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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 16TH, 1918.

*EDWARDS v. BLACKMORE.

Company—Promissory Note for Purchase-price of Machinery—Power of Company to Contract—Incorporation by Letters Patent under Ontario Companies Act—Specified Object of Incorporation—Amendment to Companies Act by 6 Geo. V. ch. 35, sec. 6—Powers of Common Law Corporation Created by Charter—Unlimited Power to Contract—Powers of President and Manager of Company—Ostensible Authority—Executed Contract under Seal—Companies Act, sec. 23 (1) (a), (i).

Appeal by the defendants Burks Limited from the judgment of MASTEN, J., after the trial of the action by him without a jury, in favour of the plaintiff against the appellants for the recovery of $1,182.61 and costs, in an action upon a promissory note.

The appeal was heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

J. M. Ferguson, for the appellants.

R. S. Robertson, for the plaintiff, respondent.

FERGUSON, J.A., read a judgment, in which he said that the promissory note sued on was made by the defendants Blackwood, Burks Limited, and Monet, in favour of the plaintiff, payable one month after date, at the Dominion Bank, Toronto. The defendants other than Burks Limited did not appear, and judgment was entered against them by default.

The defence of the appellants was, that they had no authority

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

or power, under their charter, to make the note. The appellants were incorporated as a company by letters patent under the Ontario Companies Act, dated the 4th March, 1914. The object of incorporation was the carrying on of a real estate business. The promissory note was made on account of a purchase of machinery and patent rights for the manufacture of machines for pressing clothes.

At the trial, an amendment was made by which the appellants set up misrepresentation in connection with the contract of purchase. That contract was signed by the three defendants, the appellants executing by their corporate seal and the signature of their president and manager. The trial Judge found the facts against the appellants' allegation of misrepresentation.

Upon the question of ultra vires the trial Judge also ruled against the appellants.

Upon the appeal, the argument was confined to the question of ultra vires.

In view of the decision in Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566, and of the amendment to the Ontario Companies Act, R.S.O. 1914 ch. 178, made in 1916, by 6 Geo. V. ch. 35, sec. 6, adding sec. 210 to the principal Act, FERGUSON, J.A., was of opinion that the contract of purchase was not ultra vires of the appellants.

By the new section (210), it is declared "that every corporation or company heretofore or hereafter created . . . by or under any general or special Act of this Legislature, shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter."

Reference to Riche v. Ashbury Railway Carriage Co. (1874), L.R. 9 Ex. 224, 264; Palmer's Company Law, 10th ed., p. 3; Baroness Wenlock v. River Dee Co. (1887), 36 Ch.D. 674, 685; British South African Co. v. De Beers Consolidated Mines Limited, [1910] 1 Ch. 354; Diebel v. Stratford Improvement Co. (1916), 37 O.L.R., 492, 498.

A corporation created by charter had at common law almost unlimited capacity to contract; statements in the charter defining the objects of incorporation do not take away that unlimited capacity; and even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives the Crown a right to annul the charter.

It was suggested that, even if the contract of purchase was intra vires the company, it was ultra vires the directors and president and general manager of the company. But the contract was made under the seal of the company, was executed by the delivery of the machinery, and was made by and with the president and general manager of the company, and it was not made out or found that the plaintiff acted in bad faith or had notice or knowledge that the contract was beyond the objects of the company as expressed in the charter; and, because the contract was under seal and was an executed contract, and because the president and general manager had apparent authority to execute it and make the note sued on, he had, so far as the plaintiff was concerned, actual authority to do so: National Malleable Castings Co. v. Smith's Falls Malleable Castings Co. (1907), 14 O.L.R. 22, 30; Biggerstaff v. Rowatt's Wharf Limited, [1896] 2 Ch. 93; County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co., [1895] 1 Ch. 629,

The appeal should be dismissed with costs.

LENNOX, J., was also of opinion that the appeal should be dismissed. He read a short judgment to the same effect as that of FERGUSON, J.A.

ROSE, J., was also of the opinion that the appeal should be dismissed, but upon another ground. He read a judgment in which he referred to sec. 32 (1) (*a*) and (*i*) of the Ontario Companies Act, defining the powers of a company incorporated under that Act, which included the power to purchase machinery and plant which might be thought necessary or convenient for the purposes of the business of the company. Even if the plaintiff was to be assumed to have known the contents of the letters patent of incorporation, there was no evidence that he had knowledge of any facts, if there were any, which ought to have led him to suppose that the company were not in fact exercising, as incidental to the main purpose of their business, that power which they appeared to be exercising through their president and manager.

MEREDITH, C.J.C.P., read a dissenting judgment. He was of opinion that the appeal should be allowed and the action dismissed as against the appellants.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. FEBRUARY 11TH, 1918.

STEVENSON v. COLVIN.

Nuisance—Smoke and Odour—Injunction and Damages—Opportunity to Abate Nuisance.

ACTION for an injunction and damages in respect of a nuisance.

The action was tried without a jury at Hamilton.

C. W. Bell, for the plaintiffs.

G. S. Kerr, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs presented an overwhelming mass of uncontradicted testimony proving the existence of an intolerable nuisance, both as to emitting smoke and burning garbage.

The negative testimony adduced by the defendant was that of people outside or too far inside of the baleful zone of smoke and odour.

The defendant had not adopted the simplest device to minimise either form of nuisance. He took the defiant stand, by conduct and in the witness-box, that he "didn't have to."

Sometimes very independent gentlemen of this type find out that they must have some regard for the rights, feelings, and comfort of other people.

Appleby v. Erie Tobacco Co. (1910), 22 O.L.R. 533, shews that the reasonableness of the defendant's user of his own premises does not affect the plaintiffs' rights.

There will be judgment for the plaintiffs with damages $1 each, an injunction, and costs on the Supreme Court scale. In view of the conditions as to coal &c., the operation of the injunction will be stayed for 20 days to enable the defendant to abate or minimise the nuisance.

Should the defendant shew honest and substantial progress in this direction within the 20 days, he may apply to a Judge in Chambers to extend the time.

The plaintiff's statement of claim should be amended as per the paper-writing annexed to the record; and judgment should be entered in terms of the substituted paragraph (*a*).

LATCHFORD, J. FEBRUARY 11TH, 1918.

NOEL v. L'UNION ST. JOSEPH DU CANADA.

Injunction—Motion for Interim Injunction—Delay in Bringing Action—Increase in Rates of Benefit Society—Allegation of Illegality—Motion Refused—Balance of Convenience—Society to Keep an Account—Speedy Trial.

Motion by the plaintiffs for an interim injunction restraining the defendants from levying, imposing, or collecting, or attempting to levy, impose, or collect, certain rates or assessments attempted to be imposed upon the plaintiffs and other members of the defendant society, by virtue of an alleged by-law passed by the Federal Council of the defendant society on or about the 21st August, 1917.

The motion was heard in the Weekly Court, Ottawa.
E. R. E. Chevrier, for the plaintiffs.
O. A. Sauvé, for the defendant society.

LATCHFORD, J., in a written judgment, said that the defendant was a duly incorporated benefit society, with nearly 30,000 members. The administration of its business was carried on by or under the direction of what was called a Federal Council, composed of representatives from subordinate courts. In 1914, at a session of the council, it was decided to secure the services of a competent actuary to ascertain the financial position of the society. An expert was employed, who, about June, 1917, reported (among other matters) that it was desirable to establish a new scale of rates or assessments.

When, in August, 1917, the Federal Council met, it was decided —unanimously, according to the material filed—to adopt new and much higher rates than had been previously paid. The new scale was to become effective on the 1st January, 1918.

The applicants were members of the society upon whom the new rates were a heavy burden. They alleged that the requirements of the constitution were not complied with when such rates were imposed. This the society disputed, contending in addition that it would soon become insolvent unless the new rates were exacted.

The matter was of great importance to both the society and its members. If the injunction applied for was granted, serious injury might be occasioned to the defendant society. On the other

hand, the plaintiffs could have no great reason to complain if their application were refused. If they were within their rights in resisting the imposition of the new rates, they delayed taking action for months. Had suit been entered when, in August last, the plaintiffs became fully aware of all that they now asserted, the action could have been tried at the sitings held at Ottawa in October and November, or at the recent winter assizes there. All the facts necessary to determine the issues involved would have been fully before the Court, and not the limited and imperfect material now presented.

In the circumstances, the application for an interim injunction should not prevail. The action should proceed to trial at the earliest possible day. In the meantime, the defendant society should keep a special account of the assessments paid according to the new scale by the plaintiffs and other members in the same classes. If the plaintiffs should succeed at the trial, they would be entitled to a refund of any excess paid over the proper legal rates. Should doubt be entertained by the defendants as to the legality of their proceedings, and it should be necessary to the solvency of the society that the rates adopted in August, 1917, should be ahdered to, an adequate remedy might be obtained by legislation.

Costs in the motion should be costs in the cause unless the trial Judge should otherwise order.

FALCONBRIDGE, C.J.K.B. FEBRUARY 13TH, 1918.

CAMPBELL v. SUTHERLANDS LIMITED.

Master and Servant—Action for Wrongful Dismissal of Servant—Evidence—Termination by Servant of Contract of Hiring.

Action for damages for wrongful dismissal.

Trial at Hamilton without a jury.

H. A. Burbidge, for the plaintiff.

T. B. McQuesten, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that on the 2nd August, 1917, the defendants wrote a letter to the plaintiff discharging him from their employment. On the next day, the plaintiff's solicitor wrote to the defendants complaining of the

dismissal, stating the plaintiff's willingness to return to work, otherwise threatening action for damages. A telephone conversation between the plaintiff and James W. Sutherland, president of the defendant company, ensued, and the plaintiff went back to work on the Sunday night following, and worked until Monday evening, when he demanded an unconditional withdrawal of the letter of dismissal and extra pay for overtime. These concessions Sutherland refused to make, and the plaintiff left the defendants' employment.

In so acting, he, of his own free will, terminated the contract. As Sutherland said, if the plaintiff was back at work, he was back, so what was the use of withdrawing the letter? And, as to the overtime, he was either putting an end to the contract, or at least seeking, in a somewhat arbitrary and high-handed manner, to impose on the defendants his own reading and construction thereof.

The plaintiff therefore failed. His action must be dismissed—in all the circumstances, without costs.

ROSE, J. FEBRUARY 13TH, 1918.

SLATER v. SLATER.

Husband and Wife—Lands Bought by Husband and Conveyed to Wife—Presumption of Gift—Evidence to Rebut—Action for Declaration of Trust.

Action for a declaration of trust.

Trial at London, without a jury.

J. W. G. Winnett, for the plaintiff.

Sir George Gibbons, K.C., and G. S. Gibbons, for the defendant.

ROSE, J., in a written judgment, said that the action was by a man against his wife for a declaration that a house bought in 1898, and by the plaintiff's direction conveyed to the defendant, was held by the defendant in trust for the plaintiff; and for a declaration that two other properties, the one called the Richmond street property, bought in 1900, and the other called the Dundas street property, bought in 1906, both of which were similarly conveyed to the defendant, were, and that the proceeds of the sales of them and any properties or securities now repre-

senting such proceeds were, similarly held in trust. The house bought in 1898 was a double house. The parties and two of their children still occupied one half of it; the other half was rented for $20 or $25 a month. The transactions in respect of the other properties were of some size, on paper, but the result of all the dealings seemed to be, that there was an annual income of an amount that would be no more than sufficient to maintain an invalid son of the parties; the defendant was maintained by another son—her daughter, a teacher, assisting as far as she was able.

In the statement of claim the plaintiff asserted that all the properties were placed in the name of the defendant in trust for the plaintiff and solely for his benefit and convenience; but what he swore to was that, when he was buying the dwelling-house in 1898, he told his wife that it was to be in her name in trust for him and his family, including the wife; and that that was the only occasion upon which a trust was mentioned. The defendant denied this conversation. She said that the statement was, that the plaintiff did not want his creditors to get the house; and that a similar statement was made by him in reference to the Dundas street property at the time of its purchase in 1906.

The defendant's evidence was to be accepted in preference to the plaintiff's; the plaintiff as a witness was one upon whose memory reliance could not be placed where there was a contradiction. The facts given in evidence as to the dealings with the properties —for instance, the defendant's statement that she collected the rents of the Richmond street property, and the fact that the plaintiff joined in the various mortgages as covenantor—did not point clearly either to a gift to the defendant or to a trust for the plaintiff. Therefore, all that there was against the presumption in favour of a gift, which arises when a property bought by a husband is conveyed to his wife, was the statement, as to the house in 1898, and as to the Dundas street property in 1906, that the plaintiff did not want his creditors to get them; and, as pointed out by the Chief Justice of Canada in Scheuerman v. Scheuerman (1916), 52 S.C.R. 625, 626, there was "nothing necessarily inconsistent between the idea of his making an absolute gift to his wife and the fact of his having given her the property to keep it from his creditors."

The presumption of law that the gifts were absolute ones was not rebuted; and the action must be dismissed.

MIDDLETON, J. FEBRUARY 15TH, 1918.

*LEWIS v. CHATHAM GAS CO.

Injunction—Consent Judgment—Motion to Suspend Operation——Jurisdiction—Emergency.

Motion by the defendants for an order suspending an injunction contained in a judgment pronounced on the 22nd January, 1916.

The motion was heard, as in Weekly Court, at a sittings for trials in Chatham.

J. G. Kerr, for the defendants.

R. L. Brackin, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the defendants operated an electric lighting plant which supplied electricity to a number of persons in Chatham. Before the judgment containing the injunction was pronounced, the power was supplied by an engine operated by internal explosion of a mixture of gas and air. The operating of the engine, a large and powerful one, caused such vibration that it was deemed a nuisance to all persons residing within a considerable radius of the defendants' works.

In this action an injunction was sought, and by a consent judgment granted, restraining the operation of the defendants' works in such a way as to cause the vibration complained of.

Since the judgment the plant had been operated by steam.

Owing to a fuel shortage in Western Ontario, the defendants sought to have the injunction suspended in order that they might again operate their engine by explosion for six weeeks only, and thus save the steam used and give it to a company which heats buildings in Chatham by steam distributed from a central plant.

Jurisdiction to alter a judgment once entered exists only when the judgment does not express the real intention of the Court, or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked—emphatically so when the judgment is a consent judgment: Attorney-General v. Tomline (1877), 7 Ch. D. 388.

There is no law which enables the Court to sanction the breach of a contract or the violation of a judgment granting an injunction.

The motion should be refused, on the ground of want of jurisdiction to grant it.

EMPIRE FLOUR MILLS LIMITED v. CITY OF ST. THOMAS—KELLY, J.—FEB. 16.

Contract—Supply of Electric Current—Rates of Payment—Counterclaim—Interest—Costs.]—Action against the Corporation of the City of St. Thomas and the Hydro-Electric Commission of St. Thomas for a declaration that the plaintiffs, who were customers of the defendants for a supply of electric current for power purposes, were liable only for rates according to class E., and for an injunction restraining the defendants from cutting off the plaintiffs' supply of power. The action was tried without a jury at St. Thomas. KELLY, J., in a written judgment, said that the plaintiffs' written contract was for a supply under class A., which was practically unrestricted. There was a contest as to whether the contract had been varied or altered. The learned Judge finds that there was nothing in the nature of a bargain by which the plaintiffs could enforce a change from one class to another at such time or times as suited their convenience. When they did enjoy that privilege, it was by a voluntary concession or license. The plaintiffs had not made out their case, and the action failed. The defendants the Hydro-Electric Commission of St. Thomas counterclaimed for $1,173.24, the amount representing the difference between the rates under class E. (at which rates the plaintiffs had made payments from month to month) and the rates chargeable to users of current under class A. These defendants were entitled to recover the amount claimed with interest (if exacted) and costs. W. K. Cameron, for the plaintiffs. W. B. Doherty, for the defendants the Corporation of the City of St. Thomas. G. H. Kilmer, K.C., for the defendants the Hydro-Electric Commission of St. Thomas.

McGIRR v. STANDEVEN—MIDDLETON, J.—FEB.16.

Injunction—Interim Order—Cutting and Removal of Timber—Motion to Continue—Order Confined to Removal—Balance of Convenience—Preservation of Rights until the Trial.]—Motion by the plaintiff to continue till the trial an interim injunction restraining the defendant from cutting and removing timber from the plaintiff's land. The motion was heard in the Weekly Court, London. MIDDLETON, J., in a written judgment, said that the plaintiff, on the 29th November, 1917, agreed to sell the standing timber on his farm to one Gregory for $1,000; part of the price, $100, was paid in cash; the remainder was to be paid in two equal instalments, the first on the 15th January and the second on the 15th March, 1918. Nothing in the agreement called for tender before removal; the timber was to be removed before the 1st December, 1919. On the 14th December, 1917, Gregory sold the timber to the defendant for $780. The defendant paid Gregory $380, but that was not paid over to the plaintiff. The plaintiff was apprehensive that, if the timber was removed, he might not be able to recover. The rights of the parties could not be tried upon this motion; what could be done was to devise some means of enabling the trial Judge to grant an effective judgment, whichever way he determined the case. There was a dispute as to the meaning and effect of a subsequent agreement for the sale of the farm by the plaintiff to Gregory. No harm would be done by the cutting of the timber, so long as it was not taken from the land; and the injunction should be varied by confining its operation to the removal. The defendant should be allowed to remove also, upon giving security for payment of the value of the timber removed (up to the balance due the plaintiff) in the event of the plaintiff succeeding in the action. When the plaintiff can get the timber on giving security, the balance of convenience is in favour of continuing the injunction, modified as indicated—which means only delay to the defendant, as against complete loss to the plaintiff if the defendant can get away with the timber without paying. Costs should be disposed of by the Judge at the trial. T. G. Meredith, K.C., for the plaintiff. J. M. McEvoy, for the defendant.

RE WILLIAMS—MIDDLETON, J.—FEB. 16.

Will—Construction—Difficulty in Ascertaining Meaning of Testator—Workable Solution.]—Motion by the executors of the will of A. R. Williams, deceased, for an order determining several questions in regard to the construction of the will, arising in the administration of the estate. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that the will was drawn by the testator without legal assistance, and presented some difficulties which could not be solved with any certainty. All that could be done was to attach such a meaning to the words used as to evolve a workable solution which would as a whole be in accordance with the expressed wishes of the testator. The learned Judge then set out and construed some portions of the will which presented difficulties. The questions discussed are not of importance except to the parties. An order was pronounced covering all the points in dispute; and costs of all the parties were ordered to be paid out of the estate. G. W. Mason, for the executors. Casey Wood, for the testator's eldest daughter. H. S. White, for the testator's widow. F. W. Harcourt, K.C., Official Guardian, for the testator's infant children.