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HIGH COURT DIVISION.

BRITTON, J. JULY 24TH, 1918.

RICHARDSON v. SABINS.

Deed—Conveyances of Land—Action to Set aside—Improvidence—Undue Influence—Lack of Independent Advice—Evidence—Ante-nuptial Agreement—Invalid Marriage—Consideration—Provision for Child of Parties.

Action to set aside certain conveyances of land made by the plaintiff to the defendant, on the grounds of improvidence, undue influence, absence of independent advice, and other grounds.

The action was tried without a jury at Belleville.
E. G. Porter, K.C., for the plaintiff.
Gideon Grant, for the defendant.

BRITTON, J., in a written judgment, said that the plaintiff was an unmarried man and was the owner of a farm subject to the life-estate of his mother. The defendant was a married woman, but supposed she had obtained a divorce from her husband, and so went through a ceremony of marriage with the plaintiff. Before the supposed marriage, the parties made an oral agreement that, in consideration of the marriage, the plaintiff would convey his farm, or a portion of it, to the defendant; but no conveyance was executed before the marriage ceremony. A considerable time after the ceremony, and after the death of the plaintiff's mother, the plaintiff conveyed the farm to the defendant; the deed was executed on the 12th August, 1909. There was a second conveyance, but merely to confirm the first.

The learned Judge found that there was no undue influence such as ought to vitiate the conveyance. He referred to Collins v. Kilroy (1901), 1 O.L.R. 503, per Maclennan, J.A., at p. 504.

The transaction was not an improvident one for the plaintiff; a lease of the farm to him for life was to be made by the defendant, and this she was willing to do.

As to obtaining independent advice, the parties thought they had all the necessary advice. The conveyances were drawn by a solicitor, who was acting as much for the plaintiff as for the defendant.

There was a third conveyance, made because in the earlier ones no provision was made for the daughter of the plaintiff and defendant. The third conveyance made the defendant a trustee for this daughter.

The third conveyance was voluntary, and was not supported by the ante-nuptial agreement. The plaintiff did not understand the true meaning of it. It was not obtained by undue influence, but was executed by mistake of both the plaintiff and defendant.

The third conveyance should be set aside and the registration thereof vacated.

The action should be dismissed as to the other two conveyances.

As success was divided, there should be no costs.

FALCONBRIDGE, C.J.K.B. JULY 26TH, 1918.

*CAMPBELL v. MAHLER.

Contract—Formation—Sale of Goods—Telegrams—Bought and Sold Notes—Statute of Frauds—Letter Repudiating Contract nevertheless Evidence to Satisfy Statute—Omission of Statement of Time for Payment—"Terms Usual"—Custom of Trade—"Shipment Opening Navigation"—Breach of Contract by Vendors—Damages—Nominal Damages—Costs.

Action for damages for breach of an alleged contract for the sale by the defendants to the plaintiffs of a car-load of evaporated apples.

The action was tried without a jury at London.

G. S. Gibbons, for the plaintiffs.

R. G. Fisher, for the defendants.

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

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs, carrying on business in Calgary, Alberta, asserted that they had bought from the defendants, through Nicholson & Bain, agents for the defendants, a car-load of apples, which the defendant refused to ship in accordance with the contract.

The contract was said to be evidenced by: (1) a telegram of the 14th October, 1914, from N. & B. to the defendants saying that N. & B. had sold the plaintiffs a car choice winter pack at 5 cents for fifties, 5¼ for twenty-fives, including commission—shipment opening navigation; (2) telegram from the defendants to N. & B. of the 16th October, "Accept price;" (3) sold note sent by N. & B. to the defendants on receipt of telegram, 16th October; (4) bought note sent on the same day by N. & B. to the plaintiffs; (5) letter of the 20th October written by the defendants to N. & B. on receipt of the sold note, objecting to terms mentioned in sold note.

If the terms of the contract had not sufficiently appeared by the telegrams and bought note, the letter of the 20th October would supply a sufficient memorandum to satisfy the Statute of Frauds, notwithstanding that it contained a repudiation of the contract by the defendants—the question is not one of the intention of the person signing the document, but merely of evidence against him: Bailey v. Sweeting (1861), 9 C.B.N.S. 843, and other cases cited in Benjamin on Sale, 5th ed., pp. 266, 267.

The omission of the particular mode or time of payment does not necessarily invalidate a contract of sale: Valpy v. Gibson (1847), 4 C.B. 837.

Correspondence between the defendants and N. & B. continued up to the end of 1914, the defendants always insisting on payment for the car when packed, but eventually offering to take payment as of the 1st January, 1915. The plaintiffs always insisted upon their contract.

The contention of the defendants that "shipment opening navigation" could mean anything but the opening of navigation in 1915 was absurd—if they failed to grasp the obvious meaning of the first telegram, their misapprehension could not affect the validity of the contract.

In the bought and sold notes, the only reference to payment was in the two words used—"Terms usual." The effort to shew a custom of trade by which these words meant payment at the time of the sale or payment before shipment, failed.

As to damages, the measure was not the price which the plaintiffs had to pay at the time for shipment of the apples—say from the middle of April to the middle of May, 1917. When the plain-

tiffs found that the defendants would not carry out the contract, the plaintiffs ought to have gone into the market and done the best they could with a similar contract. There was no evidence, except of the most general kind, given on the plaintiffs' behalf of any praticular rise in price from that time on up to the end of the year. The defendant Mahler swore that he could have bought at a little less when he objected to the contract; that the prices remained low up to March, 1915, when they went up about 2 cents.

The plaintiffs were therefore entitled only to nominal damages. There should be judgment for them for $5 damages with costs upon the County Court scale, without any set-off of costs. The defendants should be deprived of a set-off because they broke their contract without any reasonable or valid excuse.

CAMPBELL v. CAMPBELL—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—JULY 23.

Husband and Wife—Alimony—Interim Allowance—Earnings of Wife—Means of Husband—Assignment by Husband for Benefit of Creditors—Quantum of Allowance—Date of Commencement of Payments—Delay in Delivery of Statement of Claim—Interim Disbursements.]—Motion by the plaintiff in an alimony action for an order for interim alimony and disbursements. The motion was heard by the Senior Registrar, sitting in the absence of the Master. The Registrar, in a written judgment, said that the defendant (a practising physician) contended that, because his wife, the plaintiff, had been earning money by working as a milliner, she was in no need of support. Prima facie a husband is bound to support and maintain his wife; and the fact of the existence of a suit for alimony does not ordinarily relieve him of that obligation pendente lite. Having regard to the position in life of the parties, the husband was not entitled to be relieved from his prima facie obligation because his wife, in her dire need, had resorted to manual labour to gain a living. The small pittance which she had earned, even if it were a certain and permanent source of income—which it did not appear to be—was insufficient to maintain her in the position to which she was entitled as the wife of the defendant. The defendant had not made out that he was destitute of means, nor that the plaintiff was in no need of support. The fact that the defendant had made an assignment for the benefit of creditors was no reason for refusing to make the order asked. The defendant should pay the plaintiff $14 a week interim

alimony. As there had been an apparent, but unexplained, delay of a month in filing the statement of claim, the interim alimony should run from the service of notice of this motion: Parish v. Parish (1912), 4 O.W.N. 105. The defendant should also pay the plaintiff's solicitor forthwith $30 for disbursements. J. H. Hammond, for the plaintiff. Grayson Smith, for the defendant.

VICTOR v. ROMOVITZ—BRITTON, J.—JULY 24.

Vendor and Purchaser—Agreement for Sale of Land—Failure of Attempt to Prove Abandonment by Purchaser—Agreement as to Collection of Rents and Payment of Disbursements—Account—Specific Performance—Costs.]—Action for a declaration that a certain agreement is unenforceable and that the defendant has forfeited all rights thereunder. Counterclaim for an account and specific performance of the agreement. The action and counterclaim were tried without a jury at Toronto. BRITTON, J., in a written judgment, said that the agreement was for the sale by one Raffleman, the plaintiff's assignor, of certain land to one Beck, the defendant's assignor, for $1,850. The money was payable in instalments, and all became due in 1915. The defendant alleged that there was an arrangement between him and Raffleman that Raffleman should collect the rents, pay the taxes, make the other necessary disbursements, and "carry the property" until after the end of the war, or for some other reasonable time, and give an account to the defendant of amounts received and paid out. The plaintiff had dealt with the property in a way consistent with such an agreement. Upon the evidence, the case was not one in which an abandonment or forfeiture should be declared. The defendant alleged his willingness to carry out the purchase according to the agreement, and asked for an account of rents and profits and specific performance of the agreement. The defendant was entitled to a judgment for specific performance. The plaintiff should pay the costs, fixed at $100, and that amount should be deducted from the purchase-money to be paid by the defendant. An account having been rendered, there was no need for a reference on that score; but there may be a reference to the Master in Ordinary as to title, if deemed necessary by either party. J. M. Ferguson, for the plaintiff. H. H. Shaver, for the defendant.

DISTRICT COURT OF THE DISTRICT OF NIPISSING.

POWELL, DIST. CT. J. JULY 10TH, 1918.

YOUNG v. CANADIAN PACIFIC R.W. CO.

Railway—Animals Killed by Train—Defective Cattle-guards and Fences at Level Highway Crossing—Notice—Failure to Repair—Cattle Lawfully on Highway Getting on Railway Tracks—Proximate Cause—Liability—Railway Act, R.S.C. 1906 ch. 37, sec. 294 (4)—9 & 10 Edw. VII. ch. 50, sec. 8.

Action to recover the value of a cow and two heifers belonging to the plaintiff, killed on the 29th May, 1917, by a passing train on the defendants' line of railway in the township of Humphrey, in the district of Parry Sound.

The action was tried without a jury.

W. L. Haight, for the plaintiff.

J. D. Spence, for the defendants.

POWELL, DIST. CT. J., in a written judgment, said that the animals got on the railway lands within a short distance of the plaintiff's property, at the north side of a level crossing of a highway, by reason of the broken condition and nonrepair of the cattle-guards and of the defective condition of the portion of the east fence turned in towards the cattle-guards or railway track; the animals were killed on the railway track at a considerable distance north of this crossing.

The defects were such as to allow the cattle to pass easily upon the railway strip, and had continued for some weeks; the defendants had ample notice and ample time for making the necessary repairs, but had failed to perform their manifest duty, as required by sec. 254 of the Railway Act, R.S.C. 1906 ch. 37, and the amendments thereto, 9 & 10 Edw. VII. ch. 50, sec. 5, and 1 & 2 Geo. V. ch. 22.

The animals were not breachy, and would not have got on the railway if the cattle-guard and fence had been in proper repair. The defective condition plus the neglect to repair was the proximate cause of the cattle being on the railway lands and of their being killed. Under sec. 427 (2) of the Railway Act, the defendants were liable to the plaintiff for the value of the cattle killed, unless relieved by the provisions of sec. 294 or 295 of the Act.

The defendants relied on sub-sec. 4 of sec. 294, as amended and re-enacted by 9 & 10 Edw. VII. ch. 50, sec. 8, that is to say, the

defendants maintained that the animals got at large through the negligence or wilful act or omission of the owner or custodian of the animals.

According to the local municipal by-laws, the plaintiff's cattle were not improperly on the highway, from which they got upon the railway.

Sub-section 4 of sec. 294 places on the defendants the onus of establishing that the animals got at large through the negligence, wilful act, or omission of the plaintiff, and requires the defendants to establish this in every case in which they seek to avoid liability for the killing of cattle at large on the railway track (not at a crossing); but it does not follow that in every such case in which the plea is established the defendants must be relieved of liability for the damages.

The plaintiff was justified in assuming that the cattle-guards and fences of the railway were in proper repair when he allowed his cattle out to graze. It was not his duty to fence against the railway nor against the highway. To allow the cattle out on his own premises to graze, at the end of May, was a necessary and natural and reasonable thing to do; it was what was usual, daily; the cattle were quiet and inoffensive; he did not at the time foresee any danger to his cattle; and the act of the plaintiff was not one for which he should be blamed, nor was the act even remotely the cause of the cattle getting on the property of the railway company where they were killed.

Reference to Higgins v. Canadian Pacific R.W. Co. (1908), 18 O.L.R. 12, 15; Palo v. Canadian Northern R.W. Co. (1913), 29 O.L.R. 413; McLeod v. Canadian Northern R.W. Co. (1908), 18 O.L.R. 616.

Judgment for the plaintiff for $200 and costs.