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HIGH COURT OF JUSTICE.

OSLER, J.A. FEBRUARY 24TH, 1910.

* CURRIE v. CURRIE.

Charge on Land—Mortgage Paid by Tenant for Life—Absence of Evidence to Shew Intention to Exonerate Fee—Effect of Taking and Registering Discharge of Mortgage—Preservation of Lien or Charge — Statute of Limitations — Duty to Keep down Interest—Payment to Save Bar—Second Life Estate—Intervening Period—Receipt of Rents and Profits—Election —Permissive Waste—Voluntary Waste.

Action for a declaration that the plaintiff, the widow of John Currie senior, deceased, was entitled to a lien or charge on certain land for moneys paid by the plaintiff in satisfaction of a mortgage made by the deceased, and for sale of the land in default of payment, and for other relief.

The defendants were respectively the surviving children and grandchildren of the deceased, who were entitled to the land in remainder under the will of a deceased son, after the determination of the plaintiff's life estate therein under the same will.

The claim was resisted on the grounds that the mortgage was paid in exoneration of the fee; that the plaintiff had been guilty of voluntary and permissive waste in respect of the land to an amount more than sufficient to answer any charge or lien she might be entitled to; and that her claim was barred by the Statute of Limitations.

The defendants also counterclaimed for damages for waste in permitting the buildings and fences on the land to become ruinous and out of repair and the land to become depreciated in value for want of proper cultivation and for waste in cutting and selling timber and firewood off the land.

It appeared that the deceased mortgaged the land in fee to McD. in 1876 to secure $760, payable in three instalments of

*This case will be reported in the Ontario Law Reports.

principal and interest, the last of which became due on the 25th February, 1880. He died on the 15th March, 1877, and by his will (proved the 12th January, 1878) devised the mortgaged land to his son John in fee, subject to a life estate therein to the plaintiff, defeasible on the son attaining the age of twenty-one. The will directed that the plaintiff should have the whole and sole control of the testator's farm, which consisted of the mortgaged land and of an adjoining lot, which he devised to his other sons, also to a life estate in favour of the plaintiff, during the continuance of her life interest, and she was the residuary devisee of all the testator's real and personal property. The will contained no direction as to payment of debts, nor any reference to the mortgage.

After her husband's death, the plaintiff, who lived on the mortgaged land with her family, or rented it when she was not living there, paid off the mortgage by a number of payments, commencing on the 31st March, 1877, and ending on the 12th January, 1888. These payments were made out of her own moneys; and on the 31st January, 1888, she obtained from the executors of the mortgagee a discharge of mortgage, in the usual form, which she retained in her own possession.

The son John became of age on the 18th December, 1892. He died on the 8th December, 1900, having by his will devised the land to the plaintiff "to be used by her as she might deem fit during her lifetime," with remainder to his four sisters in fee. He knew that the plaintiff had paid off the mortgage.

From the time the son John became of age until his death the plaintiff remained in possession, receiving the rents and profits as before, and John and the unmarried daughters lived with her.

On the 5th December, 1903, the plaintiff, upon a solicitor's advice, caused the discharge of mortgage to be registered.

In October, 1908, she endeavoured, without success, to obtain from her surviving daughters and grandchildren a release of their interests in remainder, and, after proposals for a sale of the land and investment of the proceeds for the benefit of all parties had failed, this action was brought on the 30th September, 1909, up to which time there was no claim for repayment of the moneys paid by her; nor was there evidence either way of any expressed intention of the plaintiff in paying off the mortgage—whether she was paying it off for her own benefit or for the benefit of those entitled in remainder. She paid it off because it was overdue, and the executors of the mortgagee were threatening to sell.

A. E. H. Creswicke, K.C., for the plaintiff.

W. H. Irving and W. E. S. Knowles, for the defendants.

OSLER, J.A.:—In the circumstances disclosed by the evidence, the plaintiff was . . . entitled to treat the principal money paid by her in discharge of the mortgage as a subsisting charge in her favour upon the mortgaged lands. Of her right to do so she was ignorant until she was advised of it before the action was brought. . . . Burrill v. Earl of Egremont, 7 Beav. 205. 226, 232; . . . Macklem v. Cummings, 7 Gr. 318. . . . The plaintiff's right is not affected by the taking or the registration of the discharge. It is no more than if she had taken a release of the mortgage or a conveyance of the original estate of the mortgagor: Burrill v. Lord Egremont; Gifford v. Fitz Hardinge, [1899] 2 Ch. 32. . . .

The plaintiff is, therefore, in my opinion, entitled to relief unless her claim is defeated by one or other of the various defences pleaded thereto.

As to the Statute of Limitations: "Where the tenant for life is himself the owner of a charge upon it, since it is his duty to keep down the interest, he is deemed to pay himself out of the rents and profits, and this is a sufficient payment to save the bar of the statute:" Lightwood on the Time-limit of Actions (1909), p. 361, citing Burrell v. Earl of Egremont, Topham v. Booth, 35 Ch. D. 607, 611, and other cases; and see Fisher on the Law of Mortgages, 5th ed., sec. 795; Darby & Bosanquet on Limitations, 2nd ed. (1893), p. 465. . . .

When the son became of age, the statute (R. S. O. 1897 ch. 133, sec. 23) was not running, the plaintiff being tenant for life under her husband's will, paying and receiving the interest on the charge out of the rents and profits of the land. When that life estate came to an end . . . her right to possession and receipt of the rents and profits ceased, and the statute began to run and continued to do so until the death of the son on the 8th December, 1900. But the plaintiff's new life estate then came into existence, and with it the right to the rents and profits and the corresponding obligation to keep down, out of them, the interest on the still existing charge, or so much thereof as might be due after charging the plaintiff with whatever sum she ought to be charged with in respect of her receipts during the eight years which elapsed between the termination of her first life estate and the commencement of the second. The result of payment of the interest in this way is . . . in accordance with the authorities above cited, that the statute is not a bar.

It was contended that the plaintiff was bound to elect between the retention of the charge and the acceptance of the life estate under her son's will. . . . In the absence of evidence from

which to infer any agreement on this subject between herself and her son, I hold that she was not put to her election—the mere acceptance of the life estate not being inconsistent with the existence of the charge, and there being no evidence that the discharge of the mortgage was registered in consequence of an intention on her part to abandon it. . . .

As to the plaintiff's receipts during the eight years . . . there is no very satisfactory evidence. . . . She is chargeable with whatever she did receive over and above what may have been paid on account of the household expenditure (which, in the circumstances, must be held to have been authorised) or otherwise on John's account, and interest at 6 per cent. on the amount of the charge, $760. If the defendants think it worth while to take a reference on this point, they may do so—otherwise I am disposed to hold that the one should be set off against the other. . . .

In respect of permissive waste, no express duty to repair being imposed by the will . . . I am bound by . . . Patterson v. Central Canada Loan and Savings Co., 29 O.R. 134, following In re Cartwright, 41 Ch. D. 532, to hold that a tenant for life is not impeachable for waste of that description. See, however, Morris v. Cairncross, 14 O. L. R. 544. . . .

As to voluntary waste, the plaintiff appears to have cut and sold a considerable quantity of timber and cordwood, not in the ordinary process of clearing the land, and with the value of this, which I fix at $250, she must be charged. It was urged that the terms of the son's devise were large enough to authorise what she did, but I do not think so. . . . Pardoe v. Pardoe, 16 Times L. R. 373. . . .

The plaintiff is, therefore, entitled to judgment declaring her entitled to a lien on the land for $510, or so much less as may be found due to her upon the reference, if the defendants desire a reference, and to sale in default of payment. Further directions and costs reserved.

BRITTON, J. FEBRUARY 26TH, 1910.

GORMAN v. MORROW.

Release—Interest in Mining Properties—Concealment of Facts—Rescission — Partnership Agreement — Reformation—Termination—Account.

The defendant, a prospector, and the plaintiff, a dentist, on the 3rd January, 1908, entered into an agreement (reduced to writing) whereby the defendant, in consideration of $200 paid by

the plaintiff, gave the plaintiff a one-half interest in the net profits of all undertakings of the defendant from the date of the agreement "and all properties hereafter acquired during the continuance of this agreement, in the Montreal River district . . . which said agreement shall continue in full force and effect until such time as the same may be determined" by the defendant giving to the plaintiff "at least three months' notice in writing of his intention to determine same."

The action was brought to enforce this agreement and for an account, etc.

The defendant alleged that the real agreement between the parties was limited to certain "Noel Plante" claims, and asked for rectification of the written instrument.

Negotiations for the "Noel Plante" claims fell through, and the defendant acquired what was called the "Silver Lake" claim, and voluntarily offered (he said) to allow the plaintiff to "come in" in respect of that claim.

On the 1st February, 1909, the plaintiff, in writing, "for value received," assigned, transferred, and set over unto the defendant "all interest in any mining locations held by" the defendant "to which I may be entitled by virtue of agreement heretofore entered into by me with him, and hereby release" the defendant "of and from all claims under the said agreement."

The defendant set up this release.

M. J. Gorman, K.C., for the plaintiff.

T. W. McGarry, K.C., for the defendant.

BRITTON, J., held, on the evidence, that there was no ground for any rectification. He further found that the defendant (on the 1st February, 1909), wearing a beaver coat of considerable value, was addressed by the plaintiff and told that he (plaintiff) would give the defendant his interest in the "Silver Lake" claim for the coat; that the defendant said he would do even better than that; that he would give the plaintiff the coat and $50; that the plaintiff accepted, and the agreement of the 1st February, 1909, was thereupon drawn up and signed. The learned Judge further found that, when this agreement was executed, the defendant had not informed the plaintiff, and the plaintiff did not know, of any mining claims or prospects or interests which the defendant had acquired since the agreement of the 3rd January, 1908; that the withholding of information as to other claims was intentional and wilful on the part of the defendant; that the defendant knew on the 1st February, 1909, that the plaintiff, upon offering to release the defendant, in consideration of the coat, and then of the coat

and $50, was proceeding on the erroneous belief that the "Silver Lake" claim was the only one the defendant had acquired after the agreement of January, 1908.

The learned Judge held, therefore, that the defendant "knowingly assisted in inducing the plaintiff to enter into the contract" of releasing the defendant "by leading the plaintiff to believe that which was known to be false." Lee v. Jones, 17 C. B. N. S. at p. 507.

The defendant between the 3rd January, 1908, and the 1st February, 1909, had obtained an interest in other mining claims in the Montreal River district . . On discovery by the plaintiff of this concealment . . he acted promptly. . . . As soon as he reasonably could, and before action, the plaintiff tendered the coat and money to the defendant.

It cannot be said that the plaintiff, by such use of the coat as was made by him, intended to keep it; and he did not injure it. . . .

Judgment setting aside the release or settlement of the 1st February, 1909, and that the partnership under the first agreement be determined as of the 1st February, 1909, save as to following the property and taking the accounts between the parties. Reference to the local Master at Ottawa to take the accounts and make inquiries and report. The defendant to pay the plaintiff's costs of the action down to judgment. Further directions and subsequent costs reserved.

MASTER IN CHAMBERS. FEBRUARY 28TH, 1910.

JACKSON v. HUGHES.

Foreign Commission—Time for Return—Practice—Application to Suppress Commission Evidence — Solicitor a Partner of Commissioner—Con. Rules 512, 522.

Motion by the defendants the Hughes Company to set aside an ex parte order extending for two days the time for the return of the commission sent to take evidence at Dundee, Scotland, and to suppress the same.

J. T. White, for the applicants.

Williams (Montgomery & Co.), for the defendant Percy Hughes, supported the motion.

H. S. White, for the other defendants, stood neutral.

F. Arnoldi, K.C., for the plaintiff, shewed cause.

THE MASTER:—The first branch of the motion was made under a misapprehension, as the time for the return is the date on or before which it must be executed and despatched by the commissioner. It does not mean the date at which it must reach the central office: see Darling v. Darling, 9 P. R. 560, a decision of the present Chancellor on appeal from the contrary opinion of the Master in Ordinary (Taylor): see Con. Rule 512.

As to the other branch, it is, so far as I know or can ascertain from inquiries of the oldest inhabitants of Osgoode Hall, the first application of the kind in this province.

The ground taken is that the commissioner was a solicitor, and that his partner appeared on behalf of the plaintiffs on the execution of the commission.

It was contended that, as the commissioner had to administer the oath to the witnesses, our Con. Rule 522 should be applied. The cases on this Rule are given in Holmested & Langton's Judicature Act, at p. 727. That of Wilde v. Crow, 10 C. P. 406, seems adverse to the motion.

The following cases were also cited and relied on: Fricker v. Moore (1730), Bunbury 289, where the Court suppressed the depositions because taken before the plaintiff's solicitor, who was one of the commissioners; Re G. M. Selwyn (1779) 2 Dick. 563, for similar reasons; Sayer v. Wagstaff (1842), 5 Beav. 462, where it was said by Lord Langdale, M.R., that a commissioner should not act as solicitor for either party after his appointment.

The practice in England at these dates, as at present, is set out in Odgers on Pleading, 5th ed., ch. xvii., p. 268 et seq. It is so entirely different from ours that the English cases have little, if any, application on the present motion. If it was known beforehand what questions were going to be put to the witnesses, who would then have their answers settled beforehand by their solicitors and counsel, it would be clearly improper for the partner of a commissioner to act for either party or for such a commissioner to be named by the examining party. At p. 279 Odgers says: "The answers (to interrogatories) must be carefully drawn." So too objections may be taken to the interrogatories, and apparently they too are prepared in the same careful way. It would seem to follow from this radical difference in the English practice that objections which would be fatal there would have little or no weight here.

Mr. Arnoldi has been cross-examined on his affidavit, and I have seen the depositions. He states that he does not know if any member of the commissioner's firm had been acting as the plaintiffs' solicitor in this matter or in any other, nor does he think it

likely, but, as he has not a copy of the evidence, and the commission has not been opened, he cannot say what, if anything, they did.

I think, in these circumstances, the motion must be dismissed with costs to the plaintiffs in the cause, leaving the defendants to avail themselves of their right to make all valid objections at the trial.

DUNSMORE v. NATIONAL PORTLAND CEMENT CO.—MASTER IN CHAMBERS—FEB. 28.

Venue—Fair Trial—Convenience.] — Motion by the defendants (the cement company and the Canadian Pacific Railway Company) to change the venue from Orangeville to Owen Sound. Under Rule 529 (b) the venue should have been laid at Owen Sound; and the Master treats the motion as one made by the plaintiff to have the trial at Orangeville: Pollard v. Wright, 16 P. R. 507. As to the contention that there could not be a fair trial in the county of Grey, the Master refers to Town of Oakville v. Andrew, 2 O. W. R. 608, and Brown v. Hazell, ib. 784, and says that no case is made for a change on that ground. Order made changing the place of trial to Owen Sound, without prejudice to an application by the plaintiff, if a trial at Owen Sound on the 21st March is not possible, to change to Orangeville. Costs to the defendants in any event. H. S. White, for the defendants the cement company. A. D. Armour, for the other defendants. W. E. Raney, K.C., for the plaintiff.

CONMEE v. AMES—BRITTON, J., IN CHAMBERS—MARCH 1.

Pleading—Statement of Defence — Res Judicata — Pleading Evidence.]—An appeal by the plaintiff from the order of the Master in Chambers, ante 470, was dismissed with costs in the cause to the defendants. W. N. Ferguson, K.C., for the plaintiff. Strachan Johnston, for the defendants.

MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION—BRITTON, J., IN CHAMBERS—MARCH 1.

Pleading—Statement of Claim — Anticipating Defence—Alternative Cause of Action—Particulars.]—An appeal by the defendants from the order of the Master in Chambers, ante 471, was dismissed, without prejudice to a further application if particulars not given by the plaintiff. Strachan Johnston, for the defendants. W. M. Stewart, for the plaintiff.