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HIGH COURT DIVISION.

BRITTON, J. JULY 8TH, 1913.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Mortgage—Judgment for Redemption or Sale—Master's Report—Appeal—Assignees of "Parts of the Equity of Redemption"—Subsequent Incumbrancers—Parties — Account — Amount Due—Costs—Authority of Previous Decision.

Appeal by the defendants McKillican and Smith from an interim report made by the Master at Ottawa, dated the 13th May, 1913.

C. H. Cline, for the appellants.
F. A. Magee, for the plaintiffs.

BRITTON, J.:—A previous report was made by the Master, and an application by way of appeal from it was made to Mr. Justice Sutherland, on various grounds, to open it up. This appeal was dismissed: see 3 O.W.N. 1595. An appeal from Mr. Justice Sutherland's order was taken to a Divisional Court. That Court thought the facts not fully found by the Master, and sent the case back for further inquiry: see ante 128.

After further inquiry, the Master made the report which is the subject of the present appeal. I have before me the findings of fact by the learned Master, his report, and his reasons for his findings and for his report. The appeal was argued ably and at length before me, and, in addition, there were placed before me the written arguments used before the Master and before my brother Sutherland and before the Divisional Court.

I am of opinion that subsequent purchasers of portions of the mortgaged property, who have given mortgages thereon, are not necessarily subsequent incumbrancers, within the meaning of the Rules. The plaintiffs were at liberty to make such of the owners of (as put by the Master) "parts of the equity of redemption," as they, the plaintiffs, thought proper, parties to the action. The plaintiffs were not bound to add as parties all who appeared to have claims to portions of the mortgaged lands.

I cannot say that the learned Master was wrong in finding that there was nothing due by the defendant McKillican to the plaintiffs. Having so found, it would have been more logical to have given McKillican her costs. I would do so now; but, by the judgment of the Divisional Court, costs were left to the discretion of the Master. I am bound by that judgment and cannot interfere with the discretion vested in him. A very large amount of costs has already been incurred in this case—in fact the question is now mainly one of costs, as it appears that the residue of the mortgaged property is amply sufficient to satisfy the balance of the mortgage-debt; but I am bound to say that some of the points raised by Mr. Cline, for the appellants, are important and difficult, and would seem to invite the opinion of an Appellate Division.

I deal only with the last report and the reasons for it, not with any previous opinions or findings during the inquiry.

I agree with the Master that the defendant Smith is not, in this action, and as the matter now stands, entitled to an account and statement in detail of the plaintiffs' mortgage account and of the plaintiffs' dealings with the mortgaged property.

The appeal will be dismissed, under the circumstances, without costs.

FALCONBRIDGE, C.J.K.B. JULY 8TH, 1913.

NEOSTYLE ENVELOPE CO. v. BARBER-ELLIS LIMITED.

Contract—License to Manufacture and Sell Patented Envelopes —Non-compliance with Postal Regulations—Failure of Consideration—Repudiation of Contract—Acquiescence—Modified Envelope—Applicability of Patent.

Action for damages for breach of a contract.

C. S. MacInnes, K.C., and Christopher C. Robinson, for the plaintiffs.

G. F. Shepley, K.C., and G. H. Kilmer, K.C., for the defendants.

FALCONBRIDGE, C.J.:—This is an action brought on an agreement dated the 26th September, 1910, whereby the plaintiffs granted to the defendants a license for eighteen years for the manufacture and sale of envelopes said to be covered by a certain patent of the Dominion of Canada, and, in consideration thereof, the defendants agreed to pay to the plaintiffs a certain royalty on a minimum quantity to be manufactured by the defendants—the quantity running into the millions, and increasing year by year up to a certain period.

The patented envelope was alleged by the plaintiffs and was supposed to be so constructed that circulars and other printed matter, within the classification of third-class postal matter, enclosed therein, were secured from falling out of the envelope and were secret, but that, the end of the envelope being open, the rate of postage would be that payable in respect of third-class matter, which was much less than the usual letter rate.

Section 82 of the Postal Regulations of the Dominion of Canada provides as follows: "Every packet of printed or miscellaneous matter must be put in such a way as to admit of the contents being easily examined. For the greater security of the contents, however, it may be tied with a string. Postmasters are authorised to cut the string in such cases if necessary to enable them to examine the contents; whenever they do so, they will again tie up the packet."

It is claimed by the defendants, and I find to be proved, that the envelope in question, when in use and in transit through the mails, cannot be opened so as to allow the contents to be examined and replaced without destroying the envelope. The

vice-president of the plaintiff company, H. A. Swigert, made a demonstration of the envelope in the witness-box, and, manifestly somewhat to his own surprise, did succeed in opening one without destroying the envelope; but no unskilled person could possibly do so, and no postmaster or post-office clerk, endeavouring to open it in accordance with the regulations, could do so without destroying the envelope, except occasionally and by accident. . . .

The defendants, who manufacture and sell envelopes on a very large scale, submitted a sample of this envelope to the post-office authorities, viz., to Mr. Ross, Chief Post Office Inspector, who condemned the device, and held that the proposed use of that envelope, at the rate of postage for third-class matter, would infringe the Postal Regulations. Apart from any rule of the department, I find as a fact that it does infringe the regulations, for the reasons I have stated above.

A great deal of correspondence ensued, the defendants claiming to rescind the contract altogether; and the plaintiffs made a modification of the envelope above-described, and secured from the post-office department the privilege of enclosing printed matter in it to be mailed at one cent for two ounces. . . .

It is claimed by the defendants that this is not what they bought; and this I find to be the case. It is true that it is easier to get at the contents, but it presents very little, if any, advantage over the old "sealed yet open" envelope, exhibit 10. . . .

This is not what the defendants bought. I doubt very much whether it would be held to be covered by the plaintiffs' patent, although this is not before me for decision, in view of my opinion on the main issue. . . .

I find that the consideration of the contract has wholly failed, and that the plaintiffs cannot recover. Apart from any question of representation or misrepresentation by the plaintiffs' agent, the parties were contracting with reference to an article which would answer the requirements of the Canadian Post-office Department, so as to send the matter enclosed therein at the lower rate of postage; and this article failed to answer them.

There is another element in the case which I am also about to pass over, but it might present a serious difficulty in the plaintiffs' way, if I had otherwise taken a favourable view of their case; and that is, the effect of the license granted by the plaintiffs to the W. Dawson Company on the 10th August, 1911, for the manufacture and sale of the envelope east of Kingston,

and the privilege of selling in Manitoba and Western Canada. This is relied upon by the defendants either as an adoption of or acquiescence in the defendants' attempt to rescind the contract, or as an act in direct violation of the contract and so working a rescission.

The action will be dismissed with costs.

BRITTON, J. JULY 12TH, 1913.

DOUGLASS v. BULLEN.

Boundaries—Establishment of Line between Adjoining Parcels of Land—Evidence—Encroachment—Damages—Injunction—Interim Order—Undertaking as to Damages—Remoteness—Refusal to Order Inquiry—Costs.

Action to establish the boundary-line between the land of the plaintiff and that of the defendant on the east side of Surrey Place, in the city of Toronto, and for an injunction restraining the defendant from encroaching. The plaintiff Douglass was the owner and the plaintiff Woods the tenant of land which lay to the north of the defendant's land.

The action was tried at Toronto before BRITTON, J., without a jury.

A. McLean Macdonell, K.C., and O. H. King, for the plaintiffs.

Shirley Denison, K.C., and F. C. Snider, for the defendants.

BRITTON, J.:— . . . The plaintiff Douglass purchased in 1886, and the conveyance to him describes the land by metes and bounds. Since his purchase, the plaintiff Douglass has been in undisputed possession. In the early part of 1912, the defendant purchased the property lying to the south of the plaintiffs', for the express and avowed purpose of erecting thereon a large and expensive apartment house. The plaintiffs were quite opposed to such a building close to their southern boundary, and they were on the alert to prevent the defendant trespassing to the slightest extent in prosecuting his building operations.

The plaintiffs allege that, immediately before the commencement of this action, viz., on the 10th June, 1912, a surveyor of

the defendant entered upon the plaintiffs' land and planted a post, which, the surveyor alleged, marked the north-east boundary of the defendant's land. The plaintiffs allege that the surveyor assumed to determine, for the defendant, the southern boundary-line of the plaintiffs' property, that being the northern boundary line of the defendant's property. The plaintiffs allege that this post was at least three inches upon the land of the plaintiffs, and that the so-called boundary-line encroached upon the plaintiffs' land distances varying from one and three-quarter inches to nine and one-half inches. Because of this action of the surveyor, the plaintiffs, on the 10th June, applied for and obtained an interim injunction order. The usual undertaking as to damages was given, and the plaintiffs were allowed to file and use further material on motion to continue the injunction. The motion to continue was argued on the 16th July, 1912, and continuance was refused: 3 O.W.N. 1619. By that order, the costs of and incidental to both motions were reserved to be disposed of at the trial or other final disposition of this action. The defendant then proceeded with the building, and, with the exception of that part of the northern foundation wall, called the footings, erected it wholly upon his own land. There is now no claim for an injunction.

At the opening of the trial before me, counsel for the plaintiffs stated that the action was to fix the boundary between these properties of the plaintiffs and defendant, and the plaintiffs asked for a declaration as to the true boundary-line.

During the trial, counsel for the plaintiffs frankly stated that, although the encroachment by the footings is something to complain of, that is a comparatively trifling matter, and the action was not brought in reference to these. As to these footings the defendant also alleges that the matter was of trifling character, and he has paid into Court $25, alleging that sum to be sufficient compensation to the plaintiffs, if they are entitled to anything.

The defendant claims large damages consequent upon the injunction, and asks for a reference as to these.

I am of the opinion that the plaintiffs were not entitled to proceed by injunction. They acted hastily because they did not want an apartment house close to their southern boundary. They thought that the defendant intended to act in a high-handed and arbitrary manner, and they looked with alarm upon every movement the defendant made. The plaintiffs had the right, of course, to watch and protect even an inch of their

territory, but, in a matter of boundary, pending negotiations, proceeding by injunction was not the authorised way. . . .

[Reference to the correspondence and other evidence.]

The evidence satisfies me that the defendant did not intend to take or use or injure any part of the plaintiffs' land. There was no question of removing the plaintiffs' fence further than was necessary to enable the defendant to work to the line.

The defendant did speak of claiming the land to the post mentioned by Wilson, and did speak of the projecting eave or cornice of the stable; but, apart from a suggestion as to his right, he had done nothing up to the time of issuing the writ beyond what seemed reasonable under the circumstances. The acts complained of, even if done, were not likely to do any irreparable damage to the plaintiffs. If the defendant had actually commenced to build any part of his wall upon the plaintiffs' lands, he would have done so at his own risk and loss, and would be obliged to pay damages, if any, to the plaintiffs, and money in payment of damages would be an adequate remedy. Then the matter was in fact comparatively trifling to the plaintiffs. And an injunction might do the defendant great damage; and, if it did not in fact injure, it cannot be held to excuse the plaintiffs. This seems to me a case where from first to last there was no intention to injure the plaintiffs; and, had the plaintiffs attempted in a reasonable way to meet the defendant, a settlement of all the small matters in dispute could have been arrived at. My inference from the evidence is, that the defendant did not at first intend to claim or encroach upon any land in possession of the plaintiffs. After relations had become strained, the defendant apparently thought that, if his conveyance called for it, and if the surveyor was right in giving him an extra few inches, he would take it, but he did not intend to fight for it, nor did he in fact take it, and has not in this action claimed it. The plaintiffs point to the defendant's examination for discovery as shewing his real intention before the injunction order issued. The defendant's answers upon that examination go no further than to challenge or doubt the plaintiffs' paper title to as much land as they had in possession. The defendant did not set up any claim beyond what I have above stated.

The plaintiffs' claim for an injunction fails. They had a cheaper, a more just and convenient remedy for all the alleged wrongs done by the defendant: Neal v. Rogers, 22 O.L.R. 588.

The defendant says that, owing to the injunction, he was unable from the 10th June to the 16th July to proceed with the

erection of the apartment house, and thereby sustained heavy damages. These he claims under the plaintiffs' undertaking, and asks for a reference.

The order is, that the defendant "be restrained from wrongfully entering upon the plaintiffs' lands, from pulling down the plaintiffs' fences, from wrongfully taking away the support of the plaintiffs' lands, from encroaching on the boundary of the plaintiffs' lands, with excavation for a building, or in any other way trespassing upon the lands of the plaintiffs, as set out in the writ of summons."

There seems nothing in that order to prevent the defendant from doing all that he says he desires to do, or all that he afterwards did, viz., erecting the apartment house upon his own land, unless the description by metes and bounds in the plaintiffs' writ was erroneous and so misled the defendant.

The plaintiffs are responsible, at least to the extent of costs, for wrongfully proceeding by injunction. The plaintiffs put the law in motion, put the defendant upon his defence; but the plaintiffs are not responsible in damages which, if sustained, resulted from an erroneous interpretation by the defendant of the injunction order.

The defendant has, in answer to the plaintiffs' demand, furnished particulars of alleged damages. These particulars fill six pages and a half, and the damages are of a very varied character, amounting to very many thousands of dollars.

The Court is not bound to grant an inquiry as to damages, even where the defendant has sustained some damage by the granting of the injunction, but it has a discretion and may refuse any inquiry if the damage is trivial or remote. See Smith v. Day, 21 Ch.D. 421.

A considerable amount of the defendant's claim is for alleged loss of rent. . . . The damages ought to be confined to the immediate natural consequences of the injunction, under the circumstances, which were within the knowledge of the party obtaining the injunction. The damages claimed are, in my opinion, too remote. The defendant gave notice to the plaintiffs that he was liable to suffer damage by reason of the injunction, and that he would hold the plaintiffs responsible; but, as to such damages as are claimed, the plaintiffs could have no knowledge, and they could not have been within their reasonable contemplation when the order was asked for. Damages should be confined to circumstances of which the plaintiffs had notice. See Kerr on Injunctions, p. 592.

No doubt, the defendant has suffered some damage, but I cannot sort out damage by reason of the injunction distinct from loss of time and trouble and detriment arising from litigation; so no inquiry should be directed. See Gault v. Murray, 21 O.R. 458.

There will be judgment declaring a line as now agreed upon between the parties to be the true boundary-line between the properties of the plaintiffs and defendant. This line may be described, if the parties agree, by Mr. Van Nostrand, surveyor. If they do not agree, I will set out the line in the judgment, upon the minutes being spoken to.

The plaintiffs will be entitled to the $25 paid into Court as full compensation for the lapping or extension of footings of the defendant's wall upon the southern part of the plaintiffs' land.

In so far as the action was for an injunction, it will be dismissed with costs payable by the plaintiffs to the defendant.

There will be no damages to the defendant, and no inquiry will be directed. In so far as the defendant has made such damages a matter of counterclaim, the counterclaim will be dismissed without costs.

CRUCIBLE STEEL CO. v. FFOLKES—LENNOX, J., IN CHAMBERS—JUNE 10.

Judgment Debtor—Examination of Transferees—Con. Rule 903—Action pending to Set aside Transfers.]—Appeal by the plaintiffs, judgment creditors, from the order of the Master in Chambers, ante 1561. LENNOX, J., dismissed the appeal with costs. Harcourt Ferguson, for the plaintiffs. J. A. Worrell, K.C., for the transferees.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO.—BRITTON, J.—JULY 16.

Water and Watercourses—Navigable River—Power Companies' Dam—Decrease in Supply of Water for Navigation—Injury to Steamboat Business—Findings of Fact of Trial Judge—Damages—Foreign Company Joining with Ontario Company in Construction of Dam—International Stream—Jurisdiction over Foreign Company.]—The plaintiff company was the owner

of steamboats used in navigating Rainy River and the Lake of the Woods. The head-office was at Kenora, and the company had made arrangements for the season of 1911 for the transportation of freight and passengers between the towns of Kenora and Fort Frances and intermediate ports. The two defendant companies—the Ontario and Minnesota Power Company and the Minnesota and Ontario Power Company—had constructed a dam across Rainy River, above the International Falls, and used it for the production of power by means of sluices and gates in the dam. The plaintiff company complained that during the season of 1911, the defendants, by their dam and by the operation of gates and sluices therein, so obstructed the water that navigation in Rainy River was impossible for a considerable portion of the season, and that the plaintiff company was unable to ply its boats between Fort Frances and Rainy River and intermediate ports.—The two defendant companies were under the same management and control. The Minnesota and Ontario Power Company, however, was incorporated in the State of Minnesota, while the other was an Ontario corporation. The Minnesota company entered a conditional appearance and disputed the jurisdiction of the Court. The learned Judge said that the two companies together and for a common purpose constructed the dam in question. The Ontario company did the work necessary on the Canadian side of the boundary-line, and the Minnesota company did the work on the other side. The dam was a continuous, connected work, extending completely across Rainy River. If the dam as a whole so interfered with the flow of water as to cause damage to a person using the Canadian side of the river, the Minnesota company was equally responsible with the Ontario company; and, therefore, the Court had jurisdiction to entertain the action as against the Minnesota company, as well as against the Ontario company.—The plaintiff company had two steamers, the "Kenora" and the "Agwinde." The learned Judge was of opinion that the evidence did not establish that there had been any such interference by the defendants with the flow of the water as to cause damage to the plaintiff company in the running of the steamer "Kenora." As to the "Agwinde" he came to the conclusion, with some hesitation, that the defendants did so interfere with the natural flow of the water from above the International Falls into Rainy River as to cause damage to the plaintiff company by preventing the running of the "Agwinde" during part of the season of 1911.—As to the damages for

which the defendants were liable, the learned Judge said that comparatively little of the plaintiff company's loss during the season of 1911 was properly attributable to the defendants. The "Agwinde" lost twelve trips during the season. The plaintiff company was not entitled to recover for alleged loss by reason of the route being discredited, nor for damage to future prospects of navigation business; such damages were too remote. The damages were assessed at $540, for which amount judgment was given for the plaintiff company with costs. I. F. Hellmuth, K.C., and A. R. Bartlett, for the plaintiff company. Glyn Osler, for the defendants.

RAINY RIVER NAVIGATION CO. v. WATROUS ISLAND BOOM CO.—BRITTON, J.—JULY 16.

Water and Watercourses—Navigable River—Obstruction by Saw-logs—Delay in Navigating Vessel—Evidence—Findings of Fact of Trial Judge.]—The plaintiff company alleged that the defendant company, on or about the 18th June, 1911, by their saw-logs floating on Rainy River, and by their booms used to gather and keep the saw-logs in control, delayed the steamer "Agwinde," belonging to the plaintiff company, for several hours when on her regular route in navigating Rainy River; that the same steamer, on her return trip, was in this way delayed for several hours; and, again, that the same steamer was similarly delayed on the 23rd, 24th, 25th, and 27th June. It was charged that the defendant company placed piers in the middle of the channel, which further obstructed and delayed the "Agwinde," by reason of which the plaintiff company sustained damage; and a claim was made for $10,000. This action was tried with one by the same plaintiff company against the Minnesota and Ontario Power Company and the Ontario and Minnesota Power Company, supra. The learned Judge said that in this case there was no evidence that the defendants erected piers in Rainy River, or that any pier in such river so obstructed navigation as to delay the steamer "Agwinde" as charged; that the defendant company in floating its saw-logs, and in using the boom or booms as it did, was using the river in a reasonable way, in all the circumstances, and that there was no wilful or wrongful obstruction of navigation; that the defendant company so opened its booms and so moved its logs as to inconvenience the steamer of the plaintiff company as little

as possible; that it did all that could reasonably be expected in making way for the steamer. The defendant company was not guilty of any negligence or of any wilful wrongdoing; and the plaintiff company, although delayed for a short time on certain occasions when passing the logs, did not incur any appreciable or measurable damage by reason thereof. The defendant company's logs had, subject to reasonable limitations, an equal right upon the river with the steamer. The steamer must be so navigated and used as not measurably to prevent the defendant company from keeping together and moving the saw-logs to their destination. The defendant company must not so fill the river with logs and booms as to prevent navigation by the steamer; there must be give and take. In this case the defendant company's servants made the openings within a reasonable time and gave the plaintiff company reasonable facility in navigating the steamer. The plaintiff company's claim in this action was quite inconsistent with the claim in the other, where damages were, at least in part, sought for detention of the same vessel, covering the same period, because of keeping back the water necessary for navigation purposes. Action dismissed with costs. I. F. Hellmuth, K.C., and A. R. Bartlett, for the plaintiff company. Glyn Osler, for the defendant company.

CANADA CARRIAGE CO. v. LEA—LENNOX, J., IN CHAMBERS—JULY 17.

Solicitors—Lien on Fund in Court for Professional Services—Payment out.]—Motion by solicitors for an order for payment out of the moneys in Court to the credit of the Durant Dort Carriage Company. LENNOX, J., said that it appeared that the moneys in Court to the credit of the company were the fruit and result of professional services rendered by Messrs. Cahill & Soule and Carscallen & Cahill; that their bill of costs had been taxed and allowed at $855.84; and that the moneys in Court did not amount to so much as was owing to the solicitors, the applicants. Notice of the application had been duly served; and the company had not appeared. Order made in the terms of the notice of motion. T. H. Peine, for the applicants.

LAIDLAW LUMBER CO. v. CAWSON—LENNOX, J., IN CHAMBERS—JULY 17.

Interpleader—Order Directing Issue—Parties—Who should be Plaintiff.]—Appeal by the claimant from an order of the Master in Chambers directing that she should be plaintiff in an interpleader issue. LENNOX, J., said that it would, perhaps, prejudice the trial of the interpleader issue were he to go minutely into his reasons for thinking that the learned Master in Chambers was not wrong in making the claimant plaintiff in the proceedings. The way in which the property was acquired, was dealt with, and was found, to say nothing of the circumstances of a lady, in the claimant's position, investing in two automobiles, quite justified the order made. C. M. Hertzlich, for the claimant. G. F. McFarland, for the execution creditors. R. J. Maclennan, for the Sheriff of Toronto.

RE MCCOUBREY AND CITY OF TORONTO—LENNOX, J.—JULY 17.

Municipal Corporation—Regulation of Barber Shops—Early Closing By-law—Validity—Statutes.]—Motion by Charles McCoubrey for an order quashing by-law No. 6513 of the City of Toronto, passed on the 16th June, 1913, and known as the barbers' early closing by-law. LENNOX, J., said that he saw no reason to change the opinion he expressed at the argument, namely, that the by-law substantially complied with the Act. The legislative meaning was not at all clearly expressed, either in 4 Edw. VII. ch. 10, or in the Act of last session; but the exceptions of sec. 84, as applying to barber shops, would lead to manifest absurdity. The by-law should be amended by striking out the words "owner complained of," and in all other respects the application should be dismissed and the by-law confirmed. Owing to the unsatisfactory wording of the statute, there should be no costs. T. J. W. O'Connor, for the applicant. Irving S. Fairty, for the city corporation.

CORRECTION.

In Blaisdell v. Raycroft, ante 1569, 15th line from the bottom, the figures 4,800 should be 4,000.