The
Ontario Weekly Notes

VOL. VII. TORONTO, OCTOBER 9, 1914. No. 5

APPELLATE DIVISION.

SEPTEMBER 29TH, 1914.

STEELE v. WEIR.

Partition—Application for Order for Partition or Sale—Administration—Rules 612, 613—*Caution—R.S.O.* 1914 *ch.* 119, *sec.* 15(*d*)—*Executor—Payment of "Obligations"—Costs.*

Appeal by the plaintiff from an order of FALCONBRIDGE, C.J. K.B., 6 O.W.N. 400.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

W. A. J. Bell, K.C., for the appellant.

J. G. Farmer, K.C., for James and William Weir, the respondents.

THE COURT agreed with the opinion of the learned Chief Justice as to the principal matters in dispute, but varied the order as issued by adding a clause providing (in accordance with the apparent intention of the Chief Justice) that payment of the obligations referred to in the executor's affidavit should be made only so far as the "obligations" were just claims upon the estate; and, with this variation, dismissed the appeal with costs.

SEPTEMBER 29TH, 1914.

DANNANGELO v. MAZZA.

Vendor and Purchaser—Agreement for Sale of Land—Claim for Reformation—Evidence—Relief against Forfeiture—Payment of Purchase-money—Extension of Time.

Appeal by the plaintiff from the judgment of BRITTON, J., 6 O.W.N. 396.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

M. Malone, for the appellant.

W. S. MacBrayne, for the defendants, the respondents.

THE COURT dismissed the appeal without costs; and, by consent of the respondents, extended the time for payment of the plaintiff's purchase-money.

SEPTEMBER 30TH, 1914.

SIMBERG v. WALLBERG.

Negligence—Death of Servant of Contractor Engaged in Demolishing Building—Collapse of Wall—Dangerous Condition—Action under Fatal Accidents Act against Contractor and Owner—Independent Contractor—Workmen's Compensation for Injuries Act—Findings of Jury—Appeal.

Appeal by the plaintiff from the judgment of BRITTON, J., 6 O.W.N. 398.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. M. Godfrey, for the appellant.

L. Davis, for the defendant Wallberg, respondent.

W. H. Irving, for the defendant Lowes, respondent.

THE COURT dismissed the appeal with costs.

OCTOBER 1ST, 1914.

PERRY v. BRANDON.

Contract — Rent of Plant at Sum per Diem — Computation of Days—Construction of Written Agreement—Inclusion of Sundays—Deductions from Contract-price.

Appeal by the defendants from the judgment of MIDDLETON, J., 6 O.W.N. 621.

The appeal was heard by MULOCK, C.J.EX., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. Laidlaw, K.C., and W. I. Dick, for the appellants.

G. L. Smith, for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs; CLUTE, J., dissenting.

OCTOBER 1ST, 1914.

KINSMAN v. TOWNSHIP OF MERSEA.

Highway—Nonrepair—Death of Child by being Thrown from Waggon—Liability of Township Corporation—Negligence—Failure to Fence Ditches—Evidence—Action by Parents under Fatal Accidents Act—Damages—Reduction on Appeal.

Appeal by the defendants from the judgment of LENNOX, J., 6 O.W.N. 597.

The appeal was heard by MULOCK, C.J.EX., CLUTE, RIDDELL, and MIDDLETON, JJ.

J. H. Rodd, for the appellants.

M. Wilson, K.C., for the plaintiff, the respondent.

THE COURT dismissed the appeal with costs, subject to a reduction of the damages from $1,400 to $1,100.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 28TH, 1914.

WOOD v. ANDERSON.

Sale of Animal—Warranty—Breach — Evidence — Preponderance of Testimony — Return of Horse — Damages—Purchase-price and Expenses—Anticipated Profits — Remoteness.

Action for damages for breach of warranty upon the sale of a stallion.

W. N. Tilley and W. D. M. Shorey, for the plaintiff.

E. G. Porter, K.C., and W. Carnew, for the defendants.

FALCONBRIDGE, C.J.K.B.:—*Ponderantur testes, non numerantur.* Mere numerical comparison is not a consideration of decisive importance. Vide Starkie on Evidence, 4th ed., p. 832; Best on Evidence, 11th ed., p. 580.

The Scotch authorities perhaps put the maxim better, as it is clearly not confined to verbal evidence. They say: *Testimonia ponderanda sunt, non numeranda*: Halk. Max. 174; Ersk. Inst., bk. IV., tit. 2, para. 26.

I find here the testimony of the plaintiff, backed by the clear and incisive evidence of John Bright, the president of the Clydesdale Association, and of H. S. Clapp, V.S., more convincing than that of the cloud of witnesses called by the defendants.

There is also the evidence of Shelley and William G. Anderson, cousins of the defendants, as to the deformity of the horse before he was shipped.

I am quite satisfied, on the whole evidence, that the horse's defects existed from his birth, and were not the result of any improper treatment or want of proper treatment by the plaintiff.

The defendants must have known, and I find as a fact that they did know, that the plaintiff wanted the stallion for breeding purposes.

I find that his defects would be perpetuated in at least a large percentage of his offspring, and that he was unfit for breeding purposes.

There was both an express and an implied warranty. They may co-exist unless they are inconsistent: Benjamin on Sale, 5th ed., p. 622; Oliphant on Horses, 6th ed., pp. 119-121. There was breach of both. The horse was useless for the plaintiff's purposes, and he is entitled to recover back the purchase-money $800.00

Freight	34.60
Insurance	15.00
Expenses at Maple Cut	12.00
	$861.60

I think the expected profit from the service of mares is too speculative and remote. And I think the plaintiff ought to have minimised the other items which he claims, for board of horse, etc., by return of the horse or sale after notice.

Judgment for the plaintiff for $861.60 and costs.

MIDDLETON, J. SEPTEMBER 29TH, 1914.

RE SHEARD.

Will—Construction—Gift of Income—Investment of Corpus—Absolute Estate—Mental Incapacity of Legatee—Payment of Corpus to Trust Company.

Motion by Alice Sheard for an order determining a question arising upon the will of the late Joseph Sheard, who died on the 29th September, 1912.

N. W. Rowell, K.C., for the applicant.
W. D. McPherson, K.C., for the executors.

MIDDLETON, J.:—This will has already been before me for consideration. See 4 O.W.N. 1395.

A question now arises with respect to the gift to the daughter Alice Sheard. This gift differs in terms from the gift to the son Frederick. On the former occasion I came to the conclusion that the effect of the gift to Frederick of the revenue arising from the sum of $4,000 to be invested was to give him an absolute interest in the $4,000. The gift to the daughter Alice is of the interest, dividend, and annual revenue arising from another sum of $4,000 to be set apart and invested by the executors. This income the testator directs "shall be paid in half-yearly payments to my daughter Alice Sheard for her proper maintenance and support." Unless this makes a distinction, the case is governed by the former determination and the authorities there cited.

Mr. Rowell argues that the words "for her proper support and maintenance" do not in any way cut down the absolute gift to the daughter, but merely indicate the motive or purpose which was present to the mind of the testator.

The case appears to me to be governed by the decision of the Appellate Division in Re Robert George Barrett, 6 O.W.N. 267. That case serves to shew how almost impossible it is to cut down an absolute gift by anything which merely goes to shew the motive or object present to the testator's mind when making the provision. To cut down the gift is to add something to the will of the testator.

It is conceded that the daughter is not of strong mentality. The testator has assumed to appoint a married sister her guardian. There is unfortunately some friction in the family,

and the daughter is not living with this married sister, but with another married sister. The appointment of a guardian for an adult is, I think, nugatory; but it is plain to me that I ought not to order the money to be paid over to this lady, as mentally she is unfit to care for it. Mr. Rowell is quite content that the money should be paid over to a trust company for her benefit; and it appears to me that, in view of the feeling in the family, this is better than leaving it with the executors.

The trust company will have authority to pay over the income for the maintenance of Miss Sheard, with the approval of the Official Guardian, and resort may be had to the corpus at any time that it is necessary, but this should not be without notice to the members of the family represented by Mr. McPherson, so that every precaution may be had against the wasting of the money. I do not think it is necessary to appoint a guardian or committee.

Costs of both parties may, I think, properly be paid out of the testator's estate.

MIDDLETON, J. SEPTEMBER 29TH, 1914.

RE HOOPER.

Will—Construction—Trust—Realty and Personalty—Power of Appointment—Cestui que Trust—Gift over, in Default of Exercise of Power, to Representatives of Donee—Absolute Estate—Rule in Shelley's Case—Married Woman—Separate Estate.

Motion by a grandniece of one Hooper, deceased, for an order determining a question arising upon the will of the deceased.

J. S. Jones, for the applicant.

William Davidson, K.C., the sole surviving trustee under the will, appeared in person.

MIDDLETON, J.:—By his will the testator, who died on the 21st April, 1900, gave certain real estate to his trustees upon trust to pay the rents and profits to his grandniece during her life, but so that when she should be under coverture the sum should be for her separate use without power of anticipation, and after her death upon trust as she shall by deed or will

appoint, and in default of appointment upon trust for such persons as would be entitled to receive the sum had she died intestate, absolutely owning the property.

By another clause, certain shares in the Canada Permanent Loan Company go to the trustees in substantially the same terms; the power of appointment, however, being by will only. The grandniece now claims to be entitled to both the realty and personalty absolutely.

After careful consideration, I think she is right in her contention. In Farwell on Powers, 2nd ed., p. 52, it is said that "if an estate for life be first given and a power of disposition by deed or will added, this does not amount to an absolute gift, so as to vest the property in the donee for an estate that will devolve upon his representatives, if he do not exercise his power of appointment;" but it seems clear that when the testator goes further and provides that realty shall pass, in default of appointment, to the heirs or personalty to the executors, then the whole estate at once vests in the beneficiary.

In re Onslow (1888), 39 Ch. D. 622, shews that the fact that the beneficiary is a married woman, and the property is given for her separate use, makes no difference.

I cannot help feeling that this is but another case added to the long list in which the effect of the rule in Shelley's case is to disappoint the testator's intention. With every desire to give effect to the intention, I find myself unable to get away from the rule of law, which appears to me to be plain and conclusive.

The costs of both parties will come out of the estate.

ROBINSON BROTHERS CORK CO. LIMITED v. PERRIN & CO. LIMITED —MIDDLETON, J., IN CHAMBERS—SEPT. 28.

Summary Judgment—Motion for—Rule 56—Company-defendant—Affidavit of Principal Officer — Information and Belief — Sufficiency — Cross-examination — Disclosing Defence —Amendment of Writ of Summons.]—Appeal by the plaintiff company from an order of Mr. Holmsted, Senior Registrar, refusing summary judgment: ante 43. MIDDLETON, J., said that the case was near the border-line, but he thought that it was one in which the plaintiff company should go to trial. Everything was too indefinite and uncertain to justify the granting of a summary judgment. Appeal dismissed. Costs in the cause. J. I. Grover, for the plaintiff company. J. R. Rumball, for the defendant company.

TORONTO ELECTRIC LIGHT CO. v. GIBSON ELECTRICS LIMITED—KELLY, J.—SEPT. 28.

Conversion of Chattels—Evidence — Liability — Damages —Third Parties—Liability over—Costs.]—Action for damages for the removal by the defendants Stein and Dodin of a motor generator set leased by the plaintiffs to the defendants Gibson Electrics Limited for use in a business which they carried on in premises in Church street, in the city of Toronto, leased from Granites Limited, who were brought in as third parties by the defendants Stein and Dodin. The action was dismissed, by an order made before the trial, as against the defendants Gibson Electrics Limited. On the 3rd October, 1913, these premises were almost totally destroyed by fire, and the contents thereof, including the generator set, seriously damaged. Granites Limited employed Stein and Dodin to remove the ruins of the building and all rubbish. In the course of their operations, Stein and Dodin sold the generator set, and the purchaser removed and disposed of it. Upon conflicting evidence, the learned Judge finds that the defendants Stein and Dodin are liable to the plaintiffs, and that the third parties are liable over to the defendants —the liability being limited to the value of the generator set when the defendants Stein and Dodin took possession of it. This value the learned Judge finds to be $125, and gives judgment for the plaintiffs for that sum with County Court costs against the defendants Stein and Dodin, and for these defendants against the third parties for the same amount and the plaintiffs' costs. No set-off of costs in favour of the defendants. No costs, except as above, as between the defendants and the third parties. If any of the parties so desire, further evidence as to the amount of damages may be submitted, and in that event the question of the costs of the action will be reserved. H. H. Dewart, K.C., for the plaintiffs. J. Singer, for the defendants Stein and Dodin. J. R. Code, for the third parties.

MEMORANDUM.

MORTGAGES AND AGREEMENTS TO PURCHASE.

Statement issued on behalf of the Government of Ontario, on the 18th September, 1914:—

"The Government is of opinion that conditions in Ontario do not call for any legislation in the way of a general moratorium. It has, however, been brought to the attention of the Government that mortgagees and vendors of property in some cases are taking advantage of their legal position to foreclose their mortgages and securities where, owing to circumstances brought about by the present war, the mortgagors and purchasers are unable to make their payments, and where it would be unjust and unfair under the circumstances that they should lose their properties, upon which in many cases they have paid large amounts.

"It is, therefore, the intention of the Government at the next session of the Legislature to introduce an Act requiring mortgagees, holders of agreements of sale, options and other like securities, to secure an order from a Judge before taking proceedings, either through the Court or otherwise, to foreclose or forfeit such mortgages or securities for default in payment of principal; and giving Judges power, upon a proper case being made out, to relieve from forfeiture and to extend the time for payment of principal moneys.

"It is not intended by such proposed legislation to in any way interfere with rent, interest or other payments of this character, or in any case where a Judge does not feel that justice and right demand that some relief be given.

"It is the intention of the Government to make such legislation retroactive, and the Judges and the legal profession are particularly requested to make note of the proposed legislation and of this fact."