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APPELLATE DIVISION.

First Divisional Court. September 28th, 1916.

HAY v. GREEN.

Contract — Formation — Sale of Goods — Correspondence — Failure to Shew Consensus ad Idem.

An appeal by the defendant from the judgment of the County Court of the County of Kent in favour of the plaintiff in an action brought to recover damages for the breach of an alleged contract for the sale of oats.

The appeal was heard by Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A.

M. K. Cowan, K.C., and A. R. Bartlet, for the appellant.

R. L. Brackin, for the plaintiffs, respondents.

Meredith, C.J.O., delivering the judgment of the Court, said that the question turned entirely upon the effect of three letters. The first was from the respondents to the appellant, dated the 21st January, 1916, in which reference was made to the fact that a Mr. Hope, who was in their employment, had brought in a sample of oats, and that the appellant had two large cars at Windsor. The letter went on to state: "We would take these oats from you at 41c. track Windsor, shipment to New York for export shipment to be made just as soon as any trunk line will take oats to New York for export. We are told the embargo will be lifted almost every day, but have been told this for two weeks, and it still seems to be as tight as ever. If you accept, please advise us, and we will send you shipping instructions that can be used just as soon as the embargo lifts."

The appellant in his answer, on the 24th January, spoke of the oats as being 3,000 bushels on the Grand Trunk at Belle River, "like the sample you have." Then he mentioned that there was a smell of must on the oats, and that they would not be better than the sample, but would be as good, and that he would book them to the respondents, provided that he was able to get cars to move them out within a reasonable time. He then spoke

about the embargo which prevented the shipment of the oats to New York.

On the 25th January, the respondents replied acknowledging the receipt of the appellant's letter and said that they did not expect a better grade than "rejected," and instructed the appellant to ship to New York for export to Liverpool, and that if the railway company required a foreign consignee it would be the Shipton Anderson Company, and adding: "At present none of the railways are taking bulk grain for export to New York, but we are advised that the embargo which has been in effect for over a month will be lifted on Monday. You will have to try and pick up enough oats to make two cars of 54,000 lbs. each, and see that you get only cars of 30 tons capacity of 60,000 lbs. each, because the minimum for a car of oats for export in a thirty-ton car is ten per cent. of the marked capacity of 54,000 lbs., but if the car is otherwise there will be a dead freight."

There was a postscript to this letter in which it was said that, if the embargo were not lifted in a little while so that the oats could be shipped—and it was important to the appellant that they should be shipped in order that he might get his money—he was to let them know, and they would make some further proposition and arrange with him.

This correspondence, as contended by Mr. Cowan, shewed that the respondents' proposition was to enter into a contract which would oblige the appellant to hold the oats until the embargo was lifted. On the other hand, the appellant's proposition was that he should hold them for a reasonable time. There was no *consensus ad idem*, and therefore no contract.

The appeal should be allowed with costs and the action dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 17TH, 1916.

*RE J. McCARTHY & SONS CO. OF PRESCOTT LIMITED.

Company — Winding-up — Creditor's Claim—Enforcement of—Forum—Order of Judge in Chambers Allowing Creditor to Bring Action—Discretion—Appeal—Winding-up Act, R.S.C. 1906 ch. 144, secs. 22, 23, 133.

Appeal by the liquidator of the above-named company from an order of KELLY, J., in Chambers, of the 6th July, 1916, giving leave to the British Columbia Hop Company Limited to begin

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

and prosecute an action against the above-named company for the recovery of money, instead of making their claim in the winding-up proceeding before the Local Master at Ottawa, to whom the powers of the Court had been delegated, under the Dominion Winding-up Act, R.S.C. 1906 ch. 144. See ante 48.

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

H. M. Mowat, K.C., for the appellant.

G. H. Sedgewick, for the British Columbia Hop Company Limited, respondents.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that there was nothing more involved in the respondents' claim than a large sum and ordinary questions of law and fact. All proceedings affecting the winding-up of a company should be taken in the winding-up matter, and the bringing of an action should not be permitted unless some special circumstances make such an additional proceeding necessary or advisable for some very substantial reason.

Reference to secs. 22, 23, and 133 of the Act; In re Pacaya Rubber and Produce Co. Limited, [1913] 1 Ch. 218; Thames Plate Glass Co. v. Land and Sea Telegraph Construction Co. (1871), L.R. 6 Ch. 643; S.C. (1870), L.R. 11 Eq. 248; Re Toronto Cream and Butter Co. Limited (1909), 14 O.W.R. 81; In re Lundy Granite Co. (1871), L.R. 6 Ch. 463; In re David Lloyd & Co. (1877), 6 Ch. D. 339; In re Henry Pound Son & Hutchins (1889), 42 Ch. D. 402; In re Longdendale Cotton Spinning Co. (1878), L.R. 8 Ch. 150; Stewart v. Le Page (1915), 24 D.L.R. 554; S.C. (1916), 53 S.C.R. 337; Currie v. Consolidated Kent Colleries Corporation Limited, [1906] 1 K.B. 134.

The Court had no desire or intention to depart from the rule that an exercise of a discretion upon proper principles is not generally to be interfered with; in this case the Court was endeavouring to apply the principle properly applicable, which was not done in making the order in appeal.

The appeal was allowed, the order appealed against discharged, and the motion for it dismissed.

FIRST DIVISIONAL COURT. OCTOBER 25TH, 1916.

PEPPIATT v. REEDER.

Damages—Deceit—Measure of Damages—Method of Estimating—Master's Report—Appeal—Reference back—Costs.

Appeal by the plaintiff from the order of RIDDELL, J., 10 O.W.N. 263.

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

Edward Meek, K.C., for the appellant.

J. J. Gray, for the defendant, respondent.

THE COURT allowed the appeal and limited the scope of the reference back to the Master. No costs of the appeal to either party.

FIRST DIVISIONAL COURT. OCTOBER 25TH, 1916.

COTTON v. ONTARIO MOTOR CO.

Nuisance—Injunction—Temporary Suspension—Damages.

Appeal by the defendants from the judgment of MASTEN, J., at the trial, awarding the plaintiff an injunction to restrain the appellants from carrying on their business at night, as they had been carrying it on, in the manufacture of munitions for the Imperial Munitions Board.

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

R. B. Henderson and C. C. Robinson, for the appellants.

A. C. McMaster and J. H. Fraser, for the plaintiff, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O., at the conclusion of the hearing. He said that the defendants, or one of them, had a contract with the Munitions Board for the supply of a large quantity of an appliance which formed part of a shell, and it also appeared that it was very important that these articles should be produced with as great rapidity as possible.

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The case that the appellants' counsel attempted to make out, and which the learned Chief Justice did not think was made out, was that the matter was of so great importance that damages alone should be the remedy awarded to the respondent. In the circumstances of the case, having regard to the urgent need of a supply of these munitions, and the temporary character of the business, the proper course was to suspend the operation of the injunction for six months, which would be probably long enough to enable the appellants to complete their present contract.

The respondent would, of course, be entitled to damages for the injury which he had sustained, or would sustain during that period.

There should be liberty to the appellants, at the expiration of the six months, to apply for a further suspension of the injunction.

The costs of the appeal should be paid by the appellants.

There should be a reference as to damages to the Master in Ordinary.

HIGH COURT DIVISION.

CLUTE, J. OCTOBER 3RD, 1916.

*BROWN BROTHERS v. MODERN APARTMENTS CO. LIMITED.

Chattel Mortgage—Failure to Renew—Bills of Sale and Chattel Mortgage Act, sec. 21—Who Entitled to Invoke—Creditors of Assigns of Mortgagor—Possession Taken by Mortgagee—Rights of Execution Creditors—Fraudulent Conveyances Act, sec. 3—Absence of Fraud.

An action by execution creditors of the defendants the Modern Apartments Company Limited to set aside a bill of sale whereby the defendant Barthelmes transferred certain chattels to the defendants the Royal Cecil Apartments Limited, as a fraud upon the plaintiffs and the other creditors of the defendants the Modern Apartments Company Limited; and (by amendment) for a declaration that the chattel mortgage to the defendant Barthelmes (made by Hudson Brothers) by virtue of which the defendant Barthelmes purported to make the transfer had ceased to be

valid because of non-compliance with the renewal provisions of sec. 21 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135.

The action was tried without a jury at Toronto.

J. T. Loftus, for the plaintiffs.

T. H. Barton, for the defendant Barthelmes.

J. M. Ferguson, for the defendants the Royal Cecil Apartments Limited.

CLUTE, J., giving judgment at the conclusion of the hearing, said that it was perfectly clear that the Fraudulent Conveyances Act, R.S.O. 1914 ch. 105, sec. 3, had no application to the case.

As to the failure to renew the chattel mortgage, the persons who made it were the Hudson Brothers, against whom the plaintiffs had no claim by execution or judgment or otherwise. It was argued, however, that, as the chattel mortgage was expressly made binding upon the assigns of the mortgagors, and the defendants the Modern Apartments Company Limited were the assigns of Hudson Brothers, the plaintiffs came under sec. 21. The learned Judge said that he did not think that the provision in the mortgage in regard to assigns could add anything to the statute, which referred to creditors of the person making the mortgage.

Section 21 of the Act did not apply to the case; and so sec. 23 did not apply.

The defendant Barthelmes was in possession of the goods, through one Muirhead, a proposed purchaser, before and at the time when the plaintiffs' judgment was obtained and the execution placed in the sheriff's hands—the 25th August, 1915. The proposed sale fell through, and it was not until the 18th September, 1915, that the sale was made to the Royal Cecil Apartments Limited. That, however, made no difference. The mortgagee was in possession; his possession did not cease; and, aside from the Bills of Sale and Chattel Mortgage Act, which did not apply, he had a right, as between him and the original mortgagor and as against all parties, to take possession.

There was no fraud; and the plaintiff was not entitled to succeed.

Appeal dismissed with costs.

BOYD, C. OCTOBER 23RD, 1916.

RE SOVEREIGN BANK OF CANADA. BARNES'S CASE.

Bank—Winding-up—Contributory — Gift of Shares to Infant — Repudiation by Infant at Majority—Ratification by Court—Reversion to Donor—Liability as Contributory.

Appeal by Barnes from an order of the Referee in a winding-up proceeding placing the appellant on the list of contributories.

The appeal was heard in the Weekly Court at Toronto.
A. C. McMaster, for the appellant.
J. W. Bain, K.C., and M. L. Gordon, for the liquidator.

THE CHANCELLOR, in a written judgment, referred to a joint admission of facts which stated "that the daughter has repudiated her action in accepting said shares upon the ground that she was an infant, and her repudiation has been upheld by the Court."

Upon this admission the Chancellor based his judgment: the transfer of shares to the daughter from the father, by way of gift, while she was yet an infant, was not void, but it was capable of being avoided by her dissent and repudiation. She did validly and effectually repudiate the shares; her title thereto ceased, and of necessary consequence reverted to the donor, her father, the appellant, whose gift had failed by the repudiation of the beneficiary, ratified by the judgment and order of the Court.

This judgment still stood, and must be regarded as final, not being appealed from.

Appeal dismissed with costs.

BOYD, C. OCTOBER 23RD, 1916.

*RE SMITH.

Executors—Compensation for Services—Commission on Receipts—Allowance for Carrying on and Managing Business of Testator until Sold—Solicitor-executor—Professional Services—Trustee Act, R.S.O. 1914 ch. 121, sec. 67—Costs.

Appeal by Mrs. Smith, one of the executors and the principal beneficiary under the will of her deceased husband, from an order made by one of the Judges of the Surrogate Court of the County

of York, upon the passing of the executors' accounts, allowing the executors a large sum as compensation for their time and services and their care, pains, and trouble in administering the estate.

The other executor was a solicitor. The testator had carried on a retail liquor business in the city of Toronto; and after his death the business was continued by the executors, the license being in the name of the appellant. The solicitor-executor gave much time to the affairs of the estate and business, and rendered professional services when necessary.

The appellant personally attended to the business, and lived upon the premises. She was advised and assisted by her co-executor. The testator died in 1910; the business was sold in 1915; and a large profit was realised.

The appellant desired that her co-executor should receive no more than $1,000.

The appeal was heard in the Weekly Court at Toronto.

J. A. Paterson, K.C., for the appellant.

W. N. Tilley, K.C., for the solicitor-executor.

THE CHANCELLOR, in a written judgment, said that there was no error in principle in the allowance made, and the only question was one of quantum. On this head the Court is, on appeal, loath to interfere, even though it seems that the allowance is more liberal than the Court would have given if applied to in the first instance: McDonald v. Davidson (1881), 6 A.R. 320.

The result of the policy of carrying on the business, instead of winding it up by sale within the usual year for administration, and the success of the result, were shewn by the increase in the value of the estate from $26,237 to $230,126.

A good deal of miscellaneous legal business was done and advice given by the solicitor-executor, for which he might have made professional charges but for his position. That was a matter to be taken into account when the value of the executor's service was being estimated: sec. 67 (4) of the Trustee Act, R.S.O. 1914 ch. 121.

The estate had derived its value mainly from the acts and services of the executors after the death of the testator and by the prosecution of the business till a suitable time came for selling. Reference to Thompson v. Freeman (1868), 15 Gr. 384, 389.

The English authorities are not in general apposite; but reference might be had to Brocksopp v. Barnes (1820), 5 Madd. 90; Forster v. Ridley (1864), 4 DeG. J. & S. 452.

In this Province, as also in most of the States of the American Union and of the Australasian Confederation, executors and trustees have by statute a right to be paid for their services, and generally by a percentage on the receipts: Trustee Act, sec. 67.

The costs allowed on passing the accounts were complained of as excessive; but no item was pointed out as improper, and there should be no interference on that score.

Appeal dismissed with costs.

BOYD, C., IN CHAMBERS. OCTOBER 30TH, 1916.

RE DURNFORD ELK SHOES LIMITED.

Company — Winding-up — Claim upon Assets — Lease of Machinery — Contract — Payments for Repairs and Deteriorations—Order of Judge on Appeal from Master's Rulings—Leave to Appeal to Divisional Court—Winding-up Act, R.S.C. 1906 ch. 144, sec. 101.

Motion by the liquidator for leave to appeal from the order of MIDDLETON, J., ante 59, allowing an appeal from the ruling of a Local Master, in a winding-up, disallowing two items of a claim.

W. Lawr, for the liquidator.

J. Jennings, for the United Shoe Machinery Company, claimants.

THE CHANCELLOR, in a written judgment, shortly discussed the matters on which the Master seemed to have erred.

I. As to allowance for repairs, the Master had disallowed the whole claim, on the ground that it could not be ascertained how much the lessee, the company in liquidation, ought to pay. The lessee engaged to pay, at the close of the tenancy, "such sum as may be necessary to put the machinery in suitable form and condition to lease to another lessee." Because the machinery had been in use by a former tenant and turned over to the company as it then was, the Master held that the scope of the engagement should be enlarged by inserting the words "such sum as may have been occasioned by and from its use by the lessee" (i.e., the company in liquidation). He regarded the cost as it stood as uncon-

scionable, as the lessee would have to pay for the misuse or negligence of another—the former lessee. But, looking at the facts, it appeared quite proper to hold the company so bound. The former lessee was one Durnford, and on the 12th February, 1912, he agreed with two others to turn the concern into an incorporated company, in which each of them was to put in $6,000 capital. Durnford was to make up an account of assets and liabilities, and the assets were to be assigned to the company, and the company was to pay all liabilities. It was recited that large orders were on hand to be filled by the 1st April, and the letters of incorporation issued in that month. The company undertook to pay two items, amounting to $307, but it was ruled (rightly enough) that the new company was not bound by this pre-incorporation private arrangement. It might well be assumed that the company, by its constituent members, knew the condition and state of repair of the plant for which new leases were given by the new company, and that it was contemplated that the tenancy of the new concern should be as if it were a continuance of the old business, and the new company undertook, on getting the 20 years' leases, to answer for what would be needed to put the machines in good shape for a new tenant, even though some of the waste and user might have been in the time of Durnford's lease. This was the tenour of the engagement, and no case was made to alter, add to, or diminish the effect of the language of the lease.

The evidence, though meagre, was enough to confirm the verified account of the accountant and warrant the allowance of $675, if not $692, as Middleton, J., put it.

II. As to the claim for "deteriorations" etc., the Master held that, when the machines were put in good repair, there could not be a claim for deterioration. He put it that the need for repairs arose from deterioration, and, repairs having been made, the deteriorations ceased to exist.

The common phrase in leases, "to keep in good repair, reasonable wear and tear excepted," implies that there is a process of deterioration going on in spite of repair.

There is a recognisable loss in value of machinery owing to the result of ordinary "wear and tear:" e.g., invisible destruction of surface and of parts from friction or exposure or lapse of time, not susceptible of repair, but diminishing the value of the plant. It is the usual course of accountants, no matter how well the repair is maintained, to write off something on account of this depreciation of value. The parties had agreed that $100 should

stand for the amount of depreciation for 20 years. It was treated as a distinct thing from repairs (as it was), and they agreed that that sum should be paid if the lease was sooner determined by insolvency. It was not the business of the Court to interfere with this term of the contract. Allowing for the repairs and allowing for the deteriorations, the sums fixed were not double payments in respect of the same thing, nor were they so regarded by the contracting parties.

Upon both points the Chancellor's conclusion was the same as that of Middleton, J.; and therefore the Chancellor did not see his way to grant leave to appeal under sec. 101 of the Winding-up Act, R.S.C. 1906 ch. 144.

Application dismissed; costs out of the estate.