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HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. DECEMBER 17TH, 1914.

REX v. ROWENS.

Criminal Law — Application for Bail — Charge of Treason — State of War.

Application on behalf of the prisoner for bail.

T. H. Lennox, K.C., for the prisoner.
Edward Bayly, K.C., for the Crown.

LENNOX, J.:—The prisoner is a Russian, said to be well educated and of good antecedents and character. He is awaiting his trial upon a charge of treason, founded, it is alleged, upon his aiding and abetting the King's enemies in an attempt to leave Canada. It is argued that he is clearly not guilty, but, he having been committed, I must assume that there is at least a primâ facie case, and he is charged with the commission of a capital offence of the gravest character known to the law. It is not an extraditable offence; and, if it should turn out that he is guilty—an enemy of the Crown— there is no money compensation which could be regarded as the equivalent of the public injury resulting from his escape. He is of the nationality of one of our great Allies. Substantial bail has been offered, and I am inclined to believe that the application is made in good faith, and that he would await his trial. But this is a time of war, a time of great national stress and peril, when no chances should be taken; and, upon the whole, I do not think it prudent to accede to the application. The case can be brought to trial in January.

The application is refused. I make no order as to costs.

RIDDELL, J. DECEMBER 17TH, 1914.

*RE HARPER AND TOWNSHIP OF EAST FLAMBOROUGH.

Municipal Corporation—By-law — Motion to Quash—Approval of By-law by Railway and Municipal Board—Municipal Act, R.S.O. 1914 *ch.* 192, *sec.* 295 (4)—*Subsequent Setting aside by Board—By-law Standing Approved when Notice of Motion to Quash Served—Estoppel.*

Application by J. C. Harper to quash a by-law passed by the township council, the counterpart of the by-law in question in Re Fowler and Village of Waterdown, ante 309.

The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

J. G. Farmer, K.C., for the applicant.

W. T. Evans, for the township corporation.

RIDDELL, J.:—This is an application to quash a by-law of East Flamborough: the particulars are set out in the judgment of Mr. Justice Latchford in Re Fowler and Village of Waterdown (1914), ante 309.

The notice of motion to quash having been served, it was discovered that the by-law had been approved by the Ontario Railway and Municipal Board; and, when the motion came on before the Chancellor, he enlarged it that the applicant might apply to the Board to have the by-law set aside. He did so with effect, and the by-law was set aside accordingly. The motion came on before me; and on objection taken that the notice of motion was served when the by-law was inexpugnable by reason of the provisions of the Municipal Act, R.S.O. 1914 ch. 192, sec. 295 (4), I enlarged the argument that counsel might consider the point.

Argument was renewed and completed to-day.

The objection is, that, as the right of a plaintiff must be determined as of the teste of the writ: Cornish v. Boles (1914), 31 O.L.R. 505, 521; Northern Electric and Manufacturing Co. Limited v. Cordova Mines Limited (1914), 31 O.L.R. 21, 238, 243; so the rights of an applicant on such a motion as the present must be determined as of the day of the service of

*To be reported in the Ontario Law Reports.

the notice of motion, the beginning of the proceeding: Re Shaw and City of St. Thomas (1899), 18 P.R. 454. No doubt, speaking generally, that is so, but I do not think that such a principle is conclusive here. The section cannot be read literally—it cannot be that, after a by-law has been approved by the Board, it is not "open to question in any Court:" if the approval is withdrawn and the order of the Board set aside, no one would argue that "thereafter" a motion could not be prosecuted begun by a notice served thereafter.

Full effect can be given to the section by interpreting it as meaning that the Court cannot question the validity of a by-law which has been approved by the Board if such approval is in existence when the Court is called upon to decide. And this works both ways: if the approval of the Board were obtained after notice served and before the return thereof, I have no doubt the Court could not declare the by-law invalid. This is not quite the same as the case of an applicant who corresponds with a plaintiff—it is well recognised that the rights of the plaintiff are only as of the teste of the writ, that is, he cannot set up rights acquired after the teste of the writ, but the rights of the defendant are as of the day of determination if he has a mind to ask them.

No case has been cited in which a plaintiff, having begun an action, in ignorance of a bar existing to his obtaining his rights, and on discovery of the bar procuring its removal, is then barred because of that previous obstruction.

Were this a case of estoppel, difficult questions might arise; but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel will lie if the estoppel be removed before the matter comes to adjudication.

In Goodrich v. Bodurtha (1856), 72 Mass. (6 Gray) 323, a note had been sued upon and judgment given thereon in the Court of Common Pleas. Action was brought upon this judgment, and, while this action was pending, the former judgment was set aside. The defendant thereupon amended his answer, and the plaintiff obtained leave at the trial to add a claim upon the original note. It was held that this was proper. It may, of course, be said that the setting aside of the judgment upon the note was on the ground of want of jurisdiction, and consequently the judgment never had legal validity and could have no effect. But that is not the ground on which the Court proceeds—what is said is (p. 324): "The defendant answered

the merger of the note in the judgment. To this the obvious reply was and is, that, upon the reversal of the judgment, the merger ceased. It was as if no judgment had been rendered.'' Clearly, when the action was brought, an action upon the note would not lie—but, the obstruction by way of merger being removed, the plaintiff was allowed to set up what he could not have sued upon, and his judgment on this count was sustained.

The difference between merger and estoppel I do not go into. The cases are not few in which, when the matter came on for consideration and determination by the Court, an estoppel by way of judgment existed, and the fact that the judgment might be appealed, as in Doe v. Wright (1839), 10 A. & E. 763, Overton v. Harvey (1850), 9 C.B. 324, Scott v. Pilkington (1862), 2 B. & S. 11, Nouvion v. Freeman (1889), 15 App. Cas. 1, or even had been appealed and the appeal was pending, as in Harris v. Willis (1855), 15 C.B. 710, was held to be immaterial. As Cozens-Hardy, L.J., puts it in Marchioness of Huntly v. Gaskell, [1905] 2 Ch. 656, at p. 667, ''A judgment is . . . not the less an estoppel . . . because it may be reversed on appeal . . .'' But I know of no case in which the estoppel had been removed at the time the matter came up for adjudication, and it was held that the estoppel existing at the beginning of the proceedings still continued as a bar.

I think the motion must be heard on the merits; and on the merits I am bound by the judgment of Mr. Justice Latchford in 7 O.W.N. 309. It is argued that certain parts of the judgment of Mr. Justice Lennox in Re Dougherty and Township of East Flamborough (1914), 6 O.W.N. 487, are opposed to my brother Latchford's view; but these are obiter and must have been considered in the later case in 7 O.W.N. 309.

I think the motion must be allowed with costs (including costs of the postponements).

LATCHFORD, J. DECEMBER 19TH, 1914.

WINDSOR AUTO SALES AGENCY v. MARTIN.

Husband and Wife—Conveyance of Lands of Husband to Wife Subject to Trust—Reconveyance in Pursuance of Trust—Action by Judgment Creditors of Wife to Set aside Reconveyance — Absence of Fraudulent Intent — Evidence—Estoppel.

Action by judgment creditors of the defendant Elizabeth Martin to set aside a conveyance of all her lands made by her on the 30th June, 1914, to the defendant Joseph Martin, her husband.

The action was tried without a jury at Sandwich.

J. H. Coburn, for the plaintiffs.

T. Mercer Morton, for the defendants.

LATCHFORD, J.:—The plaintiffs' judgment is wholly unsatisfied or was so at the time of the trial. The automobile, for the price of which the judgment was obtained, was under seizure by the Sheriff of Essex, but had not been sold. Although its cost was $1,875, it is not probable that the car would sell for more than $800, and Mrs. Martin appears to have no other property liable to seizure.

In March, 1914, the defendants began to look about for a motor car. Mr. Martin was in failing health. It was thought that he would be benefited by frequent airings; and, as he could walk but little, if at all, it was suggested to him that the best means of taking the air was from the seat of an automobile. Mrs. Martin, at first alone, and subsequently accompanied by her husband, visited the plaintiffs' garage, and on the 18th April ordered a car costing $1,375. This was subsequently—about the 6th May—exchanged for another car, and $500 additional was agreed to be paid to the plaintiffs.

On the 13th April, 1914, Joseph Martin had conveyed to his wife his lands in the city of Windsor and the township of Maidstone.

I find that this conveyance was made to her on the express understanding that, should the husband recover from the illness he was then suffering from, she was bound, upon his request, to reconvey the lands to him. The deed was to become absolute only in the event of his death.

Martin was childless, but he had many relatives. His ill-

ness at the time was serious, and might soon result in death. Both he and his wife thought a will would, in that event, be more open to attack by his next of kin than a deed. Then there was the possibility that he might recover. He was known to own considerable property during a long and active life; he had occupied important municipal and other public positions; and he wished, should his illness pass away, to resume his place in the community.

I have no reason whatever to think that their agreement was anything but what the defendants say it was.

Martin did recover his health—not indeed fully, but to a very great extent—and asked for and obtained the reconveyance now the subject of attack.

On the 21st July, the plaintiffs brought their action for the price of the automobile. The action was against both husband and wife. Their main defence was that the sale was upon a condition which had not been observed. It failed; but judgment was given against Mrs. Martin alone, and the action dismissed as against her husband.

The conveyance of the 30th June was not, I find, made with any fraudulent intent on the part of either defendant. It was not a voluntary conveyance. Under the agreement made between Martin and his wife prior to the execution by him of the conveyance of the 13th April, she was, at his request, bound to reconvey. In the circumstances, she was merely a trustee for him of the lands included in the conveyance.

An execution against her in the interval between the 13th April and the 30th June could not bind the lands which were subject to the equity and trust in her husband's favour. See Jellett v. Wilkie (1896), 26 S.C.R. 282, especially the judgment of Strong, C.J., at p. 289, and the cases there cited, as conclusively establishing the principle that an execution creditor can sell the property of his debtor only subject to all such liens, charges, and equities as the same was subject to in the hands of his debtor.

The plaintiffs would, therefore, fail to recover against the lands in question even had the conveyance they impeach not been made.

I find nothing which operates against Mrs. Martin by way of estoppel. It was with her husband's consent that she authorised the plaintiffs to sell the farm in Maidstone for $10,000—a price at which both defendants were quite willing the farm should be sold.

The action fails and is dismissed with costs.

VANSICKLE v. JAMES—KELLY, J.—DEC. 14.

Way—Assertion of Right of User—Street—Grant of Right—Prescription—Way of Necessity—Evidence—Trespass—Injunction—Damages—Costs.]—Action for trespass to land. The acts constituting the alleged trespass were not denied; the issue was in respect of the plaintiff's ownership of the land in question to the exclusion of right of user by the defendant; and the plaintiff's right to succeed depended upon whether the defendant was entitled to use the land on which he entered, either as a public street, or by virtue of a grant of right of way, or by prescriptive right, or as a way of necessity. KELLY, J., after reviewing the whole evidence, said that a careful consideration of the whole case led to the conclusion that the plaintiff was entitled to succeed. The plaintiff asked for damages, as well as an injunction, but in his testimony admitted that the damage to his fences and crops did not exceed $3, which covered the restoring of the fences pulled down by the defendant, for the restoration of which he claimed a mandatory order. The finding on the evidence must be that the defendant was not entitled to the use or right of passage over the lands in question. Judgment for the plaintiff for an injunction and $5 damages, with costs on the County Court scale, without set-off. S. F. Washington, K.C., and L. Awrey, for the plaintiff. J. W. Lawrason, for the defendant.

RE MERCURIO AND JEWETT—MIDDLETON, J.—DEC. 15.

Dower—Equitable Estate of Husband—Vendors and Purchasers Act.]—Motion by the vendor in an agreement for the sale of land, under the Vendors and Purchasers Act, for an order declaring that the vendor can convey free from dower. The learned Judge said that in no view of the case was the vendor at any time possessed of more than an equitable estate in the land; and, therefore, if he conveyed, his wife could have no dower. W. J. Clark, for the vendor. A. W. Langmuir, for the purchaser.

HERRINGTON v. CAREY—MASTER IN CHAMBERS—DEC. 17.

Default Judgment — Order Setting aside — Indulgence — Terms—Costs—Promissory Note—Action on—Defence—Threat of Criminal Prosecution.]—Motion by the defendants Lilly Carey and Zoe C. Carey to set aside a judgment entered against

them for $1,450 and interest and costs, in an action upon a promissory note made by them and their brother and co-defendant. The plaintiff attached moneys due to the applicants to answer the judgment, and the attaching order was made absolute. The applicants stated on affidavit that they signed the note at the request of their brother and solely from fear that the plaintiff would prosecute the brother criminally. The learned Master said that the applicants, if they could prove the facts set out in their affidavits, had a good defence, citing Williams v. Bayley (1866), L.R. 1 H.L. 200. Order made setting aside the judgment, on payment to the plaintiff of all costs between solicitor and client, and without prejudice to the attachment proceedings. Gordon Waldron, for the applicants. R. L. Johnston, for the plaintiff.

RE LUCAS—FALCONBRIDGE, C.J.K.B.—DEC. 18.

Will—Construction—Absolute Interest not Subject to Trust —Inquiry as to Persons Named in Will.]—Motion by the administrator of the estate of James Lucas with the will annexed for an order determining a question arising upon the construction of the will. The learned Chief Justice said that an affidavit ought to be filed shewing want of knowledge of the place or places of residence of the sister and brother mentioned in the will, and detailing efforts made to find them. Subject to this, order made declaring that no trust is imposed by the will on the daughter, and that her mother and she take absolutely according to the terms thereof. E. T. Essery, K.C., for the applicant and for the mother and daughter.

BORNETT V. OSTLER FILE CO.—LATCHFORD, J.—DEC. 18.

Nuisance—Noise and Vibration—Damages — Injunction — Judicature Act, sec. 18—*Stay of Operation of Injunction—Opportunity to Abate Nuisance.*]—Action to restrain the defendants from operating their factory in such a way as to constitute a nuisance and a detriment to the plaintiff's enjoyment of her dwelling-house, situated close to the defendants' factory, in the city of Toronto. The learned Judge found that the plaintiff had established that the defendants in April, 1914, made a substantial addition to the pre-existing noises and vibration of the locality, such as constituted an illegal nuisance, and caused a serious disturbance of the reasonable comfort of the plaintiff

and her daughter: Rushmer v. Polsue, [1906] 1 Ch. 234, [1907] A.C. 121. By sec. 18 of the Judicature Act, where the Court has, as in the present case, jurisdiction to entertain an application for an injunction, damages may also be awarded to the party injured. The plaintiff is entitled to an order restraining the defendants from continuing the noise and vibration caused by the machines installed by the defendants in April, 1914, and to damages, assessed at $50. The operation of the injunction is not to begin until the expiration of six months from the date of this judgment. In the interim the defendants will have ample time to remove their noisy machinery to a site where it will not be a nuisance. The plaintiff is also entitled to costs. M. J. O'Reilly, K.C., for the plaintiff. W. H. Wardrope, for the defendants.

BANK OF OTTAWA v. HALL—KELLY, J.—DEC. 19.

Promissory Note—Accommodation Note — Endorsement to Bank as Collateral Security for Debt of Payee—Debt Paid before Action Begun—Claim of Bank to Hold Note for Subsequent Debt—Evidence—Findings of Fact of Trial Judge.]—Action on a promissory note for $10,000, bearing date the 26th December, 1908, made by the defendant, payable to the Canadian Cordage and Manufacturing Company Limited, one year after its date, and endorsed by that company to the plaintiffs. Issues of fact were raised as to the purpose for which the note was made by the defendant and the purpose for which it was endorsed to the plaintiffs. At the time the note was made, the company was indebted to the plaintiffs in the sum of $220,000 or thereabouts; and one of the plaintiffs' contentions was, that the note was intended to be in substitution for a note made by one Davidson and held by the plaintiffs. The defendant asserted that the note was given for the accommodation of the company; and this, the learned Judge finds upon the evidence, was the true position. The plaintiffs also contended that the note was assigned to them to be held on the terms set out in a certain memorandum of hypothecation. The learned Judge finds that this note was not included in the hypothecation agreement. There being uncontradicted evidence that all of the indebtedness which existed when the note was given was paid before the institution of the action, the plaintiffs were not entitled to succeed. Action dismissed with costs. G. F. Shepley, K.C., and G. W. Hatton, for the plaintiffs. G. H. Watson, K.C., and S. T. Medd, for the defendant.