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HIGH COURT DIVISION.

SUTHERLAND, J. JULY 23RD, 1919.

BROWN v. CRAWFORD.

Contract—Sale of Shares in Mining Company—Delivery "when Stock shall be Issued"—Stock Held by Directors under Pooling Agreement—Knowledge of Parties—Oral Evidence to Explain Written Agreement—Ambiguity—Oral Evidence of Condition—Action by Vendee for Specific Performance of Agreement or Damages for Breach—Laches—Prospectus—Absence of—Act respecting Prospectuses Issued by Companies, 6 Edw. VII. ch. 27 (O.)—Application of—Pleading—Amendment.

Action for specific performance of an agreement whereby the defendant, in consideration of $1,500 paid by the plaintiff, promised and agreed to transfer to the plaintiff 15,000 shares of the fully paid-up stock of the Prince Rupert Cobalt Silver Mines Limited ("when stock shall be issued"), or, in the alternative, for damages for breach of the agreement.

The agreement recited that the defendant was the owner of 30,000 shares and had an option on another 400,000 shares of the stock of the company ("as a member of the Syndicate"); and the defendant agreed to share and share alike with the plaintiff in all profits (if any) which the defendant might make on the sale of the 400,000 shares.

The defence was that the 15,000 shares were not to be transferred to the plaintiff until issued by the company, "and the said shares were never issued to the plaintiff or the defendant, as all the paid-up stock of the company was, to the knowledge of the plaintiff, held as pooled stock by the directors of the company at that time and until the company ceased to do business some years later, and no share-certificates were ever issued to any shareholder." The defendant also alleged that he had sold none of the 400,000 shares, although he tried to do so before the option expired, and never made any profit thereon.

The action was tried without a jury at Ottawa.

A. Lemieux, K.C., for the plaintiff.

S. R. Broadfoot, for the defendant.

SUTHERLAND, J., in a written judgment, said, after stating the facts, that it was contended for the plaintiff that no evidence was admissible tending to shew that his agreement was subject to the pooling agreement. The learned Judge, following Long v. Smith (1911), 23 O.L.R. 121, took the evidence of both parties on this point; and was of opinion that he should give effect to the testimony of the defendant that the agreement was subject to the condition that the plaintiff could not demand delivery of the share-certificates without the consent of the parties to the pooling agreement. The agreement itself recited that the defendant was a member of the syndicate. Again, the shares were to be delivered "when stock shall be issued." Construing this literally, the time had not yet arrived—and probably, the company being to all appearance defunct, never would arrive—"when stock shall be issued." That expression was at least indefinite and ambiguous. The defendant gave the explanation and cleared up the ambiguity.

The agreement was made in September, 1909; there had been such laches as should weigh against the plaintiff in considering his claim.

The letters patent incorporating the company were issued in January, 1907, under the provisions of the Ontario Companies Act, R.S.O. 1897 ch. 191, and subject to the provisions of the Ontario Mining Companies Incorporation Act, R.S.O. 1897 ch. 197. The plaintiff urged the absence of a prospectus, and referred to an Act respecting Prospectuses issued by Companies (1906), 6 Edw. VII. ch. 27. The learned Judge said that he was not sure that the provisions of the Acts referred to applied to this company so as to have rendered it necessary to issue a prospectus or to affect the dealing with the shares of the company. This point was not taken in the plaintiff's pleadings, and no amendment was actually applied for; in any event, an amendment should not be allowed: Gowganda-Queen Mines Limited v. Boeckh (1911), 24 O.L.R. 293.

Action dismissed with costs.

KELLY, J., IN CHAMBERS. JULY 23RD, 1919.

REX v. WRIGHT.

Criminal Law—Keeping Room or Place for Practice of Acts of Indecency—Magistrate's Conviction—Motion to Quash—Evidence—Reasonable Inference from Facts.

Motion to quash the conviction of the defendant by a Police Magistrate on a charge of keeping a room or place for the practice of acts of indecency, the grounds for the application being: (1) that there was no evidence upon which the magistrate could convict; and (2) that the evidence did not disclose any criminal offence.

Fletcher Kerr, for the defendant.
J. R. Cartwright, K.C., for the Crown.

KELLY, J., in a written judgment, said that, by advertising in a newspaper published in Toronto the prisoner got into communication with, and brought to his room, a woman for the alleged purpose of instructing her in massage treatment. What followed upon her going there might be taken to indicate the purpose for which women were sought out by the advertisement, and the practice that the defendant would indulge in towards any woman so induced to go there. His conduct and acts towards this woman were unquestionably indecent, and she was led by him into most indelicate acts. Whether or not she believed that his real reason for inducing her to come to his room was merely to instruct her in massaging so that when instructed she could treat him for his alleged ailment, and even if he were in need of massage treatment, it was inconceivable that the indecency of exposure in which the accused indulged was necessary to the instruction or the treatment.

The means adopted of bringing to his room the woman—and perhaps other women as well if they answered his advertisement—was open to suspicion as to his real purpose. It was urged that the case against him had not been fully proven. It was not essential, however, that every fact necessary to constitute an offence should be established by direct and positive evidence. If sufficient be shewn from which a reasonable inference can be drawn that the offence charged has been committed, a conviction so made will not, unless other unusual circumstances present themselves, be disturbed.

It was open to the magistrate to draw the conclusion, on the facts proven, and in the absence of explanation satisfactory to him of the defendant's conduct, that what happened was not merely an isolated act; and that the accused was guilty of the offence of which he was convicted.

The application should be dismissed with costs.

KELLY, J. JULY 24TH, 1919.

HUTCHISON v. CITY OF TORONTO.

Highway—Nonrepair—Injury to Pedestrian by Fall on Icy Sidewalk—Negligence of Municipal Corporation—Dangerous Condition Due to Excessive Slope and Broken Concreting as well as Ice—"Gross Negligence"—Municipal Act, sec. 460 (3), (4)—Cause of Injury—Absence of Contributory Negligence—Notice of Injury—Damages.

Action for damages for injuries sustained by the plaintiff by a fall upon a sidewalk in the city of Toronto, on the 20th February, 1918.

The plaintiff alleged negligence, nonfeasance, and misfeasance of the defendants in regard to the dangerous condition of the sidewalk on that day.

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

T. R. Ferguson, for the plaintiff.

Irving S. Fairty, for the defendants, the city corporation.

KELLY, J., in a written judgment, said that, having regard to the state of the weather on the day of the accident and the previous day, if the accident could be attributed solely to the ice on the sidewalk, he was not prepared to say that the defendants were guilty of gross negligence (Municipal Act, sec. 460 (3)) or that liability would attach to them under those conditions. But there were other conditions which were immediately related to the plaintiff's injuries. Galt avenue, where the accident happened, has a downward grade from the north to the south; this in itself called for care in the construction and maintenance of the sidewalk so as to guard against any unusual risk to persons passing over it. In two respects that care was not exercised. The accident happened on the westerly sidewalk, which at the locus in quo had an incline towards the kerbstone of two-thirds of an inch to the foot—the standard grade being one-fourth of an inch

to the foot. Competent witnesses said that the grade of this sidewalk from its westerly side towards the roadway was greater at the time of the accident than from the standpoint of safety it should have been; and that there were indications that it was then greater than when the sidewalk was constructed—that the sidewalk might have sunk. But there was positive evidence that its condition in that respect was then just as it had been for months prior to the accident. A still more serious condition was that of the broken and defective concreting of the sidewalk where the plaintiff fell. For a length of six feet or thereabouts by a width of several inches along its outer edge the concrete had been badly broken and had fallen away. This had continued from the previous summer without repair. This particular place was characterised by witnesses as dangerous, both on account of this defect and of the unusual grade, especially at a time when there was ice. The unusual grade and the broken and defective condition of the sidewalk were apparent to passers-by, and there was no effort or attempt to make repairs or to provide against or minimise the risk consequent upon those conditions. The plaintiff was going south along the westerly sidewalk when she fell at the broken part referred to, and was seriously injured.

The learned Judge had no hesitation in finding, having regard to the circumstances then existing and the length of time the sidewalk had been permitted to continue in the condition in which it was on the 20th February, that the defendants were guilty of gross negligence; that that negligence was the cause of the plaintiff's injuries; and that the plaintiff exercised reasonable care and was not negligent.

The notice of injury served by the plaintiff before action, pursuant to sec. 460 (4), was sufficient.

The plaintiff's damages were assessed at $3,500, and judgment for that sum and costs was directed to be entered against the defendants.

SUTHERLAND, J. JULY 24TH, 1919.

BOYER BROTHERS v. DORAN & DEVLIN.

Contract—Building of Houses—Provision for Termination upon Notice—Right Exercised in Good Faith and on Reasonable Grounds—Estoppel—Res Adjudicata—Claim which might and should have been Asserted in Former Action.

Action for damages for the breach of a contract.

The defendants had contracted with the Canadian Government Railways to erect certain section-houses along their lines.

The plaintiffs agreed to build eight of these houses for the defendants. The plaintiffs did some of the work under the agreement; but the defendants became dissatisfied, and assumed to terminate the contract by virtue of a power said to be given them by the agreement. The damages claimed were for loss of profits, injury to credit, etc.

The plaintiff had brought a previous action against the defendants and had recovered judgment therein for $1,009.69. The defendants pleaded res adjudicata.

The action was tried without a jury at Ottawa.

A. Lemieux, K.C., for the plaintiffs.

E. P. Gleeson, for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts and referring to the pleadings and evidence, said that the plaintiffs relied mainly upon Hayes v. Harshaw (1913), 30 O.L.R. 157, as an answer to the defence of res adjudicata. But the facts in that case were different. The true rule was indicated in Henderson v. Henderson (1843), 3 Hare 100, at pp. 114, 115.

The plaintiffs might and should have brought forward their present claim in the former action; and it was now res adjudicata.

Apart from that, the contract having been properly put an end to by the defendants by their notice of the 14th August, 1918, pursuant to clause 7 of the contract, the plaintiffs could not maintain an action for damages for breach of the contract.

The right of termination was exercised on reasonable grounds and in good faith.

Action dismissed with costs.

SUTHERLAND, J. JULY 26TH, 1919

RE LUNNESS.

Will—Construction—"Property Situated in Ontario"—Testator Domiciled in Ontario—Shares of Dominion Railway Company Stock—Head Office of Company in another Province—Certificates Kept in Ontario—Inadmissibility of Extrinsic Evidence to Shew that Testator Meant "Real Property" only—Interests in Residuary Estate—Direction for Sale of Property—Division in Specie among Persons Entitled to Proceeds—Time for Division—Discretion of Executors.

Motion by the surviving executor of the will of Joseph Lunness, deceased, for the advice and direction of the Court as to the proper

construction of the will, with reference to certain questions arising in the administration of the estate.

The motion was heard in the Weekly Court, Toronto.
R. U. McPherson, for the executor.
R. McKay, K.C., for J. R. Lunness.
T. R. Ferguson, for the other persons interested.

SUTHERLAND, J., in a written judgment, said that the testator died in November, 1915, and his widow in May, 1919. The estate was of about the value of $300,000, of which about $240,000 had been administered and the accounts in connection therewith passed in December, 1918.

By clause 7, sub-clause 2, of the will, the testator directed his executors, after providing for certain bequests, to sell and dispose of any or all of his property situated in Ontario at any time in their discretion within 10 years from his decease and to divide the proceeds equally among his three daughters; and, after the expiration of 5 years from his decease, to sell and dispose of all his property situated in Saskatchewan and Alberta and divide the proceeds equally among his four children, i.e., the same three daughters and his only son. Among the assets of the estate were 1,191 shares of Canadian Pacific Railway Company stock and 7 shares of the stock of an American company. The first question submitted was whether the Canadian Pacific shares were property in Ontario or in Saskatchewan or in Alberta, or in any of them. The testator lived and executed his will in Ontario; he died out of Ontario, his absence being for a temporary purpose. The head office of the company was in the Province of Quebec. The share-certificates were kept by the testator in a box in a safety deposit vault, in Ontario, and were there at the time of his death. The learned Judge said that he could not think, having regard to the whole will, that the word "situated" after the word "property" really made any difference in the construction to be given to the word "property" or that it must be confined to real property only. He was of opinion that the words "property situated in Ontario" included all the real and personal property which the testator owned in the Province of Ontario; and that the Canadian Pacific shares were property situated in Ontario. Evidence to shew that the testator ordinarily meant "real estate" when using the word "property" was not admissible.

The second question should be answered by saying that the testator's three daughters were entitled to the proceeds of the Canadian Pacific shares.

The third question was, whether the testator's son took any share or interest under clause 7, sub-clause 2. The learned Judge

said that, apart from the interest which the son had in the residue of the estate after the death of his mother, he took no share or interest in the property of the testator in Ontario.

In answer to the fourth and fifth questions, the learned Judge said that, all persons interested in the estate being sui juris, the executors might divide the property in specie among them, instead of selling it and dividing the proceeds, and that the division might be at any time, and before the expiration of the 5 years mentioned in clause 7, sub-clause 2.

Further questions submitted by the notice of motion were not answered because the material before the Court was not sufficiently explicit. If necessary these will be dealt with after vacation and after the further material necessary has been supplied.

Costs of all parties to be paid out of the residuary estate.

SUTHERLAND, J. JULY 26TH, 1919.

RE ELLIOTT.

Executors—Direction in Will to Create Trust Fund of Specified Amount—Agreement Made between Executors and Beneficiaries of Fund—Beneficiaries Entitled to Income on Full Amount from Date of Agreement but not before—Expense of Administering Fund—Sale of Bank-shares—Duty of Executors.

Motion by the executors of the will of William George Elliott, deceased, for the advice and opinion of the Court with reference to questions arising in regard to the distribution of the estate.

The same estate was the subject of the action of Elliott v. Colter (1919), ante 115.

The motion was heard in the Weekly Court, Toronto.

A. E. Watts, K.C., for the executors.

L. F. Heyd, K.C., for Jane A. Elliott and Eliza M. Tomlinson.

W. T. Henderson, K.C., for Mary Bridgeman, Donald E. Bridgeman, and Dorothy Atkinson.

A. M. Harley, for Luella Elliott, Sarah Lillian Dunster, and John E. Gatchell.

SUTHERLAND, J., in a written judgment, after setting out the provisions of the will, referring to the facts of the case, and quoting from the reasons for judgment of Rose, J., in Elliott v. Colter, supra, said that the first three questions submitted related in fact to the same matter—the claim of the life-annuitants to

have now paid to them the balance of the interest or income which they would have received if the $100,000 fund had been made up or created at once upon the death of the testator. It seemed plain that, as the estate stood at his death, and having regard to the changed value of the stock in the cement company, the executors never could have at once created this fund; they could not have done so, at least, without serious loss to the estate. This was now admitted on all hands. The result of the agreement between the parties, as construed and pronounced upon by Rose, J., was to preclude the claim suggested and asserted in the three questions. The parties to the agreement, including Jane A. Elliott and Eliza M. Tomlinson, acquiesced in the way in which the executors dealt with the estate down to the date thereof, and they had accepted the income paid to them in lieu of what would have been paid had it been possible to have at once created the fund of $100,000 and invested the cash portion thereof. The last clause in the agreement, by which it was agreed that the executors should stand seised of the fund created for the purpose of providing the quarterly payments for Jane and Eliza, might be thought to be an authority to the executors to continue in the same course, or at all events to do so until some objection should be taken. The learned Judge was of opinion that no effect could be given to the claim of Jane and Eliza as to the period before the date of the agreement; but, with some hesitation, he had come to the conclusion that from the date of that agreement they were entitled to have made up to them the interest or income which they would have received if the $100,000 fund had been created at that date. The allowance of the claim with respect to the costs of administering the fund should have effect also from the date of the agreement.

The fourth question was, whether Jane and Eliza were entitled to receive from the executors the gross income without deducting therefrom the costs and charges which should be incurred in the future in connection with the administration of the fund. This question should be answered in the affirmative.

In answer to the fifth question, the learned Judge said that, in his opinion, it was not incumbent upon the executors forthwith to sell and realise upon the bank-shares held by the testator at the time of his decease and now forming part of the fund.

Order declaring accordingly; costs of all parties out of the estate.

BOOTH v. SJOLIN—SUTHERLAND, J.—JULY 23.

Limitation of Actions—Dispute as to Boundary-line between two Halves of Lot—Possession and Fencing in Accordance with Agreement—Action to Recover Possession of small Strip of Land—Evidence.]—An action for a declaration of the true boundary-line between the north and south halves of lot 165 on a registered plan of a tract of land in the city of Ottawa, and for possession of the northerly three feet of the south half of the lot, according to a survey made for the plaintiffs. The action was tried without a jury at Ottawa. SUTHERLAND, J., in a written judgment, after setting out the facts, said that the defendant asserted that he had been in possession of the three feet in question, through his predecessor in title and himself, for such a length of time that any claim of the plaintiffs was barred by the Limitations Act, R.S.O. 1914 ch. 75. A surveyor was called as a witness by the plaintiffs, and another by the defendant. There might be some doubt from their conflicting testimony as to the true position of the dividing line between the north and south halves of the lot, on a proper and accurate survey. It was incumbent upon the plaintiffs to make out title to the three feet and a right to possession thereof; and the learned Judge was unable to find, upon the evidence, that they had done so. On the other hand, the defendant had proved an oral agreement made between the plaintiff Booth and the predecessor in title of the defendant (K.) to fix and establish the line between them, which was evidenced, to the extent of its length, by the fence built by K.; and that the possession of the defendant and K. of the three feet in question, lying to the north, had been consistent with the agreement, and had been open, continuous, and adverse, in so far as the plaintiff Booth was concerned, for a period of upwards of 20 years before the commencement of this action. The other plaintiff took from Booth with notice of some existing dispute between him and the defendant. Action dismissed with costs. G. F. Henderson, K.C., for the plaintiffs. George McLaurin, for the defendant.

RE MCRAE—KELLY, J.—JULY 23.

Will—Validity—Evidence—Allegations of Testamentary Incapacity and Undue Influence—Failure to Prove—Agreement Made by Testator—Promise to Convey Land in Consideration of Maintenance for Life—Agreement and Will Upheld on Evidence—Costs of Issues.]—Issues directed to be tried for the purpose of determining certain questions relating to the will of Duncan L. McRae, who died on the 28th September, 1918; and also as to an agreement made

between the deceased and David Gordon on the 24th September, 1918. The validity of the will and the agreement were questioned. The issues were tried without a jury at Parry Sound. KELLY, J., in a written judgment, said that McRae was over 80 years old at the time of his death. The will was executed on the 11th September, 1918. The deceased was the owner of certain lands in the township of Mackenzie. By the will he purported to devise to Addie Hanson lots 20 and 21 in the 2nd concession and to Felix Payette lot 19 in the 2nd and lot 19 in the 3rd concession. The testator by the will made no other specific devises or bequests and gave no directions except a direction for payment of debts and funeral and testamentary expenses, and it contained no residuary devise or bequest; but it purported to revoke all former wills. One Crisp, who drew the will, was named as executor. He applied for probate. His application was opposed by Maggie McRae, his daughter, and other persons. The agreement with Gordon was made nearly two weeks after the will was made. By it Gordon was to board and care for McRae for the rest of his life, and was to have a conveyance of lots 19 in the 2nd and 19 in the 3rd concession and certain chattels and furniture. The agreement was not well-drawn, but that appeared to be the purport of it. McRae lived only four days after the agreement was executed. Charges of want of capacity on the part of the testator and of fraud and undue influence on the part of the beneficiaries under the will and of Gordon were made; but, in the opinion of the learned Judge, they were not established; and he upheld the validity both of the will and of the agreement. He directed that the costs of the executor and of Addie Hanson should be paid by Ellen Taylor, Marguerita Bottrell, and R. Reece Hall (the latter to be liable for costs only down to the delivery of the issues). To the extent to which the executor's costs are not so recoverable, they are to be paid, as between solicitor and client, out of the estate. No costs to or against Maggie McRae and David Gordon.

ANDERSON v. NOWOSIELSKI—SUTHERLAND, J.—JULY 24.

Assignments and Preferences—Action by Assignee for Benefit of Creditors of Insolvent to Set aside Mortgage to Creditor Made by Insolvent—Evidence—Preference—Chattel Property Transferred to Creditor—Claim of Creditor against Estate—Account—Costs.]—Action by the assignee for the benefit of creditors of the defendant William Nowosielski to have a mortgage made by that defendant to the defendant Lavoie declared to be fraudulent and void as against the creditors, and also for an account of property received by L. from N., and for a declaration that L. was not entitled to rank as

a creditor upon the estate in the hands of the plaintiff. The action was tried without a jury at Sandwich. SUTHERLAND, J., in a written judgment, set out the facts and referred to the pleadings and evidence. He had, with some hesitation, come to the conclusion that the evidence did not warrant him in finding that the mortgage was made to L. for the purpose of giving him a preference over other creditors or hindering or delaying them in the payment of their claims. If the plaintiff should desire a reference for the purpose of endeavouring to shew that there was in reality not so much as $1,400 of principal money still due to L. upon the mortgage, he should have a reference to the Master at his risk as to costs. The defendant Annie N., wife of the defendant N., could not be relieved from liability under the mortgage. There was no bona fide sale of N.'s automobile to L.; L. did not pay therefor in cash and by settlement of the existing account, as alleged by him. He had parted with the vehicle and obtained in cash or its equivalent the sum of $800, which he must pay to the plaintiff for the benefit of N.'s creditors. The account of the defendant L. for supplies furnished to N., $928.95, filed as a claim against the estate, was an excessive one, and must be reduced to $401.65. There was some evidence as to a horse and a piece of furniture alleged to have been obtained by L. from N., but not such evidence as would warrant a finding of liability to account therefor. The plaintiff had failed in the most substantial part of his claim, but had succeeded on two points. That was sufficient to warrant the bringing of the action. The plaintiff should have costs against the defendants, fixed at $100, and there should be no order as to costs otherwise. F. D. Davis, for the plaintiff. E. S. Wigle, K.C., for the defendant Lavoie. A. B. Drake, for the other defendants.

RE HURNDALL AND ZEIGLER—LENNOX, J.—JULY 26.

Vendor and Purchaser—Application under Vendors and Purchasers Act—Declaration that Good Title Shewn—Costs.]—Application under the Vendors and Purchasers Act, heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that the authorities cited were not close enough to be of any very great assistance. After a good deal of thought, he had come to the conclusion that, as concerned the question submitted for decision, the vendor had shewn a good title. There should be an order declaring accordingly. It was a matter of some difficulty, and both parties had acted in good faith. Each should bear his own costs. Singer, for the applicant. R. L. Defries, for the respondent.