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C.A.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLAY.

Mortgage—Transfers of Land—Releases — Company — Impeachment for Fraud and Collusion—Redemption—Account — Terms — Time for Redemption—Withdrawal of Charges of Fraud — Postponement of Mortgage — Agent for Care and Sale of Lands—Compensation—Costs.

Appeal by plaintiffs from judgment of TEETZEL, J., dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

A. B. Cunningham, Kingston, and J. J. Maclennan, for plaintiffs.

S. H. Blake, K. C., and W. H. Blake, K.C., for defendants the Leadlays.

W. Nesbitt, K.C., and A. J. Russell Snow, for defendants the Moores.

MOSS, C.J.O.:—One purpose of the action was to impeach a mortgage dated 6th July, 1893, executed according to the form required by the Territories Real Property Act (Dom.), under the plaintiffs' seal, and by the hand of the defendant John T. Moore, their managing director, in favour of one Edward Leadlay (now deceased) and one Thomas Hook, em-

bracing certain lands owned by the plaintiffs in Alberta, Assiniboia, and Saskatchewan, for securing payment to the mortgagees of the sum of $100,000 on 1st May, 1898, with interest at the rate of 6¼ per cent. per annum, payable in advance half-yearly, on the first days of November and May, with a proviso that the interest should be 6 per cent. if paid within 15 days after the same matured. The plaintiffs alleged that the power to borrow moneys was restricted to 75 per cent. of the paid up capital stock, and that at the date of the mortgage the paid up capital stock amounted to no more than $90,970, and they claimed that the mortgage should be declared void in so far as it exceeded in amount 75 per cent. of that sum, and to that extent be cut down as a security upon the lands comprised within it.

Another purpose was to void and set aside a deed of transfer dated 31st May, 1900, executed under the plaintiffs' seal and by the hands of John J. Withrow, their president, and the defendant John T. Moore, their managing director, whereby the plaintiffs transferred to the defendants Mary Isabel Leadlay and Percy Leadlay, as executrix and executor of the last will and testament of Edward Leadlay, all the plaintiffs' interest in the lands situate in Alberta, comprised within the above mentioned mortgage, or so much of them as remained undisposed of, and also two other deeds of transfer dated 10th May, 1900, executed under the plaintiffs' seal and the hands of the said president and managing director, whereby the plaintiffs transferred to the same defendants all the plaintiffs' interest in the lands situate in Assiniboia and Saskatchewan respectively, comprised within the mortgage, or so much thereof as remained undisposed of.

The plaintiffs alleged that the execution of these instruments was induced and procured through fraud and collusion between the defendants Leadlay and John T. Moore, and that they were given without the plaintiffs' authority and without consideration to the plaintiffs.

Another purpose of the action was to declare void, as against the plaintiffs, certain agreements entered into between the defendants the Leadlays and John T. Moore, and assigned to and held by the defendant Annie A. Moore, dealing with the disposal of the lands comprised in the three instruments of transfer, or to declare the last named de-

fendants trustees for the plaintiffs of their interest under the said agreements.

The plaintiffs claimed to be entitled to the relief mentioned and to be let in to redeem the lands, on the footing of the mortgage standing as a security for the reduced amount, and the defendants the Leadlays accounting for the lands sold and for their dealings with the mortgaged premises.

The defendants united in upholding the validity and propriety of the impeached instruments and dealings and affirming the good faith and honesty of purpose of all parties engaged or interested therein. They set forth in detail the circumstances leading to and connected with the various transactions, charged the plaintiffs with knowledge, delay, and acquiescence, and denied their right to any part of the relief sought.

At the trial it was established beyond dispute that the whole amount of $100,000 secured by the mortgage was advanced by the mortgagees, and that it had been employed in payment of debts or liabilities of the plaintiffs properly payable by them; that, subsequently, the mortgagees agreed to the postponement of their mortgage claim to the floating liabilities of the plaintiffs, and that as part of the transaction on which the lands were transferred in May, 1900, the mortgagees paid liabilities or debts of the plaintiffs amounting to between $38,000 and $40,000.

Much evidence was given and received with regard to other dealings by the defendant John T. Moore with the plaintiffs' properties, as bearing on his alleged fraudulent conduct, although counsel for the plaintiffs conceded that they could not recover in this action in respect of such matters, and stated that, so far as the defendant Moore was concerned, all they sought in this action was to shew that he could not take the benefit of the agreements and transactions between him and the Leadlays (p. 143). And at the conclusion of the evidence it was agreed with respect to one charge, viz., that the defendant John T. Moore and other directors refused to allow shareholders to exchange their shares for lands, that the evidence adduced should be considered as stricken from the record.

During the progress of the trial there were some propositions and counter-propositions as to terms on which the plaintiffs might be let in to redeem the mortgage, notwith-

standing the releases of the equity of redemption, but, owing to inability to settle the footing on which the amount of indebtedness should be ascertained and payment made, they came to nothing.

In the result the trial Judge upheld the mortgage and releases and denied the plaintiffs 'claim to be let in to redeem. He found the charges of fraud to be disproved, and, with regard to the agreements between the defendants the Leadlays and John T. Moore, he held that at the time they were made the lands had become vested in and were the absolute property of the defendants the Leadlays, and that they and the defendant John T. Moore were entitled to enter into any bargain or agreement relating thereto that they saw fit to do, and that the defendant John T. Moore occupied no fiduciary or other position towards the plaintiffs which prevented him from agreeing for his own benefit, and that he was not a trustee for or accountable to the plaintiffs for his dealings with the lands under the agreements; and he dismissed the action as against all the defendants.

The plaintiffs appealed, relying on substantially the same grounds as at the trial.

At the opening of the appeal, and again more distinctly and definitely in the course of his argument, Mr. Cunningham, on the plaintiffs' behalf, expressed their willingness to redeem the defendants the Leadlays, treating the mortgage as a valid security for the whole amount secured by it, including the amount advanced and paid by the Leadlays in 1900, under and upon what has been called the postponement agreement, and the agreement under which the mortgaged lands were released to the Leadlays, making all proper allowances for taxes and other expenditures, including payments and expenses incurred in and about the sale of the lands which have been disposed of. The plaintiffs also withdrew all charges of fraud against the defendants the Leadlays.

Mr. S. H. Blake, on behalf of the defendants the Leadlays, submitted to redemption on these terms, but urged that the plaintiffs should not be allowed the usual 6 months for payment, but should pay the sum found to be payable at some shorter date. Having regard to all the circumstances, it will not be unfair to either party to permit the usual time for redemption, provided that the effect will not be to put it out of the power of the parties to deal with the lands

during that period. It would probably not be to the advantage of either party to tie up the lands at a time when it might be desirable to make sales. No doubt, however, an understanding with regard to this can be arrived at between the parties.

And, as between the plaintiffs and the defendants the Leadlays, there seems to be no reason why judgment should not be pronounced to the effect indicated.

This settlement of the matter as between the principal parties renders it unnecessary to deal at length with the grounds taken by the plaintiffs in support of their appeal against the defendants the Leadlays. It is sufficient to say that the testimony fully warrants the plaintiffs in now withdrawing all the charges of fraud or want of good faith against them. The evidence displaces any idea of improper dealings on the part of those concerned or taking part in the making of the mortgage to Leadlay and Hook, or the agreement following the mortgage, enabling disposal of the mortgaged parcels to be made by the plaintiffs, and postponing the mortgage to the floating liabilities, or of the transfers of the equity of redemption to the mortgages. It was abundantly established that whatever different views might now be entertained in the light of subsequent events with regard to the business prudence of the step, the conclusion at the time to release the equity of redemption to the mortgagees, under an arrangement whereby the other creditors of the plaintiffs were paid off and the plaintiffs saved costs and expenses, was well justified by the then outlook or prospects. But it is not now necessary to discuss these subjects or the legal aspects. It only remains to consider the position of the defendants the Moores in virtue of the agreements with the Leadlays of which they are the holders. There is no difficulty created by reason of the defendant John T. Moore having assigned the benefit of the various agreements to his wife and son, or because the former is now the sole assignee. The right under the agreements attained no higher or better position in consequence of the assignments; and the case can be dealt with as if the defendant John T. Moore, with whom the agreements were made and who is the only one of the Moores named in them, was the sole party interested.

The position that John T. Moore occupied towards the plaintiffs affords ground for the argument that he could

only enter into an agreement for the acquisition of any part of the lands of which the equity of redemption had been released, for the benefit of the plaintiffs. Assuming that the release of the equity of redemption was in law and in fact a valid transaction, and, therefore, binding upon the plaintiffs, it cannot be denied that if afterwards they could have brought about an arrangement by which in certain events they would receive back a portion of the lands, there is nothing in law to prevent them from doing so; and if the position that John T. Moore occupied towards the plaintiffs was such that if he obtained an arrangement of that nature with the Leadlays, it was his duty, as well as his legal obligation, to give the benefit of it to the plaintiffs, then it would follow that he could not in this action set it up on his own account and for his own benefit. It must not be forgotten that the effect of the release was not to work a dissolution of the plaintiffs' corporation. The defendant John T. Moore was not thereby discharged from his position as managing director. Indeed, he afterwards assumed to do acts on behalf of the plaintiffs as managing director; and there is force in the argument that, in the circumstances of this case, he could not make an arrangement for the acquisition of a portion of the released lands on payment to the mortgagees of their claim under the mortgage, except for the plaintiffs' benefit; and that would be a sufficient ground to prevent him from setting up the agreements as a bar to redemption by the plaintiffs. But, quite apart from these questions, and without absolutely determining them, there is nothing in the nature of the agreements to enable Moore to set them up as a bar.

There can be no question that before the agreement of 13th February, 1902, John T. Moore's position and that of the other Moores was only that of agency for the care and sale of the lands, on certain terms as to compensation. By the agreement of 13th February, 1902, the position of agency was retained, but under certain circumstances the agent was to receive a transfer of all the Leadlays' interest in such of the lands as remained after the Leadlays had received, in the manner specified, the amounts which they were willing to accept in satisfaction of their interest in the lands. But in the meantime and until that was done in accordance with the terms of the agreement, Moore's position was still that of agent. Upon failure to perform the terms mentioned in

the agreement according to its provisions, the parties reverted to the terms of the agreement of 3rd November, 1900, with one immaterial variation.

Manifestly, the mode of compensation provided for in the agreement of 13th February, 1902, was dependent upon the Leadlays continuing to hold their position of control over the lands when Moore was, if he ever should be, entitled to call upon them to award it to him. But, through the intervention of the Court in a proceeding to which the Moores are parties, the Leadlays' position has been changed and their control over the lands rendered subject to redemption by the plaintiffs. There can be no question of collusion between the plaintiffs and the Leadlays with regard to the redemption of the lands. The judgment to that effect issues as the result of a compromise of contested rights fairly entered into after a prolonged litigation. The agreement does not vest an estate in the lands, or give Moore any claim to any part of them, except on a contingency which cannot arise if the plaintiffs redeem according to the terms of the judgment. Under the circumstances they hold no rights which they can, on either legal or equitable grounds, set up against the plaintiffs' claim to be allowed to redeem the mortgaged premises.

Proper compensation for services in and about the care and sale of the lands they will no doubt receive, but that will form the subject of allowances to be made to them through the Leadlays on taking the accounts.

The result is that the judgment appealed from is set aside, and, the plaintiffs withdrawing all charges of fraud against the defendants the Leadlays, and submitting to redeem them in respect of their mortgage, treating it as a valid security for the whole amount, and allowing the Leadlays to charge against the mortgaged lands the amounts advanced and paid by them under and upon the postponement agreement, and for the release of the equity of redemption of the mortgaged premises, making all proper allowances for taxes and other expenditures, including payments and expenses made or incurred in and about the care and sales of lands which have been disposed of or are undisposed of, the defendants the Leadlays accounting for the lands included in the mortgage, there will be judgment accordingly with the usual directions. There is no reason why the Leadlays, the mortgagees, should not receive their costs of the action, of

the appeal, and subsequent proceedings, more especially in view of the charges of fraud which have failed; the costs to be added to their claim. In default of redemption the action to be dismissed with costs, including the costs of the appeal and subsequent proceedings.

As to the defendants the Moores, the appeal must be allowed, but I think that as between them and the plaintiffs there should be no costs of the action or appeal.

Upon the one hand, the plaintiffs made charges against these defendants of personal fraud, which were not sustained, while, on the other, these defendants did not confine themselves to a defence on the charges, but put forward claims which they were not entitled to, and a considerable portion of the trial was taken up with matters not relevant to the real issues.

MEREDITH, J.A., gave reasons in writing for the same conclusions.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

SEPTEMBER 23RD, 1907.

C.A.

REX v. ARMSTRONG.

Criminal Law—Carnal Knowledge of Girl under 14—Conviction—Motion for Leave to Appeal—Proof that Girl not Applicant's Wife—Testimony of Girl—Knowledge of Nature of Oath—Instruction for Purposes of Trial—Criminal Code, sec. 1003—Corroboration.

Application by John Armstrong, the defendant, for leave to appeal from his conviction and for an order requiring the police magistrate for the town of Napanee to state a case for the opinion of the Court.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. G. Wilson, Napanee, and F. M. Field, Cobourg, for defendant.

J. R. Cartwright, K.C., for the Crown.

Moss, C.J.O.:—The applicant was convicted on the charge, under sec. 301 of the Criminal Code, of carnally knowing a girl under the age of 14 years, not being his wife, and was sentenced to imprisonment in the penitentiary for 7 years, the magistrate refusing the request of counsel for the applicant for a stated case.

The points on which the counsel desired the case are: (1) whether it was sufficiently proved that the girl was not the applicant's wife; (2) whether the girl appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony under oath; and (3) whether, if her evidence should only have been received under sec. 1003 of the Criminal Code, it was sufficiently corroborated as required by that section.

The application was, with the consent of Mr. Cartwright for the Crown, treated as the argument upon a case stated for the opinion of the Court upon the points mentioned.

During the argument we disposed of the first question adversely to the applicant, holding that upon the whole evidence it manifestly appeared that the girl was not his wife.

As to the second question, no good reason appears for our saying that the magistrate was wrong in determining to receive the girl's evidence under oath. He states that having, in compliance with the wish of counsel for the applicant, examined the girl regarding her knowledge of the nature of an oath, he finds that she does not understand it. There is nothing in what was stated as being the answers given by her to questions addressed to her by the magistrate and counsel for the applicant to indicate that she was incapable of understanding or did not understand. Though sadly depraved, she is far from lacking intelligence, as her depositions shew. It appears that she has been attending school, and the handwriting of her signature to the depositions shews that she is not an inapt pupil in that branch.

The fact that she had been instructed on the subject a few days before the trial affords no sufficient ground for holding that her testimony was not to be admitted under oath.

Though all the Judges do not appear to have held precisely the same views with regard to the extent or means of instruction required in such cases, it seems quite settled that a child, ignorant in the matter, may be instructed for the purposes of a trial.

Whether the girl in this instance was competent or not was a question for the magistrate, to be determined when she was brought forward to testify. And, being satisfied as to that, he could not reject her testimony under oath.

This conclusion disposes of the third question, which could only arise in the event of the second question being answered favourably to the applicant's contention.

The conviction must be affirmed.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.

SEPTEMBER 23RD, 1907.

C.A.

HAMILTON STEAMBOAT CO. v. McKAY.

Appeal to Supreme Court of Canada—Extending Time for Appealing—Leave to Appeal—Necessity for—Powers of Court of Appeal.

Motion by plaintiffs for leave to appeal and to extend the time for appealing to the Supreme Court of Canada from the judgment of the Court of Appeal, ante 295, in favour of defendants.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. F. Shepley, K.C., for plaintiffs.

J. Dickson, Hamilton, for defendants.

OSLER, J.A.:—Under all the circumstances, I think we may act upon sec. 71 of the Supreme Court Act, R. S. C. 1906 ch. 139, and extend the time for allowing and allow the appeal, i.e., approve of and allow the security proposed to be given: Vaughan v. Richardson, 17 S. C. R. 703. This might have been done by a Judge of this Court, but the delay in procuring it to be done during the proper time—60 days

from the pronouncing of the judgment complained of (sec. 69)—would seem to have arisen from the impression—probably a mistaken one—that leave to appeal was necessary, and no Court was sitting during that time to which the application for leave could have been made. Inasmuch as we are now forwarding the appeal by extending the time for allowance, I think that if we are of opinion that the case is one in which leave to appeal, if necessary, should be granted under sec. 48 (e) of the Supreme Court Act, we should also now give leave, valeat quantum, and so save the parties from the delay and costs of a possible motion before the Supreme Court to quash the appeal for want of such leave.

The appellants should, of course, undertake to expedite the appeal, and the costs of this motion should be costs in the cause to the respondents.

Moss, C.J.O., Garrow and Maclaren, JJ.A., concurred.

Meredith, J.A., was of opinion, for reasons stated in writing, that the time for appealing should, on terms, be extended, but that no order should now be made giving leave to appeal.

Mabee, J. September 24th, 1907.

CHAMBERS.

Re DRINKWALTER AND KERR.

Costs—Taxation of Mortgagee's Costs of Sale Proceedings—Jurisdiction of Local Registrar.

Appeal by the assignee for the benefit of the creditors of one Drinkwalter, the mortgagor, from the taxation by the local registrar at Cobourg of a mortgagee's costs of sale proceedings. The only point argued was whether that officer had jurisdiction to tax the bill in question.

A. C. McMaster, for the appellant.

F. M. Field, Cobourg, for the mortgagee.

Mabee, J.:—An appointment to tax was issued on 26th June, and signed by the officer styling himself "local regis-

trar and taxing officer of the High Court of Justice at Cobourg." Upon the opening of the matter, objection was taken by the solicitor appearing for the assignee for the benefit of creditors of the mortgagor that the local registrar at Cobourg had no jurisdiction to proceed with the taxation. This objection was overruled, and the taxation was proceeded with under protest. Again, at the conclusion of the taxation, formal objections were filed, the first of which was a renewal of the objection to jurisdiction, which was disposed of by the officer as follows: "I hold that under R. S. O. ch. 121, sec. 30, I have jurisdiction to tax the said costs, it apparently being optional at the instance of any party interested to have such taxation before the local Master or the taxing officer."

The section of the statute referred to is as follows: "The mortgagee's costs may, without an order, be taxed by one of the taxing officers of the Supreme Court of Judicature or by the local Master, at the instance of any party interested."

Section 131 of the Judicature Act gives authority for the appointment of two or more taxing officers for the Supreme Court of Judicature, and these are the officials referred to in the above sec. 30 of ch. 121. Under Rule 84 the local registrar is made a local taxing officer, but, of course, this is a taxing officer of the High Court of Justice, and not a taxing officer of the Supreme Court of Judicature, and it is one of the taxing officers of the Supreme Court of Judicature that is given the authority to tax under sec. 30, and not a taxing officer of the High Court of Justice. Of course the local Master at Cobourg had jurisdiction under the section, but the local registrar is not the local Master there. Rule 85 cannot assist, as there was no action pending in the office of the local taxing officer.

It seems to me there is no way of getting over the objection to jurisdiction. There was no waiver of it, and the facts shew that the appellant proceeded with the taxation subject to his initial objection, and was always insisting upon it.

In the bill is a charge for obtaining an order from the County Court Judge for taxation under R. S. O. ch. 174, sec. 36. This order was not filed with the papers before me, and the taxation shews that the costs of obtaining the order were disallowed, the officer's reason being given as follows: "I disallowed all charges relating to the obtaining from the County Judge of an order for taxation, deeming it unneces-

sary, in view of the jurisdiction conferred upon me directly by the statute R. S. O. ch. 121, sec. 30."

The question of the authority of the County Court Judge to make an order under sec. 36 of ch. 174 was not argued before me, and counsel for the respondent did not attempt to uphold the taxation by virtue of the order.

I do not deal with the merits of the objections to the items of the bill in question.

In my view it is clear that the local registrar had no jurisdiction to tax the bill, and the appeal must be allowed. I can find no good reason for withholding costs to the appellant.

Appeal allowed with costs.

MABEE, J. SEPTEMBER 25TH, 1907.

TRIAL

DOMINION EXPRESS CO. v. TOWN OF NIAGARA.

Assessment and Taxes — Express Company — Liability to "Business Assessment"—4 Edw. VII. ch. 23, sec. 10—Construction—"Occupied or Used Mainly for the Purpose of its Business"—Wharf and Premises of Steamboat Company.

Action for a declaration that the business assessments attempted to be made against plaintiffs for 1905 and 1906 were illegal and void, and for an injunction restraining defendants from levying or otherwise seeking to collect the taxes claimed by them in respect of such business assessments.

Shirley Denison, for plaintiffs.

A. G. Kingstone, St. Catharines, for defendants.

MABEE, J.:— . . . An assessment was on foot prior to 1905 between plaintiffs and the Niagara Navigation Co. whereby the agent of the latter at Niagara acted during the navigation season as the agent of the plaintiffs, each paying one-half his salary from May to November. During the remaining months of the year he was paid by the navigation

company. His clerk was paid in the same proportion, except that he was not in the employ of the navigation company when the boats were not running. Goods to be carried by express were received at Niagara by the agent acting for the plaintiffs, who used part of the office of the navigation company. The great bulk of these goods consisted of fresh fruit in transit from Niagara to Toronto. Express way bills were issued; the express charges were divided between the two companies upon the basis of various scales, dependent upon the destination of the shipments. A large number of trucks were used. These were the property of the plaintiffs. When not in use they stood upon a portion of the navigation company's wharf that was found to be the most convenient. The navigation company handled all kinds of freight, carried passengers and the mails. The bulk of the fruit is shipped during August and September; some small shipments during July and possibly the latter part of June and some in October. There is no part of the premises that the express company have the exclusive right to; they pay no rent for the use of the wharf or buildings. During the fruit season the bulk of the goods are carried by the express company, but as to earnings of the two companies, if passengers are included, that of the navigation company greatly exceeds that of the express company for the whole season of navigation. The wharf and premises are assessed to the navigation company, and . . . are used indiscriminately by both companies for the purposes of their businesses, that of the navigation company in all its branches considerably exceeding that of the express company, taking the season as a whole, that is, from the opening to the close of navigation.

The question involved in this action is, whether plaintiffs are liable to assessment for business tax under the provisions of 4 Edw. VII. ch. 23, sec. 10. Under the provisions of this enactment, an express company carrying on business in connection with steamboats and occupying or using land may be assessed for a sum to be called "business assessment," where "such land is occupied or used mainly for the purpose of its business."

Plaintiffs were assessed under this head at $1,800 for 1905 and 1906. It is clear that plaintiffs occupy or use land in the town of Niagara; but is that land so occupied and used

by them mainly for the purpose of their business? I think it is clear from the evidence that the use of this wharf and premises during the season is mainly for the purpose of the business of the navigation company, and not for the business of the express company. The words "occupied or used mainly for the purpose of its business," in sub-sec. (c) of sec. 10, relate only to express companies carrying on business in connection with railways, steamboats, or sailing vessels, and not to the corporations mentioned in the earlier part of the subsection; and it seems to me that before the municipality can tax the express company under the head of "business assessment," it must shew that the main use to which the land in question is put is for the purpose of the business of the express company; and, in my view, this has not been done, and is not the fact.

This statute is to be read strictly, and it must be clear that the right of the municipality to tax arises: In re Micklethwait, 11 Ex. 452; Tennant v. Smith, [1892] A. C. 150.

Some evidence was given to the effect that in any event the amount of the assessment was excessive; I ruled at the trial that this could not be raised in this action, but was for the Court of Revision. . . .

Judgment for plaintiffs as prayed with costs of action.

SEPTEMBER 26TH, 1907.

DIVISIONAL COURT.

BICKELL v. WOODLEY.

Way—Private Way—Trespass—Boundary—User — Evidence —Costs.

Appeal by defendant from judgment of BOYD, C., ante 7.

G. Lynch-Staunton, K.C., for defendant.

S. F. Washington, K.C., for plaintiff.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), dismissed the appeal with costs.

SEPTEMBER 26TH, 1907.

C.A.

LA ROSE MINING CO. v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION.

Mines and Minerals—Crown Grant of Mining Lands—Construction—Reservation of Railway Right of Way—Evidence—Description—Plan—Actual Exception of Strip of Land and not mere Easement—Title—Declaration.

Appeal by plaintiffs from judgment of MABEE, J., 9 O. W. R. 513.

G. H. Watson, K.C., and J. B. Holden, for plaintiffs.

D. E. Thomson, K.C., for defendants the railway commission.

G. F. Shepley, K.C., and T. A. Beament, Ottawa, for defendants the Right of Way Mining Co.

A. W. Fraser, K.C., for the individual defendants.

THE COURT (MOSS, C.J.O., MACLAREN, J.A., MEREDITH, J.A.), dismissed the appeal with costs.

BOYD, C. SEPTEMBER 27TH, 1907.

TRIAL.

WARREN v. D. W. KARN CO.

Injunction—Business Morals—Publication of Testimonials in Garbled Form—Injury to Plaintiff.

Action to restrain defendants from publishing certain letters or testimonials in a garbled form, in the circumstances stated in the judgment.

BOYD, C.:—The case for relief presented by plaintiff may be thus stated. Plaintiff has been trained in the work of organ-building, and by special attention has acquired great skill in the construction of pipe-organs for churches. Thus qualified as an expert, he was employed by defendants as superintendent of their manufactory for about 8 years, from

1897 to 1905, and during that time a large number of pipe organs were successfully constructed under his supervision. These organs were of approved excellence, and plaintiff asserts that the credit of the work was chiefly due to his skill. In particular as to two organs, testimonials were given in which the merit of the plaintiff was recognized. The first in 1897, in connection with the Metropolitan Church organ, was given by Mr. Leman, a distinguished musician and organist. . . . The other, given in the shape of a letter from a well-known organist, Mr. Jeffers, with reference to an organ in the Central Methodist Church, Toronto, in 1905, addressed to plaintiff, wherein he was congratulated on having "solved the problem of a thoroughly satisfactory electro-pneumatic action." Before plaintiff became connected with defendants they did not manufacture the church pipe-organ. He left the defendants for the purpose of setting up an independent business in the line of church organs, and defendants, after he left, continued to make such organs. So that now the plaintiff and defendants are rival makers and dealers, at arm's length in business competition.

The gist of plaintiff's grievance is that defendants have issued a pamphlet containing these two recommendations, but so altered as to apply solely and only to defendants. As to Mr. Leman's report, this is done by omitting the words "and Mr. Charles J. Warren," so that the sentence reads, "I am sure the builders have every reason to congratulate themselves on the success;" and as to Mr. Jeffers's letter, by striking out the introductory, "My dear Mr. Warren," and substituting "The D. W. Karn Co.,— Gentlemen."

Plaintiff admits that he received the testimonials as agent or superintendent of defendants, and that the possession of and property in the documents is with defendants.

Plaintiff will be content if defendants use and print the testimonials in their original unmutilated shape. But defendants claim the right to use such parts as they please and to quote as much as serves their own purpose. To print the testimonials as framed by the writers, would carry commendation to both parties, and they are now rival dealers—and that would not be "business."

The writers of the testimonials (in whatever shape they are), by sending them to the plaintiff or the company, intended that they should be published. And as between the super-

intendent and the company, whose agent or employee he was, the testimonials were properly in the possession of the company, who had the right to control their publication, and this right continued after the plaintiff separated from defendants' company, in the absence of any restriction imposed by the writers of the testimonials: Howard v. Gunn, 32 Beav. 462.

The whole compaint is that by the omission or change of certain words, plaintiff has been deprived of the comendation which is contained in the original testimonials. Something of credit is withheld from him which would have been given him had no change been made in the testimonials incorporated in defendants' pamphlet published in relation to their present business. There is no proof that plaintiff has been, or is likely to be, injuriously affected in reputation or in business by this alteration, or that the public have been led astray thereby.

Granted that the testimonials have been garbled by withholding the parts relating to the plaintiff, does that give jurisdiction to interfere by way of injunction to restrain such user of the papers? It is not every breach of trust or violation of good faith or departure from honourable dealing which can call forth the powers of equity to make redress; there must be disclosed some case of civil property which the Court is bound to protect before the Court can enjoin the publication of private papers: see Lee v. Pritchard, 2 Swanst. 402, 413.

Many doubtful, and, it may be, unwarranted acts, must be left to the verdict of conscience or to the judgment of public opinion, and the present grievance appears to be one falling outside of legal limits and to be reached in the court of conscience. Tested by the business maxim "every man for himself," the pamphlet may be regarded as a shrewd stroke of advertising; tested by the golden rule of fair dealing, it would not, in my opinion, fare so well. The testimonials were given for the joint work of defendants and their guiding spirit, the then superintendent. To use them so as to exclude the latter appears to be an unfair use. They had spent their force for advertising purposes when the business connection of the parties was severed, and thereafter they should either have been withheld from public circulation, or they should have been printed as they were written. The case is one of first impression. I find no ground of legal liability, and the action should therefore be dismissed, but I do not give costs.

SEPTEMBER 17TH, 1907.

C. A.

RIDEAU CLUB v. CITY OF OTTAWA.

Assessment and Taxes — Social Club — "Business Tax" — 4 Edw. VII. ch. 23, sec. 10 (e).

Appeal by plaintiffs from judgment of MABEE, J., 8 O.W. R. 106, 12 O. L. R. 275, dismissing an action for a declaration that a business assessment imposed upon plaintiffs, a social club in the city of Ottawa, was illegal and void.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ. A.

Travers Lewis, Ottawa, for plaintiffs.

T. McVeity, Ottawa, for defendants.

MEREDITH, J.A.:—The appellants were taxed under sec. 10 of the Assessment Act, which provides for the assessment of "every person occupying or owning land .... for the purpose of any business mentioned or described," in the section; the only part of which said to be applicable to them being found in these words: "Every person carrying on the business .... of a club in which meals or spirituous or fermented liquors are sold or furnished ......" The key-note of the enactment is, therefore, the word "business," and the real question is, whether the appellants carry on the business of a club.

The word "business," being but a compound of the word "busy" and the suffix "ness," has a very wide import, being, even strictly speaking, applicable to anything about which any one or anything may be busied; and so it was quite properly said that one of its synonyms is "affairs;" and this may sometimes be brought home to us when making an uncalled for remark, even though the subject of it may be so trifling as the fashion in or becomingness of wearing apparel, by the common observation that "it is none of your business," that "you had better attend to your own affairs."

But one of the common uses is to convey the meaning of a trade or occupation carried on for the purpose of profit; that is its use in a commercial sense.

It is quite obvious that the word could not have been used in its widest sense in this enactment; and perhaps equally so that it was used in its commercial sense, the sense in which it is in business matters more commonly employed. The very many businesses mentioned in the section are all businesses of that character, and that is very marked in the subsection in question; and the income from the business is by sub-sec. 7 exempt from taxation, by reason of the business tax.

The appellants carry on no such business; there are no shareholders; there are, and can be, no profits. If they are taxable, so too would be some whist clubs, morning music clubs, Dorcas societies, mothers' meetings, cricket clubs, political clubs, and a thousand and one other social clubs engaged in no such business, and perhaps others having nothing business-like, in any sense, connected with them, and which were plainly never intended to be thus taxed, though they may provide both meat and drink, but not for profit in any sense.

The mere renting of part of their own lands can give no colour to an accusation of carrying on business within the meaning of the enactment. It would be extraordinary if every landlord carries on such a business; and if the appellants do, all must.

The cases throw a good deal of light upon the question, some of them being much in point, in the appellants' favour, and all that I have seen, without exception, tending that way: see State v. Boston Club, 45 La. Ann. 585; Smith v. Anderson, 15 Ch. D. 258; In re Bristol Athenæum, 43 Ch. D. 236; Bramwell v. Lacy, 10 Ch. D. 691, 695; Portman v. Home Hospital Assn., 27 Ch. D. 81 n.; Holmes v. Holmes, 40 Conn. 117; Goddard v. Chaffee, 2 Allen 395; Lyons-Thomas Hardware Co., v. Perry Stove Mfg. Co., 86 Texas 153; Doe dem. Wetherell v. Bird, 2 A. & E. 161; and Martin v. The State, 59 Ala. 34, 36.

I would allow the appeal.

Osler and Maclaren, JJ.A., gave reasons in writing for the same conclusion.

Moss, C.J.O., and Garrow, J.A., also concurred.