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HIGH COURT DIVISION.

WIDDIFIELD, LOCAL MASTER. JUNE 29TH, 1918.

RE OWEN SOUND LUMBER CO. LIMITED.

Company—Winding-up—Liquidator — Disbursements — Premiums Paid to Guarantee Company for Fidelity-bond.

Upon a reference to the Local Master at Owen Sound for the winding-up of the company, he appointed a permanent liquidator on the condition that he should furnish security in the sum of $15,000. The security was given by the bond of a guarantee company; and the liquidator, on passing his accounts, sought to be reimbursed the amount ($260) of the premiums paid to the guarantee company.

THE LOCAL MASTER referred to Masten's Company Law, p. 616; Parker and Clark's Company Law, p. 432; Rule 57 (5) of the English Companies (Winding-up) Rules of 1909, which specially provides that the cost of furnishing security shall not be charged against the assets of the company; the Winding-up Act, R.S.C. 1906 ch. 144, secs. 28, 40, 92, 134; and In the Goods of Harver (1889), 14 P.D. 81; and said that to compel a liquidator to pay for his bond might often work an injustice. In the present case the bond was much larger than eventually proved necessary; and, owing to protracted litigation, the liquidator had been compelled to pay in premiums an amount almost equal to the maximum sum allowable on the amount realised. The sum of $260 should be allowed as a proper disbursement in the winding-up.

ROSE, J. JULY 3RD, 1918.

WAY v. SHAW.

Evidence—Mortgage—Reference to Ascertain Amount Advanced and Due—Finding of Master—Credibility of Witnesses—Entries in Book—Suspicious Circumstances—Appeal—Costs of Defending Title to Mortgage Added to Mortgage-debt—Attack Made by Owner of Equity of Redemption.

An appeal by the plaintiff from the report of the Master at Belleville, to whom a reference was directed to ascertain the amount advanced upon and due under the mortgage which the First Divisional Court of the Appellate Division (11 O.W.N. 27), affirming the judgment of BRITTON, J. (10 O.W.N. 124), held to have been duly executed by William George Way, deceased. The plaintiff was the administrator of the estate of the deceased.

The appeal was heard in the Weekly Court, Toronto.

E. G. Porter, K.C., for the plaintiff.

W. C. Mikel, K.C. for the defendants.

ROSE, J., in a written judgment, said that upon the reference the defendant Shaw swore that he had advanced the whole amount purported to be secured by the mortgage, $620, by the payment in cash of $216 on the day of the date of the mortgage, and the surrender, at the same time, of 3 promissory notes theretofore made by the deceased Way in the defendant Shaw's favour, for $100, $104, and $200, respectively. Shaw produced a receipt, bearing the same date as the mortgage and purporting to be signed by the deceased, in which the payment of the cash and the surrender of the notes was acknowledged; and Shaw and his son, whose name was on the receipt as a witness, swore that the signature was the deceased's. Shaw also produced a day-book in which there were entries of loans to the deceased of the sums mentioned in the receipt, and of the payment by way of interest on the mortgage on the 21st June, 1913.

The Master had accepted this evidence, and had found that the whole sum was due. There was a great deal in the evidence that might well have led to the opposite conclusion; there were suspicious circumstances, discrepancies in the evidence, and the entries in the book were made in such a way as to arouse grave suspicions; but the real foundation of the Master's finding was the confidence inspired by the witnesses whom he saw, coupled with his disinclination to base a finding of forgery upon anything short of the clearest proof. If the impression which the witnesses created was sufficiently favourable, it might outweigh the sus-

picions created by the circumstances; and the learned Judge did not think that, because of his suspicions, he could reverse the Master's finding, nor reverse it because of the credit erroneously, as it appeared to the learned Judge, given to the entries. The Master may have formed too favourable an opinion of the witnesses; but he did form it; and, the case being one "where the issues involve the moral character of the actors in the transaction, and . . . they have given essential evidence which the Judge (Master) has accepted," it follows, to quote further from the judgment of the Divisional Court, that "it is almost impossible to refuse to give effect to his" (the Master's) "view:" 11 O.W.N. at p. 28.

The appeal against the finding of the amount due should be dismissed.

An attack was also made upon the Master's ruling that the costs of the trial, awarded to the defendant by the Divisional Court, were to be added to the mortgage-debt. The course taken by the Master was in accord with the rule stated by Page Wood, V.-C., in Parker v. Watkins (1859), Johns. Ch. 133: while the mortgagee is not, in general, entitled to charge the estate with the costs of defending his own title to the mortgage, he is so entitled when those interested in the equity of redemption concur in the litigation. Here the owner of the equity of redemption made the attack.

The appeal upon this branch of the case also failed.

Appeal dismissed with costs.

FALCONBRIDGE, C.J.K.B. JULY 4TH, 1918.

FERRIS v. EDWARDS.

Vendor and Purchaser—Agreement for Sale of Land—Action by Vendor for Specific Performance—Misrepresentations by Vendor—Failure to Prove—Evidence—Credibility of Witnesses—Purchaser Choosing to Act upon his own Judgment—Inspection of Land—Failure to Seek Available Information—Purchaser Estopped from Saying that he was Deceived—Presence of Noxious Weeds—Impossibility of Placing Parties in Original Position—Failure of Claim for Rescission.

Action for specific performance of agreement for the sale by the plaintiff and purchase by the defendant of land in Manitoba.

The action was tried without a jury at Sandwich.

W. G. Bartlet and H. S. Barnes, for the plaintiff.

F. C. Kerby, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that in considering the weight of testimony it was extremely unsafe necessarily to prefer the evidence of three witnesses as against one, when two out of the three were members of one party's family. More particularly was this the case when the same story was told with absolute exactitude. It gave rise to the suspicion that the matters in question had formed the subject of frequent discussion —that they had been "learned and carried by rote," so that the deponents should be letter-perfect in their tale. The learned Chief Justice had no adverse criticism to make as to the demeanour of the plaintiff, on the one side, and of the defendant and his wife and son, on the other. It was to be noted in favour of the wife that she admitted that she has talked it over with her husband.

Upon the branch of the case as to the alleged misrepresentations regarding the Manitoba farm, the learned Chief Justice did not feel bound to pass, because he found that the purchaser (the defendant) chose to judge for himself. The defendant was a practical farmer, and the plaintiff was not. The plaintiff told the defendant to go out and look at the property, which he did, and sent a telegram to the plaintiff to come out to Winnipeg and close the transaction. The defendant had visited the farm once before sending that message, and he visited again before closing, accompanied by the plaintiff. The defendant said at the trial that there was too much snow on the ground to permit him to inspect properly; but this was denied—at any rate he said nothing about it at the time. He was five or six days at Winnipeg, waiting for the plaintiff to come out. He made no inquiries from any one, neighbours or municipal officers or weed inspector.

Thus he did not avail himself of all the knowledge and means of knowledge open to him, and he could not now be heard to say that he was deceived by the alleged misrepresentations of the plaintiff: Attwood v. Small (1838), 6 Cl. & F. 232; Fry on Specific Performance, 5th ed., paras. 677-8; Crooks v. Davis (1857), 6 Gr. 317; Hannah v. Graham (1908), 17 Man. R. 532.

Upon cross-examination the defendant said: "I went out to verify his statements. I would not have bought if I had not gone out." The defendant further said that he discovered the noxious weeds (thistles etc.) on or before the 18th April, but his family did not leave Windsor to join him until the 28th April. He said nothing to his solicitor about alkali or gumbo when giving instructions for his defence.

Further, both parties could not now be placed in their original positions, so there could be no rescission, and the contract must stand: Eaton v. Dunn (1912), 5 D.L.R. 604.

There should be judgment for the plaintiff with costs.

The plaintiff said that he always had been and was now ready to make good any shortage in the grain. This amount of credit should be settled by counsel or by the Local Registrar.

SUTHERLAND, J. JULY 4TH, 1918.

RE CITY OF WINDSOR AND COUNTY OF ESSEX.

Municipal Corporations—By-law of County Corporation—Highway Improvement Act, R.S.O. 1914 ch. 40, sec. 26—Ontario Highways Act, 1915, 5 Geo. V. ch. 17—Improvement of Roads in County—Appointment of Surburban Area Commission—Report or Award—Enforcement of—Allegation by City Corporation of Non-compliance with Statute — Remedy —Prohibition, Inapplicability of, except in Plain Case—Action for Injunction.

Motion by the Corporation of the City of Windsor and by one Land, a ratepayer of Windsor, on behalf of himself and all other ratepayers, for an order prohibiting the Corporation of the County of Essex from proceeding with or acting further under an alleged award of three Commissioners, assuming to act as a Suburban Area Commission, under the provisions of the Ontario Highways Act, 1915, 5 Geo. V. ch. 17, and declaring that the Commissioners had no jurisdiction in the premises.

The grounds stated were: (1) that by-law 374 of the County of Essex, passed on the 28th April, 1916, did not create a county system of roads as provided for in sec. 26 of the Highway Improvement Act, R.S.O 1914 ch. 40; (2) that there was no authority under the Ontario Highways Act, 1915, for the appointment of a commission where all the municipalities of the county were not included in the scheme; (3) that in the award or report of the Commissioners no provision was made as to the suburban area of Walkerville, nor had the county corporation ever taken any steps towards having a suburban area fixed for that town.

The motion was heard in the Weekly Court, Toronto.

E. D. Armour, K.C., for the city corporation.

J. H. Rodd, for the county corporation.

SUTHERLAND, J., in a written judgment, after setting out the facts and quoting the statutory enactments applicable, said that the main ground on which counsel for the applicant corporation laid stress was that, in the creation of a system under the Act, the county council could not take sections of the county and exclude others, but must adopt a plan for a general system; and the system here adopted, being only partial, was not in compliance with the Act.

If this were plainly so, the principle stated by Brett, L.J., in Regina v. Local Government Board (1882), 10 Q.B.D. 309, 321, and referred to with approval in In re Godson and City of Toronto (1889), 16 A.R. 452, 455 (affirmed in Godson v. City of Toronto (1890), 18 S.C.R. 36), might be applied; but, in the present case, the question was not so free from doubt—having regard particularly to the course pursued by the applicant corporation—that the order asked should be made. It is only in a plain case that such an order should be made: Ex p. Story (1852), 12 C.B. 767, 777; Re Cummings and County of Carleton (1894), 25 O.R. 607, 611.

The county council were not at the moment doing anything which made it necessary or appropriate that an order for prohibition should be granted. The county council had demanded from the city corporation payment of certain moneys alleged to be the city corporation's proper share of moneys already disbursed by the county corporation in connection with the roads comprised in the Windsor suburban area, and payment had been refused. If the county council wished to collect this money, they might have to take other action, which the city corporation could resist, and in that action or proceeding everything attempted to be raised on this motion could be disposed of. Prohibition was not an appropriate remedy.

The motion should be dismissed with costs, without prejudice to any other action or proceeding which the city corporation might be advised to take. In an action in which an injunction was sought, the affidavits filed on this motion might well be used.

ROSE, J. JULY 5TH, 1918.

*McMAHON v. KIELY SMITH & AMOS.

Contract—Brokers—Stock Exchange—Sale by Brokers of Customer's Shares to another Broker—Sale not Made upon Exchange—Failure of Purchaser to Make Payment in Full—Liability of Brokers to Customer for Breach of Duty in not Making Sale upon Exchange—Remedies Open in such Case—Damages—Assessment of.

Action to recover $1,469.40, the balance alleged to be due upon a sale by the defendants (brokers) for the plaintiff of certain shares of the capital stock of a mining company.

The action was tried without a jury at Haileybury.

J. M. Ferguson, for the plaintiff.

Hamilton Cassels, K.C., for the defendants.

ROSE, J., in a written judgment, said that the plaintiff, being the owner of certain "pooled" shares, which he would not be able to deliver until the opening of the pool, instructed the defendants, who were members of the Standard Stock and Mining Exchange, to sell the shares at 55 or better, "seller's option 60 days or delivery 60 days." The defendants sold the shares, at 60, to a broker, a member of the same Exchange; but the sale was not made upon the Exchange, and so could not be recorded as a Stock Exchange transaction. The purchaser had paid for 2,050 of the shares, and had had delivery of 2,000 of them, but was in default as to the balance, and, apparently, was not in a position financially to pay the balance at present.

The plaintiff's case was, that the obligation of the defendants was to make the sale on the Exchange and subject to the rules of the Exchange; that, if they had performed their duty, there would have been security for the payment of the price; and that the defendants, therefore, were liable to him for the unpaid balance.

The contract between the plaintiff and the defendants was as the plaintiff stated it: Queensland Investment and Land Co. Limited v. O'Connell and Palmer (1896), 12 Times L.R. 502; Forget v. Baxter, [1900] A.C. 467, 479.

The evidence fell short of establishing an adoption by the plaintiff of the defendants' action, in any such sense as involved a release of whatever claim he would otherwise have against them; and the plaintiff was entitled to recover whatever actual damage

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

he could shew that he had sustained as a result of the defendants' breach of contract; the difficulty was in estimating that damage.

After stating the rules of the Exchange and considering what the defendants might have done to obtain payment if the sale had been a sale upon the Exchange, the learned Judge said that there was great uncertainty as to what sum might have been realised, and it seemed impossible to assess the damages at anything like the amount claimed by the plaintiff; but it seemed reasonably certain that he had lost something, and it was a fair inference from the evidence that he had lost not less than the equivalent of the 25 per cent. of the purchase-price which ought to have been put up as an initial deposit; that would amount to $750; and no more could be awarded.

There should be judgment in favour of the plaintiff for $750 and costs. If the defendants desired it, the judgment might contain provisions for their benefit in case they should succeed in getting from the purchaser the whole or some part of the balance of the purchase-price. When, if ever, it should appear that the sums received by the plaintiff, including the damages, amounted to the purchase-price, with interest from the time when payment ought to have been made, any further sums paid by the purchaser ought to go to the defendants.

HOEHN v. MARSHALL—FALCONBRIDGE, C.J.K.B.—JULY 2.

Mortgage—Sale under Power—Duty of Mortgagee to Mortgagor—Breach—Evidence—Representative of Mortgagor—Judgment for Redemption—Interest—Costs.]—Action to set aside a conveyance and to recover possession of land, tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that wherever there was any conflict of testimony between witnesses for the plaintiff and those of the defendants, he accepted the statement of the former class. The executor had a bona fide offer of $1,000 for the property from Haskett, and this was communicated to the solicitor who was assuming to exercise the power of sale, and who nevertheless went on and sold for $650—enough to cover the amount due on the mortgage and on a small judgment for dower in favour of the testator's widow, one of the defendants. In exercising a power of sale a mortgagee may not be exactly a trustee for the mortgagor, but he owes him some duty, a duty which was shamelessly disregarded in this case. There were suspicious circumstances about the transaction: the assignment of the mortgage to Catharine

Marshall, a poor woman living in Detroit; the advance of the necessary money by the solicitor's cheque; the presence of the said poor woman in London to execute the deed to Rylands, the purchaser; and the way in which the purchase-money was made up; but there was not enough evidence to justify a finding that the defendants Rylands and Logie were parties to a conspiracy to cut out the executor; and, therefore, costs should not be awarded against them. There should be a judgment for redemption against the defendants Rylands and Logie, on payment of $650, with interest from the 5th July, 1917. Interest should be allowed because the executor's solicitors were so hopelessly supine in their conduct as to have invited what actually took place. There should be no costs for or against the defendants Rylands and Logie—and it would be a mere matter of form to award costs against the other defendants. The plaintiff should be at liberty to amend his statement of claim so as to pray the relief which was now granted. Sir George Gibbons, K.C., and P. H. Bartlett, for the plaintiff. J. M. McEvoy, for the defendants Rylands, Logie, and Alice Marshall. R. G. Fisher, for the defendant Catharine Marshall.

TORONTO AND HAMILTON HIGHWAY COMMISSION v. COLEMAN —BRITTON, J.—JULY 5.

Contract—Construction of Public Highway—Agreement of Landowner to Pay Bonus—Construction of Drain—Agreement to Pay Proportion of Cost—Defence that Work not Properly Done—Evidence —Counterclaim—Findings of Fact of Trial Judge—Costs.]—Action to recover $500 which the defendant agreed to pay as a bonus if the plaintiffs' highway should be laid out and constructed (as it was) along a cetrain route which would benefit the defendant's property at Burlington; also to recover $565.53, being the difference between the price of a tile-drain and an open drain, the tile-drain being for the defendant's advantage, he having agreed to pay the difference in price and the plaintiffs having constructed a tile-drain accordingly. The defence was, in substance, that the job of constructing the drain was not a finished one, and that the drain itself was utterly worthless for the purpose intended. The defendant counterclaimed for four sums, viz., $1,178, $162.50, $15, and $17.50. The action and counterclaim were tried without a jury at Toronto. BRITTON, J., in a written judgment, reviewed the evidence and found all the issues in favour of the plaintiffs except that as to the $17.50 included in the counterclaim. Judgment for the plaintiffs for $1,065.53 with costs, and for the defendant on his counterclaim for $17.50 with costs. R. S. Robertson, for the plaintiffs. B. N. Davis, for the defendant.

PACAUD v. LEBRECQUE—ROSE, J.—JULY 6.

Vendor and Purchaser—Agreement for Sale of Land—Evidence—Mistake in Description—Rectification of Agreement.]—Action for rectification of an agreement for the sale and purchase of land, dated the 10th April, 1916, so as to make the description therein contained of the land which the plaintiff agreed to buy correspond with what he said was the real subject-matter of the bargain, and for consequential relief. The action was tried without a jury at North Bay. ROSE, J., in a written judgment, after setting out the facts and discussing the evidence, found the issues raised, which were issues of fact only, in favour of the plaintiff, and held that the plaintiff was entitled to the relief claimed, viz., a declaration that the true agreement between the parties was that the defendant sold and the defendant bought the land "secondly" described in the written agreement, together with all those portions of the land shewn on plan M. 72, i.e., parcel 9868, of which the defendant was the owner on the 10th April, 1916; and a decree for specific performance. Something was said by the plaintiff about an agreement for a lane, from the land sold to a certain stream; but this was not mentioned in the pleadings, and the plaintiff's evidence concerning it was not corroborated; so the learned Judge did not deal with it. The defendant was ordered to pay the plaintiff's costs. G. A. McGaughey, for the plaintiff. G. R. Brady, for the defendant.