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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 6TH, 1916.

*RYAN v. CANADIAN PACIFIC R.W. CO.

Negligence—Railway—Servant's Death while Uncoupling Cars—Unpacked Frog—Findings of Jury—Evidence—Failure to Connect Negligence Found with Cause of Death—Inference—New Trial.

Appeal by the defendants from the judgment of CLUTE, J., in favour of the plaintiff, the widow of Stephen Patrick Ryan, upon the findings of the jury, in an action to recover damages for his death by reason of the negligence of the defendants while he was working for them, uncoupling cars, by reason of his foot catching in an unpacked frog.

The findings of the jury were: (1) that the defendants were guilty of negligence which caused the accident; (2) that the negligence was, "frog not properly packed;" (3) that the deceased could not, by the exercise of reasonable care, have avoided the accident; (4) that the deceased did not, on the occasion in question, go between the cars when the train was in motion; and they assessed the damages at $7,000; for which amount the trial Judge directed judgment to be entered for the plaintiff with costs.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, K.C., and W. H. Williams, K.C., for the appellants.

R. J. Byrnes, for the plaintiff, respondent.

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

HODGINS, J.A., reading the judgment of the Court, referred to the findings of the jury and the charge of the trial Judge; and said that, in the absence of direct evidence as to the cause of the accident, where contributory negligence was negatived, the Privy Council had, in McArthur v. Dominion Cartridge Co., [1905] A.C. 72, upheld a verdict where there was no other reasonable explanation of the mishap than the one adopted by the jury.

Here there was evidence that the deceased had gone in voluntarily between the cars; this the jury rejected.

The negligence found is not linked up by the jury with the death, nor is the theory upon which they must have acted the only reasonable theory. Want of packing is consistent with liability or non-liability; and the jury, having declined to accept the only evidence touching the vital issue, were bound to indicate the connection between the negligence they found and the accident, as they were directed to do. This duty should be insisted on in any case which, as here, presents features making it most difficult, in view of the non-acceptance of the statements of the only eye-witnesses, to draw a reasonable conclusion as to what else the deceased actually did. There is a want of proper evidence of direct causal negligence and absence of intelligible expression by the jury of what they thought was a reasonable inference.

There should be a new trial; the costs of the former trial should be in the cause, and the costs of the appeal to the appellants in any event.

FIRST DIVISIONAL COURT. JULY 6TH, 1916.

*ST. MARY'S MILLING CO. LIMITED v. TOWN OF ST. MARY'S.

Water—Mill-site—Riparian Rights—Dam—Raceway—Obstruction to Flow of Water—Trespass—Damages—Easement—Construction of Deeds—Severance of Tenement—Dominant and Servient Tenements.

Appeal by the plaintiffs from the judgment of CLUTE, J., ante 121.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

R. S. Robertson, for the appellants.

F. H. Thompson, K.C., and F. C. Richardson, for the defendants, respondents.

A judgment was read by HODGINS, J.A., who said that the judgment appealed against was mainly in favour of the plaintiffs, who, however, contended that it did not go far enough, as only $200 was allowed for damages for trespass, and complained that the deed to them had been construed as if it had been subject to a reservation which enabled the defendants to insist on the uninterrupted flow of the water through the raceway as it existed when the deed to the plaintiffs was given.

The right granted or reserved must be determined by the use actually adopted before the grant is made. The use, when the grant to the plaintiffs was made, was the flow of the water down to and for the purposes of the mill; and, in view of the accepted findings of the trial Judge, the question was narrowed to this: Was the use reserved by the grantor when the deed to the plaintiffs was given, or did that deed carry with it the right to an easement over the remaining lands, which the plaintiffs put an end to when they voluntarily filled in the raceway at both ends.

At the time the defendants' deed was given, the lands in it were subject either to an easement in favour of the lands already granted, which the grantee in that deed might at any time abandon and which he could not be compelled to continue, or no such easement existed, and both parcels were conveyed merely as so much land then covered as to part by water. If the former was the true situation, there was nothing for the words of the Act (R.S.O. 1914 ch. 109, sec. 15) to cover in favour of the defendants. If the latter, it was impossible to include in the deed to the defendants any easement or right in relation to the watercourse. The actual use was for mill purposes; and the enjoyment of the flow of water in the raceway was for that alone, and not for the benefit of the flats, to which it was not an appurtenance; while the suggested public right was negatived by the findings of the trial Judge.

To give any other construction to these two deeds would present the anomaly of rendering the land in the earlier one the servient tenement, while it was in fact dominant, for that fact must be determined by the use to which the raceway was actually put at the time of the severance.

The appeal should be allowed, and the judgment varied by striking out paras. 4, 5, and 6, and all the words after "of this action" in para. 7. The damages allowed should not be interfered with. The defendants should pay the costs of the appeal.

Reference, among other cases, to Wheeldon v. Burrows (1879), 12 Ch.D. 31; Burrows v. Lang, [1901] 2 Ch. 502; and Union

Lighterage Co. v. London Graving Dock Co., [1902] 2 Ch. 557, 573.

GARROW, J.A., concurred.

MACLAREN, J.A., agreed in the result.

MAGEE, J.A., also agreed in the result, for reasons stated in writing.

Appeal allowed.

HIGH COURT DIVISION.

SUTHERLAND, J. JULY 4TH, 1916.

PEARSON v. TIBBETTS AND McKENZIE.

Promissory Note—Joint Maker for Accommodation—Surety—Collateral Security—Chattel Mortgage—Failure to Keep Renewed as against Creditors—Evidence—Absence of Prejudice—Delay and Negligence of Holder of Note—Time Given to Principal Debtor—Absence of Binding Contract.

Action to recover the balance due upon two promissory notes; tried without a jury at Fort Frances.

A. G. Murray, for the plaintiff.
A. D. George, for the defendant McKenzie.

SUTHERLAND, J., read a judgment in which he stated the facts. On the 5th October, 1909, the defendants made three joint and several promissory notes in favour of the plaintiff, to whom the defendant Tibbetts was then indebted. The plaintiff was aware that the defendant McKenzie was an accommodation maker. As collateral security, the plaintiff, at the same time, took from the defendant Tibbetts a chattel mortgage on his household furniture and effects. The defendant Tibbetts paid the first note. The second and third notes were each for $380.83, and became due on the 5th April and 5th July, 1910. The defendant Tibbetts made payments on account of principal and interest, the last payment (interest) being on the 16th April, 1914. In this action, begun on the 20th October, 1915, the plaintiff claimed $836.16 for principal and interest. A renewal statement in respect of the

chattel mortgage was filed towards the end of the first year, but none was filed thereafter. The defendant Tibbetts had suffered judgment by default.

The learned Judge said that the chattel mortgage was still good as between the plaintiff and Tibbetts, and that it was not shewn in evidence that, if the defendant McKenzie should now pay the amount demanded and receive from the plaintiff an assignment of the chattel mortgage, he would be in any worse position from the fact that the renewal statements had not been filed in the meantime.

The defendant McKenzie must have been aware all along that the notes had not been paid. He said that he had had opportunities in the meantime, if he had been called upon to pay the notes, to recover the moneys from Tibbetts. He did not give any particulars. A surety cannot remain passive and then seek to escape liability: Wright v. Simpson (1802), 6 Ves. 714, 733; Eyre v. Everett (1826), 2 Russ. 381. The defendant had not sustained any loss on this score through the alleged dilatoriness and negligence of the plaintiff.

It was said that the plaintiff accepted from Tibbetts a promissory note of a stranger on account of this debt; but that was not the fact.

The main contention was, that McKenzie, the surety, was discharged by reason of the plaintiff giving time to Tibbetts, the principal debtor; but the learned Judge was unable to find that any agreement of a character binding on the plaintiff was made with Tibbetts, or that there was anything more than delay and indulgence.

Reference to De Colyar's Law of Guaranties, 3rd ed. (1897), pp. 423, 426; Chalmers on Bills of Exchange, 7th ed. (1909), p. 244; Maclaren on Bills Notes and Cheques, 5th ed. (1916), p. 81; Thompson v. McDonald (1858), 17 C.R. 304; Wilson v. Brown (1881), 6 A.R. 87.

Judgment for the plaintiff against the defendant McKenzie for the sum of $836.16 and interest from the 20th October, 1915, with costs.

SUTHERLAND, J. JULY 4TH, 1916.

ROYAL BANK OF CANADA v. HEALEY.

Assignments and Preferences—Assignment to Bank of "Book-accounts, Debts, Dues, and Demands"—Exclusion of Moneys Arising from Insurance upon Goods in Stock Destroyed by Fire—Construction of Document—Ejusdem Generis Rule—Contest between Bank and Assignee for Benefit of Creditors—Adjustment of Amount Due by Insurance Companies—Binding Effect.

Action by the bank against the assignee for the benefit of creditors of G. F. Glassco & Co. to recover moneys arising from an insurance against fire of the assignors' goods in stock, the plaintiffs claiming under an assignment of book-debts from G. F. Glassco & Co.

The action was tried without a jury at Hamilton.

S. F. Washington, K.C., for the plaintiffs.

S. H. Ambrose and J. R. Marshall, for the defendant.

SUTHERLAND, J., in a written opinion, set out the facts. It appeared that the fire which damaged the stock occurred on the 20th September, 1914; that an adjustment of the loss was made shortly afterwards; that the assignment to the plaintiffs was dated the 2nd October, 1913, and that to the defendant on the 31st October, 1914.

The plaintiffs claimed the insurance moneys as included in the words of their assignment, "book-accounts, debts, dues, and demands."

The learned Judge was of opinion that, upon the facts disclosed in evidence, the adjustment had the effect of determining absolutely the amount due by the insurance companies and creating a liability on their part.

The intention of the plaintiffs apparently was to obtain an assignment of book-debts, a term fairly well known and understood in mercantile life. The literal meaning of the words should be taken: Norton on Deeds, ed. of 1906, p. 56.

The assignment was headed "Assignment of Book-Debts etc." Having regard to this, the words "debts, dues, and demands," following "book-accounts," must be held to be words applicable only to such debts, dues, and demands as are ejusdem generis with those comprised in the specific description "book-accounts."

The moneys in question were not covered by the assignment to the plaintiffs. It was argued that, as the book-debts resulted usually from a sale of the goods, the goods themselves and the moneys arising by reason of their destruction must be covered by the words used; but unsold goods could not be so regarded: Halsbury's Laws of England, vol. 10, p. 441; Turner v. Turner (1880), 14 Ch. D. 829; Newman v. Newman (1858), 26 Beav. 220; Ex p. Dawes (1886), 17 Q.B.D. 275, 286; Orr v. Mitchell, [1893] A.C. 238, 251; Tailby v. Official Receiver (1888), 13 App. Cas. 523, 533; Norton on Deeds, pp. 56, 58, 62, 227.

Action dismissed with costs.

HODGINS, J.A. JULY. 5TH, 1916.

*RE ZEAGMAN.

Will—Construction—Residuary Gift of Mixed Fund to Church for Masses for Repose of Soul of Testator and Descendents forever—Superstitious Use—Perpetuity—Charity—Private Masses—Public Benefit—Costs.

Motion by the executors of John Zeagman the elder, deceased, for an order determining a question arising upon the residuary clause of the will of the deceased.

The testator, who died in 1895, by his will gave to his executors all his estate upon trust: to pay his just debts, funeral and testamentary expenses; to pay $100 at once for Masses for the repose of the testator's soul; to allow his wife and two daughters the rents and interest of the remainder of his property for their lives and the life of each of them; after the deaths of his wife and daughters to sell and get in all his real and personal estate and from the proceeds pay $100 to each of the children of his son Charles; "and pay over all the residue of my estate to the St. Basil's Roman Catholic Church of Toronto to be invested and kept invested in such funds as the Most Reverend Archbishop of the Diocese of Toronto and his successors may think best forever and the interest arising from such investment or investments to be applied and expended by the Reverend Clergy of the said Church for the saying of Holy Masses by said Clergy for the repose of the soul of the testator and his descendants forever."

The widow and one daughter were dead, and the surviving life-tenant was an executrix, who, if the residuary gifts to the

church was inoperative, would share the residue with her co-executor and her brother John.

The motion was heard in the Weekly Court at Toronto.

A. E. Knox, for the executors.

H. S. White, for St. Basil's Church.

G. Keogh, for the next of kin.

HODGINS, J.A., in a written opinion, said that the time had not arrived for realising the residue, but no obligation was taken to the motion as being premature; and the question might be decided now without hurt to any one: In re Staples, [1916] 1 Ch. 322.

The objections to the disposition of the residue were that it was (1) superstitious; (2) offended against the rule as to perpetuity; (3) was not to a person or corporation properly described who could rightly take it.

In England, such a bequest was treated as superstitious, but that was founded upon a statute of Hen. VIII. and the statute 1 Edw. VI. ch. 14 and the interpretation thereof by the Courts. See In re Michel's Trust (1860), 28 Beav. 39, 43; Halsbury's Laws of England, vol. 4, p. 120; West v. Shuttleworth (1835), 2 My. & K. 684, 697.

But those Acts and the decisions upon them are not effective out of England: Bourchier-Chilcott's Law of Mortmain, p. 100; Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 P.C. 381.

Such a bequest is not superstitious in this Province: Elmsley v. Madden (1871), 18 Gr. 386.

The gift of the residue, however, was one of a mixed fund of realty and personalty; it was to a church; only the income from it was to be expended in Masses, and that forever. It was said that this made it void unless it was a charitable use; and, if a charitable use, void as to all save personalty.

As to the rule against perpetuities, reference was made to Cocks v. Manners (1871), L.R. 12 Eq. 574; In re Clarke, [1901] 2 Ch. 110; Carne v. Long (1860), 2 De G.F. & J. 75.

In this case, the trust upon which the residue was to be held was one creating or tending to create a perpetuity. When the testator died in 1895, the Acts 55 Vict. ch. 20 (O.) and 43 Eliz. ch. 4 were in force in Ontario; under the latter Act, the words "charitable uses" have a technical meaning, and include religious purposes for the instruction and edification of the public.

In Ireland, a bequest for Masses in perpetuity was held to be charitable; O'Hanlon v. Logue, [1906] 1 I.R. 247. The

learned Judge declined to follow that case, saying that the three conditions stated by counsel for the heir-at-law in that case (p. 257) still applied to a charitable use in this Province: (1) it must be for the public or some section of the public; (2) it must be one as to which the Court can decide on legal evidence that it will confer the benefit on the public which the donor believed it would confer; and (3) it must be enforceable by the Court. The trust in question here may be carried out by the celebration of a Mass in private, irrespective of the presence of any congregation, in which service reference to the testator or his descendants will depend wholly on the memory and mental attitude of the celebrant, who in a few years would find it impossbile to know who the descendants were for whom he was to pray.

Therefore, the disposition of the residue does not constitute a charitable use.

In the other event, the only part of the residue applicable to the trust would have been the personalty.

It was unnecessary to deal with the question whether the church could take the legacy.

Order declaring that the disposition of the residue is ineffective as tending to create a perpetuity.

Cost of all parties, as between solicitor and client, out of the estate: see In re Hall-Dare, [1916] 1 Ch. 272.

RIDDELL, J. JULY 7TH, 1916.

RE REEVES.

Will—Construction—Conditional Bequest—Waiver by Government of Succession Duties—Refusal to Waive—Substituted Bequest—Contingency Provided for.

Motion by the executors of the will of Arthur L. Reeves, deceased, for an order determining a question arising upon the terms of the will.

The testator, after providing for payment of debts and funeral and testamentary expenses, gave legacies to his relatives, and then gave all the residue of his estate in trust for the Aged Women's Home of the City of Hamilton, "on condition that the Government waive any succession dues they would be entitled to on the other bequests to my relatives. Should the Government refuse to waive said dues, the bequest to the Aged Women's Home

shall be null and void . . . and the residue of my estate shall be divided among my nephews and nieces."

The "Government" refused to waive succession duty on the legacies; and the question for determination was, whether the legacy to the Aged Women's Home was void.

The motion was heard in the Weekly Court at Toronto.

G. Lynch-Staunton, K.C., for the executors and all adult persons named as legatees.

E. D. Armour, K.C., and A. H. Gibson, for the Aged Women's Home.

F. W. Harcourt, K.C., for infants interested.

RIDDELL, J., read a judgment in which, after setting out the facts, he said that there could be no doubt that by the "Government" was meant the Executive for Ontario; and, while there was no power in this Executive to waive the statutory duties in such a case, it would seem that the testator believed that such power existed and might be exercised. The fact that this was a mistake on a matter of general law, and not of private right, was not of importance, in the view of the case adopted by the learned Judge.

The "condition" here had no reference to the conduct, act, or position of the legatee, and none to the amount of the bequest.

The testator, believing—however erroneously—that the Government had the power and might perhaps be induced to waive the succession duties on the bequests to his relatives, contemplated two possible cases: (1) that the Government would waive the duties; and (2) that it would not. He provided for either contingency. On the happening of the first contingency, the Aged Women's Home was to benefit—of the second, it was not. The second had happened, and the Home was not to benefit.

Order declaring accordingly; costs of all parties out of the lapsed part of the estate.

AGNEW v. EAST—SUTHERLAND, J.—JULY 6.

Payment—Claim for Price of Goods Sold and Delivered—Payment by Promissory Notes and Assignment of Mechanic's Lien—Destruction by Fire of Building on Land Covered by Lien—Application of Insurance Moneys—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 9.]—Action for the

balance of an account rendered for goods supplied to the defendants, who were building contractors, by the Crane & Ordway Company, who assigned their claim to the plaintiff. The defendants admitted that the goods were obtained from the company, and that the prices set out in the statement of claim were correct; but said that the claim was paid in full to the company in 1910 by two promissory notes and the assignment of a mechanic's lien, which were accepted by the company in full satisfaction of their claim. The action was tried without a jury at Fort Frances. SUTHERLAND, J., reviewed the evidence in a written opinion, and stated his finding, upon the complicated facts of the case, that nothing was due from the defendants to the plaintiff upon the claim assigned to him. The balance which could properly be claimed by the plaintiff, he must seek from a solicitor who has in his hands certain insurance moneys, arising from the destruction by fire of the building covered by the lien assigned: see the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 9. Action dismissed with costs. Notes of the defendants to be delivered up to them. A. G. Murray, for the plaintiff. C. R. Fitch, for the defendants.

RE PHERILL—KELLY, J., IN CHAMBERS—JULY 6.

Lunatic—Petition for Order—Evidence—Failure to Make Case.] —Petition for an order declaring Sarah Ann Pherill a lunatic. The learned Judge said that the evidence adduced by the petitioner was not of such a character as would justify the making of the order. The application was launched in May, 1916. Affidavits of two doctors were submitted by the petitioner. One of these doctors, whose affidavit was sworn in March, 1916, had not examined or seen Sarah Ann Pherill since July, 1915; and his evidence of what he then observed was not sufficient ground for making the order. The affidavit of the other doctor was equally unsatisfactory, especially with the light thrown upon it by the affidavits in answer to the application. No importance was to be attached to the letters of Sarah Ann Pherill put in in reply, which were written years ago. In the affidavit of Dr. C. K. Clarke, whose recent examination of Sarah Ann Pherrill was made independently and without knowledge on his part of the purpose for which it was intended, he was most emphatic in his opinion that she possessed all the intellect necessary to manage her affairs. The application could not succeed; and on the material there was

no sufficient ground for directing an issue. Motion dismissed with costs. G. M. Willoughby, for the petitioner. A. J. Russell Snow, K.C., for Sarah Ann Pherill.

BLAY v. STAHL—KELLY, J.—JULY 6.

Contract—Division of Water Lot among Riparian Owners—Dispute as to Proper Share of one Owner—Evidence—Costs.]—The parties being owners of adjoining properties bordering on the Detroit river, the defendant Stahl obtained the patent for a water lot in front of the lands of all, and proposed to divide the water lot fairly among the owners, pursuant to an arrangement previously made. The plaintiff brought this action for a declaration of his right to a larger share of the water lot than Stahl proposed to convey to him. The action was tried without a jury at Sandwich. The learned Judge reviewed the evidence in a written opinion and said that the plaintiff had failed to substantiate his claim. The defendants and others interested having signified their willingness that the plaintiff and his wife should be allotted the part of the water lot described in para. 7 of Stahl's defence, the plaintiff and his wife may have conveyances of that portion on compliance with the terms as to payment adopted by the other property-owners. In other respects, the action should be dismissed. The plaintiff to pay the defendants' costs. J. Sale, for the plaintiff and the defendant Julia C. Blay. G. A. Urquhart, for the other defendants.

HISLOP v. CITY OF STRATFORD—SUTHERLAND, J.—JULY 7.

Highway—Dedication—Acceptance—Sale of Land Including Portion Dedicated—Acquiescence of Purchasers.]—Action for a declaration that the plaintiffs are the owners in fee simple of a parcel of land in Stratford and that the city corporation, the defendants, have no right or title to the parcel, and for an injunction and other relief. The action was tried without a jury at Stratford. SUTHERLAND, J., read a judgment in which he set forth the facts, and stated that the defendant pleaded a dedication by the Honourable John Idington of the lands comprising the extension of Idington street (the property in question) as a public street or highway and acceptance by the defendants.

Upon the evidence, the learned Judge came to the conclusion that there was such a dedication and acceptance, and that the plaintiffs took the land with knowledge thereof, and had, since they became the owners of the property adjoining, by the payment of taxes for a sewer and otherwise, acquiesced therein. Action dismissed with costs. T. Hislop, for the plaintiffs. R.S. Robertson, for the defendants.

WIGLE v. HUFFMAN—KELLY, J.—JULY 8.

Will—Annuity — Arrears — Dower — Money Lent—Funeral Expenses—Administration.]—Action by the executrix of the will of Albert Huffman and by others against the co-executor of that will and against others to recover $600 and interest; also payment of arrears of an annuity given to Agnes Huffman, the deceased widow of the testator; for a declaration that Agnes Huffman was entitled to dower in the lands of the testator, and for sale of the lands to realise the same; and for administration. The action was tried without a jury at Sandwich. KELLY, J., read a judgment in which he said that, upon the evidence, the action failed, in so far as it was against the defendant William Huffman for arrears of an annuity to his mother and for arrears of dower. As to the sum of $500 advanced by his mother to the defendant Randolph Huffman, it was, on the evidence, a loan. The claim against Randolph and against the land devised to him for arrears of dower of his mother should also be dismissed, the mother having lived with him upon the land, and there being no evidence of any demand for dower by her: Phillips v. Zimmerman (1871), 18 Gr. 224. Randolph was liable to his mother's estate for the $500 lent and interest, and for the arrears of annuity to which the devise to him was made subject. As against these sums, he was entitled to credit for the amount of his mother's funeral expenses. The plaintiffs' costs of the action, in so far as they applied to the claims allowed against him, should be paid by him; in other respects, the action as against him should be dismissed without costs. The action as against William Huffman should be dismissed with costs. F. D. Davis, for the plaintiffs. J. Sale, for the defendants.