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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 22ND, 1917.

*REX v. KARP.

Criminal Law—Offence of Having in Possession Mineral Ore Suspected to have been Stolen—Criminal Code, secs. 424 (b), (c), 424A.—Grounds for Suspicion—Failure to Give Satisfactory Account of Possession of Ore—To whom Account to be Given—Conviction by District Court Judge—Refusal to State Case—Motion for Leave to Appeal—Code, secs. 1014, 1015—Question not Raised at Trial.

Motion by the defendant for leave to appeal from a conviction.

The defendant was tried before the Judge of the District Court of the District of Temiskaming, in the District Court Judge's Criminal Court, upon the charge "that he, the said Adolph Karp, on or about the 1st day of September, 1917, at the town of Cobalt, in the district of Temiskaming, did knowingly have in his possession a quantity of silver and gold ore of the value of not less than 25 cents per pound which there is reasonable ground to suspect has been stolen or dealt with contrary to paragraph (*b*) or (*c*) of section 424 of the Criminal Code of Canada, and the said Adolph Karp is unable or refuses to account satisfactorily for or prove his right to the possession of the same."

The defendant was found guilty and sentenced to 18 months' imprisonment at hard labour.

The conviction was under sec. 424A. of the Code (added by sec. 1 of 9 & 10 Edw. VII. ch. 12), referring to paras. (*b*) and (*c*) of sec. 424.

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

The District Court Judge refused to state a case; and the motion for leave to appeal was made under secs. 1014 and 1015 of the Code.

The question which the Judge refused to reserve was: "Whether or not a satisfactory accounting or proof of possession of the ore should be asked for and made to the officer before the arrest in order to complete the offence charged."

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, SUTHERLAND, LENNOX, and ROSE, JJ.

A. G. Slaght, for the defendant.

Edward Bayly, K.C., for the Crown.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that leave to appeal was asked in respect of a matter that was not apparently raised at the trial at all, and as to which there could not be an appeal.

There is nothing in the statute which requires the officer, before arresting the accused, to ask him to account satisfactorily for the ore in his possession or to prove his right to its possession.

All that is necessary is (in the opinion of the Chief Justice, speaking for himself), that it shall be proved that there is reasonable ground to suspect that the ore has been stolen or has been dealt with contrary to the provisions of para. (*b*) or (*c*) of sec. 424 of the Criminal Code.

The defendant had every opportunity for doing all that it is now said he ought to have had an opportunity of doing, before and at the time of his arrest. According to the evidence, he not only failed to give a satisfactory account of the ore, but gave a very unsatisfactory one of the ore he had concealed on his person. He denied that he had it.

There was, throughout the case, reasonable ground for suspicion, reasonable ground for conviction.

The motion should be dismissed.

SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1918.

*CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v. LEONARD-PARMITER LIMITED.

*CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v. G. F. LEONARD.

Trade Publications—Piracy—Evidence—Injunction—Damages—Form of Judgment—Contract—Employee—Misconduct—Remuneration for Services—Reference—Ontario Companies Act, sec. 92—Payment for Services of Director as Travelling Salesman—Absence of By-law.

Appeals by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 12 O.W.N. 388, in the two actions.

The appeals were heard together by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

J. P. MacGregor, for the appellants.

A. C. McMaster and E. H. Senior, for the plaintiffs, respondents.

RIDDELL, J., read a judgment in which he set out in detail the facts in regard to the two actions.

The plaintiff company had for some time published a list of lawyers in Canada whom they recommended to their customers to make mercantile collections. These lawyers they "bonded" with a guarantee company, and undertook to their customers for the solvency and honesty of the lawyers whom they recommended. They also furnished a list of banks, through whom their customers might draw on debtors, instructions being given to the banks that, in case of non-payment, the collections were to be made by "bonded" lawyers.

The defendant Leonard was employed by the plaintiff company, from its inception, as a traveller, and later became also a director; he so remained till the summer of 1916. The defendant Parmiter was from 1913 till the summer of 1916 also in the employment of the plaintiff company.

About the 1st July, 1916, Leonard started an opposition business, and Parmiter joined him. They formed a joint stock company, Leonard-Parmiter Limited, the defendant company, and began the publishing of a "Guide to Bonded Lawyers," much like that of the plaintiff company.

The first action was brought against Leonard and Parmiter and the new company for an injunction.

During the time Leonard was employed by the plaintiff company, he received from and for the company considerable sums of money. These sums he claims as salary, while the plaintiff company set up that he was false to his charge, and was not entitled to any wages. They also said that there was no by-law for the payment of anything to him, and—he being a director—he was not entitled to receive anything.

The second action was brought to recover the money so received by Leonard.

Taking up the second action first, the learned Judge said that the result of the evidence was, that Leonard, early in June, was canvassing for an opposition book. It was true that he obtained renewals for the plaintiff company; but he transgressed his duty, because it was his duty to obtain a renewal in such a way as not to prejudice future renewals. For the month of June, 1916, he should not be paid any salary at all; but there was no reason why, apart from the effect of his position as director, he should not be paid his salary till June.

The Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 92, requires a by-law for the payment of a director to be confirmed by the shareholders at a general meeting. There was no by-law in this case.

After a review of the Ontario cases—the most recent of which is Re Matthew Guy Carriage and Automobile Co. (1912), 26 O.L.R. 377—the learned Judge said that if the services were such as only a director could perform, he could not recover compensation for them, unless the statute was complied with; but there was no necessity for a by-law to authorise payment for the services of one who, though a director, is employed in a subordinate capacity, and at a reasonable figure. There was nothing in the evidence which indicated that the salary agreed upon was excessive; the work done by Leonard was not done as a director, but as a clerk or subordinate; and there was no reason why he should not be paid $200 a month and expenses.

In the first action, the plaintiff company were properly found entitled to succeed, but the judgment entered was too broad and should be modified.

FERGUSON, J.A., agreed with RIDDELL, J.

ROSE, J., read a judgment, with which LENNOX, J., concurred. They agreed in part with RIDDELL, J., but were of opinion

that the period for which Leonard was allowed his salary of $200 a month should include June, 1916; and that the injunction in the first action should be limited to enticing servants and to soliciting customers of the plaintiff company who were customers of the partnership whose business was transferred to the plaintiff company.

In the result, the appeal in the first action is dismissed, with a variation in the form of the judgment. The plaintiff company to have the costs of the trial; the defendants to have the costs of a motion to vary the minutes of the judgment at the trial and the appeal in that regard; otherwise no costs of the appeal.

In the second action, the appeal is allowed with costs; but the defendant Leonard is to be subjected to a deduction of $100 from his salary, if the parties agree upon that sum; if they do not agree, there is to be a reference to the Master in Ordinary, who will dispose of the costs of the reference; no costs of the trial.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1918.

*PEEL v. PEEL.

Husband and Wife—Alimony—Interim Allowance—Property Conveyed by Husband to Wife—Pending Action by Husband to Recover—Registration of Certificate of Lis Pendens—Separate Estate—Allowances from Friends—Husband not Possessed of Property—Quantum of Allowance.

Appeal by the defendant from an order of the Master in Chambers requiring the defendant to pay the plaintiff $4 a week interim alimony.

E. Meek, K.C., for the defendant.
W. J. McLarty, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the marriage took place 26 years ago; 11 years ago, the defendant bought a house; in 1912, he conveyed it to his wife—as he said, "in trust for him." When he asked for a reconveyance, his wife—as he swore—ordered him to leave, and beat him with a mop-handle.

His wife told a different story. He brought an action to recover the house and land, and registered a certificate of lis pendens.

In this action for alimony, a motion being made for an interim allowance, the defendant's counsel cited Knapp v. Knapp (1887), 12 P.R. 105, and contended that the plaintiff was able to maintain herself out of her separate estate—viz., the house and land, tied up by the registration of the certificate. The wife was living in the house, and the Master rightly reduced the allowance, as the plaintiff had not to pay rent, though she must pay interest and taxes.

What was mainly relied upon was "allowances from her friends." The defendant said that the eldest son would not see his mother starve, and sought to shift the maintenance of his wife from his own shoulders to those of his children. This was to parody what was said by the late Chancellor in the Knapp case.

Eaton v. Eaton (1870), L.R. 2 P. & D. 51, referred to as having no bearing on compassionate gifts to a deserted wife.

The Master, indeed, let the defendant off too easily—$4 a week was a meagre allowance for a wife who had brought up a family of children, and who had no earning capacity.

Finally, the defendant asserted that no means existed by which payment could be compelled—he had no property of any kind. This the plaintiff had the right to test by an execution.

The appeal should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 19TH, 1918.

REX v. MINHINNICK.

Theatres and Cinematographs Act—Regulations as to Placing Advertising Matter in Front of a Theatre—"In the Nature of Posters"—Conviction for Breach of Regulation—Construction of Regulation.

Motion to quash a conviction of the defendant by the Police Magistrate for the City of London for breach of regulation 65 framed under the Theatres and Cinematographs Act, R.S.O. 1914 ch. 236, the offence being that the defendant did on the 15th January, 1918, "have advertising matter shewn from above the main entrance of the Grand Opera House, contrary," etc.

The motion was heard, as in Chambers, at a sittings of the Weekly Court in London.

E. W. M. Flock, for the accused.

T. G. Meredith, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the advertising matter was a canvass tacked to a wooden frame—two feet wide and extending across the entrance—advertising "The Garden of Allah," with pictures of animals and reading matter.

The contention was that the regulation did not apply because the canvass was not "in the nature of" a poster, and the prohibition is only of advertising matter "in the nature of posters."

In the learned Judge's opinion, the canvass as described was "advertising matter in the nature of a poster," and it was in strictness a poster.

Webster and "Cyc.," following some American cases, define a poster as "a large bill posted for advertising," and Murray, as "a placard posted or displayed in a public place as an announcement or advertisement." "Post," the verb from which this noun is derived, is, according to Murray, "To affix (a paper etc.) to a post or in a prominent position; to stick up in a public place."

The contention also failed because it was based upon a misreading of the regulation, which was: "All advertising matter in front of a theatre . . . in the nature of posters. . . . shall be confined to bill-boards . . . attached to the front of the building . . . . and no such advertising matter . . . shall be placed above the main entrance. . . ."

Fairly read, this meant that all permitted advertising matter should be on the walls etc., and none of the advertising should be above the main entrance. To construe too strictly the enactment, and hold that it permitted, instead of prohibited, the placing of what might be the most sensational and attractive advertisement in the position of danger, merely because it was painted on cloth and tacked on a frame, instead of being printed upon paper and pasted upon a board, would be to revert to the worst spirit of ancient technicality, when there was some justification for the statement that the Courts existed to destroy the laws which Parliament attempted to enact. Rather, when the intention is clear, should some slight violence be done to the grammar of the statute.

Motion dismissed with costs.

MIDDLETON, J. FEBRUARY 19TH, 1918.

RE HURON AND ERIE MORTGAGE CORPORATION AND COGHILL.

Will—Devise of Land—Restraint upon Alienation—Invalidity—Title to Land—Vendor and Purchaser.

Motion by the purchaser of land for an order, under the Vendors and Purchasers Act, declaring the validity of an objection to the title.

The motion was heard in the Weekly Court, London.

F. P. Betts, K.C., for the purchaser.

W. A. Smith, for the vendor.

MIDDLETON, J., in a written judgment, said that in the will under which title was made there was a gift over to Mildred Wigle, in the event of Morley Wigle, to whom the land in question was given, dying without issue. Mildred Wigle joined in the conveyance; so the sole question was as to a restraint upon alienation, similar in the case of both grantors—they "shall have no power to lease, mortgage or deed the said lands until he (or she) becomes 60 years of age." There was no gift over.

This, since Blackburn v. McCallum (1903), 33 S.C.R. 65, was decided, was clearly void. It was an attempt to deprive the estate in fee simple of one of its attributes. The right to alienate cannot be destroyed in this simple way.

So declare. No order as to costs.

RIDDELL, J., IN CHAMBERS. FEBRUARY 20TH, 1918.

GODERICH MANUFACTURING CO. v. ST. PAUL FIRE AND MARINE INSURANCE CO.

Appeal—Leave to Appeal from Order of Judge in Chambers Striking out Jury Notice—Rule 507—Rule 398—Action on Policy of Fire Insurance—Defence of "Arson"—Other Defences—Intricate Investigation—Case Proper for Trial without Jury—Leave Refused.

Motion by the plaintiffs, under Rule 507, for leave to appeal from an order of ROSE, J., in Chambers, striking out the jury notice in this and eleven other actions brought by the same plaintiffs, each action against a different insurance company.

G. H. Gilday, for the plaintiffs.
Frank McCarthy, for the defendants.

RIDDELL, J., in a written judgment, said that the rules to be followed upon such a motion are beyond question: Robinson v. Mills (1909), 19 O.L.R. 162. It was admitted that there were no conflicting decisions: Rule 507 (3) (*a*); the application could succeed only under clause (*b*), that is, if there appears to the Judge applied to for leave to be good reason to doubt the correctness of the order and the appeal would involve matters of importance.

On an application to strike out a jury notice, care must be taken in respect of cases decided before the 23rd December, 1911, when Con. Rule 1322, now Rule 398, was passed, effecting a change in the practice. Reference to Bissett v. Knights of the Maccabees (1912), 3 O.W.N. 1280; Gerbracht v. Bingham (1912), 4 O.W.N. 117.

The pleadings shewed that these actions were brought by the same plaintiffs against the several defendants on policies covering property destroyed by fire in August, 1917. The statement of claim was in a usual form. The statement of defence, in addition to a general denial, set up specifically that the statements in the proofs of loss were false and fraudulent, and therefore, by condition 20, the plaintiffs' claim was vitiated and void.

It was argued for the plaintiffs that arson was the real defence. If arson were the real and the only defence, a Judge might wish the opinion of a jury to be taken. But here there were many other defences, involving much and intricate investigation; and the cases should not be tried by a jury.

This determination would not interfere with the discretion of the trial Judge, who may think fit to direct a trial by jury: Rule 398 (2).

Motion dismissed, with costs to the defendants in any event of the action.

SUTHERLAND, J. FEBRUARY 20TH, 1918.

SHIELDS v. SHIELDS.

Contempt of Court—Disobedience of Injunction Order—Motion to Commit—Delay in Issuing Order—Personal Service of Order not Made on Defendant Said to be in Contempt—Practice—Knowledge of Order.

Motion by the plaintiff to commit the defendant John J. Shields for contempt of Court in disobeying an injunction order.

The motion was heard in the Weekly Court, Toronto.

W. E. Fitzgerald, for the plaintiff.

W. Lawr, for the defendant John J. Shields.

SUTHERLAND, J., in a written judgment, said that the first injunction order was made by the Local Judge at London on the 12th September, 1916. The injunction was continued by an order of Latchford, J., of the 27th September, 1916. The defendant John J. Shields was thereby restrained from cutting timber on certain lands and from disposing of or dealing with any timber thereon. This order was varied by an order of Middleton, J., by which the defendant was further restrained from cutting timber for any purpose on the land, without the approval of the Local Master at London.

It appears that the solicitors for the defendant were aware of the terms of the various orders, and that knowledge thereof had been communicated to the defendant.

The learned Judge was not satisfied from the material that the defendant had not in fact violated the order of Middleton, J., which was the existing one.

But it was objected that, as the order of Middleton, J., had not been personally served upon the defendant John J. Shields, an order for his committal could not be made.

There was great delay on the part of the plaintiff in issuing the order of Middleton, J.; it was not issued until after the notice of this motion had been served; and there was no satisfactory explanation of the delay. In a matter so important as the committal of a litigant for alleged violation of the terms of an order, the practice of making personal service of the order before launching the motion should not be departed from, except in special circumstances.

Upon the whole, the learned Judge was unable to see his way, upon the material before him, to make the order for committal, and he declined to do so.

Motion dismissed without costs and without prejudice to any further motion which the plaintiff may see fit to make.

KELLY, J. FEBRUARY 20TH, 1918.

*SMITH v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Water—Erection of Dam in River—Maintenance and Use Causing Injury to Owners and Occupants of Land—High Water-level—Neglect to Use Means to Reduce—Liability of Company Controlling Operation of Dam—Damages.

Five actions were brought against the Ontario and Minnesota Power Company Limited and the Minnesota and Ontario Power Company, the plaintiffs being Matthew H. Smith, Seth Smith, Narcisse Gagne, Peter Foster, and John Tighe, to recover damages for injuries to their respective properties by the acts of the defendants.

The plaintiffs alleged that the defendants erected and maintained a dam across Rainy river between the town of Fort Frances, Ontario, and the city of International Falls, Minnesota; that this dam impeded and interfered with the natural flow of the waters of Rainy lake, discharging through Rainy river, and maintained the level of the water in the lake above its normal height; that this dam was constructed and maintained without any legal authority and in direct violation of the provisions of the Ashburton Treaty, 1842; that, during the autumn of 1916 and the succeeding winter, and in the summer of 1916, and down to the time of the commencement of these actions, the defendants by means of the dam unlawfully held back the waters of Rainy river and Rainy lake until they reached an unduly high level, and in consequence these waters were raised to and maintained at so high a level that the properties of the respective plaintiffs were either destroyed or seriously damaged; that the plaintiff in each action was deprived of the use of his buildings and prevented from carrying on his usual trade or occupation; and that, even if the defendants had the right to maintain the dam, they maintained it in such a negligent manner as to cause the loss and damage referred to.

The actions were tried together, without a jury, at Fort Frances.

C. R. Fitch, for the plaintiffs.

A. J. Andrews, K.C., and F. M. Burbidge, for the defendants.

KELLY, J., in a written judgment, set out the history of the dam and the facts established by the evidence in detail.

He referred to Greenock Corporation v. Caledonian R.W. Co., [1917] A.C. 556, and other cases.

His finding was that, although the abnormally high water in the lake in the spring and summer of 1916 was not due solely to the defendants or those controlling the dam, there were, in the early part of that year, to the knowledge of those operating the dam, indications that the water-level would be high; and the probability of danger was accentuated by the positive actions of those operating the dam: (1) by their having held back and stored immense quantities of water, filling up what would otherwise have been a receptacle for a like quantity of water produced by the spring freshets or excessive rainfall; and (2) by their persistent refusal and neglect to open the sluice-gates and waste-ways at the dam, which, if opened, would have drawn down large quantities of water, and prevented the high water-level which resulted disastrously to the plaintiffs.

The defendants who controlled and operated the dam were liable for the injuries sustained by the plaintiffs; and it was unnecessary, for the purposes of these actions, to consider the allegation that the dam was constructed and maintained without legal authority and in violation of the provisions of the Ashburton Treaty.

Upon the evidence, the Minnesota and Ontario Power Company did not control or maintain the dam, and so were not liable. As against them, the action should be dismissed without costs.

The several plaintiffs were entitled to recover damages and costs against the Ontario and Minnesota Power Company Limited. The damages were assessed as follows: to the plaintiff M. H. Smith, $1,900; to the plaintiff Seth Smith, $1,450; to the plaintiff Foster, $900; to the plaintiff Gagne, $1,400; to the plaintiff Tighe, $540.

KELLY, J. FEBRUARY 20TH, 1918.

GIRTON v. ONTARIO AND MINNESOTA POWER CO. LIMITED.

Water—Dam Erected in River—Injury to Land by Flooding—Liability of Company Controlling and Operating Dam—Damages—Costs.

An action against the company and one Backus, commenced in March, 1914; the cause of action against the company was

based on the allegation that in 1912 the waters of Frog creek, a tributary of Rainy river, overflowed its banks and flooded the plaintiff's lands adjacent to Frog creek, and that this was caused by the penning back of the waters of Rainy river and Rainy lake by the defendant company's dam at Fort Frances; the claim against the defendant Backus was abandoned.

The action was tried without a jury at Fort Frances.

H. A. Tibbetts, for the plaintiff.

A. J. Andrews, K.C., and F. M. Burbidge, for the defendants.

KELLY, J., in a written judgment, said that it was agreed by counsel at the trial that, if liability were found, damages should be assessed down to the time of the trial, subject to what might be determined as to the proper disposition of costs, having regard to the time when the action was commenced.

The learned Judge found that the defendants were liable for the injury to the plaintiff's land, for the reasons stated in the Smith case, ante; but was unable to accept the plaintiff's estimate of his damage.

Judgment for the plaintiff against the defendant company for $250, with costs on the County Court scale, without set-off.

LENNOX, J. FEBRUARY 20TH, 1918.

SHANNAHAN v. BROWN.

Sale of Goods—Conditional Sale—Lien-note—Default in Payment of Instalments—Seizure of Goods—Sale within 20 Days—Non-compliance with Conditional Sales Act, sec. 8—Claim for Deficiency—Conversion—Nominal Damages—Wages—Evidence—Fraud—Costs.

Action for damages for breach of contract. Counterclaim by the defendant for the balance alleged to be due under the contract, $434.11, and for wages, $30.96.

The action and counterclaim were tried without a jury at Toronto.

J. T. Loftus, for the plaintiff.

William Proudfoot, K.C., for the defendant.

LENNOX, J., in a written judgment, said that the defendant was the owner of a manufacturing business and of machinery

and plant used in connection therewith. On the 14th August, 1916, the plaintiff (in writing and under seal) agreed to purchase the business, plant, stock, and machinery as a going concern. The price was $1,500; $200 was paid on account in cash; and a lien-note was given by the plaintiff for $1,300, payable in instalments. The terms of the lien-note were apparently sufficient to comply with the Conditional Sales Act, R.S.O. 1914 ch. 136. The agreement also provided that the defendant should work for the plaintiff for 15 months for $18 a week, "provided the services of" the defendant "are acceptable to" the plaintiff.

The plaintiff took over the business, plant, etc., and the defendant went to work for the plaintiff.

The plaintiff made default, to the extent of $50, on the 15th December, 1916, without lawful excuse; and further default, to the extent of $100, on the 15th January, 1917.

The plaintiff said that the agreement was induced by fraud; but there was no evidence of that. He also complained that the defendant did not faithfully serve him; that the defendant was inefficient; and that he purchased bad material, to the plaintiff's loss. There was no undertaking or representation as to efficiency. The defendant rendered honest and efficient service; and the plaintiff discharged the defendant without justification. The plaintiff discharged the defendant about the 15th January, 1917; the plaintiff locked up the shop, and the defendant could not get in to work. The instalments were then in arrear, and the wages slightly in arrear.

On the 19th January, 1917, the defendant seized, took possession, and removed the plant and machinery.

Up to that time the defendant had acted fairly, and the plaintiff had no ground for complaint. The defendant acted honestly and in good faith afterwards, but not in conformity with the provisions of the Conditional Sales Act.

The defendant employed a bailiff to seize, and paid him $35. The defendant took the goods seized to his own garage, advertised them, and sold the bulk, by private bargains, for what he believed to be good prices, between the 19th January and the 3rd February.

The defendant put in his account and claimed a balance of $434.11 and some interest. He could not recover this as upon a sale and deficiency. Section 8 of the Act provides that the goods shall not be sold until 20 days after the retaking possession; and, if they exceed the value of $30, and the seller intends to look to the original purchaser for a deficiency, the seller shall give notice in writing. The defendant had forfeited his right to recover the deficiency directly, by reason of non-compliance with the

provisions of the statute; but, upon a claim for conversion, the defendant would still have a right to set off the money owing to him by the plaintiff.

The plaintiff should have nominal damages ($4.96) in respect of the goods sold within the 20 days; but this should be deducted from the amount due for wages, which was $30.96, leaving the defendant entitled to recover $26 on his counterclaim without costs. The action should be dismissed without costs; and the defendant's counterclaim should also be dismissed except as to the wages.

LENNOX, J. FEBRUARY 22ND, 1918.

THOMPSON v. GATCHELL.

Vendor and Purchaser—Agreement for Sale of Land not in Ontario —Action for Balance of Purchase-money—Specific Performance —Jurisdiction of Supreme Court of Ontario—Ability to Shew Good Title and to Convey—Reference.

Action by the assignees of the vendor to recover the balance of the purchase-money said to be due under an agreement for the sale of land in Alberta.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiffs.

T. R. Ferguson, for the defendant.

LENNOX, J., in a written judgment, said that one Smyth agreed to convey 18 town lots in Albert Park, Alberta, to the defendant, in consideration of the payment by the defendant of $6,613 in instalments, all of which had matured. The plaintiffs were assignees not only of the unpaid instalments but of the interest of the vendor in 9 of the lots which had not been conveyed. The defendant, under the terms of the agreement, was not to be entitled to a conveyance until he had paid in full; but, under a subsequent arrangement, when the defendant had paid about half of the purchase-money, the vendor conveyed to him one half of the land, that is, 9 of the 18 lots. This was before the assignment to the plaintiffs.

The plaintiffs sued for the balance of the purchase-money, and alleged that they were ready and willing to make a good title and to convey the 9 lots, upon payment.

The defendant could not escape liability by setting up that upon his own default the agreement became null and void.

There was no ground for the contention that the agreement as to the remaining lots was cancelled when it was arranged that 9 lots should be conveyed.

At the trial, before any evidence was taken, the defendant asked leave to amend by alleging that the plaintiffs were not in a position to convey or make a good title. Judgment was reserved upon this application. The learned Judge now said that the amendment should be allowed.

The defendant urged that, as the action was for specific performance, and the land was not in Ontario, the Supreme Court of Ontario had no jurisdiction. But the plaintiffs, by the institution of the action, had submitted themselves to the jurisdiction, and the defendant resided in Ontario. The Court had power to adjust and enforce the rights of all the parties to the action.

The principles to be followed and the method to be adopted to secure the relative rights of the parties is governed by such cases as: Campbell v. Barrett (1914), 32 O.L.R. 157, 169; St. Denis v. Higgins (1893), 24 O.R. 230; Paisley v. Wills (1890–01), 19 O.R. 303, 18 A.R. 210; Montgomery v. Ruppensburg (1900), 31 O.R. 433; Leroux v. Brown (1852), 12 C.B. 801; In re Hoyle, [1893] 1 Ch. 84. See also Duder v. Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132.

The plaintiffs were entitled to recover the amount sued for and the costs of the action down to and including the trial, if they could make a good title and convey. Reference as to title; costs of the reference and further directions reserved.

SUTHERLAND, J. FEBRUARY 22ND, 1918.

DE LUCA v. HARE.

Libel—Jury Trial—Verdict for Plaintiff "without Damages"—Costs—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 5.

Action for libel, tried with a jury at St. Catharines.

J. M. Godfrey and C. J. Bowman, for the plaintiff.
Irwin Hilliard, K.C., for the defendant Hare.
J. E. Hetherington, for the defendant Donovan.

SUTHERLAND, J., in a written judgment, said that the two defendants, J. J. Hare and H. B. Donovan, the latter being the publisher of "The Canadian Poultry Review," were accused of falsely and maliciously publishing in that newspaper an article referring to the plaintiff in the way of his business as a poultry-breeder, with the meaning, implication, or innuendo that he was dishonest and guilty of stealing, early in September, 1916, two of the defendant Hare's fowls. Hare was also a breeder of poultry.

The publication complained of was a letter written by Hare and published in the "Review." On Hare's own evidence, it appeared that at the time he wrote the letter he was moved and influenced by a sense of personal annoyance and loss—even if, in addition, he had a bona fide intention of discharging a public duty by publishing statements which he believed to be true and which he considered it desirable in the public interest to publish.

The jury found Hare "guilty of libel without damages."

Upon this verdict, the plaintiff moved for the costs of the action.

In view of the jury's finding, costs could not be allowed to the plaintiff: Lemay v. Chamberlain (1886), 10 O.R. 638, 643, 644; Wisdom v. Brown (1885), 1 Times L.R. 412, 413.

Reference to sec. 5 of the Libel and Slander Act, R.S.O. 1914 ch. 71.

The plaintiff was not entitled to costs against the defendant Hare; nor was either of the defendants entitled to costs against the plaintiff.

SUTHERLAND, J. FEBRUARY 23RD, 1918.

RE FOY.

PARKINSON v. TRUSTS AND GUARANTEE CO. LIMITED.

Executors—Administration of Estate—Application by Beneficiary for Administration Order—Rule 612—Refusal of Application.

Motion by Mary Foy Parkinson for an order for the administration of the estate of George Joseph Foy, deceased. The applicant was a beneficiary under the will of the deceased.

A. J. Russell Snow, K.C., for the applicant.

W. N. Tilley, K.C., and E. J. Hearn, K.C., for the Trusts and Guarantee Company Limited, the executors.

SUTHERLAND, J., in a written judgment, said that the testator died on the 1st October, 1909; that letters probate of his will were issued to the executors on the 15th November, 1909; that the estate was large, and included a valuable warehouse property in the city of Toronto.

The applicant was a married woman, and those interested in the estate, in addition to her, were: the widow of the testator, and Kathleen M. Meyers, Percy L. Foy, Florence Foy Kelly, and George J. Foy, all of whom were sui juris.

It appeared, by an affidavit filed in opposition to the motion, that the estate was originally inventoried at $448,854.99; and that, at the time of the application, all of it had been realised except assets, including the warehouse property, valued approximately at $50,000.

After setting out some of the provisions of the will, and the statements made in several affidavits filed, the learned Judge said that the applicant had got the same share of the estate as the other beneficiaries; and he was unable, from the material before him, to say that, having regard to what it was necessary for the executors to keep in hand from time to time for the general purposes of the estate, she did not receive substantially her share thereof.

Under Rule 612, it is not obligatory on the Court to make an order for the administration of the estate of a deceased person if questions between the parties can be properly determined without such order.

The other persons interested in the estate were not in accord with the plaintiff in making this application; the estate had apparenly been and was now being managed with business capacity and good faith; and no benefit could at present accrue, to the applicant or any other of the beneficiaries, by making the order asked.

Reference to Re McCully, McCully v. McCully (1911), 23 O.L.R. 156, 162.

The accounts should now be passed before the Surrogate Court; and after that, if a proposed sale of the undisposed of property should be carried out, the executors should be in a position to make a further division of a substantial portion of the remaining assets, apart from the sum of $60,000, held to protect the widow's annuity.

Motion dismissed with costs.

LAWRENCE v. TOWN OF ORILLIA—LENNOX, J.—FEB. 20.

Highway—Non-repair—Injury to Pedestrian by Fall upon Sidewalk—Liability of Municipal Corporation—Damages.]—Action by husband and wife for damages for injuries occasioned to the wife by a fall upon the sidewalk of a public highway in the town of Orillia. The metal covering of a culvert under the sidewalk was insecurely placed or fastened; and in passing over it the plaintiff Julia Lawrence tripped upon it and fell. At the trial, at Barrie, without a jury, the learned Judge found that the defendants, the Municipal Corporation of the Town of Orillia, were liable for damages; and reserved judgment in order to consider the quantum. In a short written judgment he now discussed the extent of the injuries of the plaintiff Julia Lawrence and the necessary expenditure in connection therewith made by her husband. Judgment for $700 with costs; $525 for the wife and $175 for the husband. J. T. Mulcahy, for the plaintiffs. M. B. Tudhope, for the defendants.