The
Ontario Weekly Notes

VOL. XI. TORONTO, FEBRUARY 9, 1917. No. 22

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 30TH, 1917.

MORRISON v. MORRISON.

Appeal—Order of Judge in Chambers—Final or Interlocutory—Necessity for Leave—Rule 507.

Appeal by the defendant Philip Morrison from an order of CLUTE, J., in Chambers, ante 294, deferring the hearing of a summary application for an order for partition or sale of land, and directing the trial of an issue to determine the claim of title made by the appellant.

The appeal came on for hearing before RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

H. S. White, for the plaintiff, objected that the order in Chambers was an interlocutory one, and that no appeal therefrom lay without leave: Rule 507.

I. Hilliard, K.C., for the appellant.

THE COURT quashed the appeal with costs, without prejudice to a motion by the appellant to a Judge to amend the order or for leave to appeal.

SECOND DIVISIONAL COURT. JANUARY 30TH, 1917.

HOWE v. IRISH.

Contract—Advances to Owner of Mining Claims—Agreement to Allot Shares in Mining Property when Company Incorporated—Failure to Incorporate—Interest in Property—Declaration—Parties—Trustee—Creation of Trust.

Appeal by the defendant from the judgment of KELLY, J., 10 O.W.N. 455.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

F. D. Davis, for the appellant.

D. L. McCarthy, K.C., for the plaintiffs, respondents.

THE COURT varied the judgment by declaring that a trust should be created for all the parties, including the defendant, who should be removed from his trusteeship, and the Trusts and Guarantee Company appointed trustee, if it will consent to act. The appellant to pay the costs of the appeal.

SECOND DIVISIONAL COURT. JANUARY 30TH, 1917.

BURDICK v. STATHAN.

Deed—Conveyance of Land—Agreement of Grantee to Maintain Grantor—Covenant—Breach—Condition — Forfeiture — Relief against—Evidence—Waiver.

Appeal by the defendant from the judgment of MIDDLETON, J., ante 213.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

F. D. Davis, for the appellant.

E. C. Saunders, for the plaintiff.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 30TH, 1917.

BALL v. WINTERS.

Master and Servant—Claim for Arrears of Wages—Promise to Increase Wages—Evidence—Failure to Establish Claim.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 92.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

R. T. Harding, for the appellant.

V. H. Hattin, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 31ST, 1917.

*RE WEST NISSOURI CONTINUATION SCHOOL.

Costs—Misconduct of Members of Municipal Council—Evasion of Order of Court—Personal Liability for Costs—Indemnity of Municipal Corporation against Costs.

Motion by Bryan and others, the respondents in an appeal disposed of on the 4th December, 1916 (ante 197), to vary as to costs the minutes of the order then pronounced.

By arrangement and consent, the motion was heard by RIDDELL, J., in Chambers, the other members of the Court which heard the appeal not being available.

E. C. Cattanach, for Bryan and others.

W. Lawr, for the members of the council of the township, and for the township corporation.

RIDDELL, J., in a written judgment, said that he had had communication with the other members of the Court, and all were of opinion that the whole trouble had been caused by the foolish conduct of members of the township council, who seemed to have imagined that their silly evasion of the order of the Court would be accepted as an honest attempt to obey it. For this they were personally to blame, and they must suffer the legitimate consequences of their folly. An order of the Court must be obeyed, however unpopular it may be. The wrongdoing was that of the individuals, and they could not hide behind a majority of the ratepayers; nor could they be allowed to use public money to pay for the result of their own misconduct.

The individual members of the council must indemnify the township corporation against all costs, repaying to the township corporation all its costs, between solicitor and client, and all costs which the township corporation is obliged to pay. The

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

respondents to the appeal (the present applicants) are to have all their costs paid by the individual members of the council (or, if more convenient, by the township corporation in the first instance).

SECOND DIVISIONAL COURT. JANUARY 31ST, 1917.

*GAGE v. REID.

Trial—Jury—Prejudice—Nationality of Plaintiff—Evidence Improperly Admitted—New Trial—Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial at Belleville, upon the findings of a jury, in favour of the plaintiff, for the recovery of $3 damages and Division Court costs, in an action for false imprisonment, with a set-off to the defendant of the excess of his costs in the Supreme Court of Ontario, in which the action was brought, over the costs to which he would have been entitled had the action been brought in a Division Court.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, KELLY, and MASTEN, JJ.

D. O. Cameron and J. B. Mackenzie, for the appellant.

Edward Bayly, K.C., for the defendant, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the defendant, being sued for false imprisonment, was allowed to give evidence, wholly irrelevant to the issue, that the plaintiff was a subject of a nation then and now at war with Great Britain, and, based upon that evidence, counsel for the defendant was permitted to urge the jury to assess the plaintiff's damages, because of his nationality, at little or nothing. It was a plain case of a mistrial; and there must be a new trial. The plaintiff's costs of this appeal to be paid by the defendant forthwith; the costs of the first trial to be disposed of by the Judge at the second trial.

RIDDELL and KELLY, JJ., agreed in the result.

MASTEN, J., read a dissenting judgment, in which he referred at length to the evidence and the course of the trial, and also to numerous authorities. He said, in conclusion, that it appeared

to him that justice had been done, that the verdict was right, that there had been no resulting injustice, and that the plaintiff had failed to bring his complaints to the attention of the trial Judge. In these circumstances, the appeal ought to be dismissed.

Reference to Rex v. Banks, [1916] 2 K.B. 621, at p. 623.

New trial ordered; MASTEN, J., *dissenting.*

SECOND DIVISIONAL COURT. FEBRUARY 1ST, 1917.

ROOS v. SWARTS.

Evidence—Judgment—Foreclosure—Reference—Costs.

Appeal by the defendant from the judgment of SUTHERLAND, J., 10 O.W.N. 446, ante 166.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

L. E. Dancey, for the appellant.

C. Garrow, for the plaintiff, respondent.

THE COURT made an order opening up the judgment and directing the entry of a judgment for foreclosure in the ordinary form, with a reference to DICKSON, Local Judge at Goderich. The evidence taken before DOYLE, Local Judge, to stand quantum valeat, and all parties to have the right to call the witnesses already examined for examination or cross-examination, and also such other witnesses as they may be advised to call. Costs throughout to be costs in the cause. The costs of the execution creditor to be added to his claim.

HIGH COURT DIVISION.

MASTEN, J., IN CHAMBERS. FEBRUARY 3RD, 1917.

RE PORTER.

Executors and Administrators—Application by Executor for Administration Order—Foreign Domicile of Testator—Issue of Letters Probate by Foreign Court—Estate Said to be in Ontario—Attornment to Foreign Jurisdiction—Discretion to Refuse Order.

Application by the executor of the will of Alexander Porter, deceased, for an order for the administration of his estate. He

died in London, Ontario, but his domicile was in Manitoba. The ground for the motion was, that the estate, remaining in the hands of the executor, consisted of moneys on deposit in Ontario, where he also resided.

The application was heard in Chambers at London.

U. A. Buchner, for the executor.

J. F. Faulds, for Mary Sawyer, Robert Porter, and Rosenbuch.

H. B. Elliott, K.C., for Margaret Marshall and James Porter, supported the motion.

MASTEN, J., in a written judgment, said that the application must be refused, for the following reasons:—

(1) The subject-matter was peculiarly within the jurisdiction of the Manitoba Court. The testator was domiciled there. His estate was principally there—none of it was in Ontario. Probate was granted in Manitoba, and the executor was an appointee of the Surrogate Court of Manitoba. No probate had been issued in Ontario.

(2) The management of the estate was in Manitoba; and, if mismanagement or neglect took place in connection with the realisation of the estate, it would be proved by evidence in Manitoba.

(3) More than one-half in value of the beneficiaries were in Manitoba, and a common order for administration of the estate was granted there, before this application was launched. That order was made on notice to the executor, who appeared to oppose it, and thus attorned to the jurisdiction of the Manitoba Court, if any attornment was necessary, in these circumstances, to give it jurisdiction.

(4) The Manitoba Court being seized of the matter, in the conditions and circumstances described, there was no ground on which an application could successfully be made to the Manitoba Court to stay the administration there because an order had been granted in Ontario. Duplicate proceedings to the same end were not to be encouraged, and no conceivable good purpose would be served by granting the order.

In the circumstances, the granting of an administration order appeared to be a matter of discretion and not *ex debito justitiæ*.

It might well be doubted whether there were assets in Ontario —even if the residue of the estate, which, it was admitted, had been fully realised and converted into money, had been deposited to the credit of a special account in Ontario. It would seem

rather to be a debt owed by the executor, in his capacity of executor, acting under Manitoba letters probate.

Application refused with costs to be paid by the executor.

MASTEN, J., IN CHAMBERS. FEBRUARY 3RD, 1917.

RE JEANES.

Infant—Custody—Illigitimate Child—Right of Mother—Interest of Infant—Evidence.

Application by Lena Grace Jeanes for a writ of habeas corpus, supplemented by a motion by way of originating notice for an order for the custody of the infant Ivy Grace Jeanes.

The parties, by their counsel, asked that the whole question should be summarily determined on the present application; that the actual issue of a writ of habeas corpus, the return thereto, and subsequent proceedings thereon, shou d be dispensed with.

C. V. Langs, for the applicant.
W. M. McClemont, for the respondents.

MASTEN, J., in a written judgment, said that the infant was an illegitimate child. The application was made by the mother of the infant, and the respondents were Lance Hill and his wife, who, about a year before, had received the infant from the putative father under an informal agreement as to adoption.

The affidavits were voluminous and contradictory. Without making any finding of fact on the contradictory statements, but assuming them all in favour of the applicant, the learned Judge thought that they were overborne by the precarious nature of her ability to support and provide a home for the infant.

The applicant earned her living by domestic service. At present she was engaged as servant in the household of Charles Barsky. Mrs. Barsky had consented that the infant should be brought to her house, kept with its mother the applicant, and brought up along with the children of the Barsky household, and to this arrangement Mr. Barsky had agreed. It was in contemplation that this arrangement should be permanent, but it seemed to the learned Judge too precarious to rely upon; and, in the event of its cessation, there was little likelihood of the applicant

being able to secure a similar arrangement elsewhere, and she would probably be compelled to place the infant in the charge of some public institution.

On the other hand, the arrangement under which the infant had lived with the respondents for the past year, promised to secure it a permanent home and a good upbringing.

Having regard to the circumstances last mentioned, the legal right of the applicant as the mother of the child, which had been fully considered and duly appreciated, must yield to the rule that the best interest of the infant is the first consideration for the Court. That principle may not prevail in all cases, but where, as here, the ability of the mother to support the child and give it a home is at least doubtful, a basis is afforded for the Court to deal with the question on the footing of what is likely to be best for the welfare of the infant.

Reference to Re Gefrasso (1916), 10 O.W.N. 65, 166, 36 O.L.R. 630; Re Clarke (1916), 10 O.W.N. 110, 36 O.L.R. 498; Re Longaker (1908-9), 12 O.W.R. 1193, 14 O.W.R. 321; Re D Andrea (1916), 10 O.W.N. 195, 37 O.L.R. 30.

Application refused; no costs.

CANADIAN HOOD-HAGGIE CO v. SAMWELL—KELLY, J.—JAN. 30.

Contract—Sale of Goods—Non-delivery—Breach—Counterclaim—Findings of Fact of Trial Judge.]—Action for damages for breach of the defendant's agreement to deliver a large quantity of nails to the plaintiffs. Counterclaim for damages for non-delivery by the plaintiffs of a quantity of rope under another contract. The action and counterclaim were tried without a jury at Peterborough. KELLY, J., in a written judgment, dealt with the facts appearing in evidence in relation to both claim and counterclaim, and gave judgment in the plaintiffs' favour on both branches, with costs. J. A. Macintosh and J. F. Strickland, for the plaintiffs. W. F. Nickle, K.C., and J. M. Farrell, for the defendant.