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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*REX v. MONSELL.

Criminal Law—Undertaking to Tell Fortunes—Criminal Code, sec. 443—Evidence—Deception—Intent to Defraud.

Case stated by the Senior Judge of the County Court of the County of York, after a conviction of the defendant for undertaking to tell fortunes.

The charge was laid under sec. 443 of the Criminal Code, which provides that "every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found."

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

T. C. Robinette, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the argument for the defendants was, that it was essential, in order to bring the case within sec. 443, that the persons whose fortunes the accused had undertaken to tell must have been deceived; that the evidence shewed that they were not deceived; and that a document was signed by them which in effect stated that they understood that what was being done was merely an examination of their palms according to rules laid down in certain books on palmistry, etc.

The question in Rex v. Marcott (1901), 2 O.L.R. 105, was,

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

whether there was any evidence to go to the jury, and it was held that there was such evidence—that there must be an intent on the part of the person who is telling the fortune to delude and defraud, but it is not necessary that he should succeed in deceiving or defrauding. That case was really an authority against the defendant.

It was found by the County Court Judge that the use of the document signed by the customers was a mere sham, and that it was acted upon; but, if it had been the real thing, it would not have helped the defendant.

Conviction affirmed.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*REX v. PORTER.

Criminal Law—Fraud of Trader—Failure to Keep Books—Period of Time—Criminal Code, sec. 417(c)—Fraudulent Intent.

Case stated by the Senior Judge of the County Court of the County of York after the conviction of the defendant, under sec. 417(c) of the Criminal Code, upon a charge that he, being a trader and being indebted to an amount exceeding $1,000 and unable to pay his creditors in full, did not keep such books of account in his business as are required by sec. 417(c), which provides that "every one is guilty of an indictable offence and liable to a fine of $800 and to one year's imprisonment who . . . (c) being a trader and indebted to an amount exceeding $1,000, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as . . . are necessary to . . . explain his transactions. . . ."

The question reserved was, whether the defendant came within the enactment—he having been in business for a period of 9 months only.

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

T. C. Robinette, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O., delivering the judgment of the Court, said that what the section was aimed at was the failure to keep books of account with the fraudulent intent of defrauding cre-

ditors, and it was deemed proper that where that had continued for five years, shewing a systematic course of conduct, a presumption of intent to defraud should arise, which, however, the accused might rebut in the manner mentioned in the section.

This construction, no doubt, would permit a man who had been in business for five years, and had for four years and eleven months failed to keep books of account, to escape liability of he were astute enough to keep them for the remaining month; but that is a matter for the consideration of Parliament.

As the section stands, it is an essential element of the offence that the person charged, for five years next before his inability to pay his creditors arose, should not have kept such books of account as were necessary to explain his transactions.

Conviction quashed.

SECOND DIVISIONAL COURT. JANUARY 19TH, 1916.

*McKINNON v. DORAN.

Contract—Purchase of Bonds—Broker Becoming Purchaser—Agent for Sale—Fraud and Misrepresentation—Approval of Purchaser's Solicitor—Memorandum in Writing—Statute of Frauds—Certainty as to Subject-matter of Contract.

Appeal by the defendant from the judgment of CLUTE, J., 34 O.L.R. 403, ante 43.

The appeal was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., RIDDELL and LATCHFORD, JJ.

N. W. Rowell, K.C., for the appellant.

J. B. Clarke, K.C., for the plaintiffs, respondents.

MAGEE, J.A., read a judgment in which he said that the evidence fully warranted the finding that the defendant verbally agreed, on the 2nd June, 1914, to buy the bonds himself, and was not acting either as agent for the plaintiffs or ostensibly as agent for any disclosed or undisclosed principal in Ontario or elsewhere. The question was, whether there was a memorandum in writing of the bargain, signed by the defendant, sufficient to satisfy the Statute of Frauds, if that statute applied. There were numerous conversations, by telephone and vis-à-vis between the defendant and the plaintiffs, and also between him and Edmund Daude, his associate in New York, and between the latter and the plaintiffs; but it was to the letters and telegrams,

as the only writings, that the Court must look, except for explanation of the circumstances when necessary.

The most that could be read from all the writings was this: "On the 2nd June, 1914, I bought these bonds, $223,700 of this railway, from McKinnon & Co. They must be paid for this 16th June, and they have sent me a statement calculating the price at $224,585.98, and debiting me, as purchaser, with that amount." It could not be said that the defendant was, in writing, acknowledging that he had agreed to pay that amount which the plaintiffs claimed.

The Statute of Frauds applied. In the absence of evidence, it could not be presumed that the statute was not still in force in Alberta; so that, whether the law of that Province or of Ontario should govern, there must be a memorandum in writing. The bonds referred to the trust-deed which conveyed the real property of the railway company to the trustees to secure the payment.

The appeal should be allowed with costs.

LATCHFORD, J., concurred.

RIDDELL, J., read a judgment in which he said that four defences were set up by the defendant: (1) that he was only the plaintiffs' agent to sell; (2) that, if he agreed to buy the bonds, the agreement was procured by false and fraudulent representations made by the plaintiffs and relied on by the defendant; (3) that the sale, if any, was subject to the approval of the defendant's solicitor, which had not been obtained; and (4) the Statute of Frauds, R.S.O. 1914 ch. 102.

After an examination of the grounds of all four defences, the learned Judge concludes that none of them can avail the defendant.

With regard to the Statute of Frauds, he said, that was fully met. In the telegram of the 3rd June the defendant asserted that he had absolutely bought "the Alberta bonds which you have particulars of"—his correspondent had received particulars of the bonds by a circular sent him by the defendant; the terms appeared in the telegram of the 29th May—"McKinnon will sell Alberta bonds $223,700 less $2,500 to us subject to Toronto payment and delivery small quantity sold." The bonds were those Alberta bonds which McKinnon & Co. were selling—what they were, even if uncertain, could be rendered certain.

Reference to Owen v. Thomas (1834), 3 Myl. & K. 353;

Plant v. Bourne, [1897] 2 Ch. 281; Ogilvie v. Foljambe (1817), 3 Mer. 53; Shardlow v. Cotterell (1881), 20 Ch. D. 90; Bleakley v. Smith (1840), 11 Sim. 150; Sugden on Vendor and Purchaser, 14th ed., p. 134; Fry on Specific Performance, 5th ed., pp. 166, 169.

The appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., agreed in the result arrived at by RIDDELL, J.

The Court being equally divided, the appeal should be dismissed without costs.

Appeal dismissed without costs.

SECOND DIVISIONAL COURT. JANUARY 19TH, 1916.

O'HEARN v. FRIEDMAN.

Vendor and Purchaser—Agreement for Sale of Land—Default in Payment of Purchase-money—Forfeiture of Moneys Paid —Appeal—Consent Judgment—Terms—Costs.

Appeal by the defendants Friedman and White from the judgment of CLUTE, J., ante 218.

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

J. E. Cook, for the appellants.

A. C. McMaster, for the plaintiff, respondent.

THE COURT made the following order: By consent, the action is to be dismissed, without costs, if, within two calendar months, the defendants pay to the plaintiff the balance of the purchase-money, with interest, and the costs of the action, upon receiving a sufficient conveyance, with good title, to the property in question. And, by consent also, in case the parties are unable to agree as to the amount of the balance of the purchase-money and interest, or as to the conveyance or title, then it is to be referred to the proper local officer to hear and determine any and all such matters, and the agreement in question is to be carried out according to the ruling of such officer—subject to the ordinary right of appeal—within the said two months. And, by consent also, in case the defendants shall fail to pay the balance of the purchase-money and interest or the costs of the action, including any costs of such reference, if any, as the Referee shall direct payment of, then this appeal is to be dismissed with costs.

Liberty to apply; no order as to costs of this appeal in either of the first two events above provided for.

SECOND DIVISIONAL COURT. JANUARY 20TH, 1916.

GENTLES v. GEORGIAN BAY MILLING AND POWER CO.

Fraud and Misrepresentation—Sale of Land—Promissory Note —Counterclaim—Rescission—Damages.

Appeal by the plaintiff in the original action and defendants by counterclaim from the judgment of CLUTE, J., 8 O.W.N. 618.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellants, the plaintiff, and Albert Gentles, defendant by counterclaim.

W. L. Haight, for the appellant Hurlburt, defendant by counterclaim.

W. E. Raney, K.C., and H. E. Stone, for the defendant company and the defendant Sparling, respondents.

LATCHFORD, J., delivering the judgment of the Court, after setting out the facts, said that rescission was impossible, for a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original positions: Clarke v. Dickson (1858), E. B. & E. 148. The only remedy open to the plaintiffs by counterclaim was an action for damages. If no damages were sustained, their claim failed. Damages were found by the trial Judge to have been sustained by them; but, with great respect, that was under a misapprehension of the evidence. Values should have been estimated as of the date of the transaction, and not as of the date of the trial. When the true value of the property at the time of the sale is taken into account, the parties counterclaiming sustained no damage; and there was no misrepresentation inducing the contract to purchase.

After a careful perusal of the evidence and consideration of all the circumstances, the learned Judge was of opinion that Moore and Sparling relied on their own judgment in buying the lots—a judgment which was right according to the conditions existing at the time—and that they were not misled by any party to this action, if at all, and were satisfied with their pur-

chase until the market for chemical wood had so fallen that the value of the property had greatly diminished, and until, after failing to secure a renewal of the first of the two notes for $900, they were sued by Charles A. Gentles.

The appeal should be allowed with costs, and judgment be entered in favour of Charles A. Gentles, the plaintiff, for the amount of his claim, with costs, and the counterclaim should be dismissed with costs.

HIGH COURT DIVISION.

BRITTON, J. JANUARY 15TH, 1916.

RE PORT ARTHUR WAGGON CO. LIMITED.

SMYTH'S CASE.

Company — Winding-up — Contributory — Agreement to Take Shares in Company to be Formed—Inapplicability to Company Actually Formed—Acceptance of Shares—Acting as Director — Estoppel —Acquiescence—Allotment—Necessity for—Companies Act, R.S.C. 1906 *ch.* 79, *sec.* 46—*Common and Preferred Shares.*

Appeal by W. R. Smyth from an order of the Master in Ordinary, in the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, confirming the placing of the appellant's name upon the list of contributories in respect of 50 shares of the company's preferred stock, of the par value of $100 each.

Strachan Johnston, K.C., for the appellant.

A. McLean Macdonell, K.C., for the liquidator.

BRITTON, J., said that the contention of the appellant was, that he never applied or subscribed for any of the shares of the company, that he never was the owner of any preferred shares, and that no such shares were allotted to him.

The appellant signed his name opposite a seal in a stock-book. On the first page was the signature and seal of D. C. Cameron, and on the second that of W. R. Smyth, each dated the 24th September, 1909, and each witnessed by H. I. Lindsay. The company had not then been incorporated or organised. The agreement was simply one between the two signers. Each agreed with the other to become incorporated as a company,

under the name of the Port Arthur Manufacturing Company Limited, or such other name as the Secretary of State might give to the company, with a capital of $1,000,000, divided into 10,000 shares of $100 each;" and, "We do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written and to become shareholders in such company to the said amount." Opposite the appellant's signature was written "50 shares." There were no other signatures.

D. C. Cameron joined with others in applying for and obtained a charter incorporating the company now in liquidation, a company with a different name, suggested by the applicants, and a different capital. The appellant did not join in the application, and had no opportunity to assent or dissent. The agreement signed by the appellant was not assigned by Cameron to the company.

The appellant could not be made liable for these shares by virtue of the agreement which he signed.

The appellant did accept the company's certificate that he was the owner of 25 shares of common stock. As no such stock was to be issued by the company, except as a bonus to holders of preferred stock, it was argued that the holding of these shares was an admission of being the holder of preferred shares. But the appellant did not get the shares of common stock in that way. He had been named as a director, though he never acted as such, and he allowed his name to appear as one of the signers of a prospectus. This might amount to an admission primâ facie that he was the holder of one share, but it would not operate by way of estoppel against him.

But, if the appellant could be held to have applied for stock, there was no allotment. When allotment is necessary, it must be by by-law, and it is necessary unless shares are applied for or subscribed for before incorporation: sec. 46 of the Companies Act, R.S.C. 1906 ch. 79. Here the stock had not been allotted by letters patent; no mode of allotment was prescribed by the letters patent; and the allotment must be as by by-law prescribed.

The appellant was not obliged to come into another company differently formed—he was not obliged to accept a position in or the property of another company in lieu of what he at one time agreed to accept. See Stevens v. London Steel Works Co., Delano's Case (1887), 15 O.R. 75. There was no acquiescence on the part of Smyth as a shareholder.

It is common knowledge that preferred stock is not the same as common stock—in dividends, in distribution of assets, and perhaps as to voting. See Re Queen City Refining Co. (1885), 10 O.L.R. 264, as explained by In re London Speaker Printing Co., Pearce's Case (1889), 16 A.R. 508.

The appeal should be allowed, with costs here and below, to be paid to the appellant by the liquidator out of the company's assets.

LENNOX, J. JANUARY 20TH, 1916.

SMITH v. DARLING.

Limitation of Actions—Mortgage—Action for Redemption—Infant—Disability—Limitations Act, R.S.O. 1897 *ch.* 133, *secs.* 19, 43—*Action for the Recovery of Land—Possession Obtained by Abuse of Process of Court—Final Order of Foreclosure—Setting aside—Costs.*

Action for redemption and an account, brought by Bernard Smith against Thomas J. Darling, William Henry Toner, and William Toner.

The plaintiff claimed as one of the heirs at law of his mother, Margaret Ann Smith, who died intestate on the 10th June, 1902, leaving her surviving her husband, Benjamin B. Smith, and nine children, including the plaintiff, then an infant under the age of 11 years.

There were two parcels of land in question, a lot in Kingston, and lots in the township of Storrington.

On the 27th December, 1912, the plaintiff attained the age of 21 years. This action was begun on the 4th June, 1915. The defendants pleaded the Statute of Limitations.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiff.

J. L. Whiting, K.C., and W. F. Nickle, K.C., for the defendants the Toners.

J. A. Jackson, for the defendant Darling.

LENNOX, J., read an opinion in which he stated the facts at length. He said that counsel for the defendant Darling strenuously urged that as to both properties the plaintiff was barred under the statute by lapse of time; that the statute applicable was R.S.O. 1897 ch. 133; that the limit of time for an action to redeem is the ten years mentioned in sec. 30 of that Act relating

to a mortgagee in possession; that sec. 43, the disability section of ch. 133, does not include an action for redemption of a mortgage; and that sec. 40 of 10 Edw. VII. ch. 34, which would include an action to redeem, cannot be invoked.

If any Statute of Limitations was applicable, in the circumstances here disclosed, the learned Judge said, he thought it was R.S.O. 1897 ch. 133, although this appeared to conflict with the rule recognised in Dumble v. Larush (1878-9), 25 Gr. 522, 27 Gr. 187; see also Harris v. Prentiss (1880), 30 U.C.C.P. 484; Harris v. Mudie (1882), 7 A.R. 414. On the other hand, the rule contended for by counsel for the defendant Darling was recognised in Faulds v. Harper (1884-6), 9 A.R. 537, 11 S.C.R. 639. But, the learned Judge said, he had not been able to detect any difference in substance or effect between sec. 43 of the earlier and sec. 40 of the later Act. It is possible that neither of these sections applies to an action to redeem, but it is impossible to argue that one of them does and the other does not.

The crucial question is, whether an action to redeem the mortgage of a mortgagee in possession of the lands comprised in his mortgage—in possession within the meaning of sec. 19—is "an action to recover land" within the meaning of sec. 43.

It was held by our Court of Error and Appeal that a similar section included an action to redeem: Hall v. Caldwell (1861), 7 U.C.L.J. O.S. 42. The judgment of the Supreme Court of Canada in Faulds v. Harper, 11 S.C.R. 639, did not turn upon the construction of the statute, but upon a ground which clearly entitles the plaintiff to maintain this—that the mortgagee, through whom the defendants claimed, obtained possession of the mortgaged land and set up absolute ownership therein, by a fraudulent disregard of his duty to protect the heirs of the mortgagor, an abuse of the process of the Court, and could not be treated as a mortgagee in possession, but was a trustee for the plaintiff, against whom no time-limit could be set except such as might be dictated by the conscience of the Court by reason of the misconduct, acquiescence, or laches of the claimants, or the consideration to be shewn to subsequent bona fide purchasers for value without notice, as in Skae v. Chapman (1874), 21 Gr. 534.

As regards the Storrington property, the case is not distinguishable from Faulds v. Harper. It would be impossible to allow the foreclosure order and quit-claim deed or either to stand to the prejudice of the plaintiff.

The defendant Darling has not, nor has any person claiming

through him, been in possession as mortgagee, and the Limitations Act does not apply.

Nothing has been shewn which would justify the Court in refusing to aid the plaintiff.

If the statute can be held to apply, then, upon the authority of Hall v. Caldwell and Faulds v. Harper in the Supreme Court of Canada, and the relative positions of secs. 19 and 43 as a guide, it must be considered that sec. 43 includes an action to redeem, and limits and controls the operation of sec. 19.

If it should be held that the statute does apply, and sec. 43 does not include an action to redeem, and so the plaintiff cannot recover in an action to redeem, the action should be treated as one for the recovery of land, and the plaintiff afforded relief upon equitable terms.

As to the Kingston property, sec. 19 of the statute applies, but ten years have not run since the plaintiff's right of action first accrued. He is entitled to an account and to redeem both mortgages as against the defendant Darling.

The plaintiff to have his costs of the action against all the defendants; but the defendants the Toners to have the right to recover from the defendant Darling any sum they are compelled to pay the plaintiff for costs; no order as to their costs of defence. Further directions and the costs of the reference reserved.

PRESTOLITE CO. v. LONDON ENGINE SUPPLIES CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JAN. 22.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Question of Practice—Change of Venue—Leave Refused.]—Motion by the plaintiffs for leave to appeal from the order of a Judge in Chambers affirming the order of one of the Registrars in Chambers, changing the venue. The learned Chief Justice said that the matter was altogether too trivial to engage the attention of a Divisional Court. The only important question of principle involved was, whether London counsel should attend at Hamilton sittings or Hamilton counsel at London sittings—perhaps a subsidiary one, viz., whether any Court was very likely to reverse this particular Judge on a point of practice. Leave refused. Costs to the defendants in any event. H. E. Rose, K.C., for the plaintiffs. H. S. White, for the defendants.

WRIGHT v. SYLVANITE GOLD MINES LIMITED—FALCONBRIDGE, C.J.K.B.—JAN. 22.

Injunction—Control of Company—Postponement of General Meeting — Speedy Trial of Action — Interim Injunction Continued.]—Motion by the plaintiffs to continue an interim injunction granted by BRITTON, J. The learned Chief Justice said that the matter was so elaborately argued that its disposition would include passing on the merits as if on a trial. There might be injury to the plaintiffs not capable of being estimated in damages by their losing control of the company through the proposed action of the individual defendants. The injunction should be continued until the trial, which must be arranged for forthwith, with or without pleadings; and the general meeting appointed for the 27th instant must be postponed accordingly. The learned Chief Justice, being tolerably conversant with the case, will give the trial precedence before him at the non-jury sittings at Toronto beginning on Monday the 31st instant, if the parties agree. Costs to be in the cause unless the Judge at the trial shall otherwise order. R. McKay, K.C., and J. B. Holden, for the plaintiffs. G. H. Watson, K.C., for the defendants.