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HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS. FEBRUARY 8TH, 1910.

RE HOPE AND CENTRAL ONTARIO R. W. CO.

Sheriff—Poundage — Rule 1190 (2) — Writs of Fi. Fa. against Equity of Redemption in Railway Lands—Settlement Satisfying Judgments and Executions—No Benefit Obtainable from Execution—First Charge on Lands beyond Value — Appointment of Receiver.

Motion by the sheriff of Hastings for an order for payment of his fees and poundage, in the circumstances stated below.

A. C. McMaster, for the sheriff.

C. A. Moss, for the Bank of Ottawa, execution creditors.

T. P. Galt, K.C., for other execution creditors.

BOYD, C.:—Claim for poundage on executions is made under the following peculiar state of facts. Writs of fi. fa. lands were put into the sheriff's hands in 1893 in respect of actions brought to recover interest represented by coupons due on first mortgage bonds in the Central Ontario Railway Company. The sheriff duly advertised for sale the equity of redemption in the railway lands, and the day of sale was adjourned more than 33 times. The railway extended through parts of the counties of Hastings, Northumberland, and Prince Edward.

In 1902 the bonds matured, calling for over four millions of dollars, and proceedings were taken to sell the road. Judgment to that effect was pronounced in March, 1903. On the 14th October, 1902, a receiver of the railway was appointed, and that officer was continued through all the subsequent proceedings.

In 1906 the Master reported (under reference in the sale proceedings) that the mortgage bonds formed a first charge on and covered all the property belonging to the railway. Early in 1907 the sheriff was notified to do nothing upon the executions, and the writs were all withdrawn in August, 1907.

In September, 1906, the terms of a settlement were arrived at by which the whole corpus of bonds and coupons was to be bought by Ritchie at the rate of about 70 cents in the dollar ($464,000). The executions, it is said in the evidence, were kept in the sheriff's hands till a satisfactory arrangement was come to with Ritchie: the bonds and coupons along with them were sold at 70 cents in the dollar; the interest would have amounted to considerably more than the principal. This transaction "satisfied the judgments."

In January, 1909, the money was received by the plaintiffs by which the bonds and coupons and judgments were satisfied; this money being paid in pursuance of the settlement arrived at before the writs were withdrawn from the sheriff's hands.

Upon this state of facts, I would infer that the proceedings at law and the maintenance of the writs of execution against the equity of redemption in the lands of the railway company were a precautionary measure to preserve any possible rights of property that might be available for execution; but in point of law the execution was a nugatory proceeding, both because a section of the road could not be sold (i.e., such part as was in the sheriff's bailiwick), and because the first charges on the road turned out to be even more than it was worth, and there was nothing in the equity. Having regard to the terms of Rule 1190 (2), I think there was a settlement arrived at here pending the execution, which was an equitable satisfaction of the judgments and executions; but, as upon a sale nothing could possibly have been realised, I cannot find any basis on which to say that any sum should be given as representing poundage. The agreement of the 29th January, 1906, put in, shews that the 70 per cent. basis of settlement was arrived at by taking the face value of the bonds as the prime factor, leaving out the accrued interest.

Another point is that the possession of the receiver in 1902 would effectually prevent the enforcement of any writ of execution.

Having regard to all the details, I should say this is not a case contemplated by the new Rule 1190 (2). That Rule is intended for the benefit of the sheriff when a settlement has been arrived at under pressure of an execution, which, if enforced, would be productive of beneficial results for the execution creditor; no levy on this fi. fa. on the equity of redemption of a part of the road could have worked any change in the situation. And the settlement was induced not because of there being writs in the sheriff's hands, but for other more cogent reasons.

I would dismiss the application, but give no costs, as the sheriff might have well been more liberally dealt with.

MULOCK, C.J.Ex.D. FEBRUARY 9TH, 1910.

RE NIAGARA FALLS HEATING AND SUPPLY CO.

Company—Winding-up—Contributory — Shares Illegally Issued at Half Price—Liability of Subscriber for Balance of Price—Conduct—Receipt of Dividend—Estoppel.

Appeal by J. G. Cadham and others from the report of the local Master at Welland, who placed the appellants upon the list of contributories of the company, in liquidation under the Winding-up Act.

T. W. Griffiths, for the contributories.

T. F. Battle, for the liquidator.

MULOCK, C.J.:—During the course of the argument it was understood that the decision in Cadham's case should apply to the cases of all the appellants. I therefore deal in detail with the Cadham case only.

The evidence shews that Cadham agreed to subscribe for four shares of $50 each in the capital stock of the company, and upon the 17th September, 1906, paid $200 to the company for eight shares. Thereupon the company issued and delivered to him a certificate, bearing date the 14th September, 1906, to the effect that he was the owner of eight shares of $50 each in the capital stock of the company. This certificate he accepted and gave to the company a receipt therefor in the following words: "Received certificate No. 28 for eight shares this 17th day of September, 1906. J. G. Cadham." Thereupon Cadham's name was entered in the books of the company as shewing Cadham the holder of eight shares of $50 each.

On the 19th January, 1907, the board of directors ordered that "a four per cent. dividend be paid per annum based on the said report for three months in which business has been done, namely, October 1st to December 31st, 1906." At this time Cadham was treated by the company as being a shareholder to the extent of $400, the year's dividend upon which, at the rate of 4 per cent. per annum, would amount to $16, and, on the 4th of March, 1907, the company issued its cheque of that date upon the Bank of Hamilton, payable to J. G. Cadham or bearer, for $4, being the three months' dividend at the rate of 4 per cent. per annum—the body of the cheque containing the word "dividend." This cheque Cadham received and indorsed, obtaining and retaining the proceeds thereof. The stock certificate of the 14th September, 1906, issued to Cadham, appears to have been re-delivered to the

company by Cadham, it bearing on it the following indorsement: "Surrendered this of October, 1907, J. G. Cadham."

When Cadham signed the receipt for the certificate for eight shares, he knew that the amount of each share was $50. When he originally agreed to subscribe for the four shares he informed the secretary of the company that his liability was to be limited to $200, and he seems to have accepted the certificate for eight shares in the belief that he was not thereby incurring any liability in respect of the unpaid portion of the stock represented by the certificate.

A company like the present one, organised under the Ontario Companies Act, is not entitled to issue shares at a discount, and the circumstance that the eight shares in question, in accordance with the understanding or agreement between the company and Cadham, were issued to him as paid up in full, would not relieve him of liability in respect of the unpaid amount, if he is held liable as a holder of the eight shares.

The real question to determine here is whether Cadham agreed to become a member of the company in respect of the eight shares. The evidence shews that when pressed on behalf of the company to become a member, he expressed his determination to assume no responsibility in excess of $200, and he sought to impress that determination upon the secretary of the company. When, on the 4th September, 1906, the company issued and tendered to him a certificate for eight shares of $50 each, instead of refusing to accept the certificate, he gave the company a receipt therefor. This act in itself appears to me to be a consent on Cadham's part to become a member of the company in respect of the eight shares. On the 17th September, 1906, he paid to the company $200 for the shares covered by this certificate, doubtless supposing that this payment discharged his full liability as a member holding eight shares of $50 each. At that time he knew he was being treated by the company as the holder of eight shares, and he was content to allow matters to remain in that position until October, 1907. In the interval, namely, on the 4th March, 1907, the company declared a dividend, and he accepted the same. He knew that the $4 then being paid to him was a dividend upon his holding of eight shares. So far as appears, he still retains the $4.

The company has been in liquidation since the 24th August, 1908, and, on the 25th February, 1909, Cadham filed a notice contesting the liquidator's right to place him upon the list of contributories; but he did not even then, with his notice of contestation, offer to return the dividend. His acceptance of the

eight shares, and thereafter his acceptance of the dividend thereon, and his retention of the amount throughout the contestation proceedings, are inconsistent with his present contention that he is not a member in respect of eight shares. Except as a shareholder to the extent of eight shares he has no right to the $4. How can he be entitled to retain the dividend and at the same time say that he is not the holder of the shares which alone entitle him to the dividend? Although in the first instance he may not have intended to subscribe for eight shares, yet, the company having placed his name upon the lists of members to the extent of eight shares, his subsequent conduct is evidence of an agreement upon his part to become such member, and he is now estopped from denying such membership: In Re Railway Time Tables Publishing Co., Ex p. Sandys, 42 Ch. D. 112.

For these reasons, I think the Cadham appeal fails. The other appeals, in accordance with the understanding during the argument, share the same fate. The respondent is entitled to the costs of the appeals.

DIVISIONAL COURT. FEBRUARY 9TH, 1910.

VANDERBERG v. TOWNSHIPS OF MARKHAM AND VAUGHAN.

Municipal Corporations — Road-ditch — Overflowing Adjacent Lands—Liability of Corporations—Tile Drains of Private Owners Discharging into Ditch—Permission—Presumption—Ability to Prevent Connection—Injunction—Damages.

Appeal by the defendants from the judgment of LATCHFORD, J., awarding the plaintiff $240 damages and a mandatory injunction against both defendants, requiring them to open up and maintain a culvert crossing Yonge street opposite the plaintiff's land, in such a manner and to such an extent that such culvert should have a capacity sufficient and proper to receive and carry away waters that might from time to time flow along the east side of allowance for road of Yonge street, so that the waters might not back up on the plaintiff's land.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

McGregor Young, K.C., for the defendants the Corporation of Markham.

T. H. Lennox, K.C., for the defendants the Corporation of Vaughan.

A. G. F. Lawrence, for the plaintiff

MEREDITH, C.J.:—The evidence establishes that the ditch along the east side of Yonge street, which is under the control of the defendants, brings down to a point opposite the plaintiff's land more water than would but for the ditch be brought there, which is sometimes spoken of as foreign water, and brings the water down more rapidly than it would otherwise be brought down; that the culvert opposite the plaintiff's land, which was designed to carry the water brought down by the ditch to the opposite side of Yonge street, is not adequate for that purpose, owing partly to its not being originally of sufficient capacity, and partly to its having been allowed to become out of repair, and that the consequence of this has been that the plaintiff's land has been overflowed, to his damage.

It is clear that on this state of facts the plaintiff is entitled to recover, unless . . . the damage suffered by him was caused by water being brought into the ditch by the land-owners along Yonge street, and the use by them of the ditch for that purpose was not authorised or permitted by the defendants, and the defendants are for that reason not answerable for the injury.

The evidence shews that three or four farms along Yonge street in the neighbourhood of the plaintiff's lands, have drains, either tile or open, which discharge into the defendant's ditch but there is nothing to shew to what extent the volume of water which has flowed in the ditch was increased by the water brought into it from these drains, and nothing to warrant the conclusion that, but for this water, the ditch would not have caused the injury of which the plaintiff complains.

Nor does the evidence shew how long these drains have been connected with the ditch, or under what authority, if any, they were connected with it.

It it were necessary for the decision, I should be inclined to hold that, in absence of evidence to the contrary, the fair inference is that the connections were made if not by the authority of the defendants, at all events by their permission.

Being of the opinion I have indicated, the question of law which my brother Teetzel, whose opinion I have had an opportunity of reading, has dealt with, does not arise; but, assuming that the injury which the plaintiff has suffered was due entirely to

the water brought into the defendants' ditch from the farm drains, and that the inference to which I have referred ought not to be drawn, I am of opinion that the defendants, nevertheless, are liable, because this water would not and could not have been brought to and discharged on the plaintiff's land but for the ditch they are maintaining, and they are in a position physically to prevent the discharge of this water by stopping the connection of the farm drains with their ditch.

Assuming that it was established that the water which caused the injury was brought down partly by the defendants and partly by the others for whose acts they are not answerable, the principle of such cases as Thorpe v. Brumfitt, L. R. 8 Ch. 656, and Blair v. Deakin, 57 L. T. N. S. 526, applies, as far at all events as the granting of an injunction is concerned.

I would vary the judgment, however, as to the terms of the injunction awarded, by making it one restraining the defendants from continuing to bring the foreign water down to the injury of the plaintiff, and I would suspend the operation of the judgment for one year to enable the defendants to do this.

With this variation, the judgment should be affirmed and the appeal from it dismissed with costs.

MACMAHON, J.:—I agree.

TEETZEL, J., was of opinion that the plaintiff was prima facie entitled to redress under Rowe v. Township of Rochester, 29, U. C. R. 590, McArthur v. Town of Strathroy, 10 A. R. 631, and many other authorities.

He referred to the contention that the excess water was largely accounted for by the fact that several owners north of the plaintiff had utilised the defendants' ditch as an outlet for their tile drainage, without the defendants' express consent, and that, therefore, the case came within Gray v. Corporation of Dundas, 11 O. R. 317; and said that, in his opinion, the proper decision of this case was not affected by the Dundas case. He referred to Darby v. Corporation of Crowland, 38 U. C. 33, and Ostrom v. Sills, 24 A. R. 526, 27 S. C. R. 485; and said that by allowing the owners of the tile drains wrongfully to discharge their surface water into the defendants' ditch, and by permitting the same to be carried upon the plaintiff's land, when they had the right physically to prevent it, the defendants became liable as joint wrongdoers with such owners; and upon principle and the authority of Charles v. Finchley Local Board, 23 Ch. D. 767, the defendants were liable to the plaintiff.

He therefore agreed in the result arrived at by MEREDITH. C. J.

CANADA CARRIAGE CO. v. DOWN—MASTER IN CHAMBERS—FEB. 7.

Venue — Change — County Court.]—Upon motion of the defendants, an order was made transferring the action from the County Court of York to the County Court of Perth. The action was for the price of a waggon made by the plaintiffs, who carried on business at Brockville, and sent to the defendants at Stratford. The Master thought it would be reasonable to have the trial at Stratford, where the waggon could be inspected by the Judge and witnesses. Costs in the cause. H. E. Rose, K.C., for the defendants. Mervil Macdonald, for the plaintiffs.

TAYLOR v. BARWELL—MASTER IN CHAMBERS—FEB. 7.

Pleading—Statement of Defence—Motion to Strike out.]—Motion by the plaintiffs to strike out part of the statement of defence in an action for specific performance of an agreement in writing to buy certain lands. The Master thought what was alleged by the defendant came within Stratford Gas Co. v. Gordon, 14 P. R. 407, and dismissed the motion with costs to the defendant in any event. Featherston Aylesworth, for the plaintiffs. A. H. F. Lefroy, K.C., for the defendant.

STIDWELL v. TOWNSHIP OF NORTH DORCHESTER—MASTER IN CHAMBERS—FEB. 9.

Venue—Change—Expense.]—The defendants moved to change the venue from St. Thomas to London. The Master was of opinion that, with an hourly electric service between the two cities, there could scarcely be any substantial difference in cost; and pointed out that a successful defendant can always apply to the trial Judge for a direction as to the taxation of the costs of the witnesess if it appears that the costs have been materially increased by the trial being at the place chosen by the plaintiff. Motion refused; costs in the cause. H. S. White, for the defendants. J. F. Lash, for the plaintiff.

CORRIGENDUM.

On p. 406, ante, 7th and 6th lines from the bottom: for "United Empire Bank" read "Home Bank of Canada."