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HIGH COURT DIVISION.

SUTHERLAND, J. JULY 31ST, 1915.

RÉAUME v. COTÉ.

Limitation of Actions — Possession of Land — Conveyance to Partners—Death of Partner—Acts of Ownership by Survivor—Payment of Taxes—Lease of Land—Statute Running against Heirs of Deceased Partner—Limitations Act, R.S.O. 1914 *ch.* 75, *sec.* 12—*Declaration of Title—Costs.*

Action for a declaration that the plaintiff was on the 17th September, 1914, entitled to the fee simple of a lot of land in the town of Sandwich, containing three-quarters of an acre.

The action was tried without a jury at Sandwich.

J. Sale, for the plaintiff.

J. H. Rodd, for the defendants Aggie Coté and Jennie Réaume.

A. St. G. Ellis, for the infant defendant, Dorothea Williams.

SUTHERLAND, J., after dealing with the facts, said that the plaintiff, who was asserting a title by possession, was not a trespasser. She was entitled, through her husband, Josiah Réaume, to an undivided one-half interest in the property, and had also acquired the interests of certain of the heirs of Benjamin Réaume. The land had been conveyed by the patentee to Benjamin and Josiah, and they had as partners carried on a milling business upon it. The plaintiff was invoking the Limitations Act as against other heirs claiming to be interested in the land, but who, for a much longer period than that necessary to constitute a statutory bar, had in no active way asserted any claim or title or done any act to preserve any such.

Josiah, during his lifetime, and the plaintiff, after his death and up to the time of the commencement of the action, were asserting and claiming ownership by paying the taxes and leas-

ing the property to a tenant. It was also plain that during all these years a reasonably substantial fence was maintained in such a way as to keep the lot continuously enclosed. The granting to one Brown of the right of placing a bill-board on the property and receiving rent therefor amounted to an assertion of ownership; and the bill-board was itself a notice to the world that some one was assuming to deal with the property, and was sufficient to put those interested upon inquiry.

In these circumstances, the payment of taxes and the maintenance of a fence were important considerations: Campeau v. May (1911), 2 O.W.N. 1420; Piper v. Stevenson (1913), 28 O.L.R. 379.

Upon the facts disclosed in evidence, it was clear that the plaintiff, by her husband and herself, had been in visible, open, continuous, and exclusive possession for more than the statutory period.

The land was originally acquired by the brothers as co-partners, joint tenants, or tenants in common. When, after the death of Benjamin, Josiah commenced to pay the taxes and leased the land, his possession became adverse to the claim of the heirs of Benjamin, and his possession and receipt of the rents would not enure to their benefit: Limitations Act, R.S.O. 1914 ch. 75, sec. 12; Harris v. Mudie (1882), 7 A.R. 414; Dart on Vendors and Purchasers, 7th ed., p. 451.

Judgment for the plaintiff without costs.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 14TH, 1915.

*RE ISLER.

Evidence—Order for Examination of Person in Ontario—Testimony for Use in French Court—Letters Rogatory—Criminal Proceedings against Person Sought to be Examined—Difference between British and French Law—Canada Evidence Act, R.S.C. 1906 ch. 145, secs. 41, 45.

Motion on behalf of the Attorney-General for Ontario, under Part II. of the Canada Evidence Act, R.S.C. 1906 ch. 145, for an order for the examination of Carl Frederick Isler, a person at present in Ontario, whose testimony is desired by the Judge of Instruction of the Court of First Instance of the Department of

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

the Seine, in the Republic of France, as shewn by letters rogatory issued by that Court, in relation to certain criminal proceedings against Isler pending in that Court upon a charge of fraud.

Edward Bayly, K.C., for the Attorney-General.

MIDDLETON, J., said that, according to the law of Canada, the accused cannot be compelled to give evidence, though he is competent to testify on his own behalf if he so desires. The law of France authorises the examination of the accused, and so differs from English and Canadian law.

Desilla v. *Fells and Co.* (1879), 40 L.T.R. 423, and *Eccles & Co.* v. *Louisville and Nashville R.R. Co.*, [1912] 1 K.B. 135, referred to.

In the Canada Evidence Act, the only limitation upon the right to examine is that found in sec. 45, which gives the witness the same right to refuse to answer questions tending to criminate, or other questions, as a party or witness would have in a cause pending in a Court in Canada.

The question of the obligation of Isler to submit to examination does not now arise, and the order sought ought to be made, leaving it to Isler to object (if he sees fit) to undergo any examination or to answer any questions which he may think would criminate him. He may be ready and anxious to give evidence.

Order made for the examination of Isler under sec. 41 of the Act, reserving to him all his rights under sec. 45.

MEREDITH, C.J.C.P., IN CHAMBERS. SEPTEMBER 17TH, 1915.

*HIBBARD v. TOWNSHIP OF YORK.

Costs—Discretion of Trial Judge—Leave to Appeal—Judicature Act, R.S.O. 1914 *ch.* 56, *sec.* 24—*Scale of Costs—Jurisdiction of County Court—Action Removed into Supreme Court—County Courts Act, R.S.O.* 1914 *ch.* 59, *sec.* 22.

Motion by the plaintiff for leave to appeal to a Divisional Court of the Appellate Division from the judgment of MEREDITH, C.J.C.P., at the trial, upon the question of costs.

The action was brought in the County Court of the County of York to recover $2,500 damages under the Fatal Accidents Act for the death of a person by reason of nonrepair of a high-

way. Upon the defendants' application, the action was removed into the Supreme Court of Ontario. It was tried by MEREDITH, C.J.C.P., without a jury, and judgment was given for the plaintiff for $300, with costs fixed at $75.

The plaintiff appealed, seeking to increase both damages and costs. On the 17th June, 1915, his appeal was heard by a Divisional Court, and dismissed as to damages; as to costs, the appeal was not disposed of, an opportunity being thus given to the plaintiff to apply for leave to appeal.

The motion for leave to appeal was heard by MEREDITH, C.J.C.P., in Chambers.

H. E. Grosch, for the plaintiff.

Grant Cooper, for the defendants.

MEREDITH, C.J.C.P., said that there was no reason why leave to appeal should be granted as to costs; justice was done to both parties by the order made at the trial.

The ordinary jurisdiction of the Courty Courts in actions such as this is limited to claims not exceeding $500 (County Courts Act, R.S.O. 1914 ch. 59, sec. 22); any jurisdiction beyond that sum is a jurisdiction by consent substantially.

Ordinarily the discretion should be exercised by awarding costs upon the scale of the Court in which the action should have been tried, with a set-off of costs, when tried in a higher Court by reason of a claim being made for more than would come within the ordinary jurisdiction of the Court in which the action should have been tried; and such an exercise of that discretion applies with much force to the circumstances of this case. The sum awarded for costs was equal to 25 per cent. of the damages, and that was enough; an appeal for more would end in the costs doubling the damages, and that would be inexcusable.

The fact that a Divisional Court had allowed the appeal to stand over in order that this application might be made should not influence the disposition of it: the discretion to be exercised is that of the trial Judge only (sec. 24 of the Judicature Act, R.S.O. 1914 ch. 56).

No point was overlooked at the trial, except a reference to Robinson v. Village of Havelock (1914), 7 O.W.N. 60, not then reported in the Ontario Law Reports: see now 32 O.L.R. 25.

Application refused without costs.

MEREDITH, C.J.C.P., IN CHAMBERS. SEPTEMBER 17TH, 1915.

*SIMPSON v. GENSER.

Arrest—Fraudulent Debtors Arrest Act, R.S.O. 1914 *ch.* 83—*Proof of Debt and of Intent to Quit Ontario and Intent to Defraud — Questions of Fact — Effect of being about to Leave without Providing for Debts.*

Motion by the plaintiffs for an order for the arrest of the defendant for debt, under the Fraudulent Debtors Arrest Act, R.S.O. 1914 ch. 83.

T. S. Elmore, for the plaintiffs.

MEREDITH, C.J.C.P., said that the extraordinary process which the plaintiffs sought ought not to issue until they had fully complied with the provisions of the enactment, that is, they must prove (1) an indebtedness by the defendant to them in amount not less than $100; (2) that the defendant is about to quit Ontario; (3) with the intent to defraud his creditors in general or the plaintiffs only. Whether or not these three things were proved was a question of fact; and, in that view, the finding in one case is really not binding in any other case.

The fact that the quitting Ontario is about to take place without any provision for the payment of debts may, in certain circumstances, be evidence of a fraudulent intent, but not in all circumstances. The Act does not provide for the arrest of persons about to quit the Province without paying their debts.

Toothe v. Frederick (1891), 14 P.R. 287, and Coffey v. Scane (1894-5), 25 O.R. 22, 22 A.R. 269, sometimes spoken of as being in conflict, may both have been well decided.

Upon the evidence, the plaintiffs had brought the case within the provisions of the Act in regard to the debt—which, if the testimony is true, is not barred by the Limitations Act, and is the debt of the defendant, and also in regard to the intent to quit and to defraud.

The application is almost necessarily made ex parte; and the defendant may displace the case made by the plaintiffs. The order for arrest is made. An application to discharge the defendant out of custody will be heard by the Chief Justice at any time.

DAVISON v. FORBES—KELLY, J.—SEPT. 13.

Trust—Share of Proceeds of Sale of Farm—Account—Contract—Counterclaim—Fraud and Misrepresentation—Costs.]—In substance, the plaintiff's claim was for an accounting by the defendants for the proceeds of the sale of about 154 acres of land, part of lot 26 in the 3rd concession from the bay, in the township of York, to the British and Colonial Land and Securities Company Limited, and for payment to him of his share of such proceeds. The defendant Haines counterclaimed for $75,000 on the ground that in 1905 he was induced by the plaintiff's false and fraudulent representations to purchase an interest in certain mining property in the Yukon. The plaintiff was the owner of the farm in the township of York, and on the 5th June, 1907—it being then subject to a mortgage for $30,000—he entered into an agreement with the two defendants for the conveyance to them of a two-thirds undivided interest therein, they agreeing to assume and pay off the mortgage. The action was tried by KELLY, J., without a jury, at Toronto. The learned Judge examines the evidence, in a carefully considered opinion, and reaches a conclusion favourable to the plaintiff upon the matters in dispute. Judgment declaring that from the 28th October, 1908, until the sale to the British and Colonial Land and Securities Company Limited in 1911, the defendant Forbes held an undivided one-third share in the farm lands in trust for the plaintiff; setting aside the documents dated the 15th July, 1910, executed by the plaintiff; directing an accounting by the defendants to the plaintiff for his one-third share of the proceeds of the sale to the said company, with interest from the time of completion of that sale; debiting him with whatever moneys were paid to him or on his account on the so-called sale to Forbes in July, 1910, with interest; and for payment by the defendants to the plaintiff of the amount thus remaining due, subject, as to the liability of the defendant Haines, to the disposition made of his counterclaim. During the argument, counsel for the defendant Haines abandoned his counterclaim, except to the extent of $5,000; and KELLY, J., now holds that the defendant Haines is entitled to recover $3,750 and interest, to be set off against what is found due by him to the plaintiff. The plaintiff is also entitled to the costs of the action, except to the extent that they have been increased by the counterclaim as proved. W. N. Tilley and J. T. White, for the plaintiff. Wallace Nesbitt, K.C., J. W. Bain, and Christopher C. Robinson, for the defendant Forbes. R. McKay, K.C., and G. W. Adams, for the defendant Haines.

ERINDALE POWER CO. LIMITED v. INTERURBAN ELECTRIC CO. LIMITED (No. 1)—MIDDLETON, J.—SEPT. 13.

Contract—Supply of Electric Current—Modification of Contract—Payment for Current Supplied—Quantum Meruit—Account—Items—Claim for Damages for Deceit — Costs.]—The plaintiff company, the owner of certain property, plant, and equipment producing electricity, was incorporated by letters patent issued by the Dominion of Canada on the 21st May, 1909. The defendant company, the owner of certain plant and premises used in connection with the distribution of electric energy, was incorporated by the Province of Ontario on the 15th July, 1908. The defendants Waddington and Edmondson were officers of both companies, and were made parties to this action in respect of the claim made for damages for deceit. The action was tried by MIDDLETON, J., without a jury, at Toronto. At the trial, it was decided that the claim for deceit failed. An agreement was entered into between the two companies by which the plaintiff company undertook to supply electricity to the defendant company, and under which electricity was supplied. This agreement was modified at different times in minor matters, and materially at a later date, when it was found that the plaintiff company could not supply the electricity contracted for. The principal claim in the action was for payment for the electricity supplied, and there was a counterclaim by the defendant company. The first and most important question which arose was as to the basis upon which the plaintiff company was entitled to be paid for the electricity supplied. The learned Judge considers the evidence and the contentions of the parties with regard to this, and says that the contract contemplated delivery and payment on a peak-load basis, but the plaintiff company was bound to have at all times ready for delivery a full 1,000 horse power. When this was found to be impossible, the parties mutually assented to give and to receive electricity intermittently, and on a basis entirely different from that which was stipulated for in the contract. That which was done by the mutual assent of the parties was quite different from that which was contracted for; and the payment, in the absence of any bargain, should be upon a quantum meruit basis. Upon this footing, and taking into account a number of items in dispute upon which the learned Judge passed, in a written opinion of some length, he came to the conclusion that the plaintiff company was entitled to recover $18,735.89. Judgment for the plaintiff for this amount; no costs to either party. H. E. Rose, K.C., and J. L. Ross, for the plaintiff company. R. McKay, K.C., and D. Inglis Grant, for the defendants.

ERINDALE POWER CO. LIMITED v. INTERURBAN ELECTRIC CO. LIMITED (No. 2)—MIDDLETON, J.—SEPT. 13.

Contract — Action for Cancellation — Failure of Proof — Costs.]—Action for a declaration that the contract referred to in the note of the case immediately preceding this is null and void and should be delivered up to be cancelled. The action was tried without a jury at Toronto. MIDDLETON, J., said that the action seemed to have been brought upon the theory that the agreement was of a far-reaching character and had some effect which it is now realised it has not. There is no foundation for the charges made against those who took part in its preparation; it embodies that which was always the arrangement between the two companies; and it should not be in any way interfered with. Action dismissed without costs. H. E. Rose, K.C., and J. L. Ross, for the plaintiff company. R. McKay, K.C., and D. Inglis Grant, for the defendants.