 938 for construction of clause 5 of will of Thomas Wallace Duncombe, who died, without issue, on the 2nd October, 1901, leaving him

surviving Mary Duncombe, his widow. Three policies of insurance upon the life of the testator are in question: one for $1,000, payable to his wife at his death; one for $5,000, for the benefit of his wife, the beneficiary, providing, however, that at his death an annuity of $250 per year for twenty years should be paid to his wife, the beneficiary; and one for $1,000, payable at his death to his legal heirs. Clause 5 of the will is as follows:—"I give and bequeath unto my dear wife, Mary Duncombe, my household furniture and one-half of my estate, including the policies of insurance made payable to her upon my death."

W. A. Wilson, St. Thomas, for the executors.

J. M. Clark, K.C., for Mary Duncombe.

J. R. Cartwright, K.C., for the Attorney-General.

A. M. Stewart, for the official guardian.

M. F. Muir, Brantford, for Mrs. Chapin.

LOUNT, J.—*Held*, that the moneys accruing under the third policy form part of the estate, but, as to the first two policies, a trust was created in favour of the wife, a preferred beneficiary, and the trust remained in her favour up to his death, and the moneys payable under these policies formed no part of his estate. Order declaring accordingly. Costs of all parties out of the estate.

MACMAHON, J. FEBRUARY 25TH, 1902.

TRIAL.

OTTAWA ELECTRIC CO. v. CONSUMERS ELECTRIC CO.

Company—Supplying Electric Light, &c.—Not Entitled to Sole Use of Streets—Other Companies Using Streets Must Keep Primary Wires at a Distance of 3 Feet from Secondary Wires—Between two Secondary Wires a Distance of 6 to 9 Inches must be Kept—Injunction—Apprehended Danger—Ground for Moving.

Action tried at Ottawa, brought to restrain defendants from erecting or maintaining poles or wires on certain streets in the city of Ottawa, Ontario, in such proximity to those of plaintiffs as to interfere with the proper working of their system, or to constitute menace and danger to the plaintiffs, or to their employees, or to the general public.

The plaintiff company is a consolidation of other companies under 57 & 58 Vict. ch. 111 (D.) The defendant

company obtained a charter in October, 1901, under R. S. C. ch. 119. The plaintiffs, for many years, have sold and distributed electricity for purposes of light, heat, and power in Ottawa, and have erected poles and wires along certain streets, subject to the terms and conditions of by-laws of the corporation of Ottawa.

The defendant company is authorized to erect and maintain poles and wires for the like purposes as the plaintiff company.

G. F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for plaintiffs.

W. Nesbitt, K.C., and Glyn Osler, Ottawa, for defendants.

MacMahon, J.—In dealing with the case it must not be overlooked that the litigants are both electric light companies, and, therefore, on an equal footing in regard to the business they were respectively chartered to carry on, and the plaintiffs being in prior occupation of the streets gives them no exclusive right or privilege to the use of such streets or to the particular sides of the said streets occupied by their poles and wires. But, being first in occupation and using the streets under an authority conferred by the municipality, they are entitled to protection against a company subsequently using the streets, under a like authority, in such a manner as is likely to injure the property of the plaintiffs, or endanger their workmen or servants: Bell Telephone v. Belleville E. L. Co., 12 O. R. 571; Consol. Elec. Light Co. v. People's Elec. L. Co., 94 Ala. 372; Rutland, etc., Co. v. Marble City, etc., Co., 65 Vt. 377. . . . There was considerable divergence in the evidence given by those skilled in the practical working of electric light and other electrical plants, as to the distance within which the poles and wires of one electric light system might with safety be placed to that of another electric light company. . . . Notwithstanding the immunity from accidents which it is said may exist for a time where the poles of one electric company are erected and pass between the wires of another company, there is beyond question an element of great danger in construction, depending in some measure on climatic changes, the danger being much greater where, as in the section of the Province in which these companies are chartered to carry on business, there are frequent sleet and snow storms. Upon the evidence, three feet may be regarded as a distance of safety between primary and secondary wires, but as between two secondary wires they may parallel each other at a distance of from 6 to 9 inches without the slightest danger.

. . . Apprehended danger was a sufficient ground for moving for the interim injunction: Siddons v. Short, 2 C. P. D. 572; Western Union, etc., Co. v. Guernsey, etc., Co., 46 Mo. App. 120. Costs of action and motion for injunction to plaintiffs.

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

O'Gara, Wyld, & Osler, Ottawa, solicitors for defendants.

STREET, J.

FEBRUARY 25TH, 1902.

CHAMBERS.

HUME v. HUME.

Pleading — Counterclaim — Action by Executrix and Devisee for Arrears of Annuity—Counterclaim by Co-Executor for Moneys Received for Estate—Rule 248.

Pender v. Taddei, [1898] 1 Q. B. 708, followed.

Appeal by defendant from order of Master in Chambers, striking out counterclaim. The action was brought by the widow of George Hume for arrears of an annuity under his will. The counterclaim was for moneys which the defendant alleged came to the hands of plaintiff, as one of the executors of the will, and which she had not accounted for. The Master held that this was not a proper subject of counterclaim, it being a claim against the plaintiff in a representative character.

J. Bicknell, for appellant.

N. F. Paterson, K.C., for plaintiff.

STREET, J.—*Held*, that since the counterclaim was for relief, not by defendant alone, but by defendant for himself and others, it does not come within Rule 248. Pender v. Taddei, [1898] 1 Q. B. 798, followed. Held, also, that the question as to the effect of the release executed by plaintiff of part of the moneys claimed in the action is not a matter to be raised by counterclaim, but as a defence *pro tanto* to plaintiff's claim. Appeal dismissed with costs payable forthwith.

Paterson, Ritchie, & Sweeney, Toronto, solicitors for plaintiff.

J. W. Elliott, Milton, solicitor for defendant.

STREET, J. FEBRUARY 25TH, 1902.

CHAMBERS.

RE GARDNER.

Will — Construction — Distribution of Estate — "Heirs" — "Next in Heirship"—Period of Ascertainment.

Motion for order declaring the construction of the will of Robert Gardner, deceased.

The will was dated 18th October, 1870; the testator died 25th November, 1870; and the widow died 31st December, 1901.

The clause of the will in question followed a gift to the widow of the real and personal estate for her life, and was as follows:—"I will and bequeath that my whole estate (after the death of my wife . . .) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Watkins, and my deceased sister Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship."

A. McKechnie, Brampton, for executor.

F. W. Harcourt, for infants.

J. A. Wright, J. H. Moss, and R. E. Heggie, Brampton, for adults interested.

STREET, J.—The persons entitled in the first place are all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death, or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The testator intends that if any one of those entitled should die in the lifetime of his widow, the share should go to the issue of the one dying. It is necessary, therefore, to construe the words "children or their heirs" as meaning "children or their issue," and as giving the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The result is that the shares of the children entitled to share become vested at once; but in the event of any child dying in the lifetime of the widow leaving issue, the share of that child is divested, and goes to such issue, and vests at once and finally in the issue, who then become the stock of descent. The words "should no heirs of the above be alive, that it go to the next in heirship," have served their purpose

when they have indicated the meaning intended by the testator to be given to the word "heirs" in the preceding sentence. That word is to be construed to mean "issue;" so is the word "heirs" in the sentence "should no heirs:" but the words "next in heirship" are to be construed as meaning the heirs at law to the realty and the statutory next of kin to the personalty: Keay v. Boulton, 25 Ch. D. 213. The heirs or next of kin in each case are to be ascertained at the death of the person whose vested share they take.

FEBRUARY 26TH, 1902.

DIVISIONAL COURT.

EVANS v. JAFFRAY.

Discovery—Affidavit of Documents—Materiality of Documents—Examination of Parties—Scope of—Consequential Discovery—Discretion—Contents of Documents—Recollection—Costs of Lengthy Examination.

An appeal by the plaintiff from the order of MEREDITH, C. J., *ante* 29.

The plaintiff alleged a contract of partnership between him and the defendant J., for the promotion of a company to purchase certain bicycle plants, and to carry on a bicycle manufacturing business, etc., and that the defendants R. and C. had maliciously caused a breach of the partnership contract; and the plaintiff claimed a partnership account, and damages for such breach and for conspiracy.

It appeared from the examination for discovery of the defendant R., that he obtained written agreements from various companies, either in his own name, or in the names of himself and the defendant C., or in the names of other persons; that these agreements, or some of them, were afterwards assigned to a company which was then incorporated (not a party to this action). The plaintiff alleged that these agreements were, in fraud of his rights, substituted, with variations, for certain agreements previously entered into between the same companies and the defendant J., who was alleged to be the plaintiff's partner in the transactions. The plaintiff also alleged that the defendants R. and C. paid $20,000 to the defendant J. to induce him to act with them, instead of with the plaintiff, in completing the purchase of the agreements; and it appeared from R.'s examination that

he and C. drew a cheque upon their bank account in favour of the defendant J., which was paid.

F. A. Anglin, for the plaintiff.

E. F. B. Johnston, K.C., and C. W. Kerr, for the defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET and BRITTON, JJ.) was delivered by STREET, J., holding as follows:—

(1) That the agreements and the cheque and also a certain memorandum prepared by the defendant R., were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits on production of documents.

(2) That the defendants R. and C. ought not, as a matter of discretion, to be ordered to disclose, upon their examination for discovery, facts which would become material only when the plaintiff should have established his right to recover damages.

(3) That the plaintiff was entitled to discovery from the defendants R. and C. as to whether they paid money to J.; whether it was their own money or that of other persons, and if the latter, of what persons; and for what it was paid.

(4) That the plaintiff was entitled also to discovery as to the amount paid by R. and C. to the M. company for the bicycle branch of their business; it being alleged by the plaintiff that he and J. had obtained an option to purchase it, and that the defendants had substituted a new option therefor.

(5) That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them.

Stuart v. Bute, 11 Sim. 452, 12 Sim. 461; Taylor v. Rundell, 11 Sim. 391, 1 Cr. & Ph. 104, and Dalrymple v. Leslie, 8 Q. B. D. 5, followed.

Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed.

Decision of MEREDITH, C.J., *ante* 29, varied.

FALCONBRIDGE, C.J. FEBRUARY 27TH, 1902.

WEEKLY COURT.

PADGET v. PADGET.

Practice—Appearance—Limited Appearance—Submission to Judgment—Irregularity—Motion for Judgment.

Motion (heard at Ottawa) by plaintiff to set aside, as irregular, the appearance entered by defendant, or for leave to sign judgment for the declaration asked for in the indorsement on the writ of summons, with costs, and to proceed with the plaintiff's claim for damages, as indorsed on the writ, or to discontinue the action as to the claim for damages, without costs. The indorsement on the writ was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of John Padget, but erroneously described therein, were absolutely freed and discharged from the conditions and obligations to which they are subjected by the will in favour of the defendant, and absolutely freed and discharged from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant; and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands, when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows:—"Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will. . . ."

W. A. D. Lees, Ottawa, for plaintiff.

J. I. MacCraken, Ottawa, for defendant.

FALCONBRIDGE, C.J.—There is no authority whatever in the Rules or in the practice for an appearance limited as is this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance will, therefore, be set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. The defendant may have leave to file a proper appearance on payment of costs of this motion. But the motion was really

argued before me as a motion for judgment, and the merits were gone into, and if the defendant so elects within one week, my order will be that, on execution by him of the quit-claim and on payment of costs (which I fix at $10), this action shall be discontinued.

Lees & Hall, Ottawa, solicitors for plaintiff.

MacCraken, Henderson, & McDougal, solicitors for defendant.

FALCONBRIDGE, C.J.] [MARCH 1ST, 1902.

WEEKLY COURT.

RE PRESCOTT ELEVATOR CO.

Company — Winding-up — Terms of Order — Execution Creditor — Priorities.

Motion for a winding-up order under the Dominion Winding-up Act, heard in the Ottawa Weekly Court.

J. I. MacCraken, Ottawa, for the petitioners.

F. A. Magee, Ottawa, for Dunn, an execution creditor of the company.

FALCONBRIDGE, C.J.—(1) There will be a declaration that this company is a corporation to which the provisions of the Winding-up Act and amendments are applicable. (2) Declaration that the company be wound up under the provisions of the said Act and amendments; and an order directing the winding-up of the same under said provisions. (3) Order appointing the Ottawa Trust and Deposit Company, Limited, provisional liquidator. (4) Order referring it to the Master at Ottawa to appoint a permanent liquidator, and to wind up the company. (5) Usual order as to costs. (6) It was stated that the judgment creditor Dunn has an execution in the sheriff's hands. It is not the intention of this order that the fruits of his diligence should be taken away from him, if he has placed himself in any position of priority. If he has done so, the Master shall direct the liquidator to sell such chattels as may be found exigible for the benefit of the execution creditor.

CORRECTION.

In Bartlett v. Canadian Bank of Commerce, *ante* 68, the decision of the Court was based upon the opinion that sufficient discovery had already been afforded to the plaintiffs. The Chief Justice of the King's Bench, delivering the judgment of the Divisional Court, expressed approval of the case of Ontario Bank v. Shields, 33 C. L. J. 393, but the question whether a bank teller is an officer of the bank was not actually decided.