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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. MAY 25th, 1920.

GOODALL v. SMOKE.

Husband and Wife—Ante-nuptial Agreement—Money Contributed by Wife towards Purchase-money of Homestead—Death of Husband—Promise to Make Will—Statute of Frauds—Ontario Evidence Act, sec. 12—Action against Executors—Evidence—Corroboration—Appeal—Costs.

An appeal by the plaintiff from the judgment of LENNOX, J., ante 116.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.
A. C. Kingstone, for the appellant.
Thomas Hobson, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. MAY 27TH, 1920.

MARTIN v. EVANS.

Mortgage—Foreclosure of Rights of Principal Debtor—Effect as to Property of Surety—Foreclosure Set aside as Nullity—Effect of Judgment—Admissions and Consent of Counsel—Interest pendente Lite—Limitations Act, sec. 18—Rate of Interest post Diem—Mortgage-deed—Construction—Computation of Interest—Compound Interest.

An appeal by the defendants from the order of MIDDLETON, J., ante 151, dismissing the defendants' appeal from the certificate of a Local Master.

The appeal was heard by MACLAREN and MAGEE, JJ.A., MASTEN, J., and FERGUSON, J.A.

W. S. MacBrayne, for the appellants.

H. E. B. Coyne, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. MAY 28TH, 1920.

RE CONSOLIDATED TELEPHONE CO. AND TOWNSHIPS OF CALEDON AND ERIN.

Ontario Railway and Municipal Board—Application to, for Approval of Sale of Telephone System—Township Corporations—Telephone Company—Conduct of Board upon Hearing—Ontario Railway and Municipal Board Act—Leave to Appeal from Order of Board—Certificate of Board as to Conduct of Hearing.

Motion by the company for leave to appeal from an order of the Ontario Railway and Municipal Board of the 23rd February, 1920.

The motion was heard by MACLAREN and MAGEE, JJ.A., SUTHERLAND, J., and FERGUSON, J.A.

F. W. Wegenast, for the company.

K. B. Maclaren, for the township corporations.

MACLAREN, J.A., read the judgment of the Court. He said that the motion should be allowed in part. The appeal should be limited to questions of law arising on the following points:—

1. That the application to the Board was not heard or determined by the Board in accordance with the requirements of the Ontario Railway and Municipal Board Act.

2. That there was error in law in this, that, on the facts and evidence before it, the Board should not have withheld its approval of the agreement for sale.

The appeal should be set down on or before the 2nd June next.

The costs of the motion should be costs in the appeal.

The company should obtain from the Board a certificate shewing how the hearing was conducted; or, if this could not be obtained, should shew the facts by affidavit.

HIGH COURT DIVISION.

Rose, J. May 26th, 1920.

ROSE v. CHURCH.

Gift—Money Withdrawn from Bank under Power of Attorney—Evidence Establishing Gift—Action by Executors of Donor against Donee—Corroboration—Money Withdrawn to Pay Claim of Donee's Husband—Withdrawal after Death of Donor—Powers of Attorney Act, R.S.O. 1914 ch. 106, sec. 3—Excessive Claim—Counterclaim—Amendment—Costs.

Action by the executors of the will of John Hill, deceased, against Joseph Church and Ruth Church, the wife of Joseph, to recover the amounts of three cheques drawn by the defendant Ruth Church upon the testator's bank, shortly before the death of the testator, under a power of attorney given to her by the testator.

The action was tried without a jury at Simcoe.
A. G. Slaght, for the plaintiffs.
W. E. Kelly, K.C., for the defendants.

Rose, J., in a written judgment, said that on or about the 14th December, 1918, Hill, who was an old man, had an attack of cerebral hæmorrhage. He could not be looked after properly in his lodgings, and the defendants offered to take him to their house. He was glad to accept their offer, and he, with professional nurses, lived with the defendants until his death on the 28th January, 1919. Early in January, a very general power of attorney was executed by Hill in favour of Ruth Church. Certain cheques for small amounts were drawn by her under this power, and were duly cashed. About them there was no question. The question was as to three cheques, one drawn on the Canadian Bank of Commerce for $500 on the 16th January, another for $500 drawn on the Molsons Bank on the 22nd January, each of which was payable to the order of Ruth Church, and one drawn on the Molsons Bank for $525 on the 27th January, payable to the order of Joseph Church.

The two cheques first drawn were said to have been drawn on the instructions of Hill and to represent a sum of $1,000 given by Hill to Ruth Church as a present. The third cheque, which was drawn just before and cashed just after Hill's death, was justified as a payment to Joseph Church for the board and lodging

of Hill and his nurses and for services rendered by Joseph during the 6½ weeks that Hill spent in the defendants' house. It was not suggested that Hill authorised or was consulted with reference to this last cheque.

The learned Judge finds that there was a gift to Ruth Church of the $1,000, and that the defendants' testimony was sufficiently corroborated by that of one Chadwick.

It was contended that, even if there was a gift, it could not be supported. Hill had confidence in Ruth Church; but there was no evidence that he was in any sense under her dominion, nor was there any possibility of a finding upon the evidence that at the time when the gift was made he was incompetent to dispose of his property, or that the gift was procured by the exercise of undue influence. If the gift could be successfully attacked, it must be because of the existence of some relationship which made it impossible for the donee to support it except by shewing that the donor had independent advice. There was no warrant for the application of the rules which govern a trustee in his dealings with his cestui que trust, or of the rules which are applied where any of the special confidential relationships like that between a physician and his patient exist. The money in the banks was not transferred to Ruth Church by the power of attorney, and she was not in law a trustee. She did perform at times some of the duties of a nurse, but only as any one in the house would have done when the regular nurse was off duty or required assistance. If there are any special rules applicable to the relationship of nurse and patient, they had no application to this case.

As to the cheque for $525, the plaintiffs were entitled to succeed. Assuming that Ruth Church, as Hill's attorney, had authority to pay Hill's debts by cheques drawn upon his bank, such authority did not extend to pay more than was justly due by Hill; and it was quite impossible to justify a charge of over $75 a week for the board and lodging of Hill and a nurse and for the trifling services rendered by Joseph.

Moreover, any authority which Ruth Church had to issue cheques ceased with Hill's death, and Joseph knew, although the bank did not, that Hill was dead when the cheque was presented for payment. While the bank was protected by sec. 3 of the Powers of Attorney Act, R.S.O. 1914 ch. 106, Joseph Church was not so protected, and must account to the executors for the money with interest from the 28th January, 1919. He had not counterclaimed for the payment for the board etc., but, if he was content to take $175 on that account, he should be allowed to amend so as to claim that amount. If the amendment should be made, he should have judgment for $175 on the counterclaim. If he

should not see fit to amend, he should be at liberty to proceed as he might be advised to recover whatever sum he thought he should have.

The defendants should not have any costs, and should pay one-third of the plaintiffs' costs. There should be no costs of the counterclaim if the amendment is made.

MASTEN, J. MAY 27TH, 1920.

PETERSON v. BITZER.

Contract—Agreement for Sale of Land (House Property)—Formation of Contract—Receipt—Cheque—Statute of Frauds—Description of Property by Street and Number—Fee Simple—Locality of House—Name of Town in which Situated—Purchase-price—Statement of—Terms of Payment—Mortgage for Part of Price—Implication as to Property on which Mortgage to be Given—Interest—Rate of—Silence of Documents—Inference—Subsequent Offer—Specific Performance.

An action for specific performance of an alleged agreement between the plaintiff and defendant for the sale by the defendant and purchase by the plaintiff of a house property in Kitchener.

The action was tried without a jury at Kitchener.

V. H. Hattin, for the plaintiff.

Gideon Grant and A. L. Bitzer, for the defendant.

MASTEN, J., in a written judgment, found as a fact that the misrepresentation alleged by the defendant had not been established, and found also against the contention of the defendant that the parties were never *ad idem*.

The defendant intended to sell and the plaintiff intended to buy the premises No. 62 St. George Street in Kitchener, and the reason of the defendant's refusal to carry out the contract was correctly stated in her examination for discovery, viz., that her son was returning from the war, and the house would be needed for his occupation.

The remaining defence was the Statute of Frauds. On that question numerous points were raised on behalf of the defendant. The agreement relied upon by the plaintiff was as follows:—

"Kitchener, Ont., December 29th, 1919.

"Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George Street—$1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage.

"Adeline Bitzer."

There was also a cheque signed by the plaintiff as follows:—

"Kitchener, Ont., December 29th, 1919.

"To Canadian Bank of Commerce,

"Waterloo, Ont.

"Pay to the order of Mrs. Adeline Bitzer, $100.00, one hundred dollars, deposit on 62 St. George Street at purchase-price of $3,800—$1,400 payable on May 1st, 1920, and assume a 5 year mtg. of $2,300.00.

"C. Peterson."

The cheque was not endorsed.

These two documents were sufficiently connected, by means of dates, name of place, and description of the terms, to entitle them to be read together as evidence of the contract for the purpose of satisfying the requirements of the statute.

It was contended that the documents did not say whether Peterson was buying the freehold of the house or some lesser interest, e.g., an assignment of a lease. But a contract simply to sell a house implies that the interest sold is the fee simple: Hughes v. Parker (1841), 8 M. & W. 244; Fry on Specific Performance, 5th ed., para. 372.

It was said that the description, "No. 62 St. George Street," was insufficient. That was answered by the decision of Middleton, J., in Canadian Dyers Association Limited v. Burton (1920), ante 83. The receipt and the cheque being dated at Kitchener, the plain meaning of the documents was that the property described as No. 62 St. George Street was property in Kitchener.

The defendant contended that the purchase-price was insufficiently set forth, referring to Fenske v. Farbacher (1912), 2 D.L.R. 634. In that case the payments set forth in the memorandum were $300 short of the total purchase-price. In this case the payments set forth covered the whole of the purchase-price.

Again, it was urged, the receipt does not mention on what property the balance of the purchase-price was to be secured. If there was otherwise an enforceable agreement, the vendor had a lien for the balance of the purchase-price, $2,300; and the plain implication from the agreement was, and the learned Judge so found as a fact, that, no other provision being made, the balance of $2,300 was to be secured by a 5 year mortgage on the premises forming the subject-matter of the purchase.

The most serious point raised was in regard to the question of interest, namely, that the documents did not deal with the rate of interest to be paid on the mortgage of $2,300. It is plain law, well-settled, that a mortgage, being a debt, carries interest; consequently this mortgage would carry interest at the legal rate of 5 per cent. With regard to the subsequent offer made by the purchaser to the vendor to pay 6 per cent. interest, that was not a

rate agreed upon before the bargain was made; on the contrary, it was clear from the evidence on both sides that the rate of interest was not mentioned or discussed. The offer of the plaintiff to pay 6 per cent. was never accepted and had no bearing on the rights of the parties. Rogers v. Hewer (1912), 8 D.L.R. 288, and Reynolds v. Foster (1913), 4 O.W.N. 694, are clearly distinguishable on the facts. The judgment of Strong, J., in Williston v. Lawson (1891), 19 Can. S.C.R. 673, was in the plaintiff's favour. The learned Judge felt bound to follow the views expressed by the Chancellor in Martin v. Jarvis (1916), 37 O.L.R. 269.

The plaintiff should have the usual judgment for specific performance, with costs.

LENNOX, J. MAY 28TH, 1920.

RE HAMMOND.

Trusts and Trustees—Marriage Settlement—Power of Appointment —Exercise by Will—General Devise and Bequest—Sufficiency —Wills Act, R.S.O. 1914 ch. 120, secs. 30, 31—Discharge of Trustees upon Passing Accounts.

Motion by the National Trust Company Limited, trustees under the marriage settlement of Frederick Sidney Hammond, deceased, executors of his will, and also executors of the will of his wife, who survived him and died recently, for the advice and opinion of the Court as to the construction of the deed of settlement.

The motion was heard in the Weekly Court, Toronto.

W. Lawr, for the applicants.

LENNOX, J., in a written judgment, said that there were no children of the marriage. The deed reserved a power of appointment to the settlor, applicable in the events that had happened. It was dated the 24th September, 1909; the settlor's will was executed on the 30th September, 1909, after the contemplated marriage had been solemnised. The settlor died on or about the 17th May, 1915, and probate of his will was granted on the 14th October, 1915.

The learned Judge was of opinion that the settlor duly exercised the power of appointment conferred by the deed, by the following clause of his will: "I further give devise and bequeath to my said wife all property and estate of which I die seised or possessed."

That was sufficient: Wills Act, R.S.O. 1914 ch. 120, secs. 30, 31; In re Jones (1886), 34 Ch. D. 65; In re Jacob, [1907] 1 Ch. 445.

The trustees also asked to be discharged. They were entitled, upon passing their accounts, to be discharged from the trusts of the settlement.

There should be a reference to J. A. C. Cameron, Official Referee, to fix the trustees' compensation, tax costs on a solicitor and client basis, and pass the accounts.

MIDDLETON, J. MAY 28TH, 1920.

CRAWFORD & WALSH v. C. W. LINDSAY CO. LIMITED.

Contract—Formation—Agreement for Lease—Statute of Frauds—Agent—Letter to—Instructions for Preparation of Formal Lease—Lack of Accord as to Important Matter—Action for Breach of Agreement not Established—Costs.

Action for specific performance of an agreement for a lease, or for damages for breach of the agreement, or for damages for deceit.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiffs.

T. J. Rigney, for the defendants.

MIDDLETON, J., in a written judgment, said that specific performance was out of the question, as one Wilson, who was in possession under another lease, was not a party to the action; and it was admitted that a case for damages for deceit had not been made out.

Considering the claim for damages for breach of the agreement, the learned Judge found that the plaintiffs had suffered substantial loss by reason of what was done; but he feared that they were without remedy.

The offer to lease contained a clause stipulating for an option to renew. When the offer was sent to Lindsay, representing the defendants, the option-clause was struck out, and it was not his intention to accept save with this modification. No written assent was given to this modification of the offer. The most that could be said was that, when the plaintiff Crawford saw the pencil-marks striking out the option-clause, he made no dissent. The clause was not discussed with Grace, the defendants' agent, when the proposition was made. A letter from Lindsay to Grace gave instructions for the preparation of a formal lease, which,

Lindsay said, would be signed. This indicated that the parties had not arrived at a contract. A letter from one of the contracting parties to the other may conclude a bargain even when a more formal contract is contemplated; and the Statute of Frauds may be satisfied by a letter written by one contracting party to his agent, in which the terms of an agreement are set out. But when there is in fact no agreement, a letter to an agent instructing the preparation of a formal document to be signed by both parties, if satisfactory, does not make a contract—far less is it any evidence of a contract. There is as yet no meeting of the minds in agreement.

There was a lack of accord about a most important matter, which would have become apparent when any formal lease came to be drawn up. The plaintiffs intended to lease the whole building, and thought that Wilson was in possession of the three flats. The defendants never intended to give up their use of the top-floor.

The action failed. There should be no costs, partly for the reason that Grace by his conduct provoked the litigation and partly to mark disapproval of the concealment by the defendants of a certain letter from Grace of the 16th August.

Action dismissed without costs.

MIDDLETON, J. MAY 28TH, 1920.

BRITISH WHIG PUBLISHING CO. v E. B. EDDY CO. LIMITED.

Contract—Construction—Supply of Paper—"150 Tons Approximately per Year."—"The Whole of the Purchasers' Requirements"—Delivery Exceeding 150 Tons in each of two first Years—Application of Excess on Amount to be Delivered in third Year—Estimate—Breach of Contract—Damages.

Action for damages for breach of a contract.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiffs.

G. F. Henderson, K. C., and G. Powell, for the defendants.

MIDDLETON, J., in a written judgment, said that the case turned upon the construction of an agreement in writing, the material clause of which was: "The company agree to sell and the purchasers to purchase during the period commencing on the 1st

January, 1916, and ending on the 31st December, 1918, for use in the publication of the British Whig newspaper, published in the City of Kingston, 150 tons approximately of paper per year . . . (being the whole of the purchasers' requirements) on the following terms and conditions . . ."

Does this mean that there is a sale of 150 tons (approximately) in each of the three years? Or does it mean that the vendors agree to sell and the purchasers to take the full amount required for their paper each year?

The learned Judge adhered to what he said in Boston Book Co. v. Canada Law Book Co. Limited (1918), 44 O.L.R. 529, 533: "In each case the first endeavour must be to ascertain the true subject-matter of the contract." Here this was 150 tons of paper (approximately) in each of the three years, and the expression "(being the whole of the purchasers' requirements)" was merely adjectival and descriptive.

Had the agreement been to supply all that was needed by the purchasers in their business, one would expect to find this plainly stated, and the estimate would then have appeared as the subordinate and parenthetic clause.

Such was the contract in Tancred Arrol & Co. v. Steel Co. of Scotland (1890), 15 App. Cas. 125.

Here the words were an allegation of fact. The amount contracted for was the estimated amount which the purchasers required for their publication, but they were not words of contract.

In many cases the true subject-matter of the contract is indicated by the circumstances. Here it was more probable that the vendors of newsprint intended to sell a named quantity, and that the purchasers estimated this as their requirement, than that the purchasers had so elastic an agreement that they might take just as much or as little as they desired. The amount of paper used was under the control of the purchasers alone.

The learned Judge did not act on any such theory, but on the construction of the document only.

Under this contract the vendors delivered more than 150 tons in the first year and also in the second year. In the third year they completed 450 tons, and added 45 tons, 10 per cent., to cover any allowance called for by the word "approximately"—and then refused any further delivery under the contract.

The contract should be read as being to deliver 150 tons in each year, and any delivery beyond that, and what would be covered by "approximately," could not be applied on the delivery for the next year. Each year stood by itself; and the purchasers having in the first two years asked for more than they were entitled to, and this having been supplied and paid for at the price asked, these accounts were closed.

The use of the word "approximately" created some trouble. It indicated such a lack of definiteness in the amount as to suggest that a thing so vaguely described could not have been the real subject of the contract. The parties agreed to regard it as indicating the right to call for more than the 150 tons, and fixed the limit at 10 per cent.

As the plaintiffs recovered only part of their claim, and this upon a theory not put forward in the correspondence or indicated in the pleadings, there should be no costs.

Judgment declaring the defendants liable to pay damages based on amount by which delivery in third year under contract fell short of 165 tons; no costs.

MIDDLETON, J. MAY 28TH, 1920.

*W. G. CRAIG & CO. LIMITED v. GILLESPIE.

Chattel Mortgage—Affidavit of Bona Fides Made by Secretary-treasurer of Mortgagee-company—Omission of Statement of Deponent's Knowledge of Facts—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, sec. 12 (3)—Fatal Defect—Mortgage Void as against Creditors of Mortgagor—Assignment of Book-debts to Creditor of Insolvents—Unjust Preference—Pressure—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5.

Action by a chattel mortgagee and assignee of book-debts to establish its right to priority over the assignment for the benefit of creditors under which the defendant claimed. The goods and debts were sold by arrangement, and the proceeds awaited the determination of this action.

The action was tried without a jury at Kingston.
F. King, for the plaintiff company.
A. B. Cunningham, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff company's security was not attacked within 60 days (Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 5 (3)), nor was the assignment to the defendant (nor any assignment) made within 60 days, after the transaction (sec. 5 (4)), and so there was no statutory presumption of invalidity. On the facts, there was

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

insolvency, to the knowledge of both debtors and creditor, and there was an intention to give and to obtain an unjust preference. There was pressure, and there was no agreement to give credit or supply future goods save for cash. The debtors (Tripp & Steenbrugh) were insolvent when they gave the chattel mortgage and assigned the book-debts. According to the decided cases, the doctrine of pressure covered all this and defeated the right of the assignee and attacking creditors.

The attack upon the plaintiff company's security was, however, based upon another ground. The mortgage was said to be void for failure to comply with the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, as the affidavit of bona fides was made by Mr. Craig, the secretary-treasurer of the plaintiff company, and he had not made the statement required by sec. 12 (3), "that the deponent is aware of all the circumstances connected with the mortgage . . . and has personeal knowledge of the facts deposed to."

Reading the statute apart from cases, no one can doubt that the statement is essential.

Reference to Bank of Toronto v. McDougall (1865), 15 U.C.C.P. 475; Freehold Loan and Savings Co. v. Bank of Commerce (1879), 44 U.C.R. 284; Universal Skirt Manufacturing Co. v. Gormley (1908), 17 O.L.R. 114; Ferguson v. Wilson (1866), L.R. 2 Ch. 77, 89.

The enactment, sec. 12 (3), is general in its terms, and refers to all officers or agents of a corporation.

For this reason the mortgage was void as against creditors.

In the result, the claim to the proceeds of the book-debts was established; but the claim to the proceeds of the goods failed.

As success was divided, there should be no costs to or against either of the parties. The defendant should have his costs out of the proceeds of the goods.

ROSE, J. MAY 28TH, 1920.

*BONHAM v. BONHAM.

Promissory Notes—Action on, by Executor of Deceased Payee—Defence—Oral Agreement between Maker and Payee—Agreement in Defeasance of Contract Contained in Notes—Evidence—Inadmissibility—Interest.

Action by the executor of the will of Elizabeth Bonham, deceased, against the plaintiff's brother, both being sons of the deceased, upon two promissory notes, each dated the 12th May,

1905, and payable three years after date, to the order of the testatrix, one note being for $800, with interest at 5 per cent. per annum, signed by the defendant and his wife, and the other for $140, with interest at the same rate, signed by the defendant alone. The notes were renewals of earlier ones for similar amounts. The defendant duly paid the interest on each of them to the testatrix until her death in 1919; so that there was no suggestion of any defence based upon the Statute of Limitations.

The action was tried without a jury at Hamilton.
H. Carpenter, for the plaintiff.
W. S. MacBrayne, for the defendant.

Rose, J., in a written judgment, said that the defendant in his testimony at the trial swore that his mother gave him the money represented by the notes upon his undertaking that he would pay her interest on it as long as she should live; it was a loan to him for her lifetime; if he outlived his mother he was to get it; if he "dropped off" first his mother could collect it if she needed it.

The defendant's testimony was corroborated, and was believed by the learned Judge; and the question was whether, having been admitted and being believed, it disclosed any answer to the plaintiff's claim.

The learned Judge said that the bargain was, not that the announcement of the obligation represented by the notes should be suspended, but rather that the notes should take some effect, but should be liable to be defeated if the event mentioned in the oral agreement happened: see Wallis v. Littell (1861), 11 C. B. N.S. 369, 374.

They were to take effect, at least so far as was necessary to bind the defendant to pay interest; they were liable to be defeated if the interest was paid and the testatrix predeceased the defendant. The documents were signed and handed over as promissory notes, but there was an oral agreement that at maturity, they should not be paid if the defendant and his mother were both living and the interest had been duly paid: see New London Credit Syndicate v. Neale, [1898] 2 Q. B. 487, 490.

In other words, the agreement relied upon was not an agreement suspending the coming into force of the contract contained in the notes, but an agreement in defeasance of that contract: therefore, the evidence of it was not admissible.

Reference to Hitchings and Coulthurst Co. v. Northern Leather Co. of America and Doushkess, [1914] 3 K.B. 907; Woodbridge v. Spooner (1919), 3 B. & Ald. 233; Porteous v. Muir (1884), 8 O.R. 127; Graves v. Clark (1842), 6 Blackf. (Ind.) 183; Daniel on Negotiable Instruments, 6th ed., pp. 114-120.

McQuarrie v. Brand (1896), 28 O.R. 69, Ontario Ladies College v. Kendry (1905), 10 O.L.R. 324, and Commercial Bank of Windsor v. Morrison (1902), 32 Can. S. C.R. 98, distinguished.

There should be judgment for the amount of the notes with interest from the 12th May, 1919, and costs.

ORDE, J. MAY 28TH, 1920.

*GRAY v. PETERBOROUGH RADIAL R.W. CO.

Negligence—Collision of Street-car and Motor-truck in Highway—Injury to Voluntary Passenger in Motor-truck—Finding of Jury—Negligence of Drivers of both Vehicles—Liability of Owner of Truck Driven by Employee but not Engaged in Owner's Business—Liability at Common Law—Motor Vehicles Act, sec. 19, as Amended—Violation of Provisions of Act—Voluntary Passenger not Identified with Driver.

Action by Claude Gray, an infant, by Joseph Gray, his father and next friend, and by Joseph Gray as a co-plaintiff, for damages arising from injuries caused to the infant plaintiff as the result of a collision between a street-car belonging to the defendant railway company and a motor-truck belonging to the defendants the Bonner-Worth Company Limited. The Hydro-Electric Power Commission of Peterborough were also made defendants by reason of their ownership or control of the defendant railway company.

The action was tried with a jury at Peterborough.

G. N. Gordon, for the plaintiffs.

Joseph Wearing, for the defendant railway company and the defendant Commission.

R. S. Robertson, for the defendants the Bonner-Worth Company Limited.

ORDE, J., in a written judgment, said that the jury found the driver of the street-car and the driver of the motor-truck guilty of negligence causing the accident, and assessed the damages at $600 for the infant plaintiff and $100 for the adult plaintiff.

At the conclusion of the plaintiffs' evidence, the defendants the Bonner-Worth Company moved for a nonsuit, on the ground that the evidence disclosed that the driver of the motor-truck was not, at the time of the accident, engaged upon his employer's business, and that the provisions of sec. 19 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, as amended, did not apply, having regard to the facts and circumstances of the present case.

Section 19, with the amendments made in 1917, by 7 Geo. V. ch. 49, sec. 14, and in 1918, by 8 Geo. V. ch. 37, sec. 8, reads: "The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner without his consent, express or implied, not being a person in the employ of the owner, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation."

The Bonner-Worth Company were in the habit of selling waste wood to their employees, and they allowed Murray, the driver of their motor-truck, and a duly licensed chauffeur, to use the truck after business hours for the purpose of carrying wood to the houses of other employees. When the accident occurred, Murray was operating the truck for this purpose—he was then in the company's service, but was not using the truck upon the company's business. Claude Gray, the injured boy, was upon the running board of the truck, with the permission of Murray, when the truck was struck by a street-car owned by the defendant railway company. The boy was thrown to the ground and seriously injured.

There was ample evidence to justify the finding of the jury that both drivers were guilty of negligence causing the accident; and there could be no doubt of the liability of the railway company.

Murray, although using his master's truck, of which, while engaged upon his master's business, he was the driver, was using if for a purpose of his own or of a fellow-employee—he was not in any way engaged upon his master's business; and no liability could at common law attach for an act of negligence in no way connected with his employer's interest, but arising solely from the private business in which he was then engaged. Duffield v. Peers (1916), 37 O.L.R. 652, distinguished.

The Bonner-Worth Company, however, were liable under the provisions of sec. 19 of the Motor Vehicles Act. The learned Judge could see no reason for holding that the Act was not intended to apply to persons in the position which the plaintiff Claude Gray occupied—a voluntary passenger in the guilty vehicle—as fully as to others using the highway. The provisions of sec. 19, in view of the wide judicial interpretation already given to them by a series of decisions, including Mattei v. Gillies (1908), 16 O.L.R. 558, are not to be limited to cases of injuries to persons using the highway other than occupants of the motor vehicle itself, but extend to cases like the present, where the occupant of the car is in no sense a party to the use of the vehicle upon business which is not that of the owner and is not aware that the car is being so used.

There should be judgment for the plaintiffs against all the defendants for the amounts found by the jury, with costs.

RE SMITH—LENNOX, J.—MAY 26.

Trusts and Trustees—Appointment of New Trustee—Consent of Beneficiaries—Dispensing with Security.]—Application for an order appointing a new trustee of the estate of John Smith, deceased. The motion was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that the two executor-trustees were dead, and the residue of the property was worth about $5,000. Juliet Blanche Smith, the owner of three-fifths of the estate, consented to the appointment of John S. Holman as trustee. Holman himself was the owner of one-tenth of the estate. Rebecca Gordon also owned one-tenth, and consented. Hugh Pearsal owned one-fifth, and consented. This must mean that they did not wish that Holman should be required to give security. The purpose was to wind up the estate immediately. Holman had been acting for the executors, and was familiar with the property. An order should issue appointing Holman trustee without security. H. D. Gamble, K.C., for the applicant.