The
Ontario Weekly Notes

VOL. XVII. TORONTO, NOVEMBER 28, 1919. No. 10

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 30TH, 1919.

CHARBONNEAU v. L'UNION ST. JOSEPH DU CANADA.

Insurance (Life)—Benefit Society—Supervision of Member—Forfeiture—Reinstatement—Waiver—Estoppel.

An appeal by the defendant society from the judgment of the Acting Judge of the County Court of the County of Carleton, dismissing the action.

The plaintiff was the widow of Honore Charbonneau, a member of the defendant society, and she claimed as the beneficiary in a policy of insurance issued by the society.

The rules of the society provided, among other things, that the monthly contributions should be due and payable on the first of the month. If the member did not pay his monthly dues within the next 30 days, he becomes automatically suspended. Then, to become a member in good standing, the suspended member must pay all arrears and make a written application for reinstatement. If this application was made within the 30 days that followed the suspension, the society would accept a declaration of good health from the suspended member. If the application was made after that time, the member must furnish a medical certificate. If the application was not made within the 60 days that followed the suspension, his policy lapsed, and he was struck off the list of members. The executive, however, had the right to reinstate the suspended member, even after the 60 days, on the application of the member and on certain other conditions which the society might exact, but this was as of grace, and the member had no strict right to be reinstated after 60 days from his suspension had elapsed.

The plaintiff's husband became suspended from the society on the 1st February, 1918, for not having paid his monthly dues for January, 1918.

January's contribution was paid in March to the local receiver of one of the subordinate lodges of the society. He accepted the money, gave a receipt in the ordinary form in the member's pass-book, and forwarded the money to the head-office. The February contribution was paid in April; the March contribution, in March; the April contribution, in June; the May, June, and July contributions, in July; the August contribution, in August; and the September contribution, on the 2nd September.

The head-office, upon receipt of these moneys, retained them by placing them in a special account called "credit account," with the intention, as testified by the general secretary of the society, to hold these contributions until the member would send in his application for reinstatement or to be refunded to the member in case he was not reinstated and struck off the list.

The member was struck off the list, as appeared by the register of lapses, on the 30th April, 1918, but no notice of this fact was sent to the member or to the local receiver. The general secretary testified that, under the rules, the executive was not bound to send such notice.

Sick benefits were paid by the local receiver on the 2nd September, and the member died on the 5th September, without having made his written application for reinstatement.

The member had been ill and under a physician's care from January of the same year, suffering from liver disease and reheumatism.

The Acting County Court Judge was of opinion that neither waiver nor estoppel was shewn, and dismissed the action without costs.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

D'Arcy McGee, for the appellant, contended that, at the time of her husband's death, he was in good standing in the society, as the August and September contributions had been paid in time. If at any time he became suspended, the society had waived the suspension and all forfeiture by accepting these contributions.

H. Saint-Jacques, for the society, respondent, maintained that there was no waiver of forfeiture or of the conditions of reinstatement required, and relied on the rules of the society, which provided that no officer appointed to receive the contributions on behalf of the society can receive from a suspended member any payments of assessments and fees before having satisfied himself that the suspended member has beforehand conformed himself to article 141 of the constitution, which article provided for the conditions of reinstatement above mentioned; and further maintained that the receipt by the head-office of the moneys from the suspended member could not act as a waiver of the intention of

reinstatement, because, first of all, it was placed in the special fund called "credit fund," and, secondly, because even the executive itself had not the power to waive the conditions of reinstatement, but that this power was vested in the convention which was the supreme body of the society; and that the member, as well as his beneficiary, was bound to know the conditions.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MASTEN, J. NOVEMBER 18TH, 1919.

THACKERAY v. BROWN.

Judgment Debtor—Motion to Commit—Failure to Attend for Examination—Unsatisfactory Answers—Rule 587—Forum—Court or Chambers—Rule 207 (4)—Notice of Motion—Necessity for Setting out Answers Complained of—Undertaking to Attend and Answer—Compliance with—Dismissal of Motion—Costs.

Motion by the plaintiff to commit the defendant for contempt of Court.

The motion was heard in the Weekly Court, Toronto.

F. L. Webb, for the plaintiff.

A. C. Heighington, for the defendant.

MASTEN, J., in a written judgment, said that the application was to commit the defendant for contempt of Court, on the following grounds:—

(1) That the defendant did not attend on an appointment for his examination as a judgment debtor on the 27th October, 1919, and did not allege a sufficient excuse for not attending.

(2) That the defendant refused to disclose his property and transactions and did not make satisfactory answers respecting the same.

The defendant was a judgment debtor, and the motion was founded on Rule 587.

Neither of the parties was to be wholly commended on the course of proceedings in this action, nor were the answers of the defendant on his examination entirely reasonable or satisfactory. Bearing in mind the provisions of Rule 207 (4), and the consistent course of practice on motions of this kind, as exemplified by Royal

Canadian Bank v. Lockman (1877), 7 P.R. 102, Klein v. Union Fire Insurance Co. (1883), 3 C.L.T. 602, Verral v. Hardy (1889), 9 C.L.T. Occ. N. 310, and many subsequent cases, it was plain that this motion should have been made in Chambers and not in Court. It was also plain that, if the judgment creditor sought relief on the ground of unsatisfactory answers, the notice of motion should particularise the answers complained of: Foster v. Van Wormer (1888), 12 P.R. 597.

The defendant, by his counsel, now undertook to attend at his own expense and submit to answer all proper questions. This undertaking being complied with, the motion to commit should be refused; but, having regard to all the circumstances and to the considerations mentioned above, the dismissal should be without costs.

MASTEN, J. NOVEMBER 18TH, 1919.

POSTMASTER-GENERAL OF CANADA v. CHONA ELIEFF.

Receiver—Sale of Goods Purchased by Defendant—Disposition of Proceeds—Payment into Court—Reference for Ascertainment of Persons Entitled—Creditors—Injunction.

Motion by the plaintiff for judgment on the statement of claim in default of defence.

The motion was heard in the Weekly Court, Toronto.

M. L. Gordon, for the plaintiff.

The defendant was not represented.

MASTEN, J., in a written judgment, said that the relief craved by the statement of claim was as follows:—

"(1) Payment of the sum of $1,934.81, together with interest thereon at the rate of 5 per cent. per annum from the 15th April, 1911.

"(2) An injunction restraining the defendant, his servants or agents, from disposing of certain goods and chattels.

"(3) That the Sheriff of the City of Toronto be appointed receiver to get in and sell all the goods and chattels purchased by the defendants, and that the said Sheriff do sell and dispose of the said goods and chattels by private sale or public auction, as he may think best, without exempting therefrom any articles in pursuance of the Execution Act.

"(4) That the said Sheriff do pay the moneys received from the said sale directly to the plaintiff, without holding the same pursuant to the Creditors Relief Act or any other Act."

The relief sought by the statement of claim was too wide. It would, on its face, purport to preclude other creditors from asserting any claim to the proceeds of the household goods and chattels referred to in the pleading; though, being res inter alios acta, it would not be effective to that end. The other creditors were not parties to this proceeding, and had no opportunity of asserting their right, if any, to share in the proceeds, and such an opportunity ought to be afforded them.

There should be a judgment granting the first, second, and third prayers of the statement of claim; the fourth prayer of the statement of claim should be refused; the proceeds of the sale, after deducting expenses of sale, should be paid by the receiver into Court to the credit of this action; and it should be referred to the Master to inquire and report the parties entitled to share in the fund.

Further directions and costs should be reserved to be disposed of by a Judge in Chambers.

FALCONBRIDGE, C.J.K.B. NOVEMBER 19TH, 1919.

MISNER v. TYERS.

Fire—Action for Damages for Injury to Plaintiff's Property by Fire Alleged to have Spread from Fire Set out by Defendant—Evidence—Onus—Negligence—Proof of Cause of Fire—Demeanour of Witnesses—Delay in Bringing Action—Findings of Trial Judge.

Action to recover damages for destruction of the plaintiff's property by fire said to have spread to the plaintiff's land from fires negligently set out by the defendant.

The action was tried without a jury at Parry Sound.

W. L. Haight, for the plaintiff.

W. E. Raney, K.C., and H. E. Stone, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendant denied that any fire set out by him spread to the plaintiff's land or caused him any damage, and alleged that, at the time mentioned in the statement of claim, large bush-fires were raging throughout the part of the country in which the lands

of the plaintiff and defendant were situated, and that one of these was threatening to run over and destroy the defendant's land and property, and that such fires as he set out were lawful "back-fires" to prevent the bush-fires from overrunning his land; and that he was not guilty of any negligence in setting out his fires and taking care of them.

In order to succeed, the plaintiff must establish: (1) that the defendant caused the fire; (2) that the defendant was negligent; (3) that the plaintiff suffered damage flowing from the defendant's negligence. The onus was upon him. It was not a case of res ipsa loquitur, and the plaintiff must prove his case beyond reasonable doubt.

It was a particularly dry season. Bush-fires were raging in all parts of the country, and in particular another fire was travelling easterly along the line of the Grand Trunk Railway and extending northerly and southerly from the railway property. It was not sufficient to find that the destruction of the plaintiff's property might have been caused by the defendant's fire. The question was whether it had been proved: Beal v. Michigan Central R.R. Co. (1909), 19 O.L.R. 502, 507, 508, 509, and cases there referred to; Newhouse v. Coniagas Reduction Co. (1917), 12 O.W.N. 136.

Upon demeanour, the evidence of the defendant and his witnesses was to be preferred to that of the plaintiff and his wife and his witnesses.

The dates were very significant. The fire took place in May, 1914. A letter written by the plaintiff's solicitors to the defendant on the 2nd June, 1917, was, the defendant said, the first intimation he had that any claim was being made on him. Then in September, 1917, 3 years and 4 months after the fire, this action was commenced; 14 months later the statement of claim was delivered; and the trial took place 5½ years after the fire.

The plaintiff's claim for damages was grossly and palpably exaggerated, and his misstatements on this head cast a lurid light on the rest of his testimony.

Action dismissed with costs.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 20TH, 1919.

FAIR v. VILLAGE OF NEW TORONTO.

Municipal Corporations—Construction by Village Corporation of Sewer through Lands of Plaintiff—Absence of Expropriating By-law—Action for Trespass and other Relief—Pleading—Statement of Defence—Allegations that By-law Passed since Action and Money Paid into Court to Answer Compensation, Trespass, and Costs—Motion to Strike out Allegations—Advantage of Having Compensation under By-law and Damages for Trespass Ascertained by same Tribunal—Consent Judgment.

An appeal by the plaintiff from an order of the Master in Chambers refusing to strike out certain paragraphs of the statement of defence.

T. J. Agar, for the plaintiff.
W. A. McMaster, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was the owner of certain lands, through which the defendants, a municipal corporation, without taking any expropriation proceedings, constructed a storm-sewer. The action was to recover damages for the wrongful act, and for a mandatory order directing the removal of the works constructed, and an injunction restraining any further trespass. By the statement of defence it was not suggested that the defendants had the right to do what they did; but it was said that, after the bringing of the action, a by-law was passed expropriating the lands, and that the defendants had now offered the plaintiff $2,000 as being the value of the land, $250 as compensation for the trespass, and $100 for costs; and, the offer being rejected, the sum of $2,350 was now brought into Court. The paragraphs containing these allegations were the paragraphs attacked.

The action of the municipality in passing the by-law was proper: Sandon Water Works and Light Co. v. Byron N. White Co. (1904), 35 Can. S.C.R. 309. But the passing of the by-law would not relieve the defendants from the liability to pay damages sustained by reason of the trespass between the time of the commission of the trespass and the expropriating by-law. It was argued that the defendants ought not to be permitted to pay into Court, in this action, the amount that had been offered as compensation in the expropriation proceedings; but the learned Judge could not see that the plaintiff was in any way prejudiced by this, and did not think that the paragraphs should be struck out.

The learned Judge, upon the argument, suggested to counsel that it would be conducive to a satisfactory solution of the problems involved that the damages for the trespass should be determined by the same tribunal as that called upon to fix the price under the expropriation by-law, and that it might be an expedient thing for them to consent to judgment accordingly. The advantage of having all the matters disposed of at one time was obvious: see Chaudiere Machine and Foundry Co. v. Canada Atlantic R.W. Co. (1902), 33 Can. S.C.R. 11.

If, before the issue of the order on this motion, the parties consent to judgment, a judgment may be issued at once; otherwise no order will be made save that the appeal be dismissed, with costs to the defendants in the cause.

MIDDLETON, J. NOVEMBER 20TH, 1919.

RE McKINLEY AND McCULLOUGH.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Conveyance Made in 1888 to Person "in Trust"—Evidence of Nature and Terms of Trust and of Right of Person to Sell, Required by Purchaser—Absence of Actual Notice of Adverse Right—Constructive Notice—Registry Act—Previous Decision on same Question—Application under Vendors and Purchasers Act—Adjournment for Hearing by Divisional Court.

Motion by a vendor of land, under the Vendors and Purchasers Act, for an order declaring whether an objection to the title made by the purchaser was or was not a valid objection.

The motion was heard in the Weekly Court, Toronto.

T. A. Gibson, for the vendor.

A. D. McKenzie, for the purchaser.

MIDDLETON, J., in a written judgment, said that the objection arose from the fact that William Cayley, who was the owner of the land on the 1st May, 1888, conveyed it on that day to John Turner—"in trust." The deed was in the ordinary statutory form and contained no indication of any trust save the words "in trust," which followed the description of the grantee. The purchaser now required evidence of the nature of the trust on which the property was held by Turner and its terms, also evidence shewing that there was a right to sell, and, if there was a power of sale, that it was duly exercised.

The learned Judge said that he should have had little trouble with the application were it not for the decision of Kelly, J., in Re Thompson and Beer (1919), ante 4, where the circumstances were precisely similar, and it was held that the purchaser was entitled to which he asked in the present case.

In an earlier case, apparently unreported, Middleton, J., said, he had arrived at precisely the opposite conclusion. In his view, the Registry Act protects the registered owner against all unregistered equities, and in fact gives to the owner an absolute title unless he has, before registration of the instrument under which he claims, actual notice of the adverse right. Constructive notice is not enough to defeat the title of the registered owner: Rose v. Peterkin (1885), 13 Can. S.C.R. 677; Tolton v. Canadian Pacific R.W. Co. (1891), 22 O.R. 204.

A different conclusion might have been reached by Kelly, J., had London and Canadian Loan and Agency Co. v. Duggan, [1893] A.C. 506, been cited to him, and had his attention been drawn to the effect of the Registry Act.

In these circumstances, the proper disposition of the motion was to enlarge the application to be heard by a Divisional Court: Judicature Act, sec. 32 (3). It was better to adopt this course than to follow the decision in Re Thompson and Beer and leave the parties to appeal, because it is said that the mere fact that a Judge entertains an opinion adverse to a title is sufficient to render it so doubtful that it should not be forced upon a purchaser. The question was one of great practical importance, because, after the lapse of time, it was here impossible to obtain any information as to the facts surrounding the transaction.

Motion adjourned to be heard by a Divisional Court.

MASTEN, J., IN CHAMBERS. NOVEMBER 22ND, 1919.

REX v. SOLOVARI.

REX v. FERRONI.

REX v. SCARRONI.

Canada Temperance Act—Magistrates' Convictions for Having Intoxicating Liquor in Possession or Bringing it into County of Peel—Absence of Evidence to Support Convictions—Order Quashing Convictions.

MOTION to quash the convictions of the three defendants, by two Justices of the County of Peel, for offences in respect of

intoxicating liquors, alleged to have been committed in the County of Peel, where the Canada Temperance Act was in force at the date of the convictions. The convictions, however, did not specify that Act or any other as having been violated.

W. A. Henderson, for the defendants.
No one opposed the motion.

MASTEN, J., in a written judgment, said that the three convictions were alike, and each read: "for that" the defendant, "on or about the 17th day of September, 1919, upon the Toronto and Hamilton highway, in the county of Peel, did have in his possession, or did bring into the county of Peel, a quantity of intoxicating liquor contrary to law; said liquor being conveyed in motor-vehicle No. 128967."

The motion to quash was based upon the grounds: (1) that there was no evidence to support the convictions; (2) that each information set forth two distinct and separate charges.

A careful perusal of the depositions before the magistrates satisfied the learned Judge that there was absolutely no evidence upon which they were entitled to convict these defendants, or any one of them, on the charge laid. All that was shewn was that there was a smell of liquor; that the car was driven away in a suspicious manner about half-past twelve at night, after a collision had taken place; and that certain bags containing bottles of liquor were in the morning found in the grass at the side of the highway a mile or a mile and a half away from where the collision took place. There was not the slightest evidence that the defendants, or any of them, put the bottles there, or had them in possession at any time.

It must always be borne in mind that mere suspicion is insufficient to convict; and that, though on a motion of this kind there is no right to quash a conviction merely because the evidence seems slight, yet if the conviction is founded on mere suspicion, without any evidence, such a conviction cannot stand. It was unnecessary to deal with the second ground.

The three convictions should be quashed, without costs, and with the usual order protecting the magistrates.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 22ND, 1919.

CAMPBELL v. LENNOX.

Practice—Order for Attendance of Plaintiff for Examination for Discovery—Default—Dismissal of Action—Plaintiff Absent out of the Jurisdiction—Solicitor for Plaintiff Unable to Find him—Rules 328, 337.

An appeal by the plaintiff from two orders made by the Master in Chambers, the first on the 26th June and the second on the 7th October.

Erichsen Brown, for the plaintiff.
R. S. Robertson, for the defendant.

MIDDLETON, J., in a written judgment, said that by the endorsement upon the writ of summons the plaintiff was said to be a resident of the city of Toronto—his precise address not being given. In the statement of claim there was no indication of his place of residence.

On the 10th June, 1919, an appointment for the examination of the plaintiff for discovery, before a special examiner, was served by the defendant's solicitor in accordance with the provisions of Rule 337, on the theory that the plaintiff was a party within Ontario.

No one attended upon the appointment, and a motion was made for an order dismissing the action. Upon the return of this motion, an affidavit was filed by the plaintiff's solicitor stating that the plaintiff was unable to appear for examination, as he was out of Ontario and upon a business trip—then being in Boston, Massachusetts. The result was the order of the 26th June, directing the plaintiff to attend for examination before the 30th September, leaving the day of attendance to his discretion and convenience, his solicitor notifying the defendant's solicitor of the time when he proposed to submit himself for examination. No appointment was taken out or anything else done looking to the examination, but an application was made to the Master by the plaintiff for an order extending the time within which the plaintiff should submit himself for examination, and upon this the second order appealed from was made, extending the time to the 31st October, 1919, and providing that, in default of the plaintiff obtaining and serving an appointment and attending and submitting to be examined as provided for in the former order, this action should be dismissed with costs.

The plaintiff contended that the procedure of Rule 337 could not be applied, and that where a party ordinarily resident within Ontario leaves the Province the right to examine him must be asserted under Rule 328.

It was not necessary to determine this question upon the present application, because the order made on the 26th June was not appealed from within due time, and, moreover, it was accepted by the plaintiff, in such a way as to preclude him from appealing therefrom, by making the subsequent application to extend the time within which the plaintiff should attend.

The order of the 26th June would in effect be an order under Rule 328, for, assuming the plaintiff to be out of Ontario, the Court ordered the examination to be taken at Toronto, that being admittedly the most "convenient place."

Having regard to the circumstances disclosed and the failure of the plaintiff to comply with the terms of the order of June, the default would amply justify the provision for the dismissal of the action for want of prosecution in the order extending the time.

On the hearing of the appeal, with the assent of both counsel, the learned Judge withheld judgment to allow the plaintiff's solicitor to endeavour to find his client, it having been made to appear that the real reason for the default was the fact that the plaintiff's solicitor was unable to find his client, who appeared to be travelling from place to place and had failed to keep in touch with his solicitor.

The time for which the decision was to be withheld had now expired; and, on notice being given to the plaintiff's solicitor, he admitted that he had not yet found his client.

The appeal failed and should be dismissed with costs to the defendant in any event of the cause.

The action was based upon a distress for rent, and a large sum of money was claimed. If the claim was put forward in good faith, the plaintiff ought to have kept in touch with his solicitor, and could not complain of the dismissal of his action, when his solicitor, after 6 months' diligent search, could not find him.