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OCTOBER 18TH, 1904.

DIVISIONAL COURT.

MALCOLM v. BRANTFORD STREET R. W. CO.

Way—Accumulation of Ice—Negligence of Owner of Building—Climatic Changes—Injury to Pedestrian—Liability.

Appeal by plaintiff from judgment of Judge of County Court of Brant dismissing action with costs. Plaintiff, while going to work in the early morning of 6th February, 1904, slipped and fell on an accumulation of snow and ice on the sidewalk alongside of defendants' car barn in the city of Brantford, and was injured. He brought this action to recover damages for his injuries.

L. F. Heyd, K.C., for plaintiff.

E. Sweet, Brantford, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

FALCONBRIDGE, C.J.—It is unnecessary for the purposes of this decision to discuss the large and important question of the liability, under any view of the circumstances here disclosed, of defendants. The findings of fact of the County Court Judge were very clear and pointed, and were abun-

dantly sustained—even by evidence adduced by plaintiff himself. Whatever might have been the condition of the sidewalk through the winter, there was such intervention by the freezing of the night before the accident as to make the alleged default or neglect of defendants too remotely connected with the damage.

There is an able discussion of the legal effect of the emergency which sometimes arises in "our uncertain and inclement climate," and of intervening and concurring causes of damage, in O'Keeffe v. Mayor, etc., of New York, 29 N. Y. App. Div. 524.

Appeal dismissed with costs.

CARTWRIGHT, MASTER. OCTOBER 19TH, 1904.

CHAMBERS.

SHEPPARD PUBLISHING CO. v. HARKINS.

Discovery—Examination of Defendant—Scope of—Contract—Breach—Denial—Damages.

Motion by plaintiffs to compel defendant to answer certain questions put to him on his examination for discovery.

W. J. Elliott, for plaintiffs.

J. G. O'Donoghue, for defendant.

THE MASTER.—The statement of claim alleges (1) an agreement by defendant to devote his whole time to the service of plaintiffs from 1889 to August, 1903; and (2) breach of said agreement "by carrying on business on his own behalf both alone and in partnership with others." Plaintiffs ask an account of such dealings, and resulting profits, and damages for breach of contract.

The statement of defence denies any such agreement, and says that, if defendant was to devote his whole time to

plaintiffs' business, he did so, and denies his having engaged in any other business on his own account.

By these pleadings two issues are distinctly raised: 1. Was there such an agreement between the parties as alleged in the statement of claim? 2. Was defendant guilty of a breach of the same? . . . Plaintiffs must prove both to entitle them to a decree.

The questions which defendant refused to answer were directed to the second point. The refusal was on the ground that plaintiffs were not entitled to an answer until they had proved the agreement.

With this I cannot agree. The rule is well laid down in Graham v. Temperance and General Life Assce. Co., 16 P. R. 536, at p. 539. . . .

The application of this rule to the present case seems to me decisive of the motion, which should be granted, with costs to plaintiffs in any event. Defendant must attend at his own expense and answer the questions so far as necessary to prove the second point. But this would not extend to going into any such detail as will be proper enough on a reference as to profits and damages, nor would defendant necessarily be required to produce his books. But I am not expressing any decided opinion on this point, because defendant has positively denied having had any business dealings with others than plaintiffs during the time of his engagement with them.

Had he rested on the first issue, defendant could not have been compelled to answer, if he had proceeded as indicated by Street, J., in the case above cited, and which was adopted: see S. C., 17 P. R. 271. If this course is thought desirable, defendant can still adopt it, but it will be for him to consider whether or not it is worth while. The issue of this order may be stayed . . . to enable him to take this course.

On the limits of discovery, reference to Bray on Discovery, pp. 11, 30, and 31, will be found useful.

OCTOBER 21ST, 1904.

DIVISIONAL COURT.

TAYLOR v. McCLIVE.

Sale of Goods—Destruction on Vendor's Premises—Liability —Damages.

Appeal by defendant from judgment of BRITTON, J., in favour of plaintiff for the recovery of $2 per barrel for a quantity of apples sold by defendant to plaintiff and destroyed by frost before they left defendant's premises.

The appeal was heard by BOYD, C., MEREDITH, J., IDINGTON, J.

C. A. Masten and F. C. McBurney, Niagara Falls, for defendant.

W. M. German, K.C., for plaintiff.

BOYD, C.—Having read all the evidence and exhibits, I see no reason to disturb the financial result of the judgment as given by my brother Britton, and the appeal will be dismissed with costs.

It would be well to have the terms settled by the trial Judge as to the manner of delivery of the barrels from defendant to plaintiff, and this may well be done on the settling of the minutes of the formal judgment, if it has not yet been drawn up: if it has, the matter may now be spoken to before one of the Judges of the Divisional Court.

MEREDITH, J., concurred.

IDINGTON, J.—I think, for the reasons given by the learned trial Judge, that his judgment should not be disturbed. I have carefully read the evidence, and do not see how the learned Judge could have come to any other conclusion than he did in regard to all the facts bearing upon the contract and the breaches thereof.

Possibly some room exists for a difference of opinion in regard to the amount of damages. There is, however, evi-

dence upon which the assessment of damages could be fairly made upon the basis upon which the judgment rests, and I do not feel called upon to interfere therewith.

I think the appeal should be dismissed with costs.

MACMAHON, J. OCTOBER 22ND, 1904.

WEEKLY COURT.

RE INGLIS AND CITY OF TORONTO.

Municipal Corporations—By-law Closing up Part of Street—Ordnance Lands—Street Laid out by Dominion of Canada—Consent of Dominion Government—Absence of—Void By-law—Subsequent Consent—Amending By-law.

Motion by the John Inglis Co. (Limited), ratepayers of the city of Toronto, for an order quashing by-law No. 4420 passed by the municipal council on 26th September, 1904, being a by-law to provide for the closing of Strachan avenue and conveying the same to the Massey-Harris Co. (Limited), on the following grounds: (1) That the corporation had no power to pass the by-law because Strachan avenue, being a public street over which the corporation had assumed jurisdiction, was laid out by a plan which included the property of the applicants, whose predecessors in title purchased according to that plan, and who had not consented to the proposed alteration. (2) Because the by-law was bad upon its face in that it did not recite the consent of the Government of the Dominion of Canada, as provided by the Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 628, the street having been laid out by His Majesty's Ordnance. (3) That the by-law provided for a conveyance by way of free gift to a private corporation, and was not a by-law in the public interest, but solely in the interest of the private corporation.

H. S. Osler, K.C., for the applicants.

J. S. Fullerton, K.C., for the city corporation.

G. H. Watson, K.C., for the Massey-Harris Co.

MACMAHON, J.—Strachan avenue is 80 feet wide, and on 13th June, 1904, the Massey-Harris Co. wrote to the city

council setting forth that they had secured options on a number of lots of land on the east side of Strachan avenue, having a frontage thereon of 400 feet, and applying to be allowed to place a building . . . on the said 400 feet, in connection with their works, 14 feet west of the easterly street line of Strachan avenue. The company represented that the building proposed . . would enable them to increase the output of their Toronto factory by one-fifth, which would mean the employment of 250 additional workmen.

The John Inglis Co. carry on business as manufacturers of engines and boilers to the south of the tracks of the Grand Trunk and other railways, and 630 feet south of the building proposed to be erected by the Massey-Harris Co., and they on 11th July wrote the city council protesting against the application of the Massey-Harris Co. being granted.

The city council, on 26th September, passed by-law 4420, which recites the application of the Massey-Harris Co., and that they are the owners of the land on each side of the avenue, and that the committee of the works department had recommended that the concession asked for by the company be granted; and then enacts "that . . . all that part of Strachan avenue bounded on the east by the present easterly limit of Strachan avenue, on the north by the present southerly limit of King street, on the west by a line drawn parallel to the easterly limit of Strachan avenue and distant 14 feet westerly therefrom, and on the south by the northerly limit of Wellington avenue," shall be stopped up and closed, and that the same be conveyed by the said corporation to the Massey-Harris Co.

After the passing of the by-law it was discovered that to render it valid the consent of the Dominion Government was required, and such consent was given by an order in council dated 6th October, 1904, and on 10th October the city council passed by-law 4428 amending by-law 4420 by inserting as a third recital the following: "And whereas the Government of the Dominion of Canada has consented to the passing of this by-law so far as it authorizes the lessening of the width of Strachan avenue by a distance of 14 feet on the easterly side thereof."

Before the by-law was amended, and on 1st October, this motion was launched. . . .

By the Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 591, authority is given to the councils of counties, townships,

cities, towns, and villages to pass by-laws (sub-sec. 12) "for granting aid by way of bonus for the promotion of manufactures . . . either by gift or loan . . . as the municipality may deem expedient." And sec. 591*a* provides that "bonus" . . . shall mean and include . . "(d) the closing up, or opening, widening, paving, or improving of any street . . . by a corporation for the particular use or benefit of a manufacturing industry."

By an amendment made to the Municipal Act in 1904, by 4 Edw. VII. ch. 22, sec. 26, the following was added to sec. 591*a* at the end thereof: "Notwithstanding anything contained in this section or in section 591, the council of any municipality may pass by-laws for closing of any road, street . . . any portion thereof, and for conveying the same to any person for the particular use or benefit of any manufacturing industry, and it shall not be necessary to submit such by-law to the electors or to obtain their assent thereto where the passing of such by-law does not involve expense to such municipality; provided that the council passing such by-law shall comply with the general provisions of this Act as to notice, compensation to persons affected, and other matters with respect to by-laws for the closing up of any public road or highway."

All expenses in connection with the passing of the by-law were paid by the Massey-Harris Co., and the provisions of the Act in respect to notice, etc., were complied with.

The land through which Strachan avenue is laid out was originally Ordnance land. And in 1856 the Act 19 Vict. ch. 45 was passed, intituled "An Act for transferring to one of Her Majesty's Secretaries of State the powers and estates and property therein described now vested in the principal officers of Her Majesty's Ordnance, and for vesting other parts of the Ordnance estates and property therein described in Her Majesty the Queen for the benefit, use, and purpose of the Province."

Two schedules are annexed to the Act, the first one being the schedule of military lands in Canada to be vested in one of Her Majesty's principal Secretaries of State; the second one being "the schedule of military properties in Canada proposed to be transferred to the Provincial Government." The property in Toronto transferred to the Provincial Government is 502 acres, 2 roods, and 1 perch: see R. S. C. ch. 24.

A report of the executive council was approved of by the Governor-General on 11th September, 1856, for carrying into effect the statutes 18 Vict. ch. 91 and 19 Vict. ch. 45, relating to the transfer of the Ordnance lands to the Provincial Government, and directing that the Ordnance lands in Toronto be laid out into town lots, which were to be offered for sale. And on 28th November, 1856, an order in council was passed instructing the preparation of plans for laying out the military reserve to Mr. Dennis, civil engineer, who afterwards made a survey laying out Strachan avenue 80 feet in width from Queen street, running south to the edge of the Bay.

The Municipal Act, 3 Edw. VII. ch. 19, sec. 628, provides : "Without the consent of the Government of the Dominion of Canada no municipal council shall pass a by-law (1) for stopping up or altering the direction or alignment of any street . . . made or laid out by His Majesty's Ordnance or the principal Secretary of State in whom the Ordnance estates became vested under the statute . . . or by the Dominion of Canada . . . and a by-law for any of the purposes aforesaid shall be void unless it recites such consent."

Strachan avenue was not a street laid out by His Majesty's Ordnance or the principal Secretary of State in whom the Ordnance lands became vested; but it is a street laid out "by the Dominion of Canada," and therefore the consent of the Dominion Government was required in order to the validity of any by-law stopping up or altering its direction or alignment.

When by-law 4420 was passed on 26th September the powers of the council were spent; and, as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, that void by-law, in the passing of which the council had exhausted its powers, could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law.

By-law 4420 must be declared invalid and void with costs.

MACMAHON, J. OCTOBER 22ND, 1904.

TRIAL.

PINKE v. BORNHOLD.

Church—Expulsion of Member—Voluntary Association—Previous Withdrawal of Member—Absence of Property Rights—Ecclesiastical Privileges—Refusal of Injunction.

Plaintiff was for 23 years a member of St. Peter's Evangelical Lutheran church in the town of Berlin, and defendants were the trustees of that church. The church was a self-governing body, having a constitution or book of ordinances. Plaintiff contributed towards the erection of the church building and the cost of a pipe-organ and chime of bells, and to the funds for the salary of the pastor and other expenses of the church. The conveyance of the land on which the church was built was made in 1860 to 7 persons described as "trustees of the Evangelical Lutheran St. Peter's Church at Berlin of the unaltered Augsburg Confession contained in the Book of Concord of 1580." The habendum was to them and their successors in office, "seven in number, to be elected by the congregation or members of said church only on the first Sabbath in the month of November in each and every year." At the annual meeting of the members of the church in November, 1903, plaintiff was elected a trustee, and later on was elected an elder and also treasurer of the church.

In February, 1904, a disruption took place in the church, and a large number of the members and adherents seceded and formed a separate congregation, adopting the name of the Evangelical Lutheran St. Matthew's church, and purchasing church premises on the same street and immediately opposite to St. Peter's church.

In March, 1904, plaintiff resigned his office as elder, and about 1st May resigned his offices as trustee and treasurer. His wife and one of his children left St. Peter's church early in May and became members of St. Matthew's. Plaintiff did not attend St. Peter's church after 1st May, but went to St. Matthew's, or to the Baptist church, or to a church in the village of Waterloo.

Clause B. of the constitution, relating to church discipline, was as follows: "In case any one be guilty of crimes, scandal, or sins which are not generally known, it will suffice

that the pastor, as the housekeeper in the house of God, refuse the offender the Holy Communion, and should his conduct improve to admit him again to the Lord's Supper. But such as live in open sin and disgrace the trustees shall have the right to exclude from membership. Any one who is excluded from the congregation loses all rights to the property of the church, as also the right to participate in the Holy Communion or as a witness at Baptism. Such rights all those who fall away from the church lose."

At the time of the disruption there were attacks against the pastor of St. Peter's, in which plaintiff took part, saying that he did not know how any member of the congregation could stay under such a minister. But on 1st May he "took all that back," as he considered he had done wrong to the pastor, who was upheld by a large majority of the congregation.

On 2nd May, when plaintiff resigned the treasurership, there was at his credit in a bank, as treasurer of St. Peter's church, $8.01, for which he gave a cheque payable to the new treasurer. On the same day one of the trustees deposited to the credit of St. Peter's church $181.73, which sum was withdrawn by plaintiff, by cheque dated 6th June, 1904, in his own favour, and deposited by him in his private account. The discovery of the withdrawal was made about 6th July. Plaintiff was threatened with an action, and on 7th July paid over the money to the new treasurer, who said he did not think plaintiff intended to keep the money, but only to annoy and antagonize the congregation.

The trustees of the church called a meeting on 25th July, at which a resolution was passed expelling plaintiff from membership in the church, of which defendant Bornhold, as secretary, notified plaintiff on 4th August. Plaintiff was not notified of the meeting, nor made aware of the intention to propose a resolution for his expulsion.

This action was brought to restrain defendants from giving effect to the resolution and for a declaration of plaintiff's rights, etc.

The statement of defence alleged that plaintiff had voluntarily ceased to be a member of St. Peter's church, and was not a member at the time it was alleged that he was expelled, but had openly and notoriously allied himself with the seceding congregation, and had advised and persuaded others to

do the same; also that plaintiff never had any right of property in the church, the pews in which were free.

E. P. Clement, K.C., for plaintiff.

A. Millar, K.C., for defendants.

MacMahon, J. (after stating the facts) :—The members of St. Peter's church formed a voluntary religious association, and having by its constitution provided a tribunal for the determination of the status of any member of the church, the question is, will the civil court, after an adjudication by the domestic tribunal which deprived plaintiff of his membership, investigate the legality or regularity of the proceedings by which he is affected?

Plaintiff's subscriptions to the church and parsonage were voluntary. His civil rights were, therefore, not affected by the resolution of the trustees expelling him from membership.

Although plaintiff held the offices of elder, trustee, and treasurer in the church, these were all honorary positions, no emoluments being attached to any of them; and he had resigned them all prior to the resolution of the trustees expelling him. And, as said . . in Dunnet v. Forneri, 25 Gr. at p. 218, "the position of a member of the church and the right to participate in the ordinances of the church are purely ecclesiastical," and it was held in that case that the Court had no jurisdiction to interfere. . . .

[Forbes v. Eden, L. R. 1 Sc. App. 568, Watson v. Ferris, 45 Miss. 18, Bouldin v. Alexander, 15 Wall. (U. S.) 131, Long v. Bishop of Capetown, 1 Moo. P. C. N. S. 411, 461, referred to.]

As plaintiff had been one of those principally concerned with the disruption of St. Peter's church, and had advised members of the congregation not to attend the church, and as he for three months had ceased attending that church and attended St. Matthew's church, the trustees of St. Peter's concluded he had fallen away from or abandoned the church, and therefore passed the resolution expelling him. It was not necessary that the trustees should have passed a rsoiution expelling him, as the same result would have been achieved by directing that his name be removed from the roll of membership because he had "fallen away from the church"—which is the ground, according to the statement of defence, on which the resolution for expulsion was passed—

which was abundantly evidenced by his conduct previous to 1st May in assisting in the disruption of the congregation, and by ceasing to worship in that church and worshipping in another church along with those formerly composing a part of the congregation of St. Peter's church.

I thought during the trial, and still think, that the fair course for the trustees to have pursued was to give notice to plaintiff of their intended meeting and the nature of the resolution it was proposed to submit; but, for the reasons stated, that course was not obligatory. Had it been obligatory, and had the trustees been enjoined from proceeding further on the resolution, they could have called another meeting, giving plaintiff notice to attend; and, from the feeling which it was manifest during the trial had been engendered in the minds of the trustees—doubtless participated in by the congregation—by reason of the conduct of plaintiff already referred to, there is no doubt that another resolution in like terms . . would be passed; so that, if he were entitled to the injunction asked, it would be of no real benefit to him, even had he an honest desire to continue a member of St. Peter's church—which I very much doubt.

The action must be dismissed with costs.