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HIGH COURT DIVISION.

SUTHERLAND, J. JULY 29TH, 1919.

HAWKINS v. ALLIED TRUCK CO. LIMITED.

Company—Voluntary Winding-up—Ontario Companies Act, R.S.O. 1914 ch. 178—Claim of Sales-manager for Salary and Commissions—Allowance of Sum Based upon Present Value of Salary for Unexpired Term after Winding-up Order—Disallowance of Claim for Unearned Commissions—Agreement with Company—Executed Contract—Absence of Seal and By-law—Sec. 92 of Act—Right to Rank on Assets—Claim for Preference Disallowed.

Action for a declaration that the plaintiff was entitled to enforce against the assets of the defendant company (in voluntary liquidation) a claim made for salary and commissions.

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

R. McKay, K.C., for the plaintiff.

A. C. Heighington, K.C., for the liquidator of the company.

SUTHERLAND, J., in a written judgment, said that on the 3rd April, 1918, an agreement was made and put in writing between C., the president of the defendant company, and the plaintiff, whereby, in consideration of the plaintiff purchasing 30 shares of the defendant company's stock for $3,000, the company agreed to engage the plaintiff as general sales-manager and treasurer, at a weekly salary of $35 and a commission on all sales at 2½ per cent. and a further commission of 2½ per cent. on all sales made directly by him—"this agreement to be in full force and effect for one year from date, after which time the same may be terminated upon three months' written notice by either party." The defendant company was incorporated in August, 1917; its business was to sell old motor-cars which had been converted into trucks. The

plaintiff paid the $3,000 to the company and obtained the shares. He at once entered upon his duties as sales-manager and continued therein until early in August, 1918; he drew his salary for four months. During that period sales of 18 or 20 trucks were made, but none directly by him. Some of the trucks sold proved unsatisfactory and were brought back.

At a meeting of the shareholders held on the 30th July, 1918, it was resolved that the company should be voluntarily wound up. The plaintiff was present at the meeting and concurred in the resolution. An order was shortly afterwards made, under the Ontario Companies Act, R.S.O. 1914 ch. 178, for the winding-up of the company.

The plaintiff lodged a claim with the liquidator for salary to the 1st July, 1919, $1,645, and commissions $770, in all $2,415; and he claimed a preference over other creditors, on the ground that his claim was for "wages." The Master in Ordinary, to whom the winding-up was referred, made an order giving the plaintiff leave to commence and prosecute an action against the company for his claim, and this action was brought accordingly.

The learned Judge said that the contract, in so far as the plaintiff was concerned, was an executed contract, he having paid his money to the company for the stock, the company having received the money and used it, he having entered upon his duties as manager, and the company having recognised him as manager and accepted and utilised his services. The contract was enforceable against the company, though not under its seal: McKnight Construction Co. v. Vansickler (1915), 51 Can. S.C.R. 374.

No proof was offered that the plaintiff was a director of the company; sec. 92 of the Ontario Companies Act applies only to a director; and a by-law was not necessary.

As to the claim for salary for the remaining 8 months of the year and 3 months longer, the learned Judge referred to Ogdens Limited v. Nelson, [1905] A.C. 109; Chapman's Case (1866), L.R. 1 Eq. 346; Ex p. Maclure (1870), L.R. 5 Ch. 737; Leake on Contracts, 6th ed. (1912), p. 637; and said that the plaintiff was entitled to claim for salary for the 8 months and 3 months.

In the case of companies being wound up, the allowance, in regard to claims such as the plaintiff's, should be dealt with by ascertaining the present value of an annuity of a sum equal to the weekly salary for the unexpired term, regard being had to the risk to health and life, and a deduction being made for the liberty to obtain new employment: Yelland's Case (1867), L.R. 4 Eq. 350; Ex p. Clark (1869), L.R. 7 Eq. 550.

The plaintiff did not appear to have made any great effort to secure another position.

The present value of his salary for the 11 months would be $1,500, and from this it would be proper to deduct $500 for all other matters which should be considered, leaving his salary-claim at $1,000.

As to the claim for commissions, it must be disallowed, on the authority of Ex p. Maclure, supra. It became impossible for the company to continue in business for lack of funds; and, with the consent of all concerned, inclusive of the plaintiff, and indeed with his active concurrence, the company went into voluntary liquidation.

Turner v. Goldsmith, [1891] 1 Q.B. 544, distinguished.

The plaintiff had no right to a preference for the amount of future wages or the sum fixed in respect thereof. He was paid earned salary up to the time of the winding-up order.

The plaintiff should have judgment with costs declaring him entitled to rank upon the assets of the company for the sum of $1,000.

KELLY, J. JULY 29TH, 1919.

REID v. C. G. ANDERSON LUMBER CO.

Contract—Sale and Delivery of Lumber—Construction of Agreement—Unconditional Agreement to Deliver Specified Quantity—Damages for Breach—Second Contract—Agreement in Duplicate—Insertion in Vendees' Copy of Words "at Least"—Evidence—Burden of Proof.

The plaintiffs, lumber-dealers in Toronto, claimed from the defendant company, wholesale manufacturers of and dealers in lumber, with an office in Toronto, $4,335.17 damages for non-delivery of lumber under two separate contracts.

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

R. McKay, K.C., and S. S. Martin, for the plaintiffs.

William Laidlaw, K.C., and S. H. Bradford, K.C., for the defendants.

KELLY, J., in a written judgment, said that the first contract was in the form of an offer and acceptance. On the 6th October, 1916, the defendants wrote to the plaintiffs: "In reference to block of one million feet of Norway pine which we are cutting out at Midland, we . . . offer you the following proposition, f.o.b. cars Midland." Then followed specifications of sizes with prices. "The above to be what we produce from our Massey logs, up to the above amount in feet in each item. . . . Total block one million feet, and it is understood that any timbers cut out will reduce the quantities of relative sizes in lumber." Terms

and dates of shipping and other matters were specified. The plaintiffs accepted the offer thus made, after a change had been made in the specifications of sizes. The defendants then proceeded to perform the contract, and made deliveries thereunder aggregating nearly 700,000 feet, but refused to make further delivery, contending that the contract was for the sale and delivery at Midland of the lumber which they would produce from their stock of Massey logs up to the amount in feet in each item listed in the contract, and that the reference to "one million feet of Norway pine which we are cutting out at Midland" was an estimate of production by them from these Massey logs, and was subject to the clause, "The above to be what we produce from our Massey logs up to the above amounts in feet in each item."

The important question was, whether the offer to supply one million feet was an absolute or merely a conditional offer. The learned Judge's view was, that the contract was for the delivery of one million feet, and that the reference to the lumber to be produced from Massey logs was a stipulation to assure to the plaintiffs that lumber of that kind and quality would be delivered.

The plaintiffs contracted for the sale to their customers of quantities of lumber on the assumption that they would receive under their contract with the defendants the full one million feet. The defendants having refused to make further deliveries, the plaintiffs on the 24th September, 1917, gave notice that, unless they received by the 30th September positive assurance that deliveries would be made of the remainder of the lumber, they would buy in the open market and charge the defendants with the difference in price. The defendants adhered to the stand they had already taken. The plaintiff then purchased elsewhere at $32 a thousand feet, which, upon the evidence, was a moderate price at the time. Upon the basis of this purchase, the damages for breach of the contract of the 6th October, 1916, should be assessed at $2,605.64.

The second contract was made on the 25th August, 1916. Under it the plaintiff claimed $78 as damages for the non-delivery by the defendants of 120 pieces of Norway pine. There was a dispute as to whether this contract was for 450 pieces "at least," the words quoted having been written in the duplicate produced by the plaintiffs. The defendants said that the contract was that the plaintiffs should have whatever quantity the defendants' logs would produce up to 450 pieces, and that all that it was possible to cut from these logs was delivered. The burden of proof was upon the plaintiffs, and they had not satisfied it. The claim for breach of the contract was not made out.

There should be judgment for the plaintiffs for $2,605.64 and costs.

KELLY, J. JULY 30TH, 1919.

RE HODGKISS AND MURRAY.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Discharge of Mortgage—Effect of—Mistake—Proceedings in Foreclosure Action.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring invalid an objection made by the purchaser to the title.

The motion was heard in the Weekly Court, Toronto.
H. T. Beck, for the vendor.
H. E. McKittrick, for the purchaser.

KELLY, J., in a written judgment, said that Emma Joselin, holder of a first mortgage on the land now in question (house No. 58 Muriel avenue in Toronto), brought an action for foreclosure, and in the proceedings Robert Hodgkiss and Thomas Hodgkiss, holders of a subsequent mortgage, were made parties and proved their claim. They then redeemed the plaintiff. Thereupon a new account was taken and a new day for redemption—the 17th September, 1917—was given the owner of the equity.

Robert Hodgkiss and Thomas Hodgkiss were also the holders of a second mortgage on the adjoining property (house No. 60 Muriel avenue), made between the same parties and bearing the same date as the mortgage they held on No. 58. On the 29th March, 1917, the amount due on their mortgage on premises No. 60 was paid by the owner of the equity of redemption to the solicitor for Robert Hodgkiss and Thomas Hodgkiss, and the owner became entitled to a discharge. The solicitor for the mortgagees prepared the discharge and had it executed, but inadvertently it was made to discharge the second mortgage held by the same mortgagees on No. 58 Muriel avenue, by virtue of which, as subsequent mortgagees, they had redeemed the mortgage held by the plaintiff (Emma Joselin) on the latter property. The discharge was registered on the 31st May, 1917. The purchaser now objected that a new mortgage-account should then have been taken in the foreclosure proceedings, crediting the owner of the equity of redemption with the amount purporting to have been paid, and a new date given for redemption.

The objection was not well taken. As a matter of fact no payment was made by or on behalf of the owner of the equity of redemption in premises No. 58, upon the second mortgage thereon,

as indicated by the discharge erroneously given. Down to the time of its registration the discharge was merely a receipt—but a receipt given in error for moneys which never were paid on that mortgage. Assuming that the legal effect of the registration of the discharge was to re-vest the title (subject to the first mortgage) in the owner of the equity of redemption, he thereby acquired no additional beneficial interest in the land, but became a holder of whatever title was then re-vested in him, for the real holder of that mortgage, to the extent of the moneys erroneously paid thereon; and the conditions on which he had the right to redeem were not altered. He was still bound to pay, as a condition of redemption, the amount found due by the Master's report. The objection was not one on which the purchaser could insist.

KELLY, J. AUGUST 2ND, 1919.

RE LAKE AND CITY OF TORONTO.

Municipal Corporations—City By-law Appointing Housing Commission and Authorising Borrowing of Money for Purposes thereof—Motion to Quash—Ontario Housing Act, 1919—Failure to Pass By-law Applying Act to Municipality—Urgent Need for House Accommodation—By-law Passed in Contemplation of Special Act to be Obtained—Status of Applicant—Special Damage not Shewn—Unusual Conditions—Large Expenditure—Municipal Act, sec. 250—Delay in Moving—Discretion of Court—Adjournment of Motion until after Next Session of Legislature—Costs.

Motion by Byron Earl Lake, a resident and ratepayer of the City of Toronto, to quash by-law 8122 passed by the city council on the 9th May, 1919, intituled "A By-law to appoint the Toronto Housing Commission and to authorise the Borrowing of Money for the Purposes thereof," on the ground that the council had never passed a by-law declaring that the Ontario Housing Act, 1919, should apply to the city, and without such a by-law the council had no power to pass by-law 8122.

The motion was heard in the Weekly Court, Toronto.
W. A. McMaster, for the applicant.
G. R. Geary, K.C., for the city corporation.

KELLY, J., in a written judgment, said that the by-law attacked recited that the city corporation intended to apply to the Ontario

Legislature at its next session for an Act authorising the corporation to erect dwelling houses on lands within the municipality to relieve the present pressing necessity for more house accommodation, and to carry out the provisions thereof through a commission to be known as "The Toronto Housing Commission;" that it was deemed necessary that building operations should commence at the earliest possible moment and be carried on through the present year; and that it was expedient to appoint the commission and to make financial arrangements to carry on the work forthwith. The by-law then proceeded to appoint five persons as a commission with authority forthwith to enter upon their duties and exercise all the powers proposed to be conferred upon them by the contemplated Act as fully and effectually as though the Act was in force at the date of the passing of the by-law, etc.

The Commissioners proceeded promptly and made purchases of building sites in various parts of the city, organised building operations, let contracts for the erection of many houses, and had actually carried several of them well towards completion, and in so doing had, long before the institution of these proceedings, expended large sums of money and committed themselves to building contracts to the extent of hundreds of thousands of dollars.

The necessity for more house accommodation was abundantly proved, and no attempt was made to deny it.

The applicant had no special personal interest in attacking the by-law beyond that of any other resident and ratepayer; he was not suffering, and there was no suggestion that he was likely to suffer, special damage.

Reference to Cotton v. Ontario Motor Co. (1916), 11 O.W.N. 100.

In view of the very strong evidence of unusual conditions and of the urgent need of prompt action, the Court should not, unless the matter were clearly outside of its discretion, adopt a course which would inevitably result not only in loss of much money already expended by the Commissioners, but in putting an end to their operations and subjecting the respondents to heavy liability for failure to fulfill the contracts made by the Commissioners, and would result also in the bringing about of conditions menacing to the health and welfare of the community. If, in anticipation of the passing of the proposed Act, the respondents choose to take the risk of proceeding with the work they have undertaken, the applicant may well be left, for the time being, to whatever other remedies are open to him. If, for instance, the by-law is invalid, or if the work be otherwise carried on without proper sanction, it may be open to him to resist payment of any taxes imposed to meet the cost of the enterprise.

Section 250 of the Municipal Act, R.S.O. 1914 ch. 192, if it does not confer power to pass the by-law attacked, at least affords an added reason why, in the Court's discretion, the application should not be granted at the present time, a reasonable presumption arising from that section that the Legislature recognised that unusual conditions might arise calling for prompt action.

A still further reason for refusing to quash the by-law was the applicant's delay. The Commissioners commenced operations early in May; and the application was not launched until the 11th July.

The propriety of deferring the granting of an order quashing the by-law was further emphasised by a consideration of the applicability of the War Measures Act to the conditions resulting from the return of so many men from military service overseas.

There is authority for deferring action upon the motion: Cotton v. Ontario Motor Co., supra; Re Alexander and Village of Milverton (1908), 12 O.W.R. 61.

The motion should be adjourned until after the proposed application for a special Act shall have been dealt with by the Legislature at its next session. If the application be unsuccessful, or if it be not then dealt with, the motion may then be renewed, and may also be renewed for final hearing and for disposing of the costs even if the proposed Act be passed. If, however, the city corporation, before that time, come within the operation of the Ontario Housing Act, 1919, either party may renew the motion on one week's notice. Costs reserved—to be disposed of on a renewal of the motion after the happening of any of these events.

KELLY, J. AUGUST 2ND, 1919.

LAKE v. CITY OF TORONTO.

Municipal Corporations—City By-law Appointing Housing Commission and Authorising Borrowing of Money for Purposes thereof—Motion for Injunction Restraining City Corporation and Housing Commissioners from Proceeding under By-law—Refusal to Enjoin.

Motion by the plaintiff for an injunction until the trial restraining the defendants other than the Corporation of the City of Toronto, viz., the defendants Eaton et al., the five Commissioners appointed under the housing by-law referred to in the note of Re Lake and City of Toronto, supra, from excavating cellars, felling trees, erecting any walls or buildings, or depositing building

material upon any of the property taken by them or on their behalf in their character as members of the Toronto Housing Commission, and from letting any contracts or making any agreements with any one for these works, and similarly restraining the defendant corporation from paying over any moneys or signing any cheques or otherwise incurring any liability on behalf of the municipal council in connection with the erection of houses on the said lands.

The motion was heard in the Weekly Court, Toronto.
W. A. McMaster, for the plaintiff.
G. R. Geary, K.C., for the defendant city corporation.
G. H. Kilmer, K.C., and A. L. Malone, for the other defendants.

KELLY, J., in a written judgment, said that, for the reasons stated in deciding the motion in the previous case, the motion should be refused. Costs in the cause unless the trial Judge should otherwise order.

SELBY v. KELLY—SUTHERLAND, J.—JULY 30.

Promissory Notes — Action upon — Evidence — Finding that Moneys Advanced and Defendant Indebted—Counterclaim—Damages for Preventing Sale of Hotel Property—Failure on Evidence.]—Action upon two promissory notes signed by the defendant, each for $1,000 and interest, dated respectively the 1st and 15th June, 1917, and payable four months after date. The defendant, by way of counterclaim, asked for damages against the plaintiff for preventing her from disposing of an hotel property. The action and counterclaim were tried without a jury at Kingston. KELLY, J., in a written judgment, said, after stating the facts, that, upon the evidence, he had no doubt that, some little time before the date of either of the notes, the plaintiff advanced the $2,000 for which the notes were given, and that the defendant was indebted to him to the amount of the notes. The learned Judge was unable, upon the evidence, to find that the plaintiff interfered with the attempts of the defendant to sell the hotel property. There should be judgment for the plaintiff for the amount of the notes with interest and costs, and the counterclaim should be dismissed with costs. A. B. Cunningham, for the plaintiff. A. Cohen, for the defendant.

AIKENS v. WAUGH AND INTERNATIONAL SAFE AND REGISTER CO. LIMITED—SUTHERLAND, J.—AUG. 1.

Company—Subscription for Shares Induced by False Representations of President—Return of Money Paid—Non-Compliance with Provisions of Ontario Companies Act, R.S.O. 1914 ch. 178, secs. 111-117, as to Prospectus, Certificate, etc.—Damages.]—Action to recover $1,250 alleged to have been paid by the plaintiff to the defendants upon conditions which were not fulfilled, and for damages for false representations. The action was tried without a jury at Sandwich. SUTHERLAND, J., in a written judgment, said that in December, 1916, the defendant Waugh (the president of the defendant company) induced the plaintiff to purchase 25 shares of the capital stock of the defendant company. The learned Judge found as facts that Waugh then represented to the plaintiff that the company was paying dividends of 2½ per cent. quarterly, and that the plaintiff subscribed for the 25 shares on the faith of that representation. In January, 1917, the plaintiff was induced by the representations of Waugh to subscribe for 100 shares, in addition to the 25. Waugh then made the same representation as to the dividends, and further promised the plaintiff that, if he subscribed for the 100 shares, he would be given employment by the company at a salary of not less than $23 a week, beginning about the 1st June, 1917, and an agreement in writing to that effect was signed by the plaintiff and Waugh. The plaintiff received dividends in February and May, 1917, but no others, and was not employed by the company. This action was begun in August, 1918. On the ground that what Waugh represented was false, and the company was bound thereby, the sales of shares to the plaintiff must be set aside, and he should have judgment against the company for $1,250 paid by him for the shares. It appeared also that the statutory requirements as to filing a prospectus and obtaining a certificate had not been complied with at the time the action was brought, and that in other respects the provisions of the Ontario Companies Act, R.S.O. 1914 ch. 178, secs. 111 to 117, had not been observed. Upon this ground also the plaintiff was probably entitled to a return of the money: McCurdy v. Oak Tire and Rubber Co. Limited (1918), 44 O.L.R. 571, 15 O.W.N. 310. The plaintiff's claim for damages should be dismissed. Judgment should, therefore, be entered for the plaintiff for $1,250 with interest from the 7th February, 1917, and costs. F. D. Davis, for the plaintiff. W. M. German, K.C., for the defendants.

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6 Geo. V. ch. 50, sec. 40—See ONTARIO TEMPERANCE ACT, 1, 2.

6 Geo. V. ch. 50, sec. 41 (1)—See ONTARIO TEMPERANCE ACT, 3, 4, 5, 6, 7.

6 Geo. V. ch. 50, sec. 51 (1)—See ONTARIO TEMPERANCE ACT, 9.

6 Geo. V. ch. 50, secs. 58, 59, 96, 97, sched. F.—See ONTARIO TEMPERANCE ACT, 8.

6 Geo. V. ch. 50, secs. 78, 85, 88—See ONTARIO TEMPERANCE ACT, 6.

6 Geo. V. ch. 50, sec. 96—See ONTARIO TEMPERANCE ACT, 7.

6 Geo. V. ch. 53, secs. 3 (4*b*), 4 (2) (O.) (Children's Protection Amendment Act)—See INFANTS, 3.

6 & 7 Geo. V. ch. 19, sec. 2 (D.) (Act in Aid of Provincial Prohibitory Legislation)—See ONTARIO TEMPERANCE ACT, 8.

7 Geo. V. ch. 49, sec. 14 (O.) (Amending Motor Vehicles Act)—See MOTOR VEHICLES ACT.

7 Geo. V. ch. 50, sec. 10 (O.) (Amending Ontario Temperance Act)—See ONTARIO TEMPERANCE ACT, 6.

7 Geo. V. ch. 92, sec. 17 (O.) (Toronto Railway Company)—See STREET RAILWAY, 8.

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