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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. SEPTEMBER 29TH, 1920.

CATTANACH AND DAVIS v. ELGIE.

Fraud and Misrepresentation—Sale of Land and Chattels—Acceptance of Threshing Outfit as Part of Consideration—Misrepresentations as to Condition of Outfit—Reliance on—Inducement for Making Contract—Evidence—Damages—Costs.

Appeal by the defendant from the judgment of KELLY, J., 18 O.W.N. 162.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

G. R. Munnoch, for the appellant.

W. H. Barnum, for the plaintiffs, respondents.

THE COURT varied the judgment by reducing the damages awarded to the plaintiff Cattanach from $800 to $300 and directing that the plaintiffs should be allowed the full costs of the action. No costs of the appeal were allowed to either party.

HIGH COURT DIVISION.

MIDDLETON, J. SEPTEMBER 27TH, 1920.

*CRIDLAND v. CITY OF TORONTO.

Municipal Corporations—By-law Regulating Erection of Buildings—Application for Permit to Erect Factory—"Residential" Street not so Declared—Amending By-law Giving Power to Inspector of Buildings to Withhold Permit—Ultra Vires—Mandatory Order—Costs.

* This case and all others so marked to be reported in the Ontario Law Reports.

Motion by J. Cridland and A. Jeffery, the plaintiffs in an action, for a mandatory order directing the defendants, the Municipal Corporation of the City of Toronto and G. F. W. Price (Inspector of Buildings), to issue to the plaintiffs a building permit with respect to the premises, 308 Coxwell avenue, in the city of Toronto, upon the ground that by-law 8284 of the city corporation is ultra vires.

The motion was heard in the Weekly Court, Toronto.

T. N. Phelan, for the plaintiffs.

C. M. Colquhoun, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiffs desired to erect a factory in a district not declared to be "residential," and had filed plans in accordance with the general building by-law of the city corporation. On the 15th December, 1919, the building by-law was amended by adding to sec. 2 a new subsection (12), as follows:—

"12. When an application or the drawings or specifications accompanying the same relate to property on a street residential in character but not so declared by by-law, the Inspector of Buildings shall forthwith report the particulars thereof to the Committee on Property, which shall consider the advisability of declaring the whole or some part of the property on said street residential, and report the matter to the council, and pending the decision of the council thereon the Inspector shall withhold the issue of a permit and shall act in accordance with the decision of the council."

The Inspector of Buildings, deeming the street to be residential, refused to issue a permit pending the decision of the council on the question of declaring the street or some part to be residental.

For some reason, the matter was not reported to the Property Committee, but the Board of Control had directed that a permit should not be issued.

It was said that the Inspector should not have found the street to be "residential in character," as at the part where the factory was to be placed there were large city stables and other buildings of a commercial character. The learned Judge thought that he should not enter upon the discussion of this matter.

He was of opinion that the amending by-law was beyond the power of the municipality. The council may declare a district residential, and so prevent the erection of a factory; but it has no power to compel a land-owner to refrain from the exercise of his rights under the law as it is to-day so as to enable the city council to consider the enactment of a law which will make that unlawful which is to-day 'awful. The citizen desiring to build is

entitled to do so if he complies with the law as it is to-day as to building, and the building by-law must not be used as a means of delaying him until the council considers a question which arises under an independent section.

The council has power to pass by-laws binding on all those who are subject to its jurisdiction, but an attempt to regulate the conduct of any individual rather than to pass a general by-law is bad. The situation indicates that the council does not really intend to pass a law setting apart a residential district, but to prohibit this factory because the particular industry may prove to be a nuisance to the owner of the adjoining premises.

The mandatory sought should be granted, and costs should be awarded against both defendants.

The validity of the city by-law being attacked, the city corporation was a proper party; and, as the civic officer was acting in obedience to the by-law, the city corporation ought to bear the costs.

MEREDITH, C.J.C.P., IN CHAMBERS. SEPTEMBER 29TH, 1920.

REX v. NEALON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Evidence—Liquor Found by Constable in Lane—Failure to Shew that Defendant "Had" it.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of St. Thomas, for having intoxicating liquor in a place other than his (the defendant's) private dwelling house, contrary to the provisions of the Ontario Temperance Act, 6 Geo. V. ch. 50, sec. 41.

J. B. Davidson, for the defendant.
F. P. Brennan, for the magistrate.

MEREDITH, C.J.C.P., in a written judgment, said that it might be a good guess that the defendant was in the alley in which he was arrested for the purpose of getting the "Old Crow whisky," in the "handbag," which were produced at the trial before the Police Magistrate, and of getting it under some arrangement, with some one interested in the ownership of it, that he (the defendant) should get it at the place where it was found; but

no one is to be convicted on mere conjecture, however shrewd the guess may be; and, if one could be so convicted, the defendant could not be convicted, because he never "had" the liquor.

There was no suggestion, there could be none with any degree of reason, that the defendant put the bag containing the liquor in the place where the constable saw it; the defendant may have gone to the place where he was arrested to get the liquor; but, if so, he was arrested before he had committed any offence, before he had been able to find the liquor. The whole evidence was that the liquor never came into the defendant's possession in any manner.

The most that could be reasonably suggested against the accused was, that he went to the place where the liquor was to get it and carry it to some one else who had employed him to do so and run the risk; but, before he was able to get it, he was arrested by the constable, who alone had the liquor and bag on that occasion. If the constable really ever thought that the defendant had come for liquor, and if he wanted only to convict of crime, not prevent it, it was an extraordinary thing that he did not remain in concealment till the defendant had taken it. In a few minutes more, the constable would have had conclusive evidence of a guilty or innocent intention.

The conviction should be quashed.

ORDE, J. OCTOBER 1ST, 1920.

RE BARNET.

Will—Powers of Executors and Trustees—Realisation of Part of Estate—Present Distribution among Beneficiaries, all being Adults—Authority of Court—Provision for Postponement of Distribution—Continuance of Advances to Company in which Testator Held Large Block of Shares—Interest of Estate—Repayment of Advances without Interest—Discretion of Trustees.

Motion by the Royal Trust Company, executors and trustees under the will of Alexander Barnet, deceased, under Rule 600, for the advice and direction of the Court as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Ottawa.

Wentworth Greene, for the applicants.

The residuary devisees and legatees, though duly served, did not appear and were not represented by counsel.

ORDE, J., in a written judgment, said that the trustees had realised part of the estate, amounting to a very substantial sum, and asked for authority to distribute it and any other sums realised from time to time among the residuary beneficiaries, viz., the widow, four daughters, and two sons of the testator, all adults and all sharing equally. By an order made by Middleton, J., on the 28th March, 1918, it was declared that the residue went to the widow and those children of the testator who were living at the expiration of one year from the testator's death; and that a clause in the will providing for substitution in the case of the death of any of the residuary beneficiaries had reference to their death before the expiration of the period of one year after the testator's death, notwithstanding certain provisions for the postponement of distribution until the testator's shares and interests in certain companies were sold. His interests in one of these companies still remained unsold, and the trustees now asked authority to distribute notwithstanding the provision for postponement. The will contained no provision for the disposal of income during the period of postponement; it must necessarily accumulate as an accretion to the residue. In these circumstances, those entitled to the fund, all being adults, could at any time put an end to the trust. In this respect the authority of the Court was hardly necessary for the protection of the trustees, but they might have a declaration if they desired it.

By clause 11 of the will, the testator directed his executors to pay annually to the credit of the president and secretary of A. Barnet & Co. Limited the sum of $10,000, to be applied by that company in paying the expenses of taking care of the timber berths and lands of the company in Quebec and in British Columbia and in paying annually to each of the testator's two sons the sum of $1,500 for their services in respect of these lands and berths; also, that these sums should be paid for a period of not more than five years after the testator's decease; provided, however, that, if at any time during that period the sons should dispose of their stock in the Brunette Saw Mill Company Limited, or any or all of the timber berths or lands held by the first-mentioned company should be sold and paid for, the annual advances to the company should cease and the payment of salaries to the sons should likewise cease; also, that, when all the timber berths and lands of the Barnet company have been sold and paid for, all moneys advanced by the executors should be repaid without interest; but it has to be distinctly understood that the sons should bear their shares of the expenses of that company.

In accordance with this, the executors paid over to the Barnet company from the 12th January, 1917, the date of the testator's death, until March, 1920, $10,000 annually for the purposes direct-

ed by the testator. In April, 1920, the two sons disposed of their shares in the Brunette company; and, accordingly, the authority for any further advances to the Barnet company ceased. The testator evidently contemplated that the sale of their stock in the Brunette company would enable the two sons to make any further advances which might be necessary to the Barnet company and to dispense with their salaries. The sons, however, declined to make the advances; and the question was, what was to be done with the estate's interest in the Barnet company. The shares in the Barnet company were said to be 794, of which the estate held 396 and the two sons 396.

The trustees asked for an order permitting them to continue, in their discretion, to make such advances to the Barnet company as may be necessary to meet the estate's share or proportion of the expenditure necessary for ground rents, taxes, fire-ranging, etc., and that such advances may be made repayable without interest if the trustees, in their discretion, see fit.

The company had no available funds for this purpose. The will contained no provision for investment; and an advance of money to a joint stock company, if regarded as an investment, would be unauthorised. But, if the limits belonged wholly to the estate, it would be proper for the trustees, pending realisation, to pay the expenses required to preserve the limits. The fact that the estate's interest in the limits is held by means of stock in a company ought not to be an insuperable obstacle to the trustees doing what in their judgment was necessary to protect the estate, especially as those entitled to the residue offered no objection.

There should be an order giving the trustees the authority asked for, with the additional provision that both the continuance of the advances and their repayment without interest should be in the discretion of the trustees. The costs of all parties should be paid out of the estate—those of the trustees as between solicitor and client.

ORDE, J. OCTOBER 1ST, 1920.

*McDOWELL v. TOWNSHIP OF ZONE.

Highway—Disputed Boundary—Original Road-allowance—Township Corporation—Survey Confirmed by Minister of Lands Forests and Mines—Surveys Act, R.S.O. 1914 ch. 166, sec. 13—Estoppel—Municipal Act, sec. 478—Trespass—Injunction—Damages.

Action by the owner of lots 4, 5, and 6 in the Gore concession of the township of Zone, in the county of Kent, for an injunction restraining the defendants, the municipal corporation of the township, from trespassing upon these lots and from tearing down and interfering with the plaintiff's fences thereon, for a mandatory order compelling the defendants to re-erect the fences torn down by them, for a declaration, and for other relief.

The action was tried without a jury at Chatham.

T. G. Meredith, K.C., for the plaintiff.

J. M. Pike, K.C., for the defendants.

ORDE, J., in a written judgment, said that the plaintiff took the position that, under the provisions of sec. 13 of the Surveys Act, R.S.O. 1914 ch. 166, a survey made by one McCubbin and its confirmation by the Minister of Lands Forests and Mines were final and binding and their effect was to fix the southern boundary of the road-allowance, and consequently the northern boundary of the plaintiff's land, on the line laid down by McCubbin.

The defendants said that a highway intended to be upon the original road-allowance, known as "the Base line," was laid out and opened up for public use more than 60 years ago, and had since been continuously used as a highway, and that statute labour had been performed and public money spent thereon; that the defendants were not aware that any part of the highway so laid out was upon the plaintiff's lands; but, if so, the defendants set up sec. 478 of the Municipal Act, R.S.O. 1914 ch. 192; that the plaintiff's lands were purchased with full knowledge of the existence of the highway as so laid out and opened; and that he and his predecessors in title had acquiesced in the location of the same, and the plaintiff was estopped.

The learned Judge said that the solution of the difficulty lay within a very narrow compass. The defendants, having set in motion the application for the survey, under sec. 13 of the Surveys Act, must be held to be bound by the result. If that result is to

shift the boundaries of the road-allowance from the lines upon which they were supposed by the defendants to stand, then the defendants must accept the judgment of the tribunal to which they had submitted the matter in dispute. They surely could not be permitted to accept the result if favourable and to reject it if adverse.

If it were argued that the result might throw the whole of the travelled roadway outside the true boundaries of the road-allowance, and so subject the municipality to needless expense, the answer would be that it was not to be supposed that the Minister would fail to take such a matter into consideration, and, by the exercise of the power to amend the survey given to him by sub-sec. 4 of sec. 13, duly protect the municipality.

The effect of the survey and the Minister's order must be to revest in the adjoining owner any land of which he may have been dispossessed by the opening up of the roadway along an erroneous line, notwithstanding sec. 478 of the Municipal Act. So long as the provisions of the Surveys Act were not invoked, sec. 478 of the Municipal Act was effective; but, by resorting to sec. 13 of the Surveys Act, the defendants opened up the whole question as to the location of the true boundary-lines; and the defendants were now estopped from questioning in any Court the order of the Minister, and they could not be heard to say that the boundary-lines as laid down by McCubbin were not the permanent boundaries of the Base line, to all intents and purposes.

Hislop v. Township of McGillivray (1890), 17 Can. S.C.R. 479, distinguished.

The plaintiff was entitled to a declaration that McCubbin's survey was final and conclusive as establishing the boundary-line of that part of the road-allowance commonly called "the Base line," and to an injunction restraining the defendants from trespassing upon the plaintiff's lands as established by that survey, and from tearing down or removing the plaintiff's fences thereon, and for the damages which the plaintiff had sustained by the wrongful acts of the defendants in tearing down the fences erected since the Minister's order, with a reference to the Local Master to fix the damages if the parties cannot agree upon a sum, and for the payment by the defendants of the plaintiff's costs.

ORDE, J. OCTOBER, 2ND, 1920.

RE NESBITT AND NEILL.

Will—Construction—Devise of Land to Son—Executory Devise over at his Decease to another Son "or his Heirs" if the first Son does not Marry—Words of Limitation—"Or" Read as "and"—Fee Simple Vested in two Sons—Conveyance to Purchaser, both Joining—Application under Vendors and Purchasers Act—Costs.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that he can make a good conveyance of the land to the purchaser.

The motion was heard in the Weekly Court, Ottawa.
F. S. Dunlevie, for the vendor.
J. E. Caldwell, for the purchaser.

ORDE, J., in a written judgment, said that John Nesbitt (the vendor) and his brother Robert were devisees of the land under the will of their father, the gift being in these words: "To my son John I bequeath the north half of lot No. 23 in 2nd con. R.F. Township of Nepean, but if he does not marry again then at his decease it shall become the property of my son Robert or his heirs." Robert was willing to join in the conveyance to the purchaser or to execute a conveyance to John, but the purchaser objected to the title on the ground that the words "or his heirs" were substitutional and not words of limitation. The vendor contended that "or" should be read as "and," which would make "or his heirs" words of limitation.

The devise to Robert, being limited upon a determinable fee, gave him an executory interest. The fee simple given to John was determinable upon his death without having married again. If he married, the determinable fee was enlarged into an absolute fee simple. If he died without having married, Robert would take the fee by way of executory devise. This would be the case whether the words "or his heirs" were added or not. The testator might have intended that, if Robert predeceased John, and the latter died without having married, Robert's heirs should take. That a devise of land to "A. or his heirs" is to be read as a devise to "A. and his heirs," and so as a devise of the fee, is settled law, notwithstanding the doubts that have arisen by reason of those provisions of the Wills Act whereby a devise of land without words of limitation passes the fee, whereas formerly it passed merely a life-estate: Re Ibbetson (1903), 88 L.T.R. 461. Reference to

In re Clerke, [1915] 2 Ch. 301; Read v. Snell (1743), 2 Atk. 642; Re Wright and Fowler (1916), 10 O.W.N. 299; Re Edgerley and Hotrum (1913), 4 O.W.N. 1434.

The only doubt in the mind of the learned Judge was whether the fact that the gift to "Robert or his heirs" was not a remainder, but an executory devise, affected the application of the rule, either because in principle it ought not to apply in such a case, or because the fact that the devise is executory may be an indication that the testator intended by the word "or" to make a gift to Robert's heirs by way of substitution. So far as the principle of the rule is concerned, the learned Judge sees no reason why it should not apply to an executory devise as well as to a remainder. The reason for the rule prior to the Wills Act of 1838 was that, in the case of a gift to "A. or his heirs," unless "or" was read as "and," A. would take only a life-estate: Hawkins on Wills, 2nd ed., p. 222. Whatever logic there may be in this as a reason for the rule is equally applicable to an executory interest. The same reasoning would apply to the question whether or not the fact that an executory interest, and not a remainder, is being dealt with, indicates a contrary intention on the part of the testator. Had the gift to Robert been contingent upon his surviving John—by the use of some such words as "if then living"—the words "or his heirs" might well be construed as substitutional, on the authority of Wingfield v. Wingfield (1878), 9 Ch. D. 658, Keay v. Boulton (1883), 25 Ch. D. 212, and like cases; but the words "then at his decease" do not make the executory devise to Robert contingent upon his surviving John. Had the gift to John been of a life-estate only, these words would not cut down the vested remainder to Robert to a contingent remainder. So that, if the executory interest had been given to Robert simply without the addition of the words "or his heirs," his interest would have been assignable under the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 10, and would also be devisable by will. If the addition of the words "or his heirs" to a devise of the fee or of a vested remainder does not contain an implication of an intention to make the gift to the heirs substitutionary, there can be no reason for applying any different rule, when the devise is executory, and there is no condition as to survivorship or otherwise.

Therefore, the words "or his heirs" are to be construed as words of limitation, the word "or" being read as "and;" and it should be declared that John Nesbitt and Robert Nesbitt can together make a good title to the land.

Each party should bear his own costs of the application.