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FALCONBRIDGE, C.J. NOVEMBER 3RD, 1902.

WEEKLY COURT.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Judgment—Consent—Sale of Railway—Petition to Open up—Conflicting Claims to Represent Railway Company—Issue Directed.

Petition by defendants to vacate a consent judgment pronounced in this action on the 27th May, 1902, for immediate sale of the company's railway, on the ground that the judgment was fraudulent and collusive, and the alleged consent upon which it was entered was fraudulent and collusive, and was not the real consent of defendants.

W. Barwick, K.C., and J. H. Moss, in support of the petition, claiming to represent the defendants.

W. R. Riddell, K.C., and R. McKay, opposing petition, also claiming to represent defendants.

D. L. McCarthy, for plaintiffs.

FALCONBRIDGE, C.J.—The order of Meredith, C.J., of 17th October, 1902, if it does not in terms authorize the presentation of this petition, quite clearly leaves the door wide open for its admission. It was conceded that a Judge in Court could not dispose, upon affidavits, of the weighty and complicated questions arising upon the petition, and the only course is to direct an issue wherein all matters in question may be determined, including the status of the different sets of claimants for the right to control the affairs of the defendant company generally, and in particular these proceedings. An order will go directing the trial of an issue at the next non-jury sittings for the county of York. The plaintiffs, being trustees, must be protected as to costs and in every other way. Usual direction as to costs.

NOVEMBER 3RD, 1902.

DIVISIONAL COURT.

ARMSTRONG v. MICHIGAN CENTRAL R. W. CO

Railway—Carriage of Goods—Misdelivery—New Contract—Breach—Negligence.

Appeal by defendants from judgment of County Court of Lambton in favour of plaintiff in an action to recover damages for loss of goods shipped by plaintiff. The goods were consigned to the Canadian Bank of Commerce, and were delivered to Smith & Co. Plaintiff never asked Smith & Co. to pay for the goods, and had never been paid for them. The defendants in their defence pleaded that they had delivered the goods to the order of the Canadian Bank of Commerce, as required by the shipping receipt, and denied any liability. At the trial the shipping receipt signed by plaintiff was put in, and defendants were permitted to rely upon a clause indorsed thereon as follows: "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

I. F. Hellmuth, K.C., and E. C. Cattanach, for defendants.

A. B. Aylesworth, K.C., for plaintiff, contended that the clause quoted did not cover or apply to such a case as the present, where the original transit was at an end, and an agreement for a new one had been entered into, and where the loss had occurred by reason of the negligence of defendants.

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

STREET, J.—Upon the facts in evidence plaintiff is entitled to recover. The defendants' agent at Brigden received instructions from plaintiff to re-ship the goods from London to Campbell & Co., at Montreal, and agreed that this should be done, and so advised defendants' agent at London. After a few days' delay the shipping receipt was indorsed and delivered by the bank agent in London to defendants' agent there; the existing contract to deliver the goods to the order of the Canadian Bank of Commerce in London was then terminated, and the new contract by defendants to carry the goods to Montreal and deliver them to Campbell & Co. arose. Instead of carrying out this new contract, the defendants,

owing to the misconception of their agent at Brigden, delivered them to A. W. Smith & Co. in Toronto. The breach committed by defendants was not, therefore, any breach of the contract to carry the goods to London and deliver them to the order of the Canadian Bank of Commerce there, but of a new contract to carry them from London to Montreal and deliver them to Campbell & Co. : McGill v. Grand Trunk R. W. Co., 19 A. R. 245. Such a contract is not alleged in the statement of claim, but the pleadings can be amended to suit the facts. Under these circumstances, the condition upon which defendants rely cannot be treated as an answer to plaintiff's claim. Even if it could be found as a matter of fact that the new contract to carry from Toronto to Montreal should be treated as having been subject to the terms of the shipping receipt under which the original contract was entered into, it could not be held, in the face of Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, that defendants, having received the goods at London as carriers upon a new contract to carry them to Montreal, can protect themselves against the consequences of their own negligence by such a condition as this, for the case comes directly within the express terms of sec. 246 of the Railway Act, 51 Vict. ch. 29 (D.), as interpreted by the Supreme Court in the Vogel case.

Appeal dismissed with costs; but the judgment should order the transfer from plaintiff to defendants of plaintiff's right to the goods in question, and to recover the value of them from A. W. Smith & Co.

FALCONBRIDGE, C.J. NOVEMBER 4TH, 1902.

CHAMBERS.

RE PINKNEY.

Security for Costs—Petition by Parents for Custody of Infant—Petitioners out of Jurisdiction—Respondents admitting Rights of Petitioners.

Appeal by William Corbett and Elizabeth Corbett from order of Master in Chambers (ante 694) refusing their application for security for costs of a petition by Thomas Pinkney and Emily Jane Pinkney for the custody of their infant son Leland Pinkney. The petitioners lived out of the jurisdiction. The Master in Chambers was of opinion that, as the respondents were willing to give up the boy to his parents, there was no necessity for the petitioners giving security.

Shirley Denison, for appellants.

W. E. Middleton, for petitioners.

FALCONBRIDGE, C.J.—The affirmance of the Master's order would leave the door open for the consideration of the merits in determining questions of security for costs, which should not be. The present case may result in the Corbetts being mulct in costs, and they should have security for costs. Sample v. McLaughlin, 17 P. R. 490, and Palmer v. Lovett, 14 P. R. 415, distinguished.

Appeal allowed with costs here and below to the appellants in any event of the petition. Security to be in the sum of $100.

WINCHESTER, MASTER. NOVEMBER 5TH, 1902.

CHAMBERS.

PARRAMORE v. BOSTON MFG. CO.

Discovery—Examination of Parties—Production of Documents—Patent Action—Forfeiture—Non-performance of Condition on which Patent Granted—Affidavit.

Motion by defendants for an order that plaintiff do file a further and better affidavit on production and attend for re-examination for discovery, and answer the questions which he refused to answer on his examination, and for an order that the J. B. Kleinert Rubber Company do make discovery of documents, and that the manager of that company in Toronto do attend for examination for discovery.

Action to restrain defendants from infringing a patent for a hose supporter.

G. H. Kilmer, for defendants.

J. Bicknell, K.C., for plaintiff.

W. N. Tilley, for the J. B. Kleinert Rubber Co.

THE MASTER.—The application for further production and examination of plaintiff was opposed on the ground that the defendants have no right to examine into the matters in question, as they desire to do so for the purpose of declaring the plaintiff's patent forfeited under the statute. The defendants do not claim a forfeiture, but properly contend that the rights of plaintiff have been extinguished on non-performance of the condition on which he obtained his patent. Hoffman v. Postill, L. R. 4 Ch. 673, Pye v. Butterfield, 5 B. & S. 829, 837, Hambrook v. Smith, 17 Sim. 209, In re Haelden's Patent, 51 L. T. N. S., referred to.

Even if the present case were one of forfeiture, plaintiff should have taken that objection on his examination. Counsel acting for him on that examination makes an affidavit taking this objection, but that is not sufficient; the plaintiff

should make the affidavit himself if it were a proper case in which to make one. The defendants are entitled to the fullest discovery from plaintiff; that has been so far withheld from them. The plaintiff must attend at his own expense and submit to be examined upon the issues raised in the pleadings, and also file a further and better affidavit on production. His agents have statements which he should produce. As to his obtaining all information necessary to give the fullest discovery, see Bolckow v. Foster, 10 Q. B. D. 161; Leitch v. G. T. R. Co., 13 P. R. 369, 373. Costs of this part of the application to defendants in any event.

Application against the J. B. Kleinert Rubber Company adjourned until after examination of plaintiff concluded.

MacMahon, J. November 5th, 1902.

TRIAL.

CROMPTON AND KNOWLES LOOM WORKS v. HOFFMAN.

Sale of Goods—Entire Contract—Property not Passing—Action for Price—Deduction for Defects—Damages.

Action by a company carrying on the business of manufacturing looms and attachments at Worcester, Mass., against J. D. Hoffman, of Stratford, and W. J. Shaver, of Toronto, carrying on business as the Maple Leaf Elastic Webbing Company, to recover $564.65, balance of the price of a loom and attachments sold and delivered to defendants as alleged. The defendants set up that the goods were shipped to them in sections, and that portions had not yet been delivered; that the goods delivered were worthless; and they counterclaimed for damages.

E. Sydney Smith, K.C., and J. Steele, for plaintiffs.

G. G. McPherson, K.C., for defendants.

MacMahon, J.—The offer of plaintiffs to furnish a loom and the necessary fittings for running the same was contained in a letter which mentioned the various articles and their prices. The defendants accepted the offer by letter, with a variation, not ordering some of the articles mentioned in plaintiffs' letter. Plaintiffs contended that the order for the loom was one contract, and the other items in the offer of plaintiffs, which was accepted by the defendants' order, formed a separate contract or contracts. It is clear, however, that the order formed one entire contract: Baldy v. Parker, 2 B. & C. 37; Elliott v. Thomas, 3 M. & W. 170; Bigg v. Whisking, 14 C. P. 195. The items of the sale were: "One-half

cash payment, balance in two notes of equal amount; our customary lien to cover all machinery purchased." The lien agreement was forwarded for defendants to sign, but they did not sign it. The machine was mechanically well built, and similar in construction to a number manufactured by plaintiffs, regarding which no complaints were received. Alterations were necessary to make the loom efficient to manufacture elastic webbing. The property in the loom had not passed to defendants, for it was sold subject to the customary lien contract used by plaintiffs, and it remained in their possession subject to the lien upon which it was sold by plaintiffs. The defendants, notwithstanding the existence of the lien, were entitled to shew that the loom was not as warranted, and so reduce plaintiffs' claim by the difference between the value of the loom as warranted and the value as it was shewn to be, as evidenced by the cost defendants were put to in remedying the defects found to exist: Cull v. Roberts, 28 O. R. 591; Copeland v. Hamilton, 9 Man. L. R. 143. This cost amounted to $69. Even if defendants were entitled to recover consequential damages, they could not do so while the goods remained the property of plaintiffs. Even if the consequential damages claimed were not too remote (as to which see Fuller v. Curtis, 100 Ind. 237, McCormack v. Vanatta, 43 Ia. 389, Osborne v. Poket, 33 Minn. 10, Brayton v. Chase, 3 Wis. 456), the defects in the machine were such as might have been remedied in a few days at the cost of a few dollars, had a competent mechanic been engaged for the purpose.

Judgment for plaintiffs for $395.63, with interest from 1st October, 1900, and costs. Counterclaim dismissed with costs.

TRIAL.

MacMahon, J. November 5th, 1902.

LANGLEY v. LAW SOCIETY OF UPPER CANADA.

Contract—Printing of Reports—Assignment by Printers of Claim for Payment—Subsequent Assignment for Creditors—Sale of Claim by Assignee—Rights of Vendee—Judgment—Set-off.

Action by the liquidator of the Publishers' Syndicate, Limited, to recover from the Law Society $346, claimed as the balance due in respect of the printing and publishing of certain law reports for the society.

C. D. Scott and S. B. Woods, for plaintiff.

H. Cassels, K.C., for defendants.

MACMAHON, J.—The Law Society had contracted with the firm of Rowsell & Hutchison for the printing and publishing of the reports. On the 17th January, 1900, Rowsell & Hutchison made an assignment for the general benefit of their creditors, pursuant to R. S. O. ch. 147, to defendant E. R. C. Clarkson. At the time of the assignment certain printing was in progress under the contract, a large amount of it being in galley form, and some type-setting being finished. The editor of the reports made an arrangement with defendant Clarkson by which the work was to be continued and completed for the Law Society, the defendant Clarkson, as assignee, agreeing to continue and complete the reports then under contract without charging any profit on it. Clarkson said that the Law Society was to pay for the work then partly performed; and the editor, in his report to the Law Society, said that Clarkson, if guaranteed his disbursements, intended to carry out the contract, as assignee, and earn the moneys payable under it. On 10th March, 1900, Clarkson sold the assets of Rowsell & Hutchison's estate, the Publishers' Syndicate becoming the purchasers of parcel No. 3, in which was included "the printing and work in progress unfinished at that date." This item comprised the work done by Rowsell & Hutchison on the reports prior to their assignment, and also the amount expended by Clarkson in furthering the completion of the reports under his agreement with the editor, making a total of $847.50, of which $346 was attributable to the work done by Rowsell & Hutchison. On the 26th December, 1899, Rowsell & Hutchison had assigned to the Bank of Hamilton "all book accounts, claims, and choses in action which are now owing to the parties of the first part (Rowsell & Hutchison), or which may hereafter be owing to parties of the first part," as security for indebtedness. On the receipt by Clarkson of the $847.50, he paid over to the Bank of Hamilton the $346, as being a book account or chose in action realized from the estate.

The Law Society were to pay Clarkson for the work then partly performed, he agreeing to carry out the contract as assignee in order to enable him to earn the moneys payable under it, which would necessarily include this partly performed portion of it. He assigned the contract to the Publishers' Syndicate, who finished the work required to be performed under the contract, and the amount of the contract price, $2,210.58, was paid by the Law Society to the Publishers' Syndicate, with the exception of the $346. Until the printing and binding of the reports was completed according to the terms of the contract, there would be no debt

due from the Law Society to Rowsell & Hutchison, or to the assignee of their estate. When completed and the reports accepted, the Law Society would be obliged to pay the contract price. Clarkson sold the printing and work unfinished in one lot, and made no division as to what had been done by Rowsell & Hutchison before their assignment, and that done by Clarkson after the assignment to him, Clarkson informing the purchasers of the terms of the agreement entered into between himself and the editor. After becoming aware that Clarkson had sold and assigned to the Publishers' Syndicate and been paid by them for the whole amount of the work done, the Law Society corresponded with the Publishers' Syndicate, and, with full knowledge of the conditions under which the Syndicate were completing the contract, took the benefit of it. When the Syndicate purchased the work done by Rowsell & Hutchison, the amount thereof was a debt due to the estate, and when paid to the assignee the money became the property of the bank under the assignment to it, and was properly paid to the bank by the assignee. There can, therefore, be no set-off by the Law Society of its judgment recovered against Rowsell & Hutchison against such sum.

Judgment for plaintiff against the Law Society for $346, with interest from 1st June, 1900, and costs on the High Court scale.

WINCHESTER, MASTER. NOVEMBER 6TH, 1902.

CHAMBERS.

JOHNSTON v. RYCKMAN.

Discovery—Examination of Plaintiff—Default of Attendance—Motion to Dismiss Action—Proof of Default—Affidavit of Solicitor—Cross-examination—Ex Parte Certificate of Examiner—Locus Pœnitentiæ.

Motion by defendant Ryckman to dimiss action on the ground of non-attendance of plaintiff for examination for discovery.

C. W. Kerr, for applicant.

W. R. Smyth, for plaintiff.

THE MASTER.—In support of the application were read the subpœna and appointment for plaintiff's examination and affidavit of service thereof on plaintiff and admission of service of appointment by his solicitor; also a certificate of the special examiner as to what took place before him, and an affidavit of the applicant's solicitor. The plaintiff asked for

an adjournment to cross-examine the solicitor for applicant on his affidavit. This I considered unnecessary and refused it. Counsel for plaintiff then contended that the certificate of the examiner was improperly issued and should not be allowed, citing Re Ryan v. Simonton, 13 P. R. 299. It was held in Jones v. Macdonald, 14 P. R. 109, that such a certificate of an examiner is good evidence of the proceedings before him, notwithstanding that it was settled ex parte. The certificate was not improperly issued, and the examiner was obliged to issue it when demanded. The plaintiff made default, he says, on account of ill-health, but there is no evidence as to this, other than what plaintiff appears to have told his solicitor. It does appear that he went to Montreal that evening, and could not, in consequence, attend on the adjourned appointment for his examination.

Order made requiring plaintiff to attend for examination at his own expense and submit to be examined. Costs to defendant in any event.

WINCHESTER, MASTER. NOVEMBER 6TH, 1902.

CHAMBERS.

REILLY v. McDONALD.

Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act.

Motion by judgment creditor to make absolute a garnishing summons. On 24th April, 1901, defendant recovered judgment against plaintiffs for costs, which were taxed at $209.49. George Reilly, one of the plaintiffs, died on 1st April, 1901, and probate of his will was granted to his sister and co-plaintiff, Mary Sullivan, on 23rd September, 1901. Three days later the action was revived. The plaintiffs appealed from the judgment, and their appeal was dismissed on the 11th March, 1902, with costs taxed at $132.40. The action was to compel the defendant to specifically perform a contract to purchase lot 13 in the 4th concession of the township of York. The plaintiff George Reilly in his lifetime owned the north half of this lot, while the father of the plaintiffs owned the south half. The money attached by the defendant was certain rent due by the tenant of this lot, the garnishee, who appeared and admitted owing $155, which he was willing to pay as the Court might direct.

W. A. Skeans, for the judgment creditor.

W. Norris, for the judgment debtor, contended that the rent was due, not to the plaintiffs, against whom the judg-

ment had been obtained, but to plaintiff Nan O'Reilly, as administratrix of her father's estate, and to Mary Sullivan, as executrix of her brother.

The garnishee, in person.

THE MASTER.—No caution was registered against the lands under the Devolution of Estates Act. The plaintiffs, by bringing the action in their own names, instead of in the name of the administratrix, asserted that the land vested in them as heirs under sec. 13, although the administratrix assumed to make a lease to the tenant (garnishee). This she apparently did for the benefit of the heirs, without any legal authority. The rent was due to plaintiffs as heirs of their father, and to plaintiff Mary Sullivan as executrix of her brother. Order made for payment of $3 out of the $155 to the garnishee for costs, and of the balance to the judgment creditor.

MOSS, J.A. NOVEMBER 6TH, 1902.

C. A.-CHAMBERS.

MINERVA MFG. CO. v. ROCHE.

Court of Appeal—Leave to Appeal—Question of Costs Dealt with on Facts.

Motion by defendants for leave to appeal from the order of a Divisional Court (ante 530) upon a question as to the scale of costs.

W. E. Middleton, for defendants.

A. C. McMaster, for plaintiffs.

MOSS, J.A.—No case was shewn for permitting a further appeal. The case was dealt with by the Court below as one turning on the particular facts. The pleadings shew that plaintiffs were relying upon the letter or undertaking given on behalf of defendants on the 21st November, 1901, rather than upon the original arrangement for purchase, and that the defendants so understood it and shaped their defence accordingly. On the question of fact as to the nature of the original arrangement, the Court below accepted the plaintiffs' version. The previous decisions have been left untouched by the judgments in this case. They have created no precedent in law, and leave to appeal on the question of fact should not be given. Application refused.