The
Ontario Weekly Notes

VOL. XIX. TORONTO, DECEMBER 24, 1920. No. 15

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. DECEMBER 13TH, 1920.

BRENNER & CO. v. F. E. SMITH LIMITED.

Writ of Summons—Service on Foreign Corporation-defendant by Serving Person in Ontario—Rule 23—Evidence—No Agent or Representative in Ontario.

An appeal by the defendant company from an order of the Master in Chambers dismissing an application to set aside the service of the writ of summons.

T. N. Phelan, for the defendant company.
H. H. Shaver, for the plaintiffs.

KELLY, J., in a written judgment, said that the writ of summons described the defendant company as of the city of Montreal, which is not in Ontario. There was evidence that the defendant company's head-office and place of business were in Montreal; that it had no place of business in Ontario, and had no person who, as its agent in Ontario, carried on any business of or for it. The plain inference was, that there was no person sufficiently representing the defendant company in this Province on whom the writ of summons could be served, according to Rule 23: Murphy v. Phœnix Bridge Co. (1899), 18 P.R. 495, 502; Ingersoll Packing Co. Limited v. New York Central and Hudson River R.R. Co. and Cunard S.S. Co. Limited (1918), 42 O.L.R. 330.

The appeal should be allowed with costs and the application made to the Master granted with costs.

At the close of the argument it was mentioned that the plaintiffs had gone into bankruptcy. The appeal was disposed of upon its merits, notwithstanding that there was no evidence of leave to proceed being obtained.

HODGINS, J.A. DECEMBER 13TH, 1920.

TEASDALE v. WELSH.

Judgment—Entry of Judgment for Default of Defence—Assessment of Damages by Jury—Motion to Set aside Judgment—Defence on Merits—Affidavit—Excuse for Default—Judgment Set aside on Terms—Payment of Costs—Payment of Money into Court—Execution—Stay of Operation.

Application by the defendant to set aside a judgment entered by the plaintiff upon default of appearance and defence and to be let in to defend.

The motion was heard in the Weekly Court, Toronto.
R. J. Gibson, for the defendant.
W. D. McPherson, K.C., for the plaintiff.

HODGINS, J.A., in a written judgment, said that he thought he had jurisdiction, under Rule 520, to set aside the judgment, which was a default judgment, notwithstanding the fact that the damages had been assessed by a jury. The defence on the merits was sufficiently indicated in the affidavits filed; and, as the Court could not try that issue here, the motion should not be adjourned in order to put in further material. No sufficient excuse was shewn for the neglect by the defendant of the process of the Court leading to judgment. The terms, therefore, on which the judgment would be set aside would be that all the costs thrown away, including the costs of this motion, be paid within 10 days after taxation, and that the sum of $164, the out-of-pocket expense to which the plaintiff had been put, be paid into Court to await the result of the trial. If there was any question of the defendant's solvency, the learned Judge might be spoken to again, with a view to a direction for payment of a further sum into Court. In any case the execution, if issued, might remain in force in the sheriff's hands, but its operation, except as to lands, must be stayed meantime. In default of payment as directed, the application should be dismissed with costs.

HODGINS, J.A. DECEMBER 13TH, 1920.

RE DOUGHTY.

Absentee—Order Declaring Person an Absentee—Application by Person himself to Rescind Order—Absentee Act, 10 & 11 Geo. V. ch. 36, secs. 5, 6—Consent of Committee—Necessity for Notice to Person who Obtained Order—Affidavit Shewing Conditions—Terms of Rescinding Order.

Application on behalf of John Doughty, a person by order declared an absentee under the Absentee Act, 10 & 11 Geo. V. ch. 36, for an order, under sec. 6, superseding the former order. The application was made on the consent of the Chartered Trust and Executor Company, the committee of the estate of the absentee.

The application was heard in the Weekly Court, Toronto.
Clara Brett Martin, for the applicant.

HODGINS, J.A., in a written judgment, said that John Doughty's wife, as the person who obtained the order, should have formal notice of the application to vacate it. Notice might be given and the matter mentioned again. An affidavit must meantime be filed to satisfy the Court, pursuant to sec. 5 of the Absentee Act, that the conditions necessary to enable the order to be set aside had arisen. Mere consent by the committee was not enough.

The order must contain the terms mentioned in the last 3 lines of sec. 6.

SUTHERLAND, J. DECEMBER 14TH, 1920.

RE McCREADY.

Will—Construction—Substituted Bequest to Surviving Children of Sister Named as Beneficiary—Period of Payment—Ascertainment of Class—Children of Deceased Child of Sister not Included.

Application by the executors of the will of William McCready, deceased, and by all the beneficiaries except the infants, for an order determining a question as to the construction of the will.

The application was heard in the Weekly Court, Toronto.
J. E. Lawson, for the applicants.
I. F. Hellmuth, K.C., for the Official Guardian.

SUTHERLAND, J., in a written judgment, said that the will was dated the 14th January, 1902, and there was a codicil thereto of the 9th March, 1906.

The testator died on the 11th March, 1906; his brother John McCready, in or about the year 1912, without issue; his sister Celia Dillert (Dilwroth), on the 1st July, 1918; and his widow, on the 27th February, 1919.

In the third clause of his will the testator gave, devised, and bequeathed unto his wife, Elizabeth McCready, all his personal estate and also part of his real estate, consisting of a house and premises in the city of Kingston.

The fourth and fifth clauses of the will were as follows:—

"Fourthly, I give and devise to my said wife, for and during the term of her natural life, all the rest and residue of my real estate, being the remainder of said lot No. 847, and upon her death I give and devise the said residue in equal shares to my brother John McCready and my sister Celia Dillert, . . .

"Fifthly, if either of my said brother and sister should predecease my said wife, his or her share shall go to the other of them unless such one so deceased should leave a child or children surviving, in which case the latter shall take, and if both my said brother and sister should predecease my said wife, such residuary estate shall go to their children surviving, if any, share and share alike."

The codicil withdrew from the operation of clause 4 another house and lot, and devised it to one Mary Kennedy.

Celia Dilwroth had 7 children, all of whom survived her and the testator's widow, with the exception of Sarah Hancock, who died on the 27th October, 1918, leaving her surviving three children, all of whom were infants.

The point was whether the children of Sarah Hancock were entitled to an interest in the lands and premises of the testator as members of the class of residuary beneficiaries, under clauses 4 and 5 of the will.

The rule of construction in such a case as this is that words of survivorship are to be referred to the period of payment or division, unless there is an indication of a contrary intention: Cripps v. Wolcott (1819), 4 Madd. 11; Stevenson v. Gullan (1854), 18 Beav. 590; In re Poultney, [1912] 2 Ch. 541; Re Douglas (1917), 13 O.W.N. 171; Re Draper (1918), 14 O.W.N. 81.

The children of Sarah Hancock, deceased, were therefore not entitled to any interest in the lands in question.

Costs out of the estate.

MASTEN, J., IN CHAMBERS. DECEMBER 14TH, 1920.

*REX v. NEWTON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Liquor in Place other than Private Dwelling House—Form of Conviction—No Offence Disclosed—Motion to Quash—Notice of Motion not Directed to Objection—Leave to Serve New Notice—Application of Magistrate to Substitute Amended Conviction—Opinion of Court as to Sufficiency of Evidence to Support Amended Conviction—Consideration of Evidence—Onus—Suspicion—Benefit of Doubt—Refusal of Amendment—Conviction Quashed—Secs. 41, 43, 88, 101, 102 of Act.

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Cobourg, for that the defendant, between the 2nd and 25th August, 1920, at the said town of Cobourg, "did have keep or give liquor in a place other than the private dwelling house in which he resides without having first obtained a license under the Ontario Temperance Act authorising him so to do." For this offence a fine of $500 was imposed.

F. M. Field, K.C., and T. N. Phelan, for the defendant.
F. P. Brennan, for the magistrate.

MASTEN, J., in a written judgment, said that on its face the conviction was plainly bad because the defendant was not thereby convicted of any specific offence. The offence was described in an alternative form—"did have keep *or* give liquor:" Rex v. Kaplan (1920), 47 O.L.R. 110, 113.

The only ground of objection stated in the original notice of motion was that there was no evidence to support the conviction. Following the practice established in Rex v. Leduc (1918), 43 O.L.R. 290, the learned Judge gave leave to the defendant to serve a supplementary notice specifying the objection above mentioned, and adjourned the hearing of the motion so that the Crown or the magistrate might, if so advised, ask to have the conviction amended pursuant to secs. 101 and 102 of the Act. He also gave the magistrate leave to file an affidavit in support of the application to amend, and the defendant leave to file an affidavit in answer. This was done, and the defendant's motion to quash and the magistrate's motion to amend were heard on a subsequent day.

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

The magistrate had returned an amended conviction and asked to have it substituted for the original—the new conviction was "for that he, the said John Newton . . . did *have* liquor in a place other than the private dwelling house in which he resides," etc. The affidavit filed by the magistrate made it plain that the conviction was based on his opinion that the evidence proved that the defendant on the 23rd August had liquor in some place other than his private dwelling. It was not for selling, keeping, or giving.

The question whether the amended conviction should be received and substituted for the original should be dealt with in the same way as an application that the Court itself amend the conviction; and the conclusion must depend on whether there is, in the opinion of the Court (not the magistrate), evidence to support the proposed amended conviction. The distinction between the two situations was broad and obvious.

If the conviction is bad on its face, and the Crown seeks to amend it so as to make it good, the amendment is to be made "in such manner as justice may require," provided there is evidence to support the same, and in that case the Court hearing the motion must reach its own conclusions on the evidence and make or permit the amendment if it is itself satisfied, on the evidence, that justice requires it.

Upon the evidence, the learned Judge was unable to hold it established that the defendant had liquor in a place other than his private dwelling. The magistrate did not base his conclusion on any statutory presumption raised by sec. 88. The onus is on the Crown, suspicion is not evidence, and the accused is entitled to the benefit of the doubt: Rex v. McKay (1919), 46 O.L.R. 125. The absence of 31 bottles, out of 48 shewn to have been received by the defendant in his house, wholly failed to establish that the defendant had them somewhere else than in his house.

The 48 bottles went direct from the express office to the defendant's private house. Section 43 of the Act, when read in conjunction with secs. 41 and 88, permits the having of liquor in a place other than a private dwelling house during transportation from one lawful place to another. Rex v. Moore (1917), 13 O.W.N. 315, distinguished.

The application to amend should be refused, and the conviction should be quashed without costs and with the usual order for the protection of the magistrate.

HOLMESTED, REGISTRAR IN BANKRUPTCY. DECEMBER 15TH, 1920.

FISHER v. WILKIE LIMITED.

Bankruptcy and Insolvency—Petition by Creditors for Adjudication in Bankruptcy—Absence of Evidence as to when Debt Accrued—Bankruptcy Act, 1919, sec. 8—Unopposed Petition—Waiver.

An application by creditors on petition for an adjudication of bankruptcy and a receiving order.

H. A. Harrison, for the petitioning creditors.

THE REGISTRAR, in a written judgment, said that he reserved judgment to consider the point whether, in the absence of evidence as to when the petitioning creditors' debt accrued, the application should be granted, in view of the provisions of sec. 8 of the Bankruptcy Act, 1919, and he had come to the conclusion that it should be granted. The petition had been duly served on the debtor company, and was unopposed. The provisions of sec. 8 were enacted for the benefit of debtors, but they are provisions which may be waived by debtors—quilibet potest renunciare juri pro se introducto—and at all events, in the absence of evidence one way or the other, as the motion was unopposed, it should be assumed that the petitioners were rightly in Court and entitled to the relief which they claimed.

The order should therefore be granted.

ROSE, J. DECEMBER 15TH, 1920.

DUGGAN v. PERKINS.

Mines and Mining—Action to Establish Partnership in Mining Claim and for Account of Profits—Evidence—Corroboration—Mining Act of Ontario, R.S.O. 1914 ch. 32, sec. 71—Defence of Res Judicata—Decision of Mining Recorder upon Dispute—Jurisdiction—Secs. 123 (2) (a), 131 (1), (5), of Act—Failure to Shew Adjudication upon Matter in Controversy in Action—Judgment Directing Accounting—Reference—Costs.

Action for an account of the profits derived from the sale of a mining claim staked and recorded in the name of the defendant, the plaintiff alleging that the claim was the property of himself and the defendant as partners.

The action was tried without a jury at Haileybury.

W. A. Gordon, for the plaintiff.

F. L. Smiley, for the defendant.

ROSE, J., in a written judgment, said, after setting out the facts, that he could not see in the evidence anything that justified the conclusion that the claim which the plaintiff staked, or assisted in staking, in the name of the defendant, was to be treated as anything but partnership property. In the questions and answers in the defendant's examination for discovery and in the evidence of one Macauley there was the corroboration required by sec. 71 of the Mining Act of Ontario, R.S.O. 1914 ch. 32.

The defence that the question now before the Court was determined by a decision of the Mining Recorder at Elk Lake was raised by pleading.

In December, 1919, the plaintiff filed with the Recorder a "dispute" against the mining claim, in which he alleged that the claim was illegal or invalid, because the plaintiff was "entitled to an undivided half interest in the said claim, which had been transferred by the recorded holder"—the defendant—"to one James C. Nelson." The plaintiff claimed "a one-half interest in the said claim, the same having been staked by A. S. Perkins and myself in equal shares, and was transferred to James C. Nelson without my knowledge, the said Nelson being well aware of my claim." It did not appear upon whom, if upon any one, the "dispute" was served. It was dated and the affidavit in support of it was sworn on the 22nd December, 1919, and on the same day the Recorder took the evidence of the plaintiff and Perkins and Nelson and another witness, and decided and ordered "that James C. Nelson still holds all interest in mining claim M.R. 5868, and the disputant Lawrence Duggan is not entitled to any interest in this claim."

By sec. 123 (2) (*a*) of the Act, it is declared that the Mining Commissioner shall have jurisdiction and power to hear and determine all claims, questions, and disputes arising before patent between contesting claimants for or in respect to any right, interest, or title in any unpatented mining claim. By sec. 130 (1), a Mining Recorder is given, as to lands situate in his mining division, all the powers conferred upon the Commissioner by sec. 123; and, by sec. 130 (5), the decision of the Recorder is final and binding unless appealed from. The lands in question are in the mining division of the Recorder by whom the "dispute" was heard, and that Recorder had jurisdiction to determine such a question as was raised before him; and it was not open to the plaintiff, who initiated the proceeding, to suggest that in this particular case the Recorder was without jurisdiction, merely

because the proceedings were initiated by a "dispute," instead of in some other way. There had been no appeal from the Recorder's decision; and, in considering the plea of res judicata, all that need be examined into was the question whether the Recorder did in fact decide, as between the plaintiff and Perkins, or whether the plaintiff was estopped from shewing that the Recorder did not decide, the question raised by this action.

What the plaintiff had to establish, in order to succeed before the Recorder, was that (1), as between himself and Perkins, the mining claim was partnership property, and (2) that Nelson was affected by knowledge of the relations between the plaintiff and Perkins. There was nothing to shew whether the Recorder held against the plaintiff as to both the facts which the plaintiff had to establish, or as to only one, and, if as to only one, which one. The Recorder may have based his order upon a finding that Nelson, as transferee from the recorded holder, was not affected by the relations between the plaintiff and Perkins, and therefore that it was proper that the mining claim should continue to stand on the records in his office in the name of Nelson.

The defendant not having proved that there had been a previous adjudication upon the matter in controversy in this action, the plea of res judicata failed.

There should be judgment declaring that the defendant was bound to account to the plaintiff for his dealings with mining claim M. R. 5868, and there should be a reference to the Master at Haileybury to take the accounts. The defendant must pay the plaintiff's costs down to judgment; subsequent costs reserved until after report.

ORDE, J., IN CHAMBERS. DECEMBER 17TH, 1920.

TORONTO GENERAL TRUSTS CORPORATION v. ARENA GARDENS LIMITED.

Appeal—Application for Leave to Appeal from Order of Judge Refusing to Set aside Receiving Order—Rule 507—Judgment Creditors—Realisation of Security by Trustees for Bondholders—Collusion—Remedy—Estoppel—Merits—Refusal of Application.

Motion by the Toronto Hockey Club for leave to appeal from the order of LATCHFORD, J., ante 236.

J. F. Boland, for the applicants.
A. C. McMaster, for the bondholders.
R. O. Daly, for the plaintiffs.

ORDE, J., in a written judgment, said that on the 20th November, 1920, an order was made by Middleton, J., appointing a receiver of all the undertaking and assets of the defendants mortgaged or charged under a certain mortgage trust deed to secure the defendants' bonds. The plaintiffs were the trustees for the bondholders, and this action was brought to realise the security.

The Toronto Hockey Club, as judgment creditors of the defendants, moved to vacate the receivership order, and the motion was dismissed by Latchford, J. (ante 236). An application, under Rule 507, for leave to appeal from the order of Latchford, J., was now made.

It was alleged by the applicants that the mortgage trust deed, in so far as it purported to mortgage or charge the chattels and other personal assets of the defendants, was void as against the applicants under the provisions of the Bills of Sale and Chattel Mortgage Act. But, assuming that to be the case, their remedy as creditors was not by way of motion to set aside the receivership order, but by some proceeding to realise upon their judgment, such as execution and seizure by the Sheriff, followed, if a contest should arise, by interpleader. The situation was in substance no different from that of a chattel mortgagee who had taken possession under a security alleged to be defective or void.

It was suggested that the proceedings to enforce the security had been the result of collusion between one of the bondholders and the trustees, the plaintiffs, because the proceedings had been taken at his instance. But how could the term "collusion" be applied to anything which took place between the trustees and one of the cestuis que trust having for its object the enforcement of the rights of the bondholders? It might as well be suggested that there could be collusion between a principal and his own agent.

It was suggested that the order of Latchford, J., or an order refusing leave to appeal from it, might operate as an estoppel against the applicants in any proceedings they might take, upon the principle of res judicata. That cannot be so, because the order in question does not deal with the merits of the matter at all, but merely with the procedure adopted by the applicants to enforce their judgment.

There appeared to be no reason to doubt the correctness of the order of Latchford, J., and the application for leave must be refused. The refusal of leave is based upon the assumption that the merits have not been dealt with; and, so far as there is power so to provide upon this application, the refusal is without prejudice to any of the rights of the applicants.

Application refused with costs.

LENNOX, J. DECEMBER 18TH, 1920.

BELL v. GUILBEAULT.

Vendor and Purchaser—Agreement for Sale of Land—Formation of Contract — Correspondence — Sufficiency — Identity of Subject-matter—Store Property—Easement—Use of Lane—Specific Performance—Damages—Costs.

An action for specific performance of the defendant's agreement to sell to the plaintiff a store-property in the town of Mattawa.

The action was tried without a jury at North Bay.

J. H. McDonald, for the plaintiff.

J. H. McCurry, for the defendant.

LENNOX, J., in a written judgment, said that the land in question was lot 3 on the south side of the Mattawa and Pembroke road, which is the "Main street" of the town, less 30 feet along the easterly side of the lot. The easterly 5 feet of the land in question and the westerly 5 feet of the 30 feet referred to were used as a lane, having been set apart by previous owners as a means of ingress and egress to and from all parts of the adjoining properties and communicating with the "Main street." The defendant obtained this property from Angela Meindl and her husband, by an unregistered deed of the 11th October, 1919. The property consisted of the land and upon it a brick building used as a store with a public hall above it, a log dwelling house about 5 feet back from the rear of the store, and stables and outbuildings in the rear of the dwelling house. Access to the rear of the store, to the public hall, to the dwelling house, and to the outhouses, was obtained by means of this lane. There was a direct means of communication between the store and the dwelling through a rear door in the store building, without using the lane. Continuously since the store was built, the whole lot had been occupied and used as one property, and all the buildings except the hall had been used in connection with the business of the store. In March, 1920, the property was under lease to one Payette, who carried on business in the store, lived in the dwelling, and utilised the stables and outbuildings in connection with the delivery branch of his business. The property had always been used in this way. Subject to Payette's tenancy, the defendant was the owner, and he desired to sell out.

The plaintiff relied upon correspondence—letters and telegrams—to make out the contract.

The question for decision was, whether the correspondence sufficiently identified the subject of the alleged contract.

There was no room for doubt as to what both parties were writing about—it was the property which the defendant had recently bought from the Meindls, a mercantile site with its adjuncts and accessories, easements, etc., a usable going concern. If the defendant had not meant the whole property obtained from the Meindls, when he wrote on the 22nd March, 1920, he would have defined what he was selling, have made stipulations as to the lane, and he would have wired in reply to the plaintiff's telegram of acceptance. As a matter of fact, it was only when the defendant got a better offer that he began to hedge and advance the amazing proposition that no lane was included in his offer.

The writings sufficiently identified the property as claimed by the plaintiff.

Counsel for the defendant did not raise any question as to the tender made on behalf of the plaintiff, if indeed any question was open to the defendant. Counsel for the plaintiff abandoned a claim for substantial damages made in his pleading, and stated that he would be content with nominal damages, although he had undoubtedly sustained considerable loss.

There should be judgment for the plaintiff for $5 damages and directing the defendant to convey to the plaintiff the whole of the property conveyed by the Meindls, upon payment of the price agreed; the defendant to pay the plaintiff's costs of the action.

LENNOX, J. DECEMBER 18TH, 1920.

McINTOSH v. WILSON.

Malicious Prosecution—Advice of Counsel—Failure to Lay Facts Fully before Counsel—Verdict of Jury—Damages—Costs.

An action for malicious prosecution and false arrest and imprisonment.

The action was tried with a jury at Picton.

J. W. Curry, K.C., for the plaintiff.

C. A. Payne, for the defendant.

LENNOX, J., in a written judgment, said that at the trial the plaintiff limited his claim for damages to the malicious prosecution branch.

The jury found against the defendant, and assessed the plaintiff's damages at $400.

The defendant, before instituting the prosecution against the plaintiff, consulted counsel; and the main issue at the trial was, whether the defendant had fairly and fully laid the facts and circumstances before counsel, and in good faith acted upon his advice in instituting and promoting the criminal proceedings complained of. From the evidence of the defendant and the gentleman referred to, it was manifest that all the material facts and circumstances were not placed before the latter.

Aside from the claim for injured reputation and loss of earnings, estimated by the plaintiff in thousands, he was at an actual expense, in journeying to several sittings of the Court, far beyond the amount of damages awarded. If he was entitled to damages at all—and the learned Judge thought the plaintiff was so entitled—he was entitled to a substantially larger sum than $400. When he sued, if he believed in the justice of his claim, he was justified in expecting a sum beyond the jurisdiction of a County Court.

There should be judgment for the plaintiff for $400, with costs according to the tariff of the Supreme Court of Ontario.

CORRECTION.

In PETERSON v. BITZER, ante 231, on p. 232, 20th line from top, after "was" insert "not."