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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 12TH, 1920.

*MALCOLM v. MALCOLM.

Husband and Wife—Alimony—Ascertainment of Proper Amount to be Allowed—Income of Husband—Proportion—Discretion—Absence of Hard and Fast Rule—Estimate of Earnings from Investment in Industrial Company.

Appeal by the defendant from the order of MIDDLETON, J., ante 93, 46 O.L.R. 198.

The appeal was heard by MAGEE, J.A., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

C. L. Dunbar, for the appellant.

R. T. Harding, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LOGIE, J. DECEMBER 4TH, 1919.

McKENZIE & KELLY v. AUTO STROP SAFETY RAZOR CO.

Restraint of Trade—Interference with Sale by Plaintiffs of Goods Manufactured by Defendants—Defamatory Statements—Evidence—Failure to Prove Special Damage—Cause of Action.

Action for an injunction and damages in respect of statements made by the defendants. See ante 150.

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

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

I. F. Hellmuth, K.C., and W. R. Wadsworth, for the plaintiffs.

Peter White, K.C., M. L. Gordon, and John I. Grover, for the defendants.

LOGIE, J., giving judgment at the conclusion of the hearing, said that the action as framed was an action for publishing, without lawful occasion, an untrue statement, disparaging the plaintiffs' goods, and thereby causing special damage.

A false and malicious statement made by the defendant relating to the plaintiff's business, a natural consequence of which is to cause a general loss of business, as distinguished from loss of particular known customers, and which has produced that effect, is actionable; but what was done in this case, as disclosed by the evidence, did not constitute a combination in restraint of trade, nor was it criminal under sec. 498 of the Criminal Code; and such cases as Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619, and Dominion Supply Co. v. T. L. Robertson Manufacturing Co. Limited (1917), 39 O.L.R. 495, were not applicable.

This case rested upon the common law, and Wren v. Weild (1869), L.R. 4 Q.B. 730, was applicable. It was there held that an action would not lie unless the plaintiff affirmatively proved that the defendant's claim was not a bona fide claim in respect of a right which, with or without cause, he fancied he had, but a mala fide and malicious attempt to injure the plaintiff by asserting a claim of right against his own knowledge that it was without any foundation.

The plaintiffs had not proved those circumstances which would entitle them to succeed.

In any event special damage must be proved, and the plaintiffs had failed to prove special damage.

The injunction granted by the Chief Justice of the Exchequer (ante 150) restrained the defendants from doing certain acts that they had previously done; but it was not proved that, even if that injunction had never been granted, the plaintiffs could not have sold the razors in the ordinary course of their business. While it was possible to prove that loss might take place, because certain persons could not sell at a "cut-rate," yet the purchase at $2.60 and the sale at $5 would allow such an enormous profit that the learned Judge could not see why it would be any restraint in reality of the plaintiffs' trade that a dealer or a hardware man or anybody like that should be told that they could not sell at less than $5. One would think that the margin of profit allowed in that would be a temptation to buy the plaintiffs' razors rather than a deterrent.

Action dismissed with costs.

MIDDLETON, J. JANUARY 12TH, 1920.

BANK OF MONTREAL v. TURNER.

Banks and Banking—Hypothecation Agreement with Customer—Pledge of Promissory Notes Made for Accommodation of Company to Knowledge of Bank—Creditor and Surety—Judgment against Surety—Credit of Amount of Collateral Securities Realised—Mortgage Given to Secure Amount Remaining Due on Judgment—Merger—Change in Relation between Creditor and Surety—Right of Surety to Credit for Collateral Securities Realised—Action upon Mortgage—Costs.

Action upon a mortgage, tried without a jury at a Toronto sittings.

Wallace Nesbitt, K.C., and G. L. Smith, for the plaintiffs.

R. McKay, K.C., and G. S. Hodgson, for the defendant D. J. Turner.

A. R. Thomson, for the defendant Florence Turner.

MIDDLETON, J., in a written judgment, said that the defendant D. J. Turner became liable to the bank as surety for Benson & Bray Limited, an incorporated company. The transaction took the form of a promissory note for $32,000, made by Messrs. Benson, Bray, and Turner in favour of the company, dated the 21st November, 1913, payable upon demand; and a second note, in similar form, for $3,000, bearing date the 15th December, 1915.

These notes were pledged to the bank by the company, by an hypothecation agreement of the 15th December, 1913, signed not only by the company but by the three makers of the notes. Under this agreement, the notes stood as "a general and continuing collateral security for payment of the present or any future liability" to the bank "and for any ultimate balance of indebtedness" by the company to the bank.

Benson, Bray, and Turner were, to the knowledge of the bank, accommodation makers of these notes.

Early in 1916 the bank sued Turner on the notes for the amount then due by the company. Turner contended that the bank were bound to realise on collateral securities before resorting to his liability upon the note; but, this being decided against him, judgment was pronounced on the 25th April, 1916, for $43,482.62, the amount then due.

On the 1st November, 1916, the mortgage now sued upon was given; it recited that there was due upon the judgment on the 1st September, 1916, the sum of $18,213.37.

This amount was arrived at by giving credit upon the judgment for all sums received from the realisation of securities between the date of the judgment and the 1st September, 1916.

The bank continued to carry the account and made new advances to the company. As security for such advances, new hypothecation agreements were given, each covering all the stock of material and manufactured goods. After the date of the mortgage, the bank changed their method of dealing with the account, and allowed no credit upon the amount of the indebtedness covered by the judgment and mortgage, but credited all money received, no matter from what source, upon the new advances.

Upon the evidence, the amounts realised from securities held at the date of the accounting on the 1st September, 1916, were: (1) proceeds of lumber sold, $12,000; (2) Playfair note, $1,000; (3) bonds, $650—in all $13,650; and the defendants maintained that these sums should be credited upon the judgment and mortgage at the dates when realised.

This was the issue tried.

When judgment was obtained by the bank against Turner, the contract of suretyship came to an end, and he became directly liable to the bank in such a way that the mere giving of time to the company would not operate to discharge him from the judgment: Re A Debtor, [1913] 3 K.B. 11. On the other hand, his contract as surety being merged, the bank could no longer make advances to the company and seek to charge him as surety. The old relation of surety and creditor was gone, and in its place there arose a new relationship based on the judgment.

There was an obligation upon the bank to give credit on the judgment for all sums paid by the company on account of the judgment, and also to credit upon the judgment the proceeds of all securities held by the creditor at the date of the judgment.

There was a crystallisation of the rights of the parties by the judgment: so long as the original contract continued, the bank could make advances and could apply the money received and the proceeds of realisation as it pleased; but the moment the bank ended the original contractual relation, new rights and new obligations arose; and one right that Turner had was that the proceeds of all then existing securities should be applied upon the debt as it then existed.

The sums mentioned were approximate only; if the parties could not agree, they might speak to the learned Judge.

There should be judgment for the plaintiffs upon the mortgage for the amount claimed after making the proper deductions, with costs as of an undefended action upon the mortgage, and the defendants should be allowed the costs of their defence against the plaintiffs (to be set off), the litigation having been caused by an unfounded claim.

The learned Judge desired to avoid a reference; but, if there must be a reference, the costs thereof should be disposed of by the Master, in accordance with his view as to the responsibility for the amount not being now adjusted.

LENNOX, J., IN CHAMBERS. JANUARY 15TH, 1920.

RE MOFFATT.

Insurance (Life)—Insurance Moneys Claimed by Wife of Assured—Alleged Gift of Policy—Absence of Assignment—Incomplete Gift.

Application by W. H. Moffatt for an order for payment out of Court of moneys paid in by an insurance company.

S. F. Washington, K.C., for the applicant.
N. R. Kay, for Sarah Moffatt, wife of the applicant.

LENNOX, J., in a written judgment, said that the application was for an order for payment out to the applicant of moneys in Court, about $1,000. If the learned Judge were able to come to the conclusion that what Sarah Moffatt, the wife of the applicant, said, was true, namely, that her husband handed the policy of insurance to her as a gift, and so expressed himself at the time, he (the learned Judge) would still not be justified in declaring that the money in question belonged to her. If it was intended as a gift, it was incomplete, and therefore ineffective in law. Howes v. Prudential Assurance Co. (1883), 49 L.T.R. 133, was conclusive. Wilson v. Hicks (1911), 23 O.L.R. 496, was a case in which the intention of a gift was beyond doubt, and the policy was assigned by a writing, although not under seal. Sarah Moffatt's evidence was contradicted by her husband, and she asked that an issue be directed. It would be foolish to try out an issue that could have no result, and an issue here would be fruitless, for the money belonged to the husband, whether his wife's statement was true or false.

There should be an order for payment out of Court to the applicant as asked.

LENNOX, J., IN CHAMBERS. JANUARY 15TH, 1920.

TOWNSHIP OF SOUTH GRIMSBY v. COUNTY OF LINCOLN AND TOWNSHIP OF NORTH GRIMSBY.

Stay of Proceedings—Motion for—Same Issues Raised in another Action Pending—Bona Fide Desire of Plaintiffs to Proceed with Action—Important Issues—Ability to Pay Costs—Refusal to Stay Proceedings without Prejudice to Right of Trial Judge to Deal with Action.

Motion by the defendants for an order staying proceedings in this action until after the final determination of an action in the County Court of the County of Lincoln, brought by the Corporation of the County of Lincoln against the Corporation of the Township of South Grimsby, in which action the Corporation of North Grimsby were brought in as third parties.

A. W. Marquis, for the defendants the Corporation of the County of Lincoln.

G. C. Thomson, for the defendants the Corporation of the Township of North Grimsby.

W. S. MacBrayne, for the plaintiffs, the Corporation of the Township of South Grimsby.

LENNOX, J., in a written judgment, said that in the other action an appeal was pending from the judgment of the County Court, and the hearing of the appeal had been adjourned sine die. The effect of this was, that that action was still pending.

It was not advisable that an order staying proceedings should be made at the present time. The issues which the plaintiffs in this action were litigating, and desired to have fully tried, were not of trifling moment—on the contrary, they were of serious consequence, far-reaching, and involving exemption from or liability for the payment of a large sum of money. If it could be avoided, it was not expedient that a litigant, seeking to maintain or enforce what he in good faith regarded as a right or privilege, should be hampered or hindered in an honest attempt to establish his contention, particularly if able to pay costs in the event of failure.

The learned Judge would have preferred to make an order for the consolidation of the actions, but the parties did not desire that.

The defendants in the action in this Court could, if so advised, set up what they now alleged, by way of answer in their statement of defence, but that was a matter for their consideration.

The learned Judge expressed no opinion as to whether the issues raised in the two actions were the same.

So far as he had power to direct, the result of this motion should not fetter the action of the trial Judge, if this action should come on for trial.

For the present no order would be made, but subject to this qualification, that, if the defendants, in order to clear the way for an appeal, desired it, the motion would be dismissed.

FRIEDMAN v. CANADIAN PACIFIC R.W. CO.—LENNOX, J.—JAN. 12.

Railway—Carriage of Goods—Contract—Delivery without Payment or Indemnity—Recovery of Damages by Shipper against Carriers—Person to whom Goods Delivered Made Liable over to Carriers—Third Parties—Costs.]—Action to recover from the defendant railway company the value of two car-loads of lumber shipped over the company's line from Renfrew to Oshawa about the 25th or 26th July, 1919. The defendant company served a third party notice upon the Canadian Stewart Company Limited, claiming indemnity or relief over. The third parties opposed the claim. The action and third party claim were tried without a jury at Ottawa. LENNOX, J., in a written judgment, said that the plaintiff sold the lumber to one W. J. Morrison. As arranged with Morrison, the plaintiff consigned the lumber to the agent of the Bank of Nova Scotia at Oshawa, and through the bank drew upon Morrison for payment at sight. The bills of lading, signed by the carriers and shipper, set out that the goods were consigned to the order of the Bank of Nova Scotia at Oshawa—"notify Canadian Stewart Company"—and "the surrender of this original order and bill of lading, properly endorsed, shall be required before the delivery of the goods." The two car-loads in question here, contrary to the contract entered into by the carriers with the plaintiff, were, by mistake of the yardmaster, delivered to the third parties without payment of the sight draft or indemnity. After discussing the facts, the learned Judge found them in favour of the plaintiff, and directed that judgment should be entered for the plaintiff against the defendant company for $642.29 with County Court costs (and no order to prevent a set-off), and judgment for the defendant company against the third parties for the amount recovered by the plaintiff against the defendant company for damages and costs (after deducting costs set off as aforesaid) together with the defendant company's costs of defence and third party proceedings, to be taxed according to the tariff of the Supreme Court. J. J. O'Meara, for the plaintiff. W. L. Scott, for the defendants. A. W. Langmuir, for the third parties.

McGUIRE v. EVANS—FALCONBRIDGE, C.J.K.B.—JAN. 14.

Church—Contest as to Right to Funds—Dismissal of Action for Account—Findings of Trial Judge.]—Action for an accounting of all funds in the custody, possession, or control of the defendants belonging to or in any way relating to the Toronto branch of the Reorganised Church of Jesus Christ of Latter Day Saints, and for interest and damages. The action was tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, acting on the request of counsel, he allowed written arguments to be put in. Most elaborate ones were handed to him on the 30th December. A Judge cannot listen to witnesses for 8 days without coming to some conclusion as to the merits of a case. The learned Chief Justice formed a pretty strong opinion, but was quite willing, with an open mind, to listen to or peruse arguments both as to the facts and the law. A very careful consideration of the arguments and authorities failed to remove the impression indicated. It was unnecessary to go into particulars, the contentions of the parties being so fully set forth in writing. He found in favour of the defendants on all points, and dismissed the action with costs. There were some small figures to be adjusted, which counsel said they were willing to do. George Wilkie and G. Hamilton, for the plaintiff. W. R. Smyth, K.C., for the defendants.