# EASTER TERM, 15 VIC.

Present—THE HON. JOHN BEVERLEY ROBINSON, C. J.
THE HON. WILLIAM HENRY DRAPER, J.
THE HON. ROBERT EASTON BURNS, J.

## DOE DEM. DICKSON ET UX. V. GROSS.

*Will and codicil, construction of—Power of the crown to sell lands of a public accountant, under* 13 *Eliz., ch.* 4.

C. died, leaving a will, which, after disposing of certain real property, proceeded as follows: "all the rest and residue of my real as well as personal estate, which I may die seized or possessed of, *in reversion, remainder or contingency*, I will, devise, and bequeath unto my beloved wife Catharine, in trust to sell or dispose of any part or parcel thereof for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort and that of her children and grandchildren, during the term of her natural life." &c. Afterwards the testator added a codicil, referring to certain land obtained by him since the execution of the will, and bequeathing the same as follows: "I do now therefore, by this codicil, to this my last will annexed, give and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, *to whom I have devised all the rest and residue of my real estate* in my will hereunto annexed," &c., adding the usual words of publication.

The testator, at and before his death, was Deputy Superintendent General of Indian Affairs, and trustee of the Six Nation Indians, and as such superintendent was an accountant to the crown, and at the time of his death he was indebted as trustee.

*Held, first*—That the testator was not a public accountant within the meaning of the 13 Eliz. ch. 4. and that the crown could have no authority to sell his land under that statute.

*Secondly*—That the codicil referring expressly to the will must be looked upon as forming part of it; and that taking the two together, the will might be construed to include all the testator's lands of which he should die seized or possessed, and not only those in reversion, remainder, or contingency.

Ejectment for the south half of 21 in the 4th concession of the township of Innisfil.

The land sued for was the property of the late Colonel Claus in his lifetime, having been granted to him in fee simple by the crown in 1822. He died on the 11th of November 1826, having made a will on the 13th of July, 1826, by which, after devising to each of his four grandchildren (being children of his daughter, Mrs. Geale) a town lot in Niagara, and to each of their respective heirs and assigns forever—he devised all the rest of his worldly estates, subject to the payment of his debts, in manner fol-

lowing, that is to say—to his son John Johnson Claus, his heirs and assigns, certain lands in Saltfleet; to his wife a certain real estate in Lower Canada, to hold during her natural life; and then the will proceeded thus,—"all the rest and residue of my real as well as personal estate which I may die seized or possessed of, in reversion, remainder, or contingency, I will, devise, and bequeath unto my beloved wife Catharine, in trust, to sell or dispose of any part or parcel thereof, for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort, and that of her children and grandchildren during the term of her natural life; and at her decease, I will, devise, and bequeath all or any such real or personal property as may remain undisposed of, as well as the aforesaid fief or farm in Lower Canada, respectively to each of my sons John Johnson and Warren, and to each of my daughters, Catharine A. M. Geale and Julia Caroline Claus, and their respective heirs and assigns, to be equally divided amongst them, to hold the same as tenants in common."

"In the event of my wife surviving my said daughter Catharine, or if my son Warren, or John, or either of them, should die before their mother, being unmarried and without issue, then I will and devise such proportion of my real and personal estate as all or either of my said children would have been entitled to under this my will, to my grandchildren, the son and three daughters before mentioned of my said daughter Catharine Geale, or such as may be living at the decease of my beloved wife, to hold the same to them and their respective heirs and assigns, as tenants in common." He then appointed his wife executrix, and his two sons executors, of his will.

Afterwards, on the 9th September, 1826, the testator added a codicil, in which he recited that the Six Nations of Indians had, on the 3rd August, 1826, surrendered a certain tract of land to his Majesty, with the intent that it should be granted by his Majesty to him (the testator), his heirs and assigns; and then he added, "I do now, therefore, by this codicil, to this my last will annexed, give

and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, *to whom I have devised all the real and residue of my real estate* in my will hereunto annexed ; for the same uses and purposes and limitations, to them, their heirs and assigns, as therein mentioned, as tenants in common." And he added the usual words, that this is published and declared as a codicil to his last will and testament, and to be taken as part thereof, in the province of, &c.

At the trial, before Robinson, C. J., it was admitted that the testator, Colonel Claus, died on the 11th of November, 1826 ; that his daughter, Julia Caroline Claus, died on the 11th of February, 1827, without issue and unmarried ; that Augusta Maria Geale, the daughter of Catharine A. M. Geale, married Walter H. Dickson, one of the lessors of the plaintiff, in 1831 or 1832 ; that Catharine A. M. Geale had one son and three daughters—viz : John B. Geale ; the above-named Augusta Maria Dickson ; another daughter the wife of William Stewart, all of whom were living at the time of the trial ; and Julia Geale, who died in the year 1837 ; and that possession of the premises was duly demanded of the defendant by the plaintiffs before this action brought.

The execution of the following deeds was also admitted :

1st. A deed made on the 6th of December, 1847, whereby Warren Claus, son of the testator, in consideration of 300*l.* paid to him by W. H. Dickson, one of the lessors of the plaintiff, released to him, his heirs and assigns, all his title and interest to the lands in question in this suit, and to certain other lands devised to him by his father, Colonel Claus.

2ndly. A deed made on the 30th of November, 1850, whereby Warren Claus, the same son of the testator, in consideration of 62*l.* 10*s.*, paid to him by Walter H. Dickson, Esquire, lessor of the plaintiff, granted, bargained, and sold to him in fee all his right, interest, and claim to the lands in the township of Innisfil in question in this suit.

3rdly. A deed made on the 7th of May, 1851, whereby

Catharine A. M. Lyons, widow (formerly Geale, a daughter of the testator), and her son John B. Geale, in consideration of 600*l.* paid to them by Walter H. Dickson, Esquire, and his wife Augusta Maria Dickson, the two lessors of the plaintiff, granted to them the lands in Innisfil, being the premises in question, to hold in fee simple.

4thly. A deed made on the 5th of May, 1851, whereby William Stewart, and Catherine C. Stewart his wife, in consideration of 600*l.*, granted to the said Walter H. Dickson and his wife, in fee simple, the lands in Innisfil, in question.

Mrs. Claus, the widow of the testator, died in 1840.

The plaintiffs, on their part, admitted that at and before the time of his death in 1826, the testator, Colonel Claus, held the office of Deputy Superintendet-General of Indian Affairs, and was also trustee of the Six Nations of Indians; and as such superintendent became and was an accountant to the crown, and was at the time of his death indebted as trustee. And it was admitted also, that on the 6th of June, 1831, John Johnson Claus, as eldest surviving son and heir of the testator Colonel Claus, by deed produced on the trial, in consideration of 5*s.*, granted, bargained, and sold to James Baby, John Henry Dunn, George H. Markland, Esquires, and to their executors, administrators, and assigns, these lands in Innisfil, to hold to them, their executors, administrators and assigns, with the usual covenants; and the grantees declared in this deed that these lands were conveyed to them in trust for the use of the Six Nations of Indians settled upon the Grand River, and their posterity, forever; and that all moneys arising from the absolute sale of the lands, and from the rents or profits thereof, should be held by the grantees for the sole use and benefit of the said Six Nations of Indians and their posterity; and on the 3rd of June, 1843, by indenture between J. H. Dunn and George H. Markland, Esquires, and Her Majesty the Queen, reciting the last mentioned deed, and that J. Baby had since died—they, as surviving joint tenants, in consideration of 5*s.*, surrendered, released, and conveyed to Her Majesty, her heirs and successors, all the estate held by them in these

lands in Innisfil in trust, for the sole use and benefit of the Six Nations of Indians settled on the Grand River, and their posterity.

It was proved that the defendant in this action was returned by the township assessor as being in possession of the land mentioned in this action in 1848—another person having been returned as in possession in 1847, but no one before that. No other evidence was given of any one having been at any time in actual possession, as claiming the fee or otherwise.

It was admitted that when the declaration in this action was served, on the 28th of May, 1851, the defendant was in possession, claiming under a title from the crown.

The defendant's counsel contended that no interest in this land, or in any of the lands in Innisfil passed under Colonel Claus' will, which only devised "such real estate as he should die seized or possessed of *in reversion, remainder, or contingency;* and that his estate in these lands in Innisfil answered neither of these descriptions :—2 that the testator being an accountant to the crown, as superintendent or trustee for the Indians, the crown could seize and sell his lands under 13 Eliz. ch. 4, without inquest of office or any previous proceeding : that the testator, being indebted to the crown, could not devise these lands : and that the devise was made subject to the testator's debts : 3—that the conveyance made to the lessor of the plaintiff by the children of the testator could not operate, because this defendant was in possession claiming the fee ; and that the deed of Warren Claus, being a mere release or quit claim, could pass nothing to the lessor of the plaintiff, W. H. Dickson, for want of any previous estate in him on which to operate, and because he was not even in possession.

It appeared to the learned Chief Justice that, as to these latter objections, they could not affect the plaintiff's right to recover in respect of such interest as Mrs. Dickson would have as one of the children of Mrs. Geale, in the share of Julia Claus, who died without issue during the life of her mother ; but both parties desired to have such legal points as the case presented reserved for the consideration of the court.

A verdict was given for the plaintiff, with leave reserved to move for a nonsuit on the objections raised.

*Wilson*, Q.C., with whom was *Turner*, for the defendant, moved for a nonsuit on the leave reserved, or for a new trial on the law and evidence. They cited Doe Ford et al. v. Bell et al., 6 U. C. R. 528; Strong v. Teatt, 1 W. Bl. 200; 2 Burr, 911, S. C.; Doe Leach v. Micklem, 6 East, 486; Right dem. Day v. Day, 16 East, 67; Hill v. Chapman, 1 Ves. Jr. 407; Crosbie v. McDoual, 4 Ves. Junr. 610; Chester v. Chester, 3 P. W. 56; Morgan dem. Surman v. Surman, 1 Taunt. 288; Atkyns v. Atkyns, 2 Cowp. 808; Doe Nowell v. Roake, 5 B. & C. 720; 6 Bing. 475, S. C.; Mosley v. Mosley, 8 East, 149; Doe dem. Parkin et al. v. Parkin 5 Taunt. 341; Doe Phillips v. Phillips, 1 T. R. 105; Doe Biddulph v. Meakin, 1 East, 456; Law Magazine, vol. 42, 108; the Mayor of Gloucester v. Wood, 3 Hare 131; Smart v. Clarke, 3 Russ. 365; Low v. Carter, 1 Beaven 426; Winterton v. Crawfurd, 1 Russ. & M. 407; Bengough v. Edridge, 1 Sim. 173; Sherratt v. Bentley, 2 Myl. & Keen. 149; Myles v. Dyer, 8 Sim. 330; Read v. Backhouse, 2 Russ. & M. 546; Doe dem. Snape v. Nevill, 12 Jur. 181; Lovell v. Knight, 3 Sim. 275; Adams v. Adams, 6 Jur. 681.

*Vankoughnet*, Q. C., contra, cited Doe Gallini v. Gallini, 3 A. & E. 340; Kerry v. Derrick, Cro. Jac. 104.

ROBINSON, C. J., delivered the judgment of the Court.

We are all clear that the statute 13 Eliz. ch. 4, which makes the lands of public accountants liable to be sold (and not merely extended) in satisfaction of their debt to the Queen or her successors, did not authorize the government of this province to sell any portion of Colonel Claus's lands to the defendant, if that were done; and that the defendant is in no position to maintain possession under anything that was proved or admitted to have been done under that statute. The 1st, 2nd, 3rd, and 10th clauses are such as shew that the statute was not intended to apply, and does not apply, to any such case as this appears to be on the evidence; and if it did apply, we have no evidence of any debt found of record, or in fact of anything attempted

to be done under the statute. Colonel Claus was not shewn to be such an accountant as comes within the act; nor was anything shewn to have been found by office against him, nor any proceeding taken against his heir, such as would be necessary under 27 Eliz. ch. 3, before the land could be sold; and as to any lien the crown may be able to establish, no ground of lien has been shown; and if there be a lien, it would not prevent the land being devised.

The only question—as indeed seemed to be almost conceded upon the argument—is, whether the lands in Innisfil passed under the will of Colonel Claus, inasmuch as the testator was not "seized or possessed of those lands either in reversion, remainder, or contingency;" for if not,then the title of the heir-at-law would be sustained,

The question raised in this will shews what inconvenience is sometimes occasioned by extreme and unnecessary caution. No one can doubt for a moment what this testator meant; and if the person who drew the will had known nothing of reversions, remainders, or contingencies,he would have drawn such a will as the testator wished, and would have left no room for question. We cannot, I think, allow the admission of the execution of the will to have so restrictive an effect as to except the codicil; for that refers to the will and is, as it were, incorporated with it so as to form one instrument. If the defendant's attorney meant to put the party to proof of the codicil as a thing separate from the will, and not intended to be admitted, he should have seen that that was distinctly understood; and there would be nothing gained by excluding it from view; for we should not determine the case till an opportunity had been given to prove it on another trial, if it seemed material to the construction of the will.

In my opinion the land in question did pass by the will. That the testator did not mean to die intestate as to his estates in possession, which, for all that appears, were all that he owned, no one considering the will can doubt for a moment. What he meant to say is, "all the residue of my estates which I may die seized or possessed of (*including*

those in reversion," &c.) Or "all the residue of my estates which I may die seized or possessed of, or which I may hold in reversion," &c. The construction contended for would certainly exclude that which he had most in contemplation, and probably all that he could actually have had in contemplation, and take in only estates of such descriptions as it is not pretended he possessed. It is evident from the whole tenor of the will that he did not intend to die intestate as to any of his property; and did not intend to leave his widow, and children, and grandchildren, to depend upon his estates in reversion, remainder, or contingency alone, nor to charge such estates alone with payment of his debts; and what he says of his wife's *using* and *enjoying* the estates devised "in such a manner as in her prudence and discretion would be most conducive to her own comfort, and that of her children and grandchildren, during her natural life," all indicates a view to present enjoyment; and it is a circumstance that in his will he provides for his heir at-law.

When the meaning is so evident, I think we shall be well warranted in reading the words "which I may die seized or possessed of," as intended to describe estates in possession, and supplying the word "*or*" before the words "in reversion," &c.; or indeed, without supplying or supposing any word, if we read the will as it stands, we may take "all the estates, real as well as personal, which I may die seized or possessed of," as one member of the sentence, meaning one description of estates; the words in "reversion," &c., as another member of the sentence, designating another description of estates, and so on,—which is a common mode of construing a sentence composed of several parts to be taken disjunctively, where the adverb is not usually repeated between each two members, but only before the last. That method or reading the sentence would suppose the word "estates" to be intended to override the whole which I have no doubt is exactly what was meant; and it would, I think, be no forced construction.

The codicil, when it refers so expressly to the will, as this does, we must look upon as a part of the will as much as

if it were written on the same paper; and it shews very clearly that the testator did mean to devise his estates in possession (not otherwise devised) to his wife for life, with remainder over, and not merely his estates in reversion, &c., and he assumed that he had done so. This serves to remove any doubt as to the intention of the will.

The heir-at-law may have a laudable desire to apply the lands now in question towards the satisfaction of any debt due to the Six Nations of Indians, or to the government, but we think that these lands did not devolve upon him, but passed under the will to the residuary devisees, and that the rule must be discharged.

Rule discharged.

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## TYLEE V. THE MUNICIPAL COUNCIL OF THE COUNTY OF WATERLOO.

*By-laws passed under 4 & 5 Vic. ch. 10—Necessity for statement of the purpose for which the money required—Land need not be separately charged, or taxed by the acre.*

A by-law, passed under 4 & 5 Vic. ch. 10, for raising a rate, stated that the money was required to pay off 1500*l.* due to the Gore Bank, and 500*l.* due by the district to A. D. *Held* sufficient, and that it was not necessary to state for what services the money was due, for the court would intend that the debts were legally contracted and for a legal purpose.

Under the above statute, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied.

In this case, *Cameron* Q. C., moved to quash several by-laws last term; and the application was disposed of so far as regarded four of the by-laws, two being reserved for further consideration (*a*).

The first of these was a by-law passed by the District Council of the district of Wellington, under the statute 4 & 5 Vic. ch. 10. It was passed on the 12th of August, 1846, and was entitled, "A by-law to assess the district of Wellington one half-penny in the pound, to pay off two debentures held by William Allan, for erecting the court house in said district."

It recited that these debentures were due, and that it was

(*a*) Ante page 572.