The
Ontario Weekly Notes

VOL. XV. TORONTO, OCTOBER 11, 1918. No. 5

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 30TH, 1918.

MACDONELL v. KEEFER.

Mortgage—Action on—Title of Mortgagee—Failure to Impugn—Evidence—Amount Due—Interest.

Appeal by the defendant from the judgment of LATCHFORD, J., 14 O.W.N. 25.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

Peter White, K.C., for the appellant.

J. L. Whiting, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. SEPTEMBER 25TH, 1918.

RE SMITH.

Will—Construction—Devise of Farm to Son for Life Subject to Charge of Legacies and Annuity to Widow—Death of Son before Payment of Legacies—Survival of Widow—Residuary Gift—Sale of Farm—Disposition of Proceeds.

Motion by the executor of the will of Thomas Smith, deceased, for an order declaring the true interpretation thereof in regard to certain questions which had arisen.

The motion was heard in the Weekly Court, London.

M. P. McDonagh, for the executor.

F. F. Harper, for the estate of Crowell Smith.

R. G. Fisher, for the testator's widow and two of the next of kin and legatees.

W. R. Meredith, for the committee of one of the next of kin.

H. S. Blackburn, for other next of kin and legatees.

MEREDITH, C.J.C.P., in a written judgment, said that the difficulties arose from the failure to provide in the will for an event which had happened—the testator's widow had outlived her son Crowell. The testator died in 1909; Crowell, in 1913; the widow was still living.

Notwithstanding the oversight, if in the whole will words could be found which sufficiently disposed of the estate, in the event which had happened, effect might be given to them; otherwise there was an intestacy as to that part of the estate which was in question in this application. The rest of the estate was fully and clearly disposed of in the will.

By clause 2 of the will, the testator devised a farm to Crowell for his life, subject to certain legacies and an annual payment of $40 to the widow, charged upon the land. By clause 3, the testator devised the farm, subject to Crowell's life estate, to his executors in trust to sell it upon the death of Crowell and to divide the proceeds amongst the testator's daughters and his other son.

With regard to clause 3, the learned Chief Justice said that the disposition therein made was only in case of the death of Crowell after payment of all the bequests, including the annual sum his mother—to hold otherwise would make his death a revocation of the will to the extent to which such legacies remained unpaid at his death, contrary to the plain purpose of the testator expressed in other parts of the will.

By clause 4, the testator directed that Crowell should furnish the widow with 6 cords of firewood every year during her life; and, in event of Crowell failing to comply with any of the conditions of the will or failing to make any of the payments, he should forfeit his right to the land, and the executors should sell it and apply the proceeds in manner directed.

This 4th clause, the Chief Justice said, seemed to apply only to an actual default or failure of Crowell to pay the legacies—not to the case of his death without default or failure. Upon his death the consideration for the payment by him of the legacies which had not become payable failed, and they ceased to be a charge upon the land, which was devised to him for life only. The clause

provided for a forfeiture of his rights under the will for default or failure—a thing which could not occur after his death, because such rights, being for life only, died with him.

By clause 16, the testator directed that, if Crowell should carry out the conditions of the will and make all the payments, at his (Crowell's) death his (Crowell's) children should share in the estate, and he gave directions to his executors accordingly.

The Chief Justice said that clause 16 was applicable only if Crowell made all the payments which under the will he was to make. Death prevented that, taking from him, and his, the property for the use of which the payments were to be made; and ended the existence of such legacies as a charge upon the property, but not otherwise.

By clause 14, the testator gave to his wife all the residue of his property for her use during her lifetime; and, after her decease, he gave it to his son Thomas and his three daughters share and share alike.

The Chief Justice said that clause 14 could be applicable only in case of the will failing to provide for the disposition of that part of the estate in the event which had happened. Having regard to the whole will, this clause applied only to any property the testator might have which was not mentioned in the will.

Having regard to the whole will, it was plain that the testator intended to make provision for his widow's maintenance, to some extent, during her whole life. If the farm were sold during her life, she should have the income from the proceeds instead of the $40 and firewood. The legacies to the testator's children and grandchild were to be paid in any event. The residue should be divided and paid as in the will provided. No opinion was expressed regarding any claim to a share that might be made by the children of Crowell.

If the parties should be unable to agree upon a present distribution of the part of the estate in question, the money in the executor's hands, representing it, should be paid into Court to the credit of the persons entitled to it.

Costs of this motion, to all persons represented upon it, out of the estate.

MIDDLETON, J. SEPTEMBER 30th, 1918.

RE OSBORNE AND CAMPBELL.

Deed—Construction—Power of Appointment—Exercise by Will—Validity—Wills Act, sec. 30—Claim to Dower—Application under Vendors and Purchasers Act—Service on Dowress—Rule 602—Title to Land.

Motion by vendors, under the Vendors and Purchasers Act, for an order declaring invalid an objection taken by the purchaser to the vendors' title to land which they had agreed to sell.

The motion was heard in the Weekly Court, Toronto.

H. R. Frost, for the vendors.

R. B. Beaumont, for the purchaser.

MIDDLETON, J., in a written judgment, said that on the 30th May, 1912, the land in question was conveyed to M. "in fee simple," "to have and to hold unto the said M., his heirs and assigns forever, to such uses as he shall by deed or deeds in writing or by his last will and testament appoint and in default of appointment to the use of him and his heirs absolutely."

M. died on the 22nd April, 1915, and by his will gave all his property to his executors in trust to convert and divide the proceeds.

The executors had now contracted to sell, and objection was taken by the purchaser to the title. M. was married, and it was said that his wife would be entitled to dower. Notice was served on her, under the provisions of Rule 602, and she had not appeared to assert any claim.

The vendors' contention was that, under the Wills Act, the will operated as a due execution of the power, and the estate passed by virtue of the exercise of the power.

That this was the effect of sec. 30 of the Act, R.S.O. 1914 ch. 120, was plain from the decision in In re Greaves' Settlement Trusts (1883), 23 Ch. D. 313.

In the absence of any claim on the part of the wife, the difficult question as to the true construction and effect of this deed, suggested in Mr. Armour's note (Real Property, 2nd ed., p. 114), should not be considered. See per Draper, C.J., in Lyster v. Kirkpatrick (1866), 26 U.C.R. 217, 228: "It appears to have been settled ever since Sir Edward Clere's Case (6 Co. 18*a*.) that a power over the inheritance may co-exist with a fee in the same person;

as where A. seised in fee made a feoffment to the use of such person and of such estate as he should limit and appoint by his last will, and died, making a will . . . the devise was upheld as a valid execution of the power." See also Maundrell v. Maundrell (1804), 10 Ves. 246, 254, 255.

It should be declared that the wife was not entitled to dower, and that the objection was not well taken.

MASTEN, J. OCTOBER 2ND, 1918.

*WEYBURN TOWNSITE CO. LIMITED v. HONSBURGER.

Company—Saskatchewan Company Doing Business in Ontario—Incorporation by Memorandum of Association under Saskatchewan Companies Act—Extra Provincial Corporations Act, R.S.O. 1914 ch. 179, sec. 16(2)—Sale of Saskatchewan Lands—Contract Made in Ontario in 1912—License Obtained by Company in 1918—Comity—Effect of License—Company not Incorporated by Sovereign Authority—Powers of Company Created by Memorandum of Association—Amendment to Saskatchewan Companies Act by 7 Geo. V. ch. 34, sec. 13a.—Acts Done before Amendment—Ultra Vires as against Citizen of Ontario—Action to Enforce Contract—Defence of Misrepresentation—Failure on Evidence.

Action for the specific performance of an agreement for the sale by the plaintiff company to the defendant of 8 lots in the townsite of Weyburn, in the Province of Saskatchewan.

The first defence was that the plaintiff, a corporation incorporated under the laws of Saskatchewan, had no power to carry on business in the Province of Ontario, and that the agreement was ultra vires and void.

The second defence was that the defendant was induced by misrepresentations to enter into the agreement.

The defendant counterclaimed for the delivery up of a promissory note made by him to the plaintiff company and for the return of $115.75 paid on account of the purchase-money.

The action and counterclaim were tried without a jury at a Toronto sittings.

W. N. Tilley, K.C., and J. W. Payne, for the plaintiff company.

A. C. Kingstone, for the defendant.

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

MASTEN, J., in a written judgment, said that the plaintiff company was incorporated under the Saskatchewan Companies Act, by memorandum of association dated the 23rd March, 1912. By clause 3, "the objects for which the company is established are to carry on real estate loan and general brokerage business." No limitation or extension of this power was contained in the memorandum.

On the 8th February, 1918, and not before that date, the plaintiff company procured a license under the Great Seal of the Province of Ontario, pursuant to the Extra Provincial Corporations Act, R.S.O. 1914 ch. 179, to do business in Ontario.

The negotiations which resulted in the agreement with the defendant took place in 1912, in Ontario, agents of the plaintiff company being in Ontario. The written agreement (dated the 15th October, 1912), was drawn up in Saskatchewan, executed by the plaintiff company there, and executed by the defendant in Ontario.

The learned Judge was of opinion that the plaintiff company, in respect of the agreement, carried on business in Ontario, and assumed to exercise powers and acquire rights outside of Saskatchewan.

Considering the question apart from the Ontario Extra Provincial Corporations Act and apart from the license issued thereunder, the assumed exercise by the plaintiff company of powers in Ontario and its assumed acquisition of rights against the defendant could not be recognised by this Court under the doctrine of comity. The act of the plaintiff company in coming into Ontario in 1912 and assuming to sell its lands to the defendant and to acquire rights against him was ultra vires at that time; and, unless aided by the license subsequently issued under the Extra Provincial Corporations Act, so remained. The defendant could not, under the doctrine of comity, have enforced a claim for specific performance against the plaintiff, and consequently the contract sued on would, apart from the license, have been unenforcable against the defendant for want of mutuality.

In so far as the license issued in 1918 conferred on the plaintiff company new powers and rights in Ontario, it purported on its face to operate from the date of its issue. Manifestly, the license was intended to confer these powers only as of its date, and the statute carried it no further. Section 16(2) must be considered as doing no more than removing, as of a time immediately preceding the commencement of the action, the disability created by sec. 7.

As a corporation incorporated by a Province of Canada differs from a company created by a sovereign authority, such as Great

Britain, France, or Italy, in that it is, by the terms of the statute under which it is incorporated, incapable of exercising any powers or rights outside the confines of the Province, unless and until it has received ab extra the necessary power and authority, the words of sec. 16(2) are ineffective in relation to such a company, because its power and right to carry on business in Ontario arises only on the granting of the license; and the words of sec. 16 must in that regard be taken as applicable only to foreign companies created by a sovereign authority possessing plenary powers, which, except as inhibited by the Ontario statute, are entitled by comity to enter Ontario and make contracts.

In the case of an English or a French company, the license sanctions the maintaining of an action for the enforcement of a contract made in the exercise of powers which the company already possesses by virtue of the doctrine of comity; but, in the case of a Saskatchewan company, its powers in Ontario must be taken to be conferred for the first time by the license, and are a new grant by Ontario authority.

Until the license was granted by Ontario to the plaintiff company, in February, 1918, it possessed no powers or rights in respect of objects outside Saskatchewan. The Ontario license assumed to confer upon it powers and rights from the date of the license only.

It was contended for the defendant that a company incorporated by memorandum of association and certificate under the Saskatchewan Companies Act was not a common law corporation like the Bonanza Creek Gold Mining Company (see Bonanza Creek Gold Mining Co. v. The King, [1916] 1 A.C. 566), and possessed no capacity to apply for or receive any power or right outside of Saskatchewan.

This case appeared to fall precisely within the words of Viscount Haldane in the case referred to, at p. 584; and the plaintiff company had originally no power to apply for or accept a license to carry on business in Ontario.

It was urged, however, that all that had been changed by a Saskatchewan statute of 1917, amending the Companies Act: see 7 Geo. V. ch. 34, sec. 13*a*. (Sask.)

The learned Judge expressed no opinion on the effect of that legislation in relation to acts of the plaintiff company done after the statute was passed in 1917; but, with regard to acts done before the statute, he was of opinion that the legislation was, as against a citizen of Ontario, beyond the powers of a Provincial Legislature.

The plantiff company's claim, therefore, failed.

It was unnecessary to deal with the defence or misrepresentation, but, for the benefit of an appellate Court, which might not agree with his conclusion on the legal and constitutional question, the learned Judge gave his views upon the facts and law as to misrepresentation, and found that this defence failed.

The action should be dismissed and the counterclaim allowed with such costs as were applicable to the first defence.

MIDDLETON, J. OCTOBER 3RD, 1918.

BIMEL-ASHCROFT MANUFACTURING CO. v. CHAPLIN WHEEL CO. LIMITED.

Contract—Formation—Sale of Goods—Statute of Frauds—Statement of Price—Reference to Price-list—Incorporation of Document by Reference—Breach of Contract—Damages.

Action to recover $2,500 damages for breach of a contract.

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

F. J. Hughes, for the plaintiffs.

Strachan Johnston K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that there was a complete contract in writing sufficient to comply with the provisions of the Statute of Frauds. The only question was whether the price was stated. The contract was for spokes, "at the following prices . . . 45% and 5% from list." The words omitted, "1¼ to take the list of 1⅛ and under," were parenthetical, and meant that 1¼ spokes were to be supplied at the list-price of 1⅛ and under. The "list" was a standard price-list, which was before the parties when contracting.

In Bailey v. Dawson (1912), 25 O.L.R. 387, the present Chief Justice of Ontario reviewed the earlier cases determining that the signed document may incorporate another by reference, and that this other document may be identified by oral evidence. Later cases to the same effect: Dewar v. Mintoft, [1912] 2 K.B. 373, and Doran v. McKinnon (1916), 53 S.C.R. 609.

The plaintiffs, having regard to what was contemplated when the contract was made, acted reasonably in laying in a stock of billets of the sizes which would probably be required by the defendants, and the loss sustained was properly recoverable.

There should be judgment for the plaintiffs for the amount claimed and costs.

MIDDLETON, J. OCTOBER 4TH, 1918.

DOLSON v. JONES.

Fraudulent Conveyance—Action to Set aside—Status of Plaintiff —Secured Creditor—Adequacy of Security—Husband and Wife.

Action to set aside a conveyance from husband to wife.

The action was tried without a jury at a Toronto sittings.
J. T. Richardson, for the plaintiff.
D. Urquhart, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was a mortgagee suing for foreclosure. The day after the writ of summons was served, the husband conveyed all his property to his wife as a protection in respect of money owed to her, and, it was said, to protect other creditors.

The defendants relied upon the fact that the plaintiff could not be regarded as a "creditor" under the statute unless it was shewn that his security was inadequate. The only evidence was that, even in the present depressed condition of the market, his security was adequate. This must be his own view, for he was asking foreclosure.

Nothing could be usefully added to what was said in Clark v. Hamilton Provident and Loan Society (1884), 9 O.R. 177; Crombie v. Young (1894), 26 O.R. 194; Thomas v. Calder (1902), 1 O.W.R. 26.

As neither husband nor wife gave oral evidence at the trial, the learned Judge made no finding of fact upon the other issues raised.

On the ground taken, the action failed.

MIDDLETON, J. OCTOBER 5TH, 1918.

NATIONAL TRUST CO. v. HANNAN.

Landlord and Tenant—Lease of Shop—Liquor License—Loss of, by Passing of Ontario Temperance Act, 1916—Notice of Cancellation of Lease Given by Tenant under sec. 145 of Act—Approval of Board of License Commissioners—Voluntary Reduction of Rent and Abatement of Amount Due on Chattel Mortgage—Independent Transactions—Agreement Precluding Application to Board not Shewn and not to be Implied—Function and Jurisdiction of Board.

Action by the executors of Frank Giles, deceased, on a covenant in a lease, to recover rent. Defence, that the lease was cancelled by notice served with the approval of the Board of License Commissioners, under sec. 145 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

The action was tried without a jury at a Toronto sittings.
M. H. Ludwig, K.C., for the plaintiffs.
H. J. Scott, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiffs set up in reply that, after the passing of the Ontario Temperance Act, there was a voluntary reduction of the rent at the request of the defendant and an abatement of $1,000, part of the money due by the defendant to the landlord upon a chattel mortgage, upon an undertaking by the defendant that he would not apply to the Board to be allowed to terminate the lease.

On the evidence, the reduction of the rent and the rebate of $1,000 on the mortgage were independent transactions. There was no bargain that the new arrangement would preclude an application to the Board; and an agreement not to apply was not to be implied.

Had there been a new and substituted lease, the defendant would have had no right, as the statute would not have applied. The old lease, it was stipulated, should still remain, and this had engrafted upon it the legislative right to terminate.

There was some confusion as to the exact amount to be paid for rent, and some default; but this was put right, and the balance due was accepted. This did not defeat the right to terminate.

The Board considered the effect of the agreement made, and the conclusion arrived at was the same as the learned Judge's.

He was not giving effect to this as res judicata, as the Board is not a Court, and its function under sec. 145 is to approve or withhold its approval of the tenant's action. It had approved, and this enabled the tenant to give an effective notice if he was otherwise entitled to do so as a matter of law. The Board had no jurisdiction to determine this question.

The action failed and must be dismissed with costs.

McILMURRAY v. TORONTO AND YORK RADIAL R.W.CO.—MIDDLETON, J.—OCT. 5.

Damages—Personal Injuries—Pain and Suffering—Loss of Earnings—Expenses—Disablement for Future—Indemnity—Assessment of Damages by Trial Judge.]—Action for damages for personal injuries sustained by the plaintiff in a head-on collision between cars operated by the defendants, in one of which he was a passenger. The action was tried without a jury at a Toronto sittings. MIDDLETON, J., in a written judgment, said that, as the result of the collision, a piece of wood was driven through the calf of the plaintiff's lett leg in a downward direction, and another injury of a less serious character was inflicted lower on the same leg. The greater portion of the muscles of the calf had to be removed. There was no question of the plaintiff's right to recover; the amount of damages was the sole question. At the trial counsel for the plaintiff earnestly pressed for $10,000. The plaintiff had suffered great pain; he lost three months' earnings, was for three months under a serious handicap, and was to some extent disabled for the future. His out-of-pocket expenses and some small allowance for domestic disorganisation and the services of his wife as nurse would be covered by the sum of $1,000. The outlook for the future was very serious. Weighing all the matters mentioned and other considerations presented by counsel, and realising that no blame could be attributed to the plaintiff, the learned Judge felt it his duty to award a sum which would be in some degree an indemnity. The damages should be assessed at $6,000. Judgment for the plaintiff for that sum with costs. T. N. Phelan, for the plaintiff. T. H. Lennox, K.C., and W. Lawr, for the defendants.

CORRECTION.

In CURRY v. GIRARDOT, ante 27, the Court was composed of MULOCK, C.J.Ex., CLUTE, RIDDELL, and KELLY, JJ.—SUTHERLAND, J., did not hear the case.