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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 11TH, 1920.

RE BULMAN.

Will—Construction—Devise to Widow in General Terms—Subsequent Direction to Divide Estate between Children, after Death of Widow—Power to Sell and Invest—Nature of Estate Given to Widow.

Appeal by Robert J. Bulman from the judgment of KELLY, J., ante 309.

The appeal was heard by MULOCK, C.J. EX., CLUTE, SUTHERLAND, MASTEN, and ORDE, JJ.

A. C. Heighington, for the appellant.

J. T. Richardson, for W. E. Bulman, the respondent.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 9TH, 1920.

PURITY SPRINGS WATER CO. LIMITED v. THE KING.

Crown—Ownership of Land—Islands in River—Change in Course of Channel since Grant from Crown in 1797—Erosion—Boundaries—Evidence—Declaration.

Petition of right against the Crown in right of the Province of Ontario.

The suppliant company claimed to be the owner in fee of certain parts of lots in the township of York fronting on the Humber river, being parts of a tract of land granted by the Crown to William Lawrence by deed of the 1st September, 1797, containing 228 acres. The company alleged that the river, at the date of the grant aforesaid and thereafter, was, and now was, a non-navigable river; that in 1878, by reason of an exceptional storm and flood, the river suddenly shifted its course, and thereafter flowed and now flowed in a channel northerly and easterly of the channel in which it flowed at the date of the grant and up to 1878; that for 60 years before the date of the petition the suppliant company and its predecessors in title "enjoyed free, open, and uninterrupted possession" of the parts of the lots in question; and that the Crown, in right of the Province of Ontario, on the 25th July, 1919, agreed to grant these lands to the Corporation of the City of Toronto, and thereby wrongfully assumed the ownership and possession thereof.

The prayer of the petition was that it might be declared that these lands passed to Lawrence by the grant of 1797; that the suppliant company was the owner thereof, and entitled to a confirmatory grant thereof from the Crown; and for restitution and costs.

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

J. W. Bain, K.C., M. L. Gordon, and B. H. L. Symmes, for the suppliant company.

Irving S. Fairty and V. Foley, for the Crown.

LENNOX, J., in a written judgment, reviewed the evidence in detail and found the facts against the contention of the Crown. W. S. Gibson's survey (1911) coincided with P. S. Gibson's work in 1889. It should be declared that W. S. Gibson's plan (exhibit 18) truly delineated the original course of the river, and that the western boundary of the land of the suppliant company, as against the Crown, was shewn on the dotted red line on that plan.

There should be judgment accordingly with costs.

LOGIE, J. FEBRUARY 9TH, 1920.

MASON v. GOLDMAN.

Vendor and Purchaser—Agreement for Sale of Land—Time for Closing Sale—Waiver of Default—Part of Purchase-money Payable by Transfer of "Guaranteed Mortgages"—Tender of Conditional Guarantee—Necessity for Unconditional one—Specific Performance—Compensation or Damages.

Action by the vendor for specific performance of an agreement for the purchase and sale of land.

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

K. F. Mackenzie, for the plaintiff.

L. C. Smith, for the defendants.

LOGIE, J., in a written judgment, said that the agreement was evidenced by an offer, dated the 4th April, 1919, by the defendant Etta Goldman, and an acceptance thereof, dated the 10th April, 1919, by the plaintiff. It was admitted that Etta, though signing the offer as principal, was in fact the agent of her husband, the defendant Henry Goldman.

A contention that—time being of the essence of the agreement and the plaintiff not having been ready to close at the time fixed by the contract for closing—the defendants had the right to cancel, was disposed of by the correspondence: there was a waiver.

The real question between the parties was, whether the mortgages and assignments thereof tendered to the plaintiff as part of the purchase-money sufficiently complied with the provision of the contract whereby "about $3,500" of the purchase-money payable to the plaintiff was to be paid by the defendants to the plaintiff by "the transfer of about $3,500 in mortgages which are guaranteed by D. Davis and his wife."

The guarantee thus referred to was an unconditional one, and the plaintiff was not bound to accept a conditional guarantee contained in two assignments executed by David Davis and his wife.

There should be judgment for the plaintiff for the specific performance of the agreement. If an unconditional guarantee of "D. Davis and his wife" of the mortgages to be assigned to the plaintiff is furnished within 10 days, this must be accepted by him. Failing this, the plaintiff should recover damages assessed at $3,500 as compensation in money in lieu of the mortgages so guaranteed.

The plaintiff should have his costs of the action.

SUTHERLAND, J. FEBRUARY 11TH, 1920.

SHAW v. SHAW.

Will—Construction—Right of Widow to "Reside" in House on Land Devised to Son—Tenancy for Life or during Widowhood—Unnecessary Action—Costs.

Action by Charles Bruce Shaw against Mary Jane Shaw, his father's widow, to recover possession of a large brick house upon his father's farm, subject to the rights of the defendant under the father's will. The plaintiff offered to maintain the defendant in the house as a member of his family or in a separate part of the house; but the defendant asserted a right to occupy the whole of the house during her lifetime.

The action was tried without a jury at Chatham.

J. S. Fraser, K.C., for the plaintiff.

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

SUTHERLAND, J., in a written judgment, said that there were two houses upon the farm, a large brick house, in which the defendant lived with the deceased up to the time of his death, and a small frame house, in which the plaintiff and his wife lived. The father devised to the plaintiff the south-west quarter of lot 24, subject to certain terms and conditions, including the payment of an annuity of $100 to the defendant and her support, maintenance, food, clothing, and medical attendance, all charged upon the land, and subject also to this provision: "My said wife during her widowhood as aforesaid shall be so supported, maintained, fed, clothed, and medically attended whether she prefers to *reside* in the larger house . . . or in a house elsewhere." The provisions contained in the will for the benefit of the defendant were to be in lieu of dower. The defendant claimed to be entitled to exclusive personal use and occupation of the brick house.

The learned Judge said that the sole question to be determined seemed to be the proper construction to be placed on the word "reside" as used in the will.

Reference to Re Eastman's Settlement (1898), 43 Sol. Jour. 114, 68 L.J. Ch. 122, and other cases.

In this case the word imported a tenancy for life or during widowhood, and the defendant had the right to reside in or occupy the whole of the brick house during her lifetime unless she desired to remove elsewhere.

The one matter in dispute, the proper construction of the will, should have been determined on an originating motion.

The action should be dismissed with costs.

LENNOX, J. FEBRUARY 12TH, 1920.

HENRY HOPE & SONS OF CANADA LIMITED v. SINCLAIR.

Company—Calls on Shares—Original Subscription before Incorporation—Representations of Promoter—Conditional Subscription—Condition Subsequent.

Action for the recovery of $9,000 for unpaid calls upon shares in the plaintiff company, subscribed for by the defendant.

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

M. L. Gordon and G. Hamilton, for the plaintiff company.

R. McKay, K.C., for the defendant.

LENNOX, J., in a written judgment, said that the defendant was an original stockholder and one of the incorporators of the plaintiff company, having signed the stock-book on the 5th December, 1912. The only payment was $100 on the 11th December, 1913. The defendant said that he was not shewn the prospectus of the company, if there was any, and also relied upon an agreement or undertaking of one Young, the general agent of the prospective company, who obtained his (the defendant's) subscription, that he should be relieved therefrom, and that his subscription was conditional upon that undertaking.

The learned Judge discussed the cases cited: In re Universal Banking Co., Rogers' Case (1868), L.R. 3 Ch. 633; In re National Equitable Provident Society, Wood's Case (1873), L.R. 15 Eq. 236; In re Aldborough Hotel Co., Simpson's Case (1869), L.R. 4 Ch. 184; In re Sunken Vessels Recovery Co., Wood's Case (1858), 44 Eng. R. 1201; In re Monarch Insurance Co., Gorrissen's Case (1873), L.R. 8 Ch. 507; In re Haggert Bros. Manufacturing Co., Peaker and Runions' Case (1892), 19 A.R. 582; In re Metal Constituents Limited, Lord Lurgan's Case, [1902] 1 Ch. 707; Buff Pressed Brick Co. v. Ford (1915), 33 O.L.R. 264; Re Monarch Bank of Canada, Murphy's Case (1919), 45 O.L.R. 412, 48 D.L.R. 588; and said that representations made by a promoter of a prospective company do not bind the company when it becomes incorporated: it cannot have an agent until it has a legal existence.

The learned Judge said that he could find no valid answer to the plaintiff company's claim. The initial question was a question of fact—was the subscription conditional? Quite clearly it was not. Take all the defendant said, and it amounted only to an expression of a hope—mutual encouragement by persons entering upon a joint adventure. Interest was not claimed.

There should be judgment for the plaintiff company for $9,000 with costs.

LATCHFORD, J., IN CHAMBERS. FEBRUARY 13TH, 1920.

*REX v. THOMPSON MANUFACTURING CO.

Revenue—Income War Tax Act, 1917, secs. 7, 8, 9—Magistrate's Conviction for Default in Making Return of Income—Penalty—Amount of—Discretion of Magistrate.

Case stated by R. E. Kingsford, Esquire, a Police Magistrate for the City of Toronto, under sec. 761 of the Criminal Code.

Norman Sommerville, for the Crown.
R. O. Daly, for the defendant company.

LATCHFORD, J., in a written judgment, said that on the 26th November, 1919, an information was laid under oath before the magistrate alleging that the defendant company did on the 3rd November, 1919, and on every day thereunto following, up to and including the 8th November, 1919, fail to make a return of information for the year 1918 required of the company to be given under the provisions of sec. 8 of the Income War Tax Act, 1917, 7 & 8 Geo. V., ch. 28, and amending Acts (Dominion).

The charge was duly heard by the magistrate on the 17th December, 1919. The defendant company pleaded "guilty," and was convicted. The magistrate imposed a penalty of $200 and costs.

At the request of counsel for the informant, the magistrate submitted for the judgment of the Court the questions:—

(1) Whether he was required by sub-sec. 1 of sec. 9 of the Income War Tax Act, 1917, and amending Acts, to impose a penalty of $100 for each day on which default continued.

(2) Whether he was entitled, under the said Acts, to exercise a discretion enabling him to impose a penalty of $200 for the 6 days' default for which the defendant company was convicted.

Section 7 of the Income War Tax Act imposes on every person liable to taxation under the Act the obligation of making, before the 28th February in each year, a return of his total income during the last preceding calendar year.

Under sec. 8, the Minister of Finance may, *inter alia*, require a return containing such information as he deems necessary to be furnished him, within 30 days; and any officer authorised thereto by the Minister may make such inquiry as he may deem necessary for ascertaining the income of any taxpayer.

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

For every default in complying with the provisions of secs. 7 and 8, sec. 9 (1) enacts, "the taxpayer, and also the person or persons required to make a return, shall each be liable on summary conviction to a penalty of $100 for each day during which the default continues."

The company pleaded guilty to being in default for the number of days charged in the informations. It was in default for each and every day of the 6 days so charged, and was liable to no less a penalty than $100 for each such day.

No discretion was left to the magistrate to limit the number of the days for which the penalty was to be imposed, or to reduce the amount of the penalty below $100 for each day's default.

In contrast to the rigidity of sub-sec. 1, sub-sec. 2 allows a wide discretion in fixing the amount of the penalty that may be imposed for making a false statement.

Accordingly, the first question must be answered in the affirmative, and the second in the negative.

No order as to costs.

SANTOLINI v. HILL—LENNOX, J.—FEB. 12.

Lost Documents—Instrument Charging Lands under Land Titles Act—Cessation of Charge—Proof of Execution and Delivery—Evidence—Payment of Amount of Charge—Action for Declaration—Finding of Fact of Trial Judge—Costs.]—The plaintiff, owner of certain land in Toronto, held under the Lands Titles Act, subject to a registered charge for $1,000 appearing of record in favour of the defendant, alleged that the charge had been paid in full, and came into Court to have it so declared and an order made directing the defendant to execute and deliver a cessation. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, said that it was alleged that the charge-money was paid in the office of the plaintiff's solicitor, and a cessation of charge executed and delivered by the defendant to the solicitor, on the 28th November, 1914. The solicitor was then on active military service in Toronto, and shortly afterwards went overseas, and was killed in action. Neither the charge nor the cessation could be found. The defendant did not deny either the payment or that he executed a discharge. The most he could say was that he did not remember; and, if he got the money, he did not know what he did with it. The learned Judge was satisfied that the defendant did not remember getting the money; and, although he had put the plaintiff to more inconvenience perhaps than could be fully justified, he gave honest evidence in Court. What

was said to have taken place in the solicitor's office actually occurred, the learned Judge found: the charge-money was paid to the defendant, he executed and delivered a cessation of the charge, and the charge was left in the solicitor's hands at the same time. The documents had been mislaid or lost. Both parties asked for costs. Cases arise in which a defendant, having executed a release, cannot safely perform a subsequent act without the protection of the Court, and in such case if he promptly submits himself to such order as the Court may make he may be entitled to be reimbursed such outlay as he could not avoid. That was not this case: but the defendant should not, if he acts now, be asked to pay the plaintiff's costs. There should be judgment declaring that the charge in question had been paid in full; that the plaintiff was entitled to execution of a cessation of the charge and delivery thereof by the defendant, upon tender thereof for execution, and an order directing the defendant to execute and deliver the same accordingly. If, upon tender or within 5 days thereafter, the defendant executes and delivers to the plaintiff or his solicitor a cessation of the charge, the judgment will be without costs; if he fails to do so, there will be judgment for the plaintiff with costs; and in that case such further order as may be necessary will be made. F. B. Edmunds, for the plaintiff. J. F. Holliss, for the defendant.