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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. SEPTEMBER 12TH, 1918.

PRINGLE v. WISCONSIN ELECTRIC CO.

Principal and Agent—Agent's Commission on Sale of Goods—Commission on Basis of Difference between Sale-price to Agent and Price to Purchaser—Increase in Price to Agent—Application to Particular Sales—Evidence—Finding of Fact of Trial Judge—Appeal.

An appeal by the plaintiffs from the judgment of ROSE, J., at the trial, in an action for commissions upon sales of grinders by the plaintiffs for the defendant company. The trial Judge overruled the contention of the plaintiffs that the bargain was that the price to them of each grinder should be $32.50, and found in favour of the defendant company's contention that the price was $36.

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

Gideon Grant, for the appellants.

Hamilton Cassels, K.C., for the defendant company, respondent.

MEREDITH, C.J.O., in a written judgment, said that the appellants were manufacturers' agents, and were employed by the respondent in that capacity to sell certain of the products of its manufacture. They were furnished with a list of the articles with the prices at which they were to be sold to jobbers and to retail dealers and the prices which were to be charged to the appellants for them, their remuneration being the difference between that price and the price at which the article was sold.

In the list furnished to the appellants the price for the articles, grinders, to be charged to them, was $32.50, and the price to the retail dealer was $43.33.

It was not disputed by the appellants that the respondent had the right to alter these prices as it might choose, but no change could of course be made which would interfere with or lessen a commission which the appellants had earned. In the exercise of this right, the respondent in December, 1915, notified the appellants that, after the 1st January following, the price to them of the grinders would be $36.

In December, 1915, an agreement was made between the respondent and the Toronto Type Foundry Company, which provided, among other things, that for 6 months beginning with January, 1916, the European connections of that company should have the exclusive sale of the respondent's Dumore Electric tool post grinders, in England, Belgium, France, and Italy, and that the price to the company would be $43.33 f.o.b. Racine, Wisconsin, but the company did not bind itself to buy any of the grinders.

Two orders for grinders were given by the Toronto Type Foundry Company in December, 1915, and there was no question as to them. Other orders were given by the company after the 1st January, 1916, and the dispute was as to these, the appellants contending that their commission should be on the basis of the $32.50 price to them, and the respondent contending that the commission should be on the $36 price to the appellants.

The contention of the respondent was right. It was clear that it was only when an order for grinders was given and accepted by the respondent that the appellants became entitled to the commission; and the commissions in question being in respect of orders given and accepted after the 31st December, 1915, the 1916 rate of commission governed.

The appellants appeared to have been impressed with this difficulty, and at the trial attempted to prove that, when the agreement with the Toronto Type Foundry Company was made, it was agreed by the respondent that the $32.50 price should govern with respect to all orders given and accepted during the 6 months for which the agreement between the company and the respondent was to continue. In that attempt they, in the opinion of the trial Judge, failed; and this Court could not say that the finding was clearly wrong.

The result reached by the trial Judge was hard upon the appellants; for it was undoubted that it was, mainly at all events, owing to their exertions that the agreement with the company was consummated. They, however, failed to protect themselves by an

agreement such as that which they unsuccessfully set up; and it was to be observed that the arrangement between the parties was such that it might well have happened that, although they had expended time and money in negotiating for the sale of grinders, they would not be entitled to any commission because their efforts had not resulted in any sale being effected.

The judgment should be affirmed and the appeal be dismissed with costs.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A., reluctantly agreed, giving reasons in writing.

MAGEE, J.A., read a dissenting judgment.

Appeal dismissed; MAGEE, J.A., *dissenting.*

SECOND DIVISIONAL COURT. SEPTEMBER 13TH, 1918.

RE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND PORTER ESTATE.

Expropriation of Land—Hydro-electric Power Commission—Strip of Land Taken for Transmission Line—5 Geo. V. ch. 19, sec. 5 (O.)—Compensation of Land-owner—Proper Method of Ascertainment—Award of Arbitrator—Findings—Evidence—Appeal—Undertaking to Erect and Maintain Fence.

Appeal by the executors of and devisees under the will of Charles Porter, deceased, from the award of an arbitrator fixing at $3,400 the compensation to be paid to the appellants in respect of lands expropriated by the Commission.

The appellants sought to increase the amount awarded.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. Laidlaw, K.C., and E. H. Cleaver, for the appellants.

G. S. Kerr, K.C., for the Commissioners, respondents.

KELLY, J., read a judgment in which he said that the appellants were the owners of a farm in the township of Nelson, and the

Commission, in the exercise of their statutory powers (Power Commission Act, 1915, 5 Geo. V. ch. 19, sec. 5 (O.)), and for the purpose of constructing their transmission power line, had expropriated a strip of land about 50 feet in width, immediately adjoining the highway, running the full length of the farm, and containing 3.07 acres. The arbitrator had awarded $3,400 as sufficient compensation for the lands expropriated and for all damage in respect of the remainder of the farm as injuriously affected and all other damage suffered by the appellants.

The arbitrator made a statement shewing the items of the aggregate amount, as follows: (1) fruit-trees taken, $400; (2) ornamental trees, $600; (3) wind-break damage, $100; (4) 3 acres of land, $500; (5) damage to whole farm from having the front blemished—farm valued at $18,000, damage 10 per cent., $1,800; total, $3,400.

The first ground of attack upon the award was, that the arbitrator deviated from the principle upon which compensation should be ascertained, which is, that the arbitrator should ascertain the value of the whole land before the taking and the value of the the part remaining after the taking and deduct the one from the other, the difference being the amount to be allowed: Re Ontario and Quebec R.W. Co. and Taylor (1884), 6 O.R. 338; James v. Ontario and Quebec R.W. Co. (1886-88), 12 O.R. 624, 15 A.R. 1; Re Hannah and Campbellford Lake Ontario and Western R.W. Co. (1915), 34 O.L.R. 615.

There was no reason why that principle should be departed from. If the arbitrator adopted that method of arriving at his conclusion, then, unless it could be shewn that he overlooked or disregarded some element necessary to be considered in finding either the value before the taking or the value after the taking, or unless there is some good and sufficient reason for throwing doubt on the soundness of his conclusions, the Court should not disturb the findings of one who, with the witnesses before him and in the surroundings in which the arbitration was conducted, was in a much better position to form a conclusion as to the facts than the members of the Court, who had not that advantage. In this case there was nothing to indicate or suggest that the arbitrator had departed from the proper method in any way. Upon the first ground, the award was not assailable.

On the ground—failure to give proper weight to the evidence on behalf of the appellants and that the award was contrary to the law and the evidence and the weight of evidence—the award should not be disturbed. The evidence was conflicting.

The judgment of the Privy Council in the recent case of Ruddy v. Toronto Eastern R.W. Co. (1917), 38 O.L.R. 556, 116 L.T.R.

257, gives the rule as to the respect to be paid to the finding of a trial Judge on questions of fact, and extends that rule to awards in arbitrations under the Railway Act. The rule is equally applicable to the present award.

The award should be upheld and the appeal dismissed; but the order dismissing the appeal should contain a provision, in accordance with a consent given by counsel for the respondents upon the argument of the appeal, that they will at their expense erect and maintain a satisfactory fence between the lands taken from and the lands retained by the appellants.

MULOCK, C.J.Ex., agreed with KELLY, J.

RIDDELL and SUTHERLAND, JJ., agreed that the appeal should be dismissed, for reasons stated by each of them in writing.

CLUTE, J., read a dissenting judgment, in which he examined the evidence with great care, cited many authorities, and stated his conclusion that the appeal should be allowed and the amount of the award increased to $6,750.

Appeal dismissed; CLUTE, J., *dissenting.*

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 7th, 1918.

DANFORTH GLEBE ESTATES LIMITED v. HARRIS & CO.

Nuisance—Offensive Odours—Evidence—Positive and Negative Testimony—Acquiescence—Easement—Declaration— Injunction—Damages—Special Damage—Nominal Damages—Costs.

Action for a declaration, injunction, and damages, in respect of an alleged nuisance.

See Danforth Glebe Estate Limited v. Harris & Co. (1917), 39 O.L.R. 553.

The action was tried without a jury at a Toronto sittings.

W. E. Raney, K.C., for the plaintiffs.

W. N. Tilley, K.C., and A. C. Heighington, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that offensive odours from the defendants' glue factory were the subject of the plaintiffs' complaint; and the evidence established beyond peradventure or doubt the existence of bad smells, before and after the commencement of the action, sometimes to an intolerable degree and generally noticeable even to passers-by in Danforth avenue. He preferred the demeanour of the plaintiffs' witnesses; and the positive testimony of apparently respectable and credible witnesses, who said that they smelt the odours, was prima facie preferable to that of persons who did not notice them.

The defendants' contentions as to the plaintiff company coming to the nuisance and as to the alleged easement, if indeed an easement could be acquired as to offensive smells, must be overruled.

There must be an injunction. All the plaintiffs suffered direct, individual, special, and peculiar damage, apart from the rest of the community, and there was no necessity for the intervention of the Attorney-General.

"Where the injury is caused by a nuisance . . . damages cannot be given in respect of the depreciation of the selling value of the land, but only in respect of the loss or inconvenience . . . actually suffered, for the continuance of the nuisance constitutes a fresh cause of action for which damages may be recovered:" Halsbury's Laws of England, vol. 10, p. 341, citing Battishill v. Reed (1856), 18 C.B. 696.

But there had been an invasion of the rights of the plaintiff company for which they were entitled to nominal damages, at least; and they had given evidence of actual loss of 7 or 8 sales and contracts which would have gone through but for the existence of this nuisance; this was matter of special and particular damage altogether apart from general depreciation in value of property, and therefore not covered by the rule laid down in Halsbury, for it was loss and damage which they had already suffered. For these reasons the plaintiff company's damages should be assessed at $2,000.

The judgment should be as follows:—

1. Declaring that the business and operations of the defendants carried on upon their premises constituted a nuisance interfering with the comfort and enjoyment by the plaintiffs of their several properties and causing them damage.

2. Injunction as prayed, with a stay of the operation thereof until the 15th May, 1919.

3. Damages as above.

4. Costs of the action.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 10TH, 1918.

TRUSTS AND GUARANTEE CO. LIMITED v. GRAND VALLEY R.W. CO.

Railway—Bondholders—Priorities—Trial of Issue.

An issue to determine the rights of different classes of holders of bonds and coupons.

The issue was tried without a jury at Toronto.

W. S. Brewster, K.C., for bondholders under a mortgage of 1902 who had not exchanged their bonds.

W. Laidlaw, K.C., for Thomas Dixon (in the same interest.)

A. C. McMaster and J. H. Fraser, for bondholders under 1902 mortgage who had exchanged bonds and taken bonds of 1907, now seeking to be reinstated.

A. W. Ballantyne, for bondholders of 1907 who never had 1902 bonds.

M. H. Ludwig, K.C., for holders of coupons under two bonds, 1902 Brantford Street Railway Company and 1902 Grand Valley Railway Company.

J. R. Roaf, for holders of coupons under bonds of Brantford Street Railway Company.

R. J. McLaughlin, K.C., for the Home Life Assurance Company, who exchanged bonds of 1902 for those of 1907.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the transaction entered into by W. S. Dinnick and other directors, claiming also to be unsecured creditors of the company to the amount of $100,000, with Verner and Drill, was a most extraordinary not to say an outrageous one. The details of it were before the Court, and they were of so improper a nature as to disentitle Dinnick or any other director who took part in it to rank on the assets of the company as holders of coupons or by any other species of claim.

As to the other 1902 bondholders, who exchanged for 1907 bonds, the evidence was quite clear that they did so on the false and fraudulent representation that all the old bondholders had either exchanged or had agreed to do so; but there was no jurisdiction, under the order directing the trial of the issue, to try this matter nor any questions except those set out in the order. The parties for the disposal of this issue were not all before the Court. Therefore, although the learned Chief Justice had no doubt as to

the merits, he could not order the reinstatement of those who so exchanged their bonds.

And as to the holders of coupons, he was of opinion, in any event, that the effect of the transaction was that those coupons were paid and extinguished—not sold or transferred in such a way as to preserve a lien—and could not now rank in priority.

The company paid the coupons on the exchange bonds of 1907 until 1910. The holders of these bonds did not then repudiate the transfer nor offer to pay back the money.

All the claims put forward in competition with the bondholders under the mortgage of 1902 should be disallowed, and these bondholders (having a clear priority) should be declared to be entitled to the money in Court.

The order provided that the costs of the motion therefor should be paid out of the money in Court.

The trial and determination of the claims were in the nature of an interpleader, and no order as to the costs thereof should be made.

CAMERON, MASTER IN CHAMBERS. SEPTEMBER 11TH, 1918.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 13TH, 1918.

BELL v. BELL.

Attachment of Debts—Pension—Toronto Police Benefit Fund—Act respecting Benevolent Provident and other Societies, R.S.O. 1897 ch. 211, sec. 12—Ontario Companies Act, 7 Edw. VII. ch. 34—Insurance Act, sec. 33.

Motion by the plaintiff for an order making an attaching order absolute. The defendant, a retired member of the Toronto Police Force, was entitled under the Rules of the Toronto Police Benefit Fund, incorporated under R.S.O. 1877 ch. 167, to a pension. This action was for alimony, and certain payments in respect of interim alimony and interim disbursements were due to the plaintiff at the time the attaching order was issued. The defendant's pension (which the plaintiff attached) was payable monthly, and fell due and was payable at the end of the month. There was nothing due when the attaching order was served, as the end of the month had not arrived.

A. R. Hassard, for the plaintiff.

G. S. Hodgson, for the defendant.

THE MASTER IN CHAMBERS, in a written judgment, said that he thought it clear that under the Act respecting Benevolent Provident and other Societies, R.S.O. 1897 ch. 211, sec. 12, the defendant's pension could not be attached. Section 12 provides that money payable to a member of the society shall be free from all claims by creditors of such member. The Act was repealed by the Ontario Companies Act, 7 Edw. VII. ch. 34, but the corporate existence of the society and all rights and privileges of the members were expressly preserved. See Slemin v. Slemin (1903), 7 O.L.R. 67. Application dismissed with costs.

The plaintiff appealed from the order of the Master.

The appeal was heard by MIDDLETON, J., in Chambers.

The same counsel appeared.

MIDDLETON, J., in a written judgment, said that under sec. 12 of R.S.O. 1897 ch. 211, all moneys payable to a member of a society such as the garnishee-society are to be free from all claims by the creditors of the member.

Slemin v. Slemin, 7 O.L.R. 67, shews that this provision is fatal to the plaintiff's claim, unless, as was contended, the effect of the repealing Act is to change the situation.

This repealing Act is now found as sec. 33 of the Insurance Act, R.S.O. 1914 ch. 183, and it expressly provides not only for the continued existence of the society, but also that, while no new insurance may be undertaken, the repeal shall not impair or affect "the rights and privileges of the members."

The right to hold money payable by virtue of membership free from attachment by a creditor is thus preserved. It may be called a pension or an annuity, but this does not advance the matter. It is money which is payable by a society and which is made immune from attachment by statute. Probably the author of the Act intended to foster saving and providence by this provision, and had not present to his mind the case of an annuitant unwilling to maintain his wife.

The appeal must be dismissed, but the defendant should have no costs.

BOUTET v. THIBIDEAU—FALCONBRIDGE, C.J.K.B.—SEPT. 3.

Injunction—Motion for Interim Order—Solvency of Defendant—Preponderance of Convenience—Adjournment till the Trial.]—Motion by the plaintiff for an interim injunction, heard in the Weekly Court, Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the parties were agreed about the solvency of the defendant; and the preponderance of convenience was in his favour. The motion should be adjourned until the trial without an injunction in the meantime; the trial to be expedited; costs of the motion to be costs in the cause, unless the Judge at the trial should otherwise order. A. W. Langmuir, for the plaintiff. J. M. Ferguson, for the defendant.