CASE AND COMMENT

WILL—CONSTRUCTION—GIFT TO PERSON DESCRIBED AS HOLDING AN OFFICE—ABSOLUTE OR ON TRUST.—It is trite law that a person who is seeking to rely upon an express trust must show that the settlor has used language from which the court may properly find, as a fact, an intention to create a trust of ascertainable property in favour of ascertainable beneficiaries. In *In re Barclay, Gardner* v. *Barclay*[1] one of the questions before the Court of Appeal was, whether the description of a man by reference to his office, in a bequest, is sufficient to impose a trust upon him? There was a gift "to the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that Church at the moment of the legacy falling due, and failing him to any other representative Father of the Order of the Society of Jesus" Tomlin, J., in the court below, held that the gift was an absolute gift to the person who was the Superior at the time the legacy fell due. The Court of Appeal, however, decided that the gift to this Superior was upon a trust for the benefit of the Church at Farm Street.

In *Doe d. Phillips* v. *Aldridge*[2] it was held that a gift, "to the Reverend Adam Aldridge, . . . now preacher at the Meeting-house at Lyndhurst" was absolute. On the other hand, in *Thornber* v. *Wilson*[3] a devise to "Thomas W. Wilkinson, Minister of the Roman Catholic chapel at Kendal, and to his successors, for ever" was held to be upon trust for the benefit of the church. Likewise in *In re Delany Conoley* v. *Quick*[4] it was held that a gift "to E. M. and M. L. of the Convent of the Assumption, Bromley-by-Bow, or their successors" was not to the named individuals for their own personal benefit. It appears that a mere gift to a named person who is also described by reference to his office transfers to him a beneficial interest in the subject-matter. If the words of the gift indicate that it is to him or his successors the result is that he has been made a trustee.

What of the case where the legatee or devisee is not named but is only designated as the holder of an office? It is submitted that

[1] [1929] 2 Ch. 173.
[2] (1791), 4 T.R. 264.
[3] (1855), 3 Dr. 245, 4 Dr. 350.
[4] [1902] 2 Ch. 642. See also *In re Davies, Lloyd* v. *Cardigan County Council*, [1915] 1 Ch. 543.

the designation by description is not sufficient to prevent him from taking for his own benefit, and that without further context it is not possible to establish a trust.[5] In the *Barclay* case the words "or other representative Father" indicated an alternative person, who like the first designated, was to take as representing the Farm Street Church. From the context the Court could properly infer that the Superior was not to take beneficially.

S.E.S.

* * *

DEFAMATION — LIBEL — INNUENDO — RIGHT TO PRIVACY.—The mere unauthorized use of a person's name in an advertisement is not actionable.[1] A striking illustration of this principle is to be found in the case of *Tolley* v. *J. S. Fry and Sons, Limited*[2] where the plaintiff, an amateur golf champion, claimed damages from the defendants, chocolate manufacturers, in respect of an alleged libel published by the defendants in two newspapers, and consisting of a caricature of the plaintiff playing a golf stroke while a caddie looked on. Below the picture appeared the following limerick:

> The caddie to Tolley said: "Oh, Sir!
> Good shot, Sir, that ball see it go, Sir!
> My word, how it flies,
> Like a cartet of Fry's;
> They're handy, they're good and priced low, Sir."

The plaintiff admitted that the advertisement was not defamatory on its face, but he alleged that it caused people to think that he had permitted the caricature and his name to be used for the purpose of advertising the defendants' chocolate, and that he had done so for gain or reward. There was, the plaintiff complained, an innuendo that he had been guilty of conduct unworthy of his status as an amateur golfer. The majority of the Court of Appeal, Greer and Slesser, L.JJ., in giving judgment for the defendants, held that no evidence was tendered or given to prove that the advertisement was capable of being understood as a statement of something that would be regarded by ordinary reasonable people as disparaging to his character or reputation, and calculated to bring him into ridicule, dislike or contempt. Words or caricatures are not actionable as defamatory, however much they may damage him in the

[5] See Lawrence and Russell, L.JJ., in *In re Barclay, Gardner* v. *Barclay*, [1929] 2 Ch. 173 at pp. 192 and 195, respectively.

[1] See *Dockrell* v. *Dougall* (1899), 80 L.T. 556; 15 T.L.R. 333.

[2] (1929), 46 T.L.R. 108; 99 L.J.K.B. 149.

eyes of a section of the community, unless they also amount to a disparagement of his reputation in the eyes of right-thinking men generally,[3] Scrutton, L.J., who dissented, was of the opinion that there was ample evidence on which a judge might rule that the cartoon was capable of being construed by reasonable men as a publication imperilling Tolley's position in the world of golf, by suggesting that he was departing from his amateur status in allowing his name or the caricature to be used, with or without remuneration, in advertising foods which golfers might buy.

None of the Lords Justices condoned the act of the defendants in publishing the advertisement. Greer, L.J., stated that the defendants had acted in a manner inconsistent with the common decencies of life, and that, in so doing, they were guilty of an act for which there ought to be a legal remedy. Slesser, L.J., branded their conduct as undesirable, and Scrutton, L.J., said that the advertisement was "a piece of offensive vulgarity."

In view of the principle that unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel it cannot be made the subject-matter of complaint by action at law,[4] the need of a remedy in the *Tolley* case is obvious.

Advances in the art of photography accompanied by newspaper enterprise are bringing about an unwarranted invasion of the private and domestic life of many citizens.[5] There is, however, a corresponding demand that the right "to be let alone" or the right to privacy be recognized and protected by the courts. The regret expressed by the members of the Court of Appeal in the *Tolley* case was founded in the inadequacy of the law concerning defamation. The law of defamation deals only with the injury done to the individual in his external relations, and to the community by lowering him in the estimation of his fellows.[6] The effect of the pub-

[3] See *Clay* v. *Roberts* (1863), 8 L.T. 397; *Miller* v. *David* (1874), L.R. 9 C.P. 118; *Myroft* v. *Sleight* (1921), 90 L.J.K.B. 883.

[4] See *Dockrell* v. *Dougall, supra; Corelli* v. *Wall* (1906), 22 T.L.R. 532.

[5] In the United States of America a new category in the law of torts which may properly be designated as the right to privacy has been recognized to some extent, see article: The Right to Privacy, (1890), 4 Harv. L. Rev. 193; article: Interests of Personality, (1915), 28 Harv. L. Rev. 445; article: Equitable Relief against Defamation and Injuries to Personality, (1916), 29 Harv. L. Rev. 640; notes: (1920), 33 Harv. L. Rev. 711 and 735; article: Progress of the Law, Equitable Relief, (1920), 34 Harv. L. Rev. 388; note: The Right to Privacy To-day, (1929), 43 Harv. L. Rev. 297; Selected Essays on the Law of Torts, (Harvard), p. 122. But "this chapter in the law of torts is not long": Pound: Interpretations of Legal History, p. 137.

[6] 4 Harv. L. Rev. 193 at p. 197.

lication upon a man's estimation of himself and upon his own feelings does not constitute an essential element in a cause of action for defamation. In granting an injunction or awarding damages in an action for libel or slander the courts are extending the protection which is given to physical property to certain of the conditions necessary or helpful to material prosperity.

Invasion of privacy in English law has always been *damnum sine injuria* because the courts refused jurisdiction if there was no right of property involved. In *Gee* v. *Pritchard*[7] Lord Eldon said: "The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court." Knight Bruce, V.C., in *Prince Albert* v. *Strange*[8] said: "Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known."

The courts in some cases have been enabled to evade the narrow grounds of protection of property and have given a remedy for an invasion of privacy by finding a breach of contract or confidence. In *Pollard* v. *Photographic Co.*[9] the defendant who had taken a photograph of the plaintiff was restrained from exhibiting and selling copies of it on the ground that there was implied in the contract a provision that the prints taken from the negative were to be appropriated only to the use of the customer. During the argument, North, J., asked the counsel for the plaintiff: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and the counsel answered: "In that case there would be no trust or consideration to support a contract." In the *Tolley* case it would be impossible to set up a breach of contract or confidence between the plaintiff and the defendants because the

[7] (1818), 2 Swanst. 402 at p. 413. For an explanation of *Gee* v. *Pritchard*, see Dean Pound in 29 Harv. L. Rev. 640 at pp. 642-3; article. A Reinterpretation of *Gee* v. *Pritchard*, 25 Mich. L. Rev. 889. See also *Warren* v. *D. W. Karn Co.* (1907), 15 O.L.R. 115. As to refusal of a court to restrain the expulsion of a member from a club in the absence of a right of property, see *Rowe* v. *Hewitt* (1906), 12 O.L.R. 13.

[8] (1849), 2 De G. & Sm. 652 at p. 695.

[9] (1888), 40 Ch. D. 345. See also *Abernethy* v. *Hutchinson* (1825), 3 L.J. Ch. 209; *Tuck* v. *Priester* (1887), 19 Q.B.D. 629; *Walter* v. *Ashton*, [1902] 2 Ch. 282; *Laidlaw* v. *Lear* (1898), 30 O.R. 26.

former did not stand in any contractual or fiduciary relation with the latter.

The authors of the "Right to Privacy"[10] said in 1890: "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?" To this question, in view of the *Tolley* case, may we not add: shall the courts or legislatures leave open wide the back door to commercial exploitation by advertising agents who in search of copy have little, if any, regard for the feelings of others?

S.E.S.

* * *

SOCIAL INTEREST IN AESTHETIC SURROUNDINGS—DESIRABILITY OF PROTECTION.—A recent quasi-judicial pronouncement by a member of the Board of Railway Commissioners is provocative and possibly prophetic. It appears in the dissenting opinion of Commissioner, the Honourable Mr. Frank Oliver in the decision of *Gatineau Transmission Company* v. *Hendricks et al.*[1] The company applied under the Railway Act[2] for the approval of a map showing the general location of its transmission lines through territory near Ottawa. Commissioner Oliver said in part:

M. J. Hendricks and C. F. Benedict, owners of property affected by the route of line applied for by the Gatineau Transmission Company, opposed the application. Satisfactory arrangements had been made by the company with owners of all other properties affected.

Hendricks is the owner of a farm of approximately 400 acres fronting towards the Gatineau but separated from the river by a 300 foot strip the property of the Transmission Company. The Gatineau highway passes through the farm on a route parallel to the river. The farm dwelling house is on the high plateau between the highway and the brow of the valley. It overlooks the country beyond the Gatineau to the eastward. To the southward the highway comes up to the plateau on which the house is situated by a fairly steep grade from a lower level. The view from the highway as the plateau is reached is very attractive. This view is enhanced by the fringe of pine and other trees which line the brow and extend down the broken front of the valley bank to the river. Just where the road rises to the plateau a point of pines extends close to the highway. The power line route, as applied for by the company, coming from the opposite bank of the river, will cut a one hundred foot swath diagonally through the pine tree fringe along the brow of the valley and completely destroy the point of pines that is close to the highway. In place of the pine trees there will be two steel towers between

[10] 4 Harv. L. Rev. 193 at p. 220.
[1] (1929), 35 Canadian Railway Cases 392 at pp. 398-399.
[2] R.S.C. 1927, c. 170, ss. 167-170.

the highway and the east boundary of Mr. Hendricks' property. I am of the opinion that the cutting down of the trees and the erection of the towers will seriously depreciate one of the most beautiful views within a six mile radius of Ottawa, and, to that extent, constitute *a trespass upon the public right.* It is of necessity, an equal trespass upon the rights of Mr. Hendricks, aside altogether from the value of the trees cut and the right of access to the line through his cultivated fields by the power company, together with whatever danger there may be to himself, his family and his live stock in the presence of a transmission line carrying electrical power to the extent of 110,000 volts across his occupied property. While the cultivable value of the greater part of Mr. Hendricks' farm is very considerable, its scenic value having regard to its situation, is much greater. In my opinion, while Mr. Hendricks is in fact the sole owner of the land as to its cultivable value, he is trustee for the public rather than sole owner of its scenic value; *for the public who use the highway have a measure of benefit from the existence of the scenery as well as himself, and therefore have an interest with him in its preservation. As the case stands, the value to the public of the scenic interest in the property is, of necessity, included in the value to Mr. Hendricks, and adds corresponding weight to his objections to the proposed injury to its scenic value.*

The damage to be suffered by Mr. Hendricks from the granting of the application is not in my opinion as serious in the obviously material losses directly imposed as in its depreciation of scenic values; but the directly material loss is serious enough to claim careful consideration.[3]

"A legal system attains its end by recognizing certain interests,—individual, public, and social,—by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavouring to secure the interests so recognized within the defined limits. It does not create these interests."[4] The social interest[5] in preservation of the beautiful view, of aesthetic surroundings, recognized by Commissioner Oliver has been described by a New Jersey Court as being at the present time "a matter of luxury and indulgence rather than of necessity."[6] It is, none the less, real, and with the rapid transition of this country from a relatively primitive pioneering state of civilization to one of higher culture there is bound to be an increasing demand that it be legally recognized and secured; the higher the state of civilization the more will aesthetic surroundings become necessary to the personal well-being of the members of the community at large.

Obviously, the effective method of securing the social interest in aesthetic surroundings by judicial means would be the preventive

[3] Italics are by the commentator.

[4] Pound, Interests of Personality, 28 Harv. L. Rev. p. 343.

[5] Social interests are defined as "interests of the community at large," *ibid.*, at p. 344.

[6] *City of Passaic* v. *Paterson Bill Posting Co.* (1905), 72 N.J. Law. 285 at p. 287. Cf. *St. Louis Poster Advertising Co.* v. *St. Louis* (1918), 249 U.S. 269, Holmes, J., at p. 274.

remedy. But since Lord Eldon's famous proposition in *Gee* v. *Pritchard*,[7] the injunction has not been deemed a proper remedy for the protection of interests of personality, but has been consecrated to the more sacred service of securing property rights.[8] The interest which Commissioner Oliver would recognize in the *Gatineau* case is solely one of personality, one difficult if not impossible to translate into property values. Also it is difficult to imagine a happy fiction whereby this interest can be invested with a property disguise for judicial purposes.[9] Thus persons residing in, or accustomed to pass through, landscape scenes of natural beauty can probably not hope for judicial redress if some day their grosser and materially-minded neighbour-landowner renders the scenery shockingly offensive to their aesthetic sensibilities.[9a] The remedy, unfortunately, lies with the legislatures.

It is to be hoped that some, at least, of the provincial legislatures of Canada will not hesitate much longer to enact statutes similar in effect to the English Advertisements Regulation Act, 1907.[10] This statute is a legislative recognition and securing of the social interest in aesthetic surroundings in that it empowers any local municipal authority to make by-laws "for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape,"[11] and provides remedy for their breach by way of monetary penalty.[12] Perhaps the growth of the tourist trade will induce some of the legislatures also to provide legal means of preserving the natural beauties of the country-side from unnecessary defacement by the scars of commercial exploitations.

[7] (1818), 2 Swanst. 402 at p. 413. (Despite the conservative language in this case, the letters actually were valueless.)

[8] See *The Emperor of Austria* v. *Day and Kossuth* (1861), 2 De. G. F. & J. 217 at p. 252; *Warren* v. *D. W. Karn Co.* (1907), 15 O.L.R. 115; *Rowe* v. *Hewitt* (1906), 12 O.L.R. 13; *Humphrey* v. *Wilson et al.*, [1917] 3 W.W.R. 529. See Falconbridge, Some Desirable Changes in the Common Law, at pp. 24-28; Proceedings Can. Bar Assoc. 1927, pp. 216-220. See also 34 Harv. L. Rev. at p. 407 *et seq.*

[9] E.g. as in *Lindsey* v. *LeSeur* (1913), 15 D.L.R. 809; 29 O.L.R. 648.

[9a] See *Salvin* v. *North Brancepeth Coal Co.* (1874), L.R. 9 Ch. App. 705, James, L.J., at pp. 709-710.

[10] 7 Edw. 7 c. 27. Nova Scotia has recently legislated concerning bill boards, empowering the Minister of Highways to remove them if they are "a menace or source of danger to traffic on the highway . . ," N. S. Statutes, 1929, c. 31, s. 1. This should be extended to include unsightly signs and those that obstruct beautiful views.

[11] 7 Edw. 7, c. 27, s. 2 (2). For interests recognized as sustaining the constitutional validity of "zoning" ordinances, see *Euclid* v. *Ambler Co.* (1926), 272 U.S. 365 at p. 390 *et seq.*

[12] *Ibid.*, s. 10.

A solution of the practical difficulty of establishing an objective standard of beauty is suggested by the method familiar to the law of nuisance, "not by an abstract consideration of the thing considered apart, but by considering it in connection with the circumstances of the locality. A nuisance may be merely a right thing in a wrong place,—like a pig in the parlour instead of the barnyard."[13]

HORACE E. READ.

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* * *

GRATUITOUS BAILOR—LIABILITY OF—DUTY TO INSPECT.—*Chapman* v. *Saddler & Co.*,[1] a recent case in the House of Lords, raises some points of interest concerning the duty of a gratuitous bailor towards his bailee.

The owners of a ship bringing a cargo of meal into the Port of Leith were by their contract with the consignees bound to raise the meal from the hold and to deliver it on the deck of the ship. The meal had been shipped in bags and the shipowners employed the defendants, a firm of stevedores, to raise the cargo from the hold to the deck. To do this, the defendants, using the ship's crane hoisted the meal in rope slings, each of which carried six bags of meal. In use these slings were readily damaged and rendered dangerous and the defendants employed a rigger to see that they were safe each time before using.

The consignees employed a firm of porters to remove the meal from the ship's deck to their warehouse. As a matter of convenience, and following the practice of the Port of Leith, the bags were not unloaded from the slings on the deck, but each slingful was handed to the porters who swung it to the wharf with a dock crane so that the slings provided by the defendants and loaded by them in the ship's hold were unloaded by the porters on shore and returned to the defendants empty. The porters had no opportunity to inspect the slings when they received them from the defendants full of meal.

In these circumstances, and while being used by the porters, a sling broke and killed one of their employees, whose next of kin were plaintiffs in the action.

It was held on the evidence that the porters relied upon the defendants' inspection of the slings for their safety and that the defendants knew this. It was also held that the death of the porter resulted

[13] Sutherland, J., in *Euclid* v. *Ambler Co. supra cit.* at p. 388. See Pollock, The law of Torts, 12th ed., at p. 414, and cases there cited.

[1] [1929] A.C. 584.

from the defect in the sling which proper inspection would have discovered. The House of Lords held that the defendants owed a duty to the porters to take reasonable care to see that the sling was in a fit condition.

In the case of gratuitous bailment, the lender is responsible for defects of which he was aware, and owing to which the borrower is injured. Knowledge of the defect is essential to create liability.[2] Although there was to some extent an "obvious business necessity" to both parties in the operation, it is submitted that there is here no more than in the case of *Blakemore* v. *Bristol & Exeter*.[3] We must therefore look elsewhere for the explanation of the liability placed upon the defendants.

If this were a gratuitous bailment simpliciter, there could have been no liability.[4] But apart from the element of bailment, there are other elements on which a duty of care may be based, without disturbing the well-established rule. The rule as to gratuitous bailment may be stated negatively thus: the mere fact of gratuitous bailment is not enough by itself to create a liability on the lender towards the borrower for defects of which the lender had no knowledge. The defendants by their course of conduct led the porters to rely on their inspection; they knew, or should as reasonable men have known, that their conduct would lead the porters so to rely and, since the porters had no opportunity to inspect for themselves, they only acted as reasonable men in relying on the defendants' inspection. These, with the "obvious business necessity," are facts on which liability may be based. It may be said that the defendants, by intentionally leading the porters to rely on their inspection,

[2] *Blakemore* v. *Bristol & Exeter Ry. Co.* (1858), 8 E. & B. 1035; *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Coughlin* v. *Gillison* [1899] 1 Q.B. 145. See also Clute, J., in *MacTague* v. *Inland Lines* (1915), 8 O.W.N. 183, at pp. 185-6.

[3] *Supra.* Defendant railway permitted a consignee, obliged to unload some heavy stone from a railway truck in the station-yard, to use a crane set up on the station platform and used by the defendants for their own purposes. Coleridge, J., at p. 1047, said: "But it is obvious that another and perhaps equally strong motive was to facilitate the removal of such heavy goods as the consignees were bound to unload or remove. It was manifestly of great importance to the defendants to have their station cleared of such goods as speedily and conveniently as possible."

[4] Lord Atkin, in the *Chapman case,* [1929] A.C. 584 at p. 596, said: "I cannot agree with the opinion expressed below that the stevedores in these circumstances were in the same legal position as though they were gratuitous bailors. If such had been the relation simpliciter, I agree that the bailor would only have been liable for a defect actually known to him. In the present case the porters were possibly entrusted with the sling, but merely to be used in a particular way, the speedy completion of which was of vital importance to the bailors' business, where the bailor and bailee, to the knowledge of both, relied for their safety on the care of the bailor. In these conditions, the rule as to gratuitous bailors appears to me to have no application."

became subject to a duty to make that inspection carefully.[5] The fundamental basis of determining liability for negligence is reasonableness, the rule being laid down by Brett, M.R., in *Heaven* v. *Pender*,[6] namely, "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense, who did think, would at once recognize that if he did not use ordinary care and skill in his own conduct, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." In the ordinary gratuitous bailment situation it is not reasonable for the bailee to expect that his benefactor should do more than warn him of known dangers, and it is only reasonable that he himself should examine the article obtained to ascertain the qualities and fitness for the purpose intended. If, however, the benefactor-bailor has led the bailee to believe that he himself has done all that would ordinarily be expected of the other party, i.e., the bailee, it is submitted that the basis of the rule fails and the satisfaction of the reasonable expectations of the parties takes a new form according to the changed circumstances. What was formerly only a right in the bailee to expect that the bailor did not deceive him as to known defects has become a right to expect that due care shall have been taken to render the goods fit for the purpose.

HAROLD KEMP.

Toronto.

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THE JUDICATURE ACT FOR PRINCE EDWARD ISLAND.—The Judicature Act, 1929, and Rules of Court thereunder came into force in Prince Edward Island on April 1st, 1930.

Since 1873 the practice in the Supreme Court of the Island has been regulated by the Common Law Procedure Act.

The Act and Rules of Court which have come into effect, except as explained below, are modelled substantially after the Imperial Act and Rules in so far as they may be applicable. The Rules of the other Provinces of Canada of Common Law jurisdiction were examined and what was considered to be the most direct procedure was selected.

[5] *Loader* v. *London and India Docks* (1891), 8 T.L.R. 5. See also American cases in 43 Harv. L.R. 145, where railway companies had voluntarily kept a flagman at certain crossings to warn people of oncoming trains to the extent that persons crossing the tracks relied on the presence of the flagman. The removal of the flagman, without notice, was said to be rightly considered as evidence of negligence. But see *Soulsby* v. *City of Toronto* (1907), 15 O.L.R. 13.

[6] (1883), 11 Q.B.D. 503 at p. 509.

The new Act constitutes a Supreme Court of Judicature but does not join, as in the case of the Imperial Act and the Acts of the other Provinces, the different jurisdictions of Common Law, Chancery, Probate and Admiralty into one court.

The thought at once presents itself that one of the most favourable features of the Judicature Act is lost, that is, the unification of jurisdiction, at least with respect to the Court of Chancery. This point was well canvassed in the discussions leading to the adoption of the Act.

It was desirous to substitute for the technicality and delay of the system which obtained in the Supreme Court, the flexibility and expediency afforded by the Rules under the Judicature Act. The need for this change was not felt in the practice at the Chancery Bar. The Chancery Act, 1910, is a code of rules under which the practice of that Court is so flexible, expeditious and well defined that it was considered sufficient.

In the case of Probate and Admiralty matters, no confusion is likely to arise. The danger of circuity of litigation is reduced to a minimum by the provision of the Act which enables the Supreme Court to give effect to any equitable right, claim or ground of defence. There is also provision made by which the Supreme Court may make an order for determination by the Chancery Court of any matter that should be so determined.

M. ALBAN FARMER.

Charlottetown.

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WILL—CONSTRUCTION—CLASS GIFT—ASCERTAINMENT OF CLASS. — A judgment of Arsenault, J.,[1] in the Prince Edward Island Chancery Court embodies some surprising conclusions.

A petition was presented to the Judge by the three trustees and executors of the last will of Horace Haszard, then deceased, under the provisions of section 42 of the Trustee Act, the wording of which is the same as section 30 of 32 & 33 Victoria, chapter 35 (Lord St. Leonard's Act), for the Court's opinion regarding the construction of the following paragraph of the will, namely: "To pay to each of the unmarried daughters of Francis L. Haszard of Charlottetown, Master of the Rolls, the sum of One thousand dollars."

The testator devised all his property, real and personal, unto three trustees upon trust to call in and convert his personal estate into cash and to make sale of his real estate or of such part as may

[1] Not reported.

be unproductive, and to collect the rents accruing in respect of his real estate occupied by tenants, and to re-let as his trustees in their discretion might deem expedient, and upon further trusts to pay to each of the above named legatees the amount above mentioned, and to ten other distinct legatees sums of varied amount. The general wording of the bequests to these legatees was the same as of that to the unmarried daughters before mentioned.

The testator recommended his trustees, which recommendation they followed, not to sell his real estate, the Cameron Block, during the lives of his brother and sister. After the death of his brother and sister, the testator directed his trustees to sell the Cameron Block property and finally to close and wind up his estate, and out of the proceeds thereof to pay six additional bequests to six different parties, among which were the following: "To each of the unmarried daughters of Francis L. Haszard, Master of the Rolls, the sum of One thousand dollars," and: "To each of the daughters of S. N. Earle then unmarried the sum of Five hundred dollars," and "to apply the residue towards the foundation, support or endowment of a home in Charlottetown for aged Protestant ladies."

The testator's sister and brother had died before the presentation of the petition. At the time the testator made his will the said Francis L. Haszard had three unmarried daughters. After the making of his will, but before the testator's death, one of the said three unmarried daughters, namely, Ethel C. Haszard, intermarried with and became the wife of one Henry G. Jones.

The trustees in their petition allege, *inter alia,* that doubts have arisen as to the interpretation of the said will and whether the said Ethel C. Jones is entitled to participate in the said legacies so bequeathed, and they consequently sought the opinion, advice and direction of the Court. On a day being set down for argument, counsel appeared for Mrs. Jones, and the then Attorney-General appeared for the residuary legatee.

Argument being had, His Lordship took the matter into consideration, and on a subsequent day gave his written opinion that "the testator used the word to mean unmarried as at the time of the making of his will," and directed the executors to pay the bequests to the said Ethel C. Jones. It seems difficult to understand why a question of this kind should have been brought up at all upon a petition for advice and direction under Lord St. Leonard's Act. The petition raises a question as to the respective and conflicting rights under the will of Ethel C. Jones and the residuary legatee. The Judge adjudicated on and determined these rights in an opinion against the residuary legatee and in favour of Mrs.

Jones, from which opinion there is no appeal. The Court cannot upon such a petition construe an instrument or make any order affecting the rights of parties to property. Such petitions are strictly limited to opinions respecting trivial matters, and the management and investment of trust funds.[2] No objection seems to have been taken before the Court respecting the procedure adopted. The opinion sought and obtained can be of no possible use or protection to the trustees.

The learned Judge offered two reasons in justification of the opinion which he gave:

First, inasmuch as the testator directed the trustees on the final closing of the estate after the deaths of his sister and brother to pay $500 to each of the daughters of Mr. Earle then unmarried, it followed, he held, that the inclusion of "then" in the one case and its omission in the other was a ground for construing the expression "unmarried" in the Haszard bequest to mean unmarried at the time of the making of the will. This would appear to be a somewhat forced construction, and unsupported by authority.

The second reason is based on what the learned Judge claimed to be an analogy between the case before him and that of *Hall* v. *Robertson*.[3] There is, however, but little similarity in the cases. They can be readily distinguished. In the latter case the testator in a codicil to his will gave to the Rev. Geo. D. Goodyar £5,000 to be invested by trustees for his own benefit during his life, and after his death to be paid to his son and unmarried daughters as he might by will direct, and failing direction, to them equally. Mr. Goodyar died after the date of the codicil in the testator's lifetime. When the codicil was made he had but one son and four daughters. All five survived him. Only one daughter was married when the codicil was made. Two of his other daughters married, after the making of the codicil, in their father's lifetime. The case came up by way of appeal. It was held that the description "unmarried daughters" applied to those who were unmarried when the codicil was made, as distinguished from the one who was then married; but Turner, L.J., based his decision on the fact that "the testator meant the son then living—that no other son could take. As to the son, he was referring to circumstances then existing, and I think it would be a strange construction to treat the testator as in one part of it referring to circumstances then present existing, and in another

[2] *Re Lorenz's Settlement* (1861), 1 Dr. & Sm. 401; *Re Hooper* (1861), 29 Beav. 656; *In re Williams* (1877), 1 Chancery Chambers (U.C.) 372; *In re Williams* (1895), 22 O.A.R. 196 at pp. 199, 200; *In re Martha A. Faxwell's Estate* (1895), 1 N.B. Eq. 195.

[3] (1853), De G., McN. & G. 78.

part to circumstances as they might stand at a future time." The Lord Justice asked what would become of the appointment in favour of the children if all three daughters happened to be married at the death of their father and an appointment had been made?

In this case the bequest was to a class consisting of children. The rule in such a case is that those members of the class take who are capable of taking at the death of the testator. This was decided by Jessel, M.R., in *In re Coleman & Jarrom.*[4] To the same effect is *In re Clarke,*[5] where the testator's property was to be divided among his children in equal shares. Chitty, J., in *Harvey* v. *Gillow,*[6] said: "A gift to a class is not a gift to individuals. The descriptive words are not a designation of any particular daughter. A gift by will to a class is taken, in Law and Equity, to be a gift, where it is immediate, to those only who survive the testator; and where it is not immediate but postponed, to be a gift to those only who survive the testator, or come into being before the period of distribution."

In *Jubber* v. *Jubber,*[7] the testator gave to his wife the use of his property for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live, and after her death to be disposed among all his children. He left four married and three unmarried children. One of the three married after the testator's death. Held that the widow and the three children who were unmarried at the testator's death were entitled equally. "An immediate gift to children, whether it be to the children of a living or a deceased person, and whether to children simply or to all the children, comprehends the children living at the testator's death, and those only."[8]

W. S. S.

[4] (1877), 4 Ch. D. 165.
[5] (1904), 8 O.L.R. 599.
[6] [1893] 1 Ch. D. 567 at p. 570.
[7] (1839), 9 Sim. 503.
[8] Jarman on Wills, 5th ed., at p. 1010.