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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 9TH, 1920.

CYCLONE WOVEN WIRE FENCE CO. LIMITED v. CANADA WIRE AND CABLE CO. LIMITED.

Landlord and Tenant—Lease—Rent—Destruction of "Building"—Special Proviso—Group of Buildings—Premises Becoming Unfit for Occupancy—Termination of Lease—Conditions Precedent—Liability for Rent—Apportionment Act, R.S.O. 1914 ch. 156, sec. 4—Surrender—Damages—Breaches of Covenants—Costs.

An appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of ROSE, J., 18 O.W.N. 103.

The appeal and cross-appeal were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

D. J. Coffey, for the plaintiffs.

I. F. Hellmuth, K.C., and H. E. McKittrick, for the defendants.

THE COURT dismissed both appeals without costs.

FIRST DIVISIONAL COURT. NOVEMBER 10TH, 1920.

KRANZ v. McCUTCHEON.

Contract—Option for Purchase of Oil-leases—Undertaking of Purchaser to Drill Wells and Develope Property—Breach—Misrepresentations—Failure to Prove—Construction of Contract—Damages—Measure of—Reference—Costs.

An appeal by the defendant from the judgment of MASTEN, J., 18 O.W.N. 395.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

R. S. Robertson, for the appellant.

G. Bray, for the plaintiff, respondent.

THE COURT varied the judgment below by striking out of the award of damages against the appellant the words "substantial damages in respect of" and substituting the words "the damages, if any, sustained by reason of," and by directing that the reference as to damages shall be at large and that the Referee shall not be bound by the opinion of MASTEN, J., as to the basis on which damages are to be computed. In other respects the judgment was affirmed, and the appeal dismissed with costs.

HIGH COURT DIVISION.

ORDE, J., IN CHAMBERS. NOVEMBER 9TH, 1920.

RE McDONALD v. COCKSHUTT PLOW CO. LIMITED.

Division Courts—Territorial Jurisdiction—Place where Cause of Action Arose—Division Courts Act, sec. 72—Contract—Where Made.

Motion by the defendants for an order prohibiting further proceedings upon a claim made by the plaintiff in the Second Division Court of the District of Algoma.

S. J. Birnbaum, for the defendants.

G. S. Hodgson, for the plaintiff.

ORDE, J., in a written judgment, said that the plaintiff, who resided in the district of Algoma, sought to recover from the defendant company, whose head office was in the city of Brantford, in the county of Brant, the sum of $100 for commissions upon the sale of certain farming machinery, under two contracts whereby the plaintiff was appointed the defendants' agent for the sale of machinery in the village of Portlock (Algoma) and vicinity.

The contracts in question were dated respectively the 12th April, 1918, and the 6th March, 1919, and were identical in their terms, except that the first covered the year 1918 and the second the year 1919. The plaintiff was appointed the sales-agent of the defendants for the territory of "Portlock and vicinity," and was required by the contracts to perform a large number of duties and to comply with certain regulations and conditions. So far as he

was concerned, the whole of his duties and obligations were apparently to be performed in Portlock and its vicinity, unless the obligation to remit the proceeds of sales, either in cash or notes, involved some obligation upon his part to see that they reached the head office of the company safely.

The contract in each case concluded with the following clause: "It is further agreed that this contract shall not be valid and binding upon said company of the first part until the same is approved of by them; and also that it cannot be subsequently changed in any of its provisions by any person without the written authority of the said company." Then followed the words, in print, "Cockshutt Plow Company Limited, by . . . Traveller," and this was followed by a blank for the signature of the intended agent. Below this appeared, in print, "Approved by Cockshutt Plow Company Limited per . . ."

It was clear from the wording of the contract that, although signed by a traveller on behalf of the company and by the agent, the contract was not complete until approved by some one else on behalf of the company; and it was sworn that "the said contracts were executed on behalf of the company at Brantford," by which it was probably meant that the signature of the approving officer was appended at Brantford. No corporate seal was affixed.

By sec. 72 of the Division Courts Act (R.S.O. 1914 ch. 63), "an action may be entered and tried (a) in the court for the division in which the cause of action arose," etc. If the plaintiff cannot bring himself within this provision, then the action must be entered in the court for the division in which the head office of the defendants is situate.

The defendants contend that, as the contracts were not completely executed until they were signed by them at Brantford, part of the cause of action arose outside the jurisdiction of the Second Division Court of Algoma. It was not necessary to review the authorities on this point. They are collected in Bicknell & Seager's Division Courts Act, 3rd ed., pp. 156 et seq. The cause of action includes every fact which it is necessary for the plaintiff to prove in order to succeed. Here he sued upon the contracts. He must prove their execution by the defendants, and it was established that they were executed by them at Brantford. It was argued that the written approval of the company (without which there was no contract) might have been given somewhere else. But it was not what might have happened but what did happen that must govern. This case was much like In re Dunn v. Gourlay (1897), 17 C.L.T. Occ. N. 415, where the contract was signed by the defendants in Toronto and sent to the plaintiff, who signed it in Peterborough. A Divisional Court held that the whole cause of action had not arisen in Peterborough.

The order for prohibition must be granted, with costs.

ORDE, J. NOVEMBER 10TH, 1920.

BIRD v. YOUNG.

Bills and Notes—Cheque Drawn on Bank—Absence of Consideration—Dishonour—Endorsement to Creditor of Payee—Action by Creditor against Drawer—Creditor Taking Cheque for Collection without Giving Credit or Value—Endorsement after Dishonour—"Holder"—"Holder in Due Course"—Third Party—Costs.

Action by W. A. Bird against W. C. Young to recover the amount of a cheque for $1,000, drawn by the defendant upon a bank in Toronto, payable to H. S. Hill, who was brought in by the defendant as a third party, and endorsed by Hill to the plaintiff.

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

W. R. Smyth, K.C., for the plaintiff and the third party.

J. J. Gray, for the defendant.

ORDE, J., in a written judgment, said that it was admitted that there was no liability of the defendant to Hill which could serve as a consideration for any promissory note or bill of exchange as between them. Hill admitted that the cheque dated the 16th August, 1917, was in reality a gift, in return for certain help which he had given to the defendant. The latter admitted the giving of the cheque, but said that it was understood that it was not to be cashed until he should send word to Hill to use it. On a later day, the defendant, being afraid that Hill might not observe this condition, stopped payment of the cheque at the bank. There was in fact no consideration for the cheque, and payment could not be enforced by Hill against the defendant.

Unless, therefore, the plaintiff was a holder in due course he stood in no better position than Hill.

In August, 1917, Hill was indebted to the plaintiff, according to their evidence, to the extent of $1,090. The plaintiff, who lived in Buffalo, was pressing Hill for payment, and it was this pressure which induced Hill to apply to Young for money. When Hill received the cheque, he went to Toronto to cash it, and found that payment had been stopped. He then endorsed it to the plaintiff, without telling him that the cheque had been dishonoured, and the plaintiff deposited it for collection in his own bank in Buffalo. When it was presented for payment in Toronto, payment was again refused.

The plaintiff now claimed to recover as a holder in due course. In the witness-box he said that he took the cheque from Hill on account "to credit him if it were paid," and no credit was in fact

ever given. And he admitted that when the cheque was returned unpaid he consulted Hill and said, "We ought to sue the cheque" —he said "we" because both he and Hill were interested in the cheque.

Where the payee of a cheque which has been issued without consideration, and which for that reason is unenforceable against the drawer, endorses it to a creditor who takes the cheque as cash and credits the payee therewith as a payment on account of a debt, the endorsee becomes a holder in due course and is entitled to recover from the drawer: Currie v. Misa (1875), L.R. 10 Ex. 153; McLean v. Clydesdale Banking Co. (1883), 9 App. Cas. 95. But in the present case the plaintiff gave no credit to Hill at all; he took the cheque for collection, intending to credit Hill as soon as it was paid. The existing debt was sufficient consideration if it had been so treated, but there was no evidence of an agreement between the plaintiff and Hill that the former would not claim payment of Hill's indebtedness to him during the currency of the cheque, such as was held in Elkington v. Cooke-Hill (1914), 30 Times L.R. 670, to be a sufficient consideration.

Sawyer v. Thomas (1890), 18 A.R. 129, and Hopkins v. Ware (1869), L.R. 4 Ex. 268, 271, distinguished.

Although the plaintiff was a "holder" by reason of Hill's endorsement of the cheque to him, and therefore entitled to enforce payment and to give a complete discharge, his right to enforce payment stood on no higher ground than that of Hill, because there was no consideration for Hill's endorsement. As a mere holder of the cheque, the plaintiff's right to enforce payment was qualified.

As the plaintiff gave no value for the cheque, it was not necessary to go into the second defence, which was that, the cheque having been already dishonoured before Hill endorsed it to the plaintiff, the latter took it subject to any defect in Hill's title.

The action should be dismissed with costs.

Had the defendant been held liable to the plaintiff, the defendant would have been entitled, as the accommodation drawer of the cheque, to indemnity from Hill. The defendant should, therefore, have judgment against Hill for his costs of the third party proceeding.

LOGIE, J. NOVEMBER 10TH, 1920.

CITY OF CHATHAM v. CHATHAM GAS CO. LIMITED.

Ontario Railway and Municipal Board—Exclusive Jurisdiction—Increase in Price for Supply of Natural Gas—Agreement between Gas Company and City Corporation—Ontario Railway and Municipal Board Act, secs. 21 (1), 22—Public Utility—Action to Restrain Company from Increasing Prices—Jurisdiction of Court Ousted.

Motion by the plaintiffs for an interim injunction restraining the defendants from raising their rates for natural gas supplied to domestic consumers in Chatham.

The motion was heard in the Weekly Court, Toronto.

O. L. Lewis, K.C., for the plaintiffs.

W. N. Tilley, K.C., and J. G. Kerr, for the defendants.

LOGIE, J., in a written judgment, said that a preliminary objection taken by the defendants, that the Court had no jurisdiction to entertain the action because the jurisdiction of the Ontario Railway and Municipal Board was exclusive, must be given effect.

The original franchise agreement between the parties, dated the 31st December, 1916, provided for the supply of gas to consumers at certain rates for a period of 5 years, and thereafter the defendants agreed to furnish gas at prices "as low as and not greater than the prices" for natural gas sold elsewhere in Ontario, but either the gas company or the city corporation might apply to the Board to increase or decrease the prices from time to time to what the Board should, in all the existing circumstances, deem reasonable.

This agreement was carried into effect by by-law No. 101 of the city corporation.

Neither the company nor the corporation had made application to the Board, but the company had, by notice to the corporation, declared an intention to raise the rates for gas to prices which, as the plaintiffs contended, were not as low as and not greater than the prices therefor as sold elsewhere in Ontario; and the corporation brought this action to restrain the company from charging the consumers at the increased rates, without application to the Board having first been made.

By sec. 21 (1) of the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, the Board has jurisdiction to inquire into, hear, and determine any application by or on behalf of any

person interested, complaining that any company operating any public utility, or having the control thereof, or charged with the performance of any duty or the exercise of any power in relation thereto, (*b*) has done or is doing any act contrary to or in contravention of any agreement entered into between the company and the corporation.

By sec. 22, this jurisdiction, where conferred, is exclusive.

The defendants were a company operating or having control of a public utility.

Nothing in the judgment of the Judicial Committee in Toronto R. W. Co. v. City of Toronto, [1920] A.C. 455, 17 O.W.N. 501, caused the learned Judge to doubt the correctness of the judgment in Town of Waterloo v. City of Berlin (1913), 28 O.L.R. 206, which entirely covers the point raised.

The jurisdiction of this Court had, therefore, by appropriate legislation, been ousted.

The question whether the parties had by agreement excluded the jurisdiction of this Court in relation to the matter in question was not argued, and the learned Judge did not pass upon it.

Motion dismissed with costs.

FERGUSON, J.A., IN CHAMBERS. NOVEMBER 12TH, 1920.

REX v. NEILSON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Alleged Sale of Intoxicating Liquor by Officer of the Law—Absence of Evidence to Sustain Finding of Magistrate—Quashing Conviction.

Motion for an order quashing the conviction of the defendant, by a magistrate, for an offence against the Ontario Temperance Act.

J. W. Curry, K.C., for the defendant.

F. P. Brennan, for the magistrate.

FERGUSON, J.A., in a written judgment, said that it was contended: (1) that the evidence in the case did not disclose a sale; and (2) that the defendant was entitled to the protection afforded by the provisions of sub-sec. 3 of sec. 50 of the Act, 6 Geo. V. ch. 50.

It was not necessary to deal with the second contention, because, after a careful study of the evidence, the learned Judge was of the opinion that the officers did not intend to enter into any contract to purchase liquor from their employee (the defendant); and that, as there must be two parties to any such contract, there was before the convicting magistrate no evidence on which he could find that the defendant sold the liquor.

The conviction should be quashed, with the usual order protecting the magistrate.

MIDDLETON, J. NOVEMBER 13TH, 1920.

RE ELLIOTT.

Will—Construction—Division of Residue—Enumerating of Persons to Take Shares—Descriptive Words—Naming of Participants—Extent of Shares—Families—Distribution per Capita.

Motion by the executors of the will of Charles Henry Elliott, deceased, for an order determining certain questions as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

W. H. Wallbridge, for the executors.

W. Lawr, for Robert J. Elliott's children.

John Shearing, for himself and his family.

F. W. Harcourt, K.C., for the infant children of Mrs. Kirby.

MIDDLETON, J., in a written judgment, said that several questions arose on the clause in the will of the late Charles Henry Elliott dealing with his residuary estate. The will bore date the 11th January, 1919, and the testator died on the 28th May following. Robert J. Elliott died on the 23rd December, 1916, and Mrs. Kirby on the 8th April, 1917.

After certain provisions not here material, and the setting apart of $25,000 for the benefit of his adopted daughter, the testator provided that the residue of his estate should be converted into money and divided "equally among the following respective persons." He then enumerated them: Dr. H. P. Elliott; "the surviving children of the late Mrs. L. Kirby of Swansea Wales each child to receive his or her share on attaining the age of twenty-one years" Mrs. Gaze Edith Elliott; "the surviving children of the late Robert J. Elliott" Helen Shearing Ruth Shearing John Shearing junior "the last three persons being the children of the said John Shearing" Edith Cracknell and John Shearing senior.

(The learned Judge omitted the place of residence given by the testator save when quoted.)

In the event of the death of the adopted daughter unmarried, her $25,000 was to be divided "among the same persons as my residuary estate is" directed to be divided.

The most important question arose from the fact that Mrs. Gaze and Edith Elliott were two of "the surviving children of the late Robert J. Elliott."

If these words were intended as merely descriptive, they were not apt, because they might as well relate to all those named before—there was no reason why they should be confined to the two last named—and they were also inaccurate, as there were 4 surviving children. The context and punctuation led the learned Judge to the conclusion that it was intended that they should refer to the naming of participants in the fund, and should not be regarded as descriptive of those already named. "The surviving children of the late Mrs. Kirby" was clearly a nomination and not a description, and when the testator intended description he used the words "the last three persons being the children of John Shearing."

There was some mistake, and there was no way of ascertaining what it was. The testator might have forgotten that Mrs. Gaze and Miss Elliott were children of his brother, or he might have meant to name the children of some one else, or he might have started to name his brother's children, and then have concluded to include only those who survived him, and have forgotten to strike out names written. It was idle to speculate. The rule is to include rather than to exclude, for the harm occasioned by inclusion is much less than that resulting from improper exclusion.

The second question was whether this gave the named persons two shares. The learned Judge thought not. The dominant idea was a sharing equally among named persons. The fact that a person was named twice did not shew that the idea of equality was abandoned.

The same reasoning answered the third question—Mrs. Kirby's children each take a share. So do Mr. Shearing's children. The persons to share are to be counted per capita, and a corresponding division is to be made.

The gift of the $25,000 fund, if and when the time comes for it to be distributed, is to this same class, with a substitutional gift, in case any beneficiary dies before the period of distribution leaving issue, in favour of such issue. If any beneficiary dies without leaving issue, the number of the class sharing in this second distribution (i.e., the division of the $25,000) is correspondingly reduced.

LENNOX, J. NOVEMBER 13TH, 1920.

CITY OF OTTAWA v. GRAND TRUNK R. W. CO.

CITY OF OTTAWA v. OTTAWA AND NEW YORK R. W. CO.

Highway—Work upon City Street Proposed to be Done by City Corporation as Local Improvement—Assessment of Land-owners—Railway Companies—Denial that Street is in Law a Highway—Assertion that Title is in Crown—Title not Asserted by Crown—Evidence—Possession—Municipal Act, secs. 432, 434, 445—Limitations Act, sec. 4 (1), (2).

Actions for a declaration that Nicholas street, in the city of Ottawa, in in law a highway.

The actions were tried together, without a jury, at an Ottawa sittings.

F. B. Proctor, for the plaintiffs.

D. L. McCarthy, K.C., and R. G. Code, K.C., for the defendants.

LENNOX, J., in a written judgment, said that the council of the plaintiffs, the Municipal Corporation of the City of Ottawa, decided to do certain work upon Nicholas street as a local improvement, and passed the usual by-laws to provide for raising the money and assessing the land-owners, as provided by the Local Improvement Act. The defendants said that the land known as Nicholas street was still vested in the Crown, and that they were not liable as land-owners to contribute to the expense of the work. It was said by counsel for the plaintiffs that the officers of the Crown did not intend either to affirm or deny the alleged rights of the Crown or the rights claimed by the plaintiffs. The judgment in these actions, the Crown not being before the Court, would not bind it.

The alignment of Nicholas street from end to end has not always been exactly as it is to-day. There were temporary diversions long ago, at certain points, when the highway was out of repair. There was also a deliberate change of route some years ago, when one of the defendant companies, or its predecessor in title, obtained a surrender of part of what was then recognised as Nicholas street, and, in lieu of it, obtained and conveyed to the city corporation land now used as part of Nicholas street. Subject to these exceptions, the effect of the evidence was to establish that the land in question had been recognised and used as a street and highway of the city just as it is to-day; and it appeared

to be beyond any doubt that almost from time immemorial, and at all events for more than 60 years, lands had been bought and sold and described with reference to Nicholas street as a boundary, easement, and means of access; and statute-labour had been done and municipal funds expended upon Nicholas street for its construction, repair, and improvement as a public highway.

Reference to secs. 432, 434, and 445 of the Municipal Act, R.S.O. 1914 ch. 192, and sec. 4 (1) and (2) of the Limitations Act, R.S.O. 1914 ch. 75.

What had been done conformed to the statutory requisites for constituting a highway; and the soil and freehold of a highway are, by the Municipal Act, vested in the municipality in which the highway is.

Not only is the right of action barred by the Limitations Act, but the title of the former owner, including the Crown, is extinguished by possession of the character contemplated by the statute upon the expiration of the time limited for bringing an action.

The defendant companies seek to evade responsibility under cover of a title which the Crown does not assert. The companies proportionately derive at least as much benefit from these improvements as any specially assessed ratepayer in Ottawa, and their defence is wholly wanting in actual merit. It would seriously unsettle conditions long recognised and concurred in, and lead to endless trouble, if a land-owner, after two-thirds of a century had elapsed, could successfully refuse to perform his allotment of statute-labour on an alleged title of the Crown, not claimed by the Crown.

Upon the facts appearing in evidence, the learned Judge did not feel bound as a matter of law to give effect to the contentions of the defendant companies.

There should be judgment against both defendants with costs.

HUTTON v. DENT—KELLY, J., IN CHAMBERS—NOV. 12.

Judgment—Default of Appearance—Action on Foreign Judgment—Defence—Judgment Set aside and Defendant Let in to Defend.]—This action was upon a judgment obtained by the plaintiff in the Province of Saskatchewan. Judgment in this action was entered on the 21st June, 1920, on default of appearance. Before the entry of judgment, there was correspondence between the solicitors of the respective parties as to extending the time for appearance, for reasons indicating substantial difficulties in the way of the defendant's solicitors obtaining the neces-

sary instructions to enable them to prepare their client's affidavit of merits. On the 15th September, 1920, an order was made by the Master in Chambers, on the defendant's application, setting aside the judgment of the 21st June, directing that the writ of fieri facias issued thereon be withdrawn, and directing the defendant to enter an appearance and file her affidavit of merits within 10 days. The plaintiff appealed from that order. KELLY, J., in a written judgment, said that sufficient had been shewn to justify the Master in giving the defendant an opportunity to raise her defence in the proper and regular way, and the order appealed from should not be disturbed. The learned Judge did not deal with the question raised on the argument as to the plaintiff's right to recover in this Court upon the foreign judgment; but simply approved of restoring the defendant to a position where she might, in the usual manner, enter an appearance and set up such grounds of defence as she might be advised. The appeal should be dismissed with costs, and the defendant should have 10 days to enter an appearance and file her affidavit of merits. W. LAWT, for the plaintiff. J. M. Ferguson, for the defendant.

MICKLE DYMENT & SON v. MASINO—KELLY, J., IN CHAMBERS —NOV. 12.

Judgment—Summary Judgment—Application for, by Plaintiff—Rule 57—Defence—Affidavit of Merits—Cross-examination on.]—An appeal by the defendant Angelina Masino against paras. 2 and 3 of an order of the Master in Chambers of the 22nd September, 1920, by which summary judgment for the plaintiffs was granted against the appellant. KELLY, J., in a written judgment, said that the appellant's affidavit of merits set up an arguable defence, and her cross-examination thereon had not displaced it. She should not be deprived of the opportunity of having her defence tested in the regular manner at a trial. The appeal should, therefore, be allowed, with costs of the appeal and of the motion before the Master. E. G. Black, for the appellant. G. M. Willoughby, for the plaintiff.

CORRECTION.

In RE FANNING, *ante* 154, the judgment is that of LOGIE, J.