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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. SEPTEMBER 22ND, 1919.

MOORE v. IMESON.

Vendor and Purchaser—Agreement for Exchange of Lands—Refusal of Defendant to Carry out—Specific Performance—Defences—Fraud—Want of Finality—Damages—Commission—Costs.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 15 O.W.N. 291.

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

F. D. Davis, for the appellant.

No one appeared for the defendant, respondent.

THE COURT dismissed the appeal without costs.

HIGH COURT DIVISION.

ROSE, J. SEPTEMBER 22ND, 1919.

GEDDES BROTHERS v. AMERICAN NATIONAL RED CROSS.

Sale of Goods—Contract—Cancellation—Repudiation—Option—Correspondence—Damages for Non-acceptance.

Action for the price of yarn sold by the plaintiffs to the defendants or for damages for refusal to accept yarn ordered by the defendants.

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

D. L. McCarthy, K.C., and A. W. Langmuir, for the plaintiffs.

A. J. Thomson, for the defendants.

ROSE, J., in a written judgment, said that the question was, who must bear a loss which would have been avoided if the defendants had answered a certain letter written by the plaintiffs, or if the plaintiffs had not construed the defendants' failure to answer that letter as a refusal of their request to be released from their contract. The plaintiffs were dealers in yarn. During the war they sold quantities of yarn to the defendants. The dispute was in regard to purchase order 1788, dated the 14th August, 1918, for 20,000 lbs. of yarn of a certain kind. There was much correspondence, set out by the learned Judge in his judgment.

After a full statement of the facts, the learned Judge said that the defendants' letter of the 2nd October might be construed either as a request for the cancellation of or as a repudiation of their obligation under the contract. If it was merely a request, in the absence of any intimation that it was granted, it amounted to nothing. If it was a repudiation, the defendants had the option either to accept it as a breach of the contract or to disregard it and insist upon performance. If they did the latter, they kept the contract alive and left the plaintiffs free to perform it, if so advised, notwithstanding the previous repudiation: Frost v. Knight (1872), L.R. 7 Ex. 112; Leake on Contracts, 6th ed., p. 639. It was suggested that the option was exercised by the defendants when they marked the contract "cancelled" upon their own files; and that their silence—their omission to complain of delay in the making of deliveries—was a communication of their election, if any communication was requisite.

The learned Judge said that he was unable to adopt that argument. It appeared to him that, notwithstanding the fact that the defendants had decided not to insist upon delivery of the yarn, they remained free to change their decision until they notified the plaintiffs of it; and no such time had elapsed and no such change of circumstances had occurred before the shipment of the yarn as amounted to an announcement of their election or as would have precluded them from insisting upon delivery.

A letter from the defendants to the plaintiffs, dated the 5th December, 1918, came too late to be effective to deprive the ntiffs of the right to be paid for any of the yarn shipped, but effective to defeat their claim in respect of any yarn on hand not shipped. They had contracted for the whole 20,000 lbs., hey succeeded in cancelling their orders for so much as they not shipped, except 1,500 lbs., which they had to accept, and

which they still had on hand at the time of the trial. If the plaintiffs had made prompt efforts to minimise their loss, they could have sold this yarn at as good a price as that realised for what was sent to New York.

It was not proven that the defendants' letter of the 5th December was too late to be effective as regarded the 1,500 lbs. The plaintiffs' right to ship must be treated as having ceased when that letter was received; and there was no such breach by the defendants of any contract relating to such yarn as was still in the plaintiffs' possession when the letters of the 10th December were written, announcing the defendants' refusal to accept delivery under order 1788.

After the defendants had refused to accept the yarn, the plaintiffs managed to find a purchaser for the 4,350 lbs. sent to New York, and realised all but $435 of the price which the defendants had agreed to pay. The defendants were entitled to credit for the amount so realised, and their liability in respect of that lot was $435. The contract-price of the yarn sent to Cleveland was $4,373.40, and of that sent to Minneapolis $6,453.70. These amounts—$11,262.10—the defendants must pay; and they would be entitled, upon payment, to the possession of the yarn which was still in the Customs.

Judgment for the plaintiffs for $11,262.10, with costs.

SUTHERLAND, J. SEPTEMBER 22ND, 1919.

BARTRAM & BALL LIMITED v. BISHOPRIC WALL BOARD CO. LIMITED.

Sale of Goods—Contract—Supply of Laths—"Mill Run"—Quality of Laths Shipped—Refusal of Purchasers to Accept—Evidence—Onus—Description—Counterclaim—Damages.

Action for damages for breach of an alleged contract by the refusal of the defendants to accept and pay for certain quantities of laths which the plaintiffs had shipped or were ready to ship to them. Counterclaim for damages on account of the plaintiffs' failure to supply laths of the quality contracted for.

The action and counterclaim were tried without a jury at Ottawa.

J. F. Orde, K.C., and M. G. Powell, for the plaintiffs.

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

SUTHERLAND, J., in a written judgment, said that the plaintiffs in their statement of claim alleged that on the 11th March, 1918, the plaintiffs and defendants entered into an agreement whereby the plaintiffs agreed to sell and the defendants to buy the cut of laths of the season 1918 from the mill at Davidson, Quebec; that the laths were to be of a size 1½ inches by 4 feet in length and the price $4.75 per thousand pieces f.o.b. cars at Davidson, shipment to be made to the defendants at Ottawa in car-load lots; that a car-load was shipped and paid for, a second car-load shipped and refused; and that the defendants refused to accept further deliveries. The defendants set up that it was a term of the agreement that the laths should be of the quality known in the trade as "mill run;" that the shipment contained in the first car, though not in accordance with the term as to quality, was accepted and paid for by them on the understanding that no further shipments would be accepted unless up to quality as required by the contract; and that the second car-load shipped to them was refused solely on the ground that it was not up to quality.

The points of difference between the parties were: (1) whether the laths from the cut of 1918 were reasonably as good in grade and manufacture as those of the cut of 1917; (2) whether they were "mill run" laths of a grade customarily known and accepted by the trade.

Both parties contracted with definite reference to the laths of the previous year.

The testimony being conflicting, the learned Judge was unable to come to the conclusion that the plaintiffs had satisfactorily proved that the laths in the two cars despatched were equal in grade and manufacture to those of the year before—the plaintiffs had not satisfied the onus that was upon them in that respect.

Upon the question, what is "mill run" or "mill grade" as customarily known and accepted by the trade? the evidence was diverse, conflicting, and somewhat confusing. Upon the whole evidence, the laths in the second car could not be said to comply with the description "mill run grade as is customarily known and accepted by the trade," in the letter of the 16th April written by the plaintiffs, who must be held to that expression, as the letter was written for the purpose of setting out in a very careful manner their understanding of the contract.

As to the counterclaim, it was shewn that the defendants had bought some No. 1 and No. 2 laths to take the place of what had been contracted for, and had paid more for them. The defendants should have judgment on the counterclaim for $500 with costs, subject to a reference at the instance of either party at that party's risk as to costs.

LOGIE, J., IN CHAMBERS. SEPTEMBER 27TH, 1919.

RE HOWELL.

Lunatic—Application by Son for Declaration of Father's Incompetence—Evidence—Conflicting Affidavits—Disposition of Property of Supposed Incompetent—Apprehension as to—Care and Custody—Dismissal of Application.

Application by Andrew Howell the younger for an order declaring his father, Andrew Howell the elder, to be a person incapable of managing his own affairs.

H. S. White, for the applicant.

Peter White, K.C., and B.H.L. Symmes, for Andrew Howell the elder.

LOGIE, J., in a written judgment, said that from the material it appeared that Andrew Howell the elder and his wife were married in 1871, there being issue nine children, seven sons and two daughters. Two of the sons, now men of mature years, William and John, never married and lived at home with their parents.

The application was made by another son, a married man who had been away from the parental home for 18 years.

None of the other sons or daughters joined in the application. William, John, and a daughter, Margaret, opposed it strenuously.

The learned Judge was of opinion that any disturbance of the routine of the father's life or habits after nearly half a century's life with a faithful and devoted wife would at his age be highly detrimental. His interest was the determining factor upon this application.

On the argument the learned Judge was inclined to hold, having had the advantage of the opinion of Dr. C. K. Clarke, that the father was incompetent; but on a careful perusal of all the material he found himself unable to say, beyond reasonable doubt, that this was so.

Seven practising physicians certified to the father's competency —three to his incompetency.

While testes ponderantur non numerantur, these physicians had not been cross-examined; and, where there is a real contest as to the issue of competency or incompetency, the forum is a trial in open Court. This was not a case where an issue should be directed.

The learned Judge made no finding as to the competency or incompetency of Andrew Howell the elder.

The applicant had disclosed no merits either in his material or upon the argument; and, as in Re Clark (1892), 14 P.R. 370, laid more stress on the property than on the person of the alleged incompetent.

The applicant did not seek nor had he disclosed a case for a change in the care of his father; but thought that his father, by reason of his alleged incompetency, due to old age, might do some act which would deprive the applicant of a portion of his estate.

This was not a valid reason for making the order sought.

No action had been commenced by the applicant, but he has made threats of future action.

An application of this kind should not be used as a make-weight in any contemplated litigation. Much of the material filed would be relevant in such litigation; and, as in the case above referred to, this petition was not needed in order to ascertain the rights of all parties interested in the father's estate.

Application dismissed with costs. Andrew Howell the elder to pay the fee of Dr. C.K. Clarke, fixed at $25, and to be permitted to tax the same against the applicant.

OLIVER-SCRIM LUMBER CO. LIMITED v. GREAT LAKES DREDGING CO. LIMITED—FALCONBRIDGE, C.J.K.B.—SEPT. 26.

Sale of Goods—Action for Price—Account Stated—Inspection Charges—Contract of Sale—Breach—Damages—Counterclaim—Costs.]—Action for the price of certain piles and pieces of timber sold and delivered by the plaintiffs to the defendants. The defendants counterclaimed damages for breach of the agreement of sale. The action and counterclaim were tried without a jury at Sandwich. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he did not think that the memorandum dated the 10th October, 1918, amounted to an account stated in the ordinary acceptation of the term. On its face it only professed to be "O.K. as to quantities of piling received." The plaintiffs were, on the evidence, properly chargeable with half the inspection charges—$916.94. A great deal of the evidence was taken on commission. The learned Chief Justice had no unfavourable criticism to make as to the demeanour of the witnesses examined before him. The defendants had proved their counterclaim, under paragraphs 7, 8, 9, 10, and 11, for damages to an amount sufficient to wipe out the plaintiffs' claim. There was nothing in the contract and no custom proved to make strikes or the alleged shortage of cars an excuse for the non-delivery according to the terms of the contract. The action should be dismissed with costs and the defendants should have the costs of the counterclaim. J. H. Rodd, for the plaintiffs. O. E. Fleming, K.C., and Foster, for the defendants.

RANGER v. RANGER—KELLY, J.—SEPT. 26.

Principal and Agent—Power of Attorney—Revocability—Document under Seal—Absence of Real Consideration—Husband and Wife.]—Action to set aside a power of attorney, under seal, executed by the plaintiff in favour of the defendant on the 15th February, 1918, authorising the defendant to grant and release unto any purchaser or mortgagee of the defendant's lands the plaintiff's dower in such lands. The plaintiff alleged that she was the wife of the defendant. The action was tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said that the question whether the plaintiff was or was not the lawful wife of the defendant was not the real issue in the action. Cases do arise where a power of attorney becomes irrevocable. In such cases there must be an actual consideration and not merely an implication of consideration from the fact that the document is under seal. This power of attorney was revocable, subject to the rights and interests (if any) of third parties already acquired under it. There should be a judgment setting aside the power of attorney, subject to the conditions stated. There should be no costs to or against either party, except the costs awarded to the defendant by an order of the Master in Chambers of the 14th May, 1919. A. C. Heighington, for the plaintiff. T. F. Slattery, for the defendant.

CORRECTION.

In HORROCKS v. SIGNAL MOTOR TRUCK CO. OF CANADA LIMITED, HORNE v. HUSTON AND CANADIAN BANK OF COMMERCE, HORNE v. HUSTON AND MERCHANTS BANK OF CANADA, *ante* 1 and 2, the Court was composed of MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ., only—SUTHERLAND, J., having withdrawn before these cases were heard.