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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 4TH, 1920.

*KERRIGAN v. HARRISON.

Covenant—Conveyance of Land—Grant of Right of Way over Road—Covenant to Keep Road in Repair—Construction of Covenant—Consideration of Attendant Circumstances—Excuse for Non-performance—Impossibility of Performance—Change in Condition—Action of Water upon Bank of Lake—Encroachment—Soil Newly Covered by Water Vested in Crown—Enforcement of Covenant to Perform Illegal Act—Damages for Non-performance—Public Policy.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 46 O.L.R. 227, 17 O.W.N. 141.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and MASTEN, JJ.

J. M. McEvoy, for the appellant.

J. A. E. Braden, for the plaintiff, respondent.

MULOCK, C.J.Ex., in a written judgment, said, after setting out the facts, that the evidence shewed that the waters of Lake Erie had imperceptibly and gradually advanced upon and overflowed the land where the road once was. The legal effect of this encroachment had been to vest in the Crown the soil thus covered by water: Rex v. Lord Yarborough (1824), 3 B. & C. 91; In re Hull and Selby Railway (1839), 5 M. & W. 327; Foster v. Wright (1878), 4 C.P.D. 438, 446; McCormick v. Township of Pelée (1890), 20 O.R. 288, 290. Nevertheless the plaintiff contended that the defendant was still bound by her covenant.

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

When the defendant entered into the covenant, she was still the owner of the road and had the right to maintain it; but, when the soil passed to the Crown, she ceased to be so entitled. Assuming it to be physically possible to rebuild the road, the defendant had no right to do so, the ownership of the soil being in the Crown.

The Court cannot absolve a person from a lawful contract. Its duty is to interpret it, and to that end to ascertain the circumstances in which it was entered into, in order to discover whether the parties made the contract upon the implied understanding that a certain state of affairs would continue to exist. If such implied understanding is found, then a term to that effect must be read into the contract. The underlying principle of the cases is, that, in the construction of a contract, attendant circumstances, as well as the letter of the contract, must be considered. The fact that attendant circumstances are to be considered implies that they may qualify the positive language of the contract itself.

Reference to Taylor v. Caldwell (1863), 3 B. & S. 826; Appleby v. Myers (1867), L.R. 2 C.P. 651; Howell v. Coupland (1876), 1 Q.B.D. 258; Nickoll & Knight v. Ashton Edridge & Co., [1901] 2 K.B. 126, 137; In re Shipton Anderson & Co. and Harrison Brothers & Co.'s Arbitration, [1915] 3 K.B. 676; F. A. Tamplin Steamship Co. Limited v. Anglo-Mexican Petroleum Products Co. Limited, [1916] 2 A.C. 397.

The evidence did not warrant a finding that the defendant could have prevented the waters of the lake from destroying the road and occupying the place where the road once was. The road ran along a small portion only of the shore; but the lake, for a long distance on each side, encroached on and submerged the water-front, making the area thus invaded part of the lake. To maintain the road in its entirety would have required the erection of preventive works in the soil of the Crown, which the defendant would not have the right to erect.

It was contended that, even if the defendant was not bound to rebuild the road, she was liable in damages for not having maintained it. The destruction of the road was the result of the action of the waters of the lake. To maintain the road now would require the defendant to do an illegal act. In the absence of evidence, the Court will not infer wrongful intention. Upon its proper construction, the covenant was to be binding only in so far as it might be legally performed. Enforcement of a contract to perform an illegal act, or an award of damages for its non-performance, would be contrary to public policy: the Shipton case, supra. If parties enter into a contract, the performance of which at the time is legal, but later, by reason of subsequent

legislation, becomes illegal, the parties are absolved from it: Brewster v. Kitchell (1698), 1 Salk. 198; Metropolitan Water Board v. Dick Kerr and Co. Limited, [1918] A.C. 119.

Subsequent events having rendered the performance of this covenant illegal, the defendant is excused from performing it.

The appeal should be allowed with costs, the judgment below set aside, and the action dismissed with costs.

CLUTE, J., agreed in the result.

RIDDELL, J., also agreed, for reasons stated in writing.

MASTEN, J., agreed with MULOCK, C.J.Ex.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 4TH, 1920.

*BOONE v. MARTIN.

Landlord and Tenant—Assignment by Insolvent Tenant for Benefit of Creditors—Lease—Yearly Rent Reserved—Covenant by Tenant to Pay Municipal Taxes—Failure to Pay—Payment by Landlord—Assessment Act, secs. 37, 94, 95—Claim to Preferential Lien upon Assets of Tenant—Construction of Covenant—Right of Distress—Subrogation—Surety—Person Liable with Tenant—Mercantile Law Amendment Act, sec. 3.

Appeal by the plaintiff from the judgment of ROSE, J., ante 28.

The appeal was heard by RIDDELL, KELLY, MASTEN, and LOGIE, JJ.

J. W. McCullough, for the appellant.

Gordon N. Shaver, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

KELLY, J. JUNE 4TH, 1920.

BOGLE v. CANADIAN PACIFIC R.W. CO.

Railway—Motor-truck Struck by Train at Level Highway Crossing —Negligence—Evidence—View Obstructed by Box-cars on Siding—Finding of Jury—Nonsuit.

Action for damages for personal injuries sustained by the plaintiff and injury to his motor-truck and goods by reason of the negligence of the defendants, as the plaintiff alleged.

The action was tried with a jury at Hamilton.

M. J. O'Reilly, K.C., for the plaintiff.

Angus MacMurchy, K.C., and J. Q. Maunsell, for the defendants.

KELLY, J., in a written judgment, said that the plaintiff alleged several acts of negligence against the defendants. The jury's only finding of negligence was "the position of the box-cars on the siding at time of accident."

The accident happened on the morning of the 19th November, 1918, at a level crossing on the defendants' railway line. For several hundred feet extending westerly from this crossing, the railway tracks and the highway (the highway being to the south of the tracks) run approximately parallel, but converging as they proceed easterly towards the crossing, nearing which the highway takes a turn to the north and crosses the railway tracks. At the point of crossing there are two lines of tracks. At a little more than 100 feet to the west of the intersection of the rails with the travelled part of the highway, an additional pair of tracks (a siding) turns from the southerly of the two main lines of tracks and runs thence westerly parallel to the main tracks. At the time of the accident there were standing on this siding box-cars which, the plaintiff alleged, obstructed his view of the approaching train, and there was on the siding a stop-block approximately 287 feet to the west of the place where the accident happened. The easterly end of the most easterly of the box-cars referred to was from 24 to 30 feet to the west of the stop-block.

The plaintiff was familiar with this crossing and the road leading to it. He says he went that way once a week. On the morning of the 19th November, he was driving his motor-truck, in which he was taking goods from his store to the brickyards,

some distance to the east of the crossing. When he reached the crossing, a passenger train of the defendants, also travelling easterly, struck his motor-truck, injuring him and damaging the truck and goods. His own evidence was that the box-cars on the siding obstructed his view of the tracks, and that they were so close to the crossing that he did not see past them until he had reached a point 10 feet from the railway track; that he did not see until he got on the track and "stalled" his car; that he did not look until he was 10 feet from the track because "it" was hidden by the box-cars; but he says that at 10 feet from the railway tracks he could see westerly more than 500 feet along the tracks. This evidence of inability to observe until he reached 10 feet from the tracks was completely contradicted by his witness Tyrrell, whose measurements shewed that at a point on the highway 20 feet from the rails there was a clear view past the box-cars standing 30 feet west of the stop-block to an object on the southerly pair of railway tracks distant 645 feet from the crossing; that at a point 30 feet from the rails there was a view past the cars to a point on these tracks 500 feet from the crossing and from a point 50 feet from the crossing to a point on the tracks 430 feet 6 inches from the crossing. It was also apparent from this witness's evidence and his plans that for at least 300 feet from the crossing the view from the highway to the railway tracks (they there run approximately side by side) was unobstructed by the box-cars as they stood at the time of the accident, and that the nearer a person on the highway approached the crossing the further west could he see an approaching train. The only one of all the acts complained of which in the jury's estimation constituted negligence being the position of the box-cars, the proper conclusion could not be otherwise than that, under the circumstances shewn by the evidence put forward by the plaintiff, leaving these cars to stand where they admittedly were at the time was not an act of negligence, whatever might be the explanation of the cause of the plaintiff's injuries and damages. The evidence which the plaintiff himself had put forward did not establish a situation which constituted negligence, nor anything implying that the defendants' act was in itself negligence; what the jury called negligence was not negligence. The case was one which, on the evidence for the plaintiff, could properly have been withdrawn from the jury.

The action should, therefore, be dismissed with costs.

KELLY, J. JUNE 4TH, 1920.

RE LENNOX.

Will—Construction—Inconsistent Clauses—Disposition of Insurance Moneys—Supplying Word to Make Sensible Reading—Intention of Testator.

Motion by the executors of the will of John Lennox, deceased, for the advice and opinion of the Court on certain questions arising upon the will and a codicil thereto.

The motion was heard in the Weekly Court, Toronto.

T. B. McQuesten, for the executors.

S. F. Washington, K.C., for Robert P. Anderson and others.

E. C. Cattanach, for the Official Guardian, representing the infants George Robertson Lennox and Harvey Armstrong Lennox.

KELLY, J., in a written judgment, said that the doubts entertained by the executors arose from an apparent inconsistency of clause 20 with the earlier provisions of the will.

Clause 9 of the will made the testator's niece Grace Anderson (daughter of his half-brother Robert P. Anderson) the beneficiary under a policy of the Sun Life Assurance Company, theretofore payable to her father, just as if she had been named as a beneficiary on the face of the policy, but with the request that, in the event of her surviving the testator, she should use and expend the moneys derived therefrom for her father's maintenance as well as her own.

Four other policies were, on their faces, payable to the testator's wife; and in providing, by clause 10 (a), an annual income for her during her life, he took into consideration the income she would receive from the moneys derivable from these four policies.

By clause 10 (b) (1), the testator gave an annuity of $300 to his sister Sarah Lennox, "in addition to any insurance on my life payable to" her. She was the beneficiary named in a policy of $2,000 in the Mutual Life Insurance Company of New York.

Four other policies were, on their faces, payable to the testator's son John G. M. Lennox; and the testator, in disposing of his residuary estate, upon the death of his wife, amongst his children, declared, by clause 10 (e), that this son's share "is in addition to any insurance on my life payable to him."

The policies mentioned were the only ones which at the testator's death were payable to named beneficiaries.

Clause 20 was as follows:—

"And I do hereby, pursuant to the provisions of the statute in that behalf, declare that any policy or policies of insurance on my life which may be in existence at the time of my decease, and all money and other benefits and advantages to be derived therefrom, shall be and accrue for the benefit of my wife and children in the proportions and in the manner in which the other portions of my estate are given to them and for their benefit as hereinbefore mentioned. And I declare that such provision shall apply to the policies which are now in existence as well as to any other policy or policies which may hereafter be issued and that any and all of the amounts received by my executors or trustees under such policies or as interest on the moneys arising therefrom shall be held by them upon and subject to the trusts above mentioned and be distributed among my wife and children in the same way and manner as the other portions of my estate."

The learned Judge said that, on a careful consideration of the whole will and of the codicil, he was of opinion that what the testator intended to accomplish was to continue to the four beneficiaries above-named (Grace Anderson being substituted for Robert P. Anderson) the benefits of the respective policies payable to them; and that clause 20 should apply to and include insurance moneys not already made payable to named beneficiaries — just as if the word "other" had been used in clause 20 so as to make it read, "I . . . declare that any *other* policy or policies," etc. Such a reading makes all parts of the will and the codicil consistent with each other, and removes the doubts entertained by the executors.

The practice of supplying words is not one to be lightly adopted, and should not be adopted where a sensible meaning can be given to the whole will without their introduction; but see Key v. Key (1853), 4 De G.M. & G. 73, 84, 85; Phillips v. Rail (1906), 54 W.R. 517.

Order declaring accordingly—costs of all parties out of the estate, those of the executors as between solicitor and client.

LATCHFORD, J. JUNE 5TH, 1920.

BONNER-WORTH CO. v. GEDDES BROTHERS.

Contract—Sale of Goods—Shipments not Made in Due Time—Right of Purchasers to Cancel Contract—Purchasers Treating Contract as Subsisting—Waiver—Recovery of Price of Goods Shipped up to Time when Vendors Received Notice to Discontinue Deliveries.

Action to recover $22,550 for woollen yarn shipped from the plaintiffs' factory at Peterborough to the defendants at Sarnia between the 9th and 16th December, 1918.

There was no dispute as to either the quantity or the price of the yarn shipped on and between the dates stated.

The defendants paid into Court $13,530, being in full for all the shipments of yarn up to and including that of the 12th December.

The defendants, by their statement of defence, alleged that, on receipt of the invoice for the shipment of the 12th December, they notified the plaintiffs that they would accept no more yarn. Notice of this cancellation was not received by the plaintiffs until the evening of the 16th December. In the meantime, on the 13th, 14th, and 16th, shipments had been made to the value of $9,020.

The wool refused was afterwards sold by an arrangement made between the parties without prejudice to their respective rights.

The defendants asserted that the cancellation was as of right, owing to the failure of the plaintiffs to fulfil the terms of the contracts existing between them and the plaintiffs; and the defendants counterclaimed for $15,000 damages for breach of contract.

The plaintiffs did not dispute the defendants' right to cancel the order as to shipments not made when the notice was received on the 16th December, but said that deliveries made before that time must be paid for.

The action and counterclaim were tried without a jury at Peterborough.

R. C. H. Cassels and J. E. L. Goodwill, for the plaintiffs.

A. Weir and A. I. McKinley, for the defendants.

LATCHFORD, J., in a written judgment, said that the yarn was shipped under three orders, two of the 6th October, 1917, and one of the 16th October, 1917, for 1,550, 4,000, and 4,000 bundles respectively. Under the orders of the 6th October the yarn was to be shipped as soon as possible. Shipment under the third order was to begin on completion of the former orders and to proceed at the rate of 600 spindles a week. Shipments of about 600 spindles a week were made during October. In November deliveries declined to 1,620 spindles, and in December to 740.

The defendants realised that the third order could not be completed at anything like the rate of 600 spindles a week. On the 7th January, 1918, they paid for the shipments made in

November and for 700 spindles delivered in December, and on the 8th January wrote complaining of failure to deliver. The plaintiffs replied on the 10th January, stating that they had been obliged to turn their plant over to complete large Government contracts, and that the defendants could rely on the spinners doing the best they could.

In January, 1918, only 230 spindles were delivered, and between the end of that month and August only 65 spindles.

The defendants complained again and again during the spring and the summer, and were answered that wool could not be obtained.

To some extent contracts with other customers of the plaintiffs were carried out; and, had the defendants wished, they could at that time have treated the third contract with the plaintiffs as broken, and have successfully sued for damages: Millar's Karri and Jarrah Co. v. Weddell Turner and Co. (1908), 100 L.T.R. 128.

Instead of treating the contract as broken, the defendants chose to regard it as subsisting, and on the 21st September, 1918, wrote urging the plaintiffs to expedition in delivery; and again to the same effect on the 18th October, and the 7th December.

Any infraction of the agreement in regard to the time limited for delivery, if time were of the essence of the contract or was a condition, was expressly waived. See Freeth v. Burr (1874), L.R. 9 C.P. 208.

The plaintiffs had at this time succeeded in obtaining wool, and in December, before the telegram cancelling the order was received, had shipped 2,500 spindles. All such shipments were made pursuant to the original order of the 16th October, 1917, and the letters of September, October, and December, 1918.

The defence and counterclaim failed.

There should be judgment for the plaintiffs for the $13,530 in Court, with accrued interest, and for $9,020 and interest from the 24th March, 1920, the date of the commencement of the action, with costs, and dismissing the counterclaim, with costs.

PARTRIDGE v. GRANT—RIDDELL, J.—JUNE 1.

Building—Erection of Garage in Prohibited Area of City—Permit—By-law—Action by Ratepayer qui tam to Restrain Building—Status of Plaintiff—Motion for Interim Injunction.]—Motion by the plaintiff (a ratepayer of the City of Toronto, suing on behalf of himself and other ratepayers), for an interim injunction

restraining the defendant Grant from proceeding with the erection of a garage upon a lot fronting on Moxon avenue in the City of Toronto, as being in contravention of a city by-law. The permit for the building was obtained some months before the by-law was passed, but the work was not begun at once. The motion was heard in the Weekly Court, Toronto. RIDDELL, J., in a written judgment, said that, in view of the very strong decisions as to the status of a plaintiff in such matters (see, e. g., Tompkins v. Brockville Rink Co. (1899), 31 O.R. 124), he thought (whatever his own view might have been were the matter *res integra*) that he should not grant an interim injunction. The application should be enlarged till the trial—costs in the cause unless otherwise ordered by the trial judge. The defendant Grant should, of course, understand that any building, etc., on his part must be at his peril. J. L. Cohen, for the plaintiff. R. U. McPherson, for the defendant Grant. Irving S. Fairty, for the defendant the Corporation of the City of Toronto.

RE HOGAN—KELLY, J., IN CHAMBERS—JUNE 4.

Lunatic—Provision for, by Will—Right to Home and Maintenance on Farm Devised—Sale of Farm—Approval of Court—Security for Maintenance—Payment of Part of Purchase-money into Court—Allowance for Maintenance—Costs.]—Motion by Annie Nolan, administratrix of the estate of Michael Hogan, deceased, for an order approving a proposed sale of a farm, part of the estate, for the price of $7,000. The motion was heard as in Chambers at the Weekly Court, Ottawa. KELLY, J., in a written judgment, said that, on the material, including a further affidavit of value which was directed to be filed, and which was now on record, the sale to Robert J. Helem on his offer to purchase might, so far as the lunatic was concerned therein, be carried out; but, as Mary Hogan's father (John Hogan) by his will devised these lands subject "to the obligation and condition that my daughter Mary shall enjoy the right of a home in the homestead, with medical care and attention in sickness, as long as she remains unmarried and desires to remain," there should be paid into Court, out of the purchase-price, $3,000 to stand in lieu of the lands as security for the fulfilment of that obligation and condition. This of course was altogether apart from Mary Hogan's claim for payment of the $500 given her by her father's will, and her right to share in the estate of her deceased brother Michael Hogan.—On the motion counsel agreed that the learned Judge

should, on the material then before him and on their statement of the facts, make an order for the maintenance of Mary Hogan, who was living with and cared for by her sister, Annie Nolan, and Annie's husband, William Nolan, Mary's committee. In the present circumstances, $250 a year was a fair and reasonable sum to allow for her maintenance, support, care, and attention; and that sum should be paid accordingly from the 1st January, 1920, until further order.—Costs of all parties of the application (including the application for maintenance) should be paid as follows: two-thirds thereof out of the estate of Michael Hogan, and one-third out of the moneys of Mary Hogan. S. M. Clark, for the applicant and the purchaser. Metcalfe, for William Nolan, committee of Mary Hogan. Gleeson, for John Hogan the younger.

CORRECTION.

In BRITISH WHIG PUBLISHING CO. v. E. B. EDDY CO. LIMITED, ante 255, 5th line from bottom, for "G. Powell" read "M. G. Powell."