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HIGH COURT DIVISION.

LATCHFORD, J. MAY 18TH, 1920.

OWEN v. CRAVEN.

Marriage—Action for Declaration of Nullity—Evidence—Marriage Act, R.S.O. 1914 ch. 148, secs. 36 (1), 37 (4)—Notice to Attorney-General—Amending Acts, 6 Geo. V. ch. 32 and 9 Geo. V. ch. 35.

Action on behalf of an infant, by her father as next friend, for a declaration that a valid marriage was not effected when, without the consent required by the Marriage Act, R.S.O. 1914 ch. 148, and amendments thereto, she went through the form of marriage with the defendant, before a clergyman at Hamilton, where both parties resided, on the 6th August, 1918, a few months after she attained the age of 16 years.

The action was tried without a jury at Hamilton.
W. H. Furlong, for the plaintiff.
The defendant was not represented.

LATCHFORD, J., in a written judgment, said that the defendant was served with the writ of summons, but did not appear or defend. The Attorney-General did not intervene. In fact it did not appear in evidence that he was served with the notice of the trial, as required by sec. 37 (4) of the Marriage Act.

The only evidence given was that of the plaintiff herself. She deposed that the marriage was not consummated. Her evidence on the point was so improbable that, in the absence of any corroboration, the learned Judge was constrained to discredit it, and to hold the proof to be lacking that the parties had not lived together as man and wife. The proviso to sec. 36 (1) was not in this respect complied with.

The amendments contained in 6 Geo. V. ch. 32 and 9 Geo. V. ch. 35—obviously enacted in consequence of the decisions in Reid v. Aull (1914), 32 O.L.R. 68, and Peppiatt v. Peppiatt (1916), 36 O.L.R. 427—did not assist the plaintiff.

Like the Court in the recent case of Ranger v. Ranger (1920), ante 66, the learned Judge refrained from expressing an opinion as to whether any of the provisions of the Act or amending Acts were ultra vires of the Legislature of this Province.

Action dismissed.

LATCHFORD, J. MAY 20TH, 1920.

BENETEAU v. BEST.

Contract—Formation of—Sale and Purchase of Land—Correspondence—Refusal of Vendor to Carry out Contract—Purchaser Absolved from Tendering Deed and Purchase-money—Specific Performance.

Action for specific performance of an alleged agreement for sale by the defendant and purchase by the plaintiff of a house and lot in Windsor.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiff.

E. S. Wigle, K.C., for the defendant.

LATCHFORD, J., in a written judgment, said that on the 20th January, 1920, the plaintiff addressed a letter from Windsor to the defendant at Port Dover asking if the defendant would consider selling No. 31 London street east (in Windsor), 28 feet 3 inches frontage by 100 feet deep. The defendant replied on the following day, stating that he had been asking $4,000, but had dropped $200 to one party and would do the same to Beneteau. The plaintiff then offered some lots in Windsor in exchange, and on the 14th February again wrote the defendant stating that he had sold the lots mentioned in his previous letter, and that he was now in a position to pay all cash, and asking to have the best cash price stated by the defendant. Best replied on the 15th February stating that his lowest price was $3,800; that others were after the property, and that the first person accepting his offer would be the one to get it.

On the 20th February, Beneteau wrote the defendant: "I will take your property at $3,800. The money is ready for you. Will I go ahead and get title searched and prepare a deed for yourself and wife (if a married man) to sign? Of course I would send along a draft for the amount. Please write at once to me and let me know how you intend to arrange the matter." As a postscript he added: "I think if I am to have a deed prepared here you should send your deed to the property to work from." Defendant replied on the 23rd February: "Yours received to-day concerning 31 London St. E. property. I am willing to accept your offer, $3,800. I would say the best way would be for you to send me deposit of $200, and I would have deed got ready and sent to the bank in Windsor for your acceptance or rejection, and if I did not satisfy you or your lawyer with a title will willingly refund your $200."

On the 25th February, Messrs. Davis & Healy, solicitors of Windsor, addressed the defendant, stating that Mr. Beneteau had brought in the correspondence and requested them to search the title to the property. They stated that they had searched the title and would prepare deed and send the same to Best for execution, with draft through the bank: the money to be paid on execution of the deed; if this was not satisfactory Best was to let them know.

Davis & Healy telegraphed again about the 9th March, and on that date the defendant wrote them a letter stating that the telegram had been received; that the deal was never completed; that he had learned the property was worth far more money; and that Mrs. Best would not sign.

On receipt of this letter the plaintiff issued his writ claiming specific performance of the agreement set forth in the correspondence.

The learned Judge thought it clear that a contract for the sale and purchase of the defendant's property was made out completely by the connected and consistent correspondence. The defendant's refusal to carry out the contract rendered it unnecessary that the deed, accompanied by the purchase-money, should be tendered to him for execution. The plaintiff was entitled to have the contract specifically performed.

There should be judgment accordingly, with a reference to the Master at Sandwich. Costs of the action and reference to be paid by the defendant.

LATCHFORD, J. MAY 20TH, 1920.

CAROM v. KOMER.

Contract—Formation of—Oral Agreement for Sale and Purchase of Land and for Lease—Small Sum Paid by Purchaser—Written Receipt Embodying Terms so far as Agreed upon—Failure to Agree upon Further Terms—No Concluded Agreement—Registration of Receipt—Judgment Directing Cancellation—Statute of Frauds—Counterclaim for Specific Performance—Dismissal.

Action for a declaration that the registry of a document should be vacated as a cloud upon the plaintiff's title to land.

Counterclaim for specific performance of an agreement for the sale of the land and for damages.

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

E. S. Wigle, K.C., for the plaintiff.

A. St. G. Ellis, for the defendant.

J. H. Rodd, for George Mantley, made a defendant by counterclaim.

LATCHFORD, J., in a written judgment, said that on the 12th August, 1919, the plaintiff agreed to sell to the defendant his house property in Windsor, for $9,000, $2,000 of which was to be paid any time before the 1st September, and the balance in instalments of $500 each, payable every 6 months, with interest. The defendant paid $25, and the plaintiff gave her a receipt which embodied the terms stated. The plaintiff affirmed and the defendant denied that it was agreed between them, when the sale was made, that he was to be given a lease of the premises at $65 a month. About a week afterwards, the parties met in the office of the defendant's solicitors. The plaintiff insisted on having a lease for a term of years signed before he executed a formal contract of sale. The defendant refused to give him a lease for more than one year, and the solicitor told them to go away, and to return only when they had reached an agreement. They were unable to come to terms, and the plaintiff returned to the defendant, and she accepted back the $25 which she had paid.

Later she registered the receipt against the plaintiff's property. He became aware of this only in January of the present year, and then had a request made that the defendant sign a discharge or release of the registered document. On her refusal, the present action was begun.

The defendant promptly counterclaimed for specific performance and damages, and brought in as an additional defendant one George Mantley, to whom Carom had sold part of the property in rear of his store. Carom's defence to the counterclaim, in addition to the Statute of Frauds, was that the document of the 12th August was not intended to be a complete agreement between the parties; that when it was given both parties clearly understood that a formal agreement should be entered into embodying other terms agreed to between Carom and Mrs. Komer, but not expressed in the receipt; that the parties failed to agree; and that the intended purchase was abandoned.

Mantley pleaded that he was a purchaser for value without notice of the defendant's alleged interest.

While not very favourably impressed by the evidence adduced in corroboration of the plaintiff's testimony, the learned Judge found as a fact that, when the plaintiff made the sale, it was agreed that he would be given a lease, negotiations for the term of which remained open for future agreement. That term was not expressed in the receipt. Indeed, it was not in contemplation of the parties that the receipt should express all the terms of their contract. They intended that a formal contract should be drawn up, and, meeting for that purpose, failed to agree. There was never a concluded and binding agreement between the parties. Even if the term of the lease had been agreed upon, it rested in parol.

In regard to the receipt and the application of the Statute of Frauds, the learned Judge referred to the reasoning of Anglin, J., in Green v. Stevenson (1905), 5 O.W.R. 761, 766, not cited in the argument; Fry on Specific Performance, 5th ed., p. 183; Strahan & Kenrick's Digest of Equity, p. 379; and Rogers v. Hewer (1912), 8 D.L.R. 288.

The plaintiff was entitled to judgment that the registration of the receipt be deleted as a cloud on his title, with costs. The counterclaim should be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. MAY 22ND, 1920.

RE BELL.

Infants—Custody—Right of Father—Adultery of Mother—Infants Act, sec. 2 (3)—Intention of Father to Take Children Abroad—Domicile—Welfare of Children—Costs.

Application by the father of two infants, a boy of 8 and a girl of 7 years old, for an order for their custody.

A. M. Denovan, for the father.

R. G. Hunter, for the mother.

MIDDLETON, J., in a written judgment, said that the parties were married in Scotland in 1911, and in 1913 came to Canada, and settled in Toronto. In 1914, they went back to Scotland. In 1916, the wife returned to Toronto, bringing the children with her. The intention at this time was that the husband should follow her to Toronto; but he did not do so—on account of war-conditions, he said. He came out to Toronto recently and found that his wife had been living with another man, by whom she had two children. On the 19th April, 1920, the wife was convicted before the Judge of the Juvenile Court, Toronto, of the statutory offence of causing the four children to be in danger of becoming immoral, dissolute, or criminal, or having their morals injuriously affected; sentence was suspended upon condition that she should stay entirely away from her paramour, she being allowed to retain the custody of her two illegitimate children, and the other two being committed to the custody of the Children's Aid Society, which society made no claim to the custody of the children, but was ready to hand them over to either parent as might be determined by the Court.

The wife was now ready to allow her husband to have the custody of the boy, but desired to retain the girl. She based her contention upon the admitted fact that it was the intention of the husband to take the children beyond the jurisdiction of the Court, and that, in the girl's own interest, she should be allowed to remain with her mother.

The fact that the husband intends to take the children beyond the jurisdiction of the Court is not a sufficient answer. His domicile is in Great Britain; and no case shews that a father who is domiciled abroad cannot invoke the assistance of the Courts of Ontario to give him the custody of his children merely because he intends to return to his domicile.

By the Infants Act, R.S.O. 1914 ch. 153, sec. 2 (3), no order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation or for alimony. The wife was not within the provision of this enactment, but her unfaithfulness had been proved by a Court of competent jurisdiction, and her adultery was amply proved and not disputed. If the spirit of the statute was to be regarded, she had no right to either of the children.

Having regard to the welfare of the little girl, she ought not to be left with the mother; and, having regard to all the circumstances, the right of the father to the custody of his children and his obligation to care for them and bring them up must prevail—he has real affection for them and the ability to discharge his obligations.

The order should therefore be, that the children be handed over to the father upon his satisfying the claim of the Children's Aid Society for their board and maintenance.

No order should be made concerning costs.

ROSE, J. MAY 22ND, 1920.

THOMAS v. McTAVISH.

Execution—Seizure and Sale by Sheriff of Company-shares—Previous Pledge of Shares to Creditor of Execution Debtor—Interest of Execution Debtor alone Exigible—Deposit of Share-certificate—Redemption—Costs.

Action for a declaration of the plaintiff's title to certain shares of the defendant the Silver Islet Mining Company Limited.

The action was tried without a jury at Port Arthur.

F. R. Morris, for the plaintiff.

R. McKay, K.C., and A. J. McComber, for the defendants.

ROSE, J., in a written judgment, said that the controversy was as to the ownership of 15,000 shares of the capital stock of the defendant company, of the par value of $5 each, claimed by the plaintiff under a transfer from the registered owner and by the defendant McTavish as the purchaser at a sale by the Sheriff under an execution against the goods of the registered owner.

One Hunter was the registered owner of 35,000 or 40,000 shares of the stock of the defendant company, an Ontario corporation. On the 18th October, 1917, he borrowed from the plaintiff at Milwaukee, where the plaintiff lived, $5,000, giving him his (Hunter's) promissory note for the amount, with interest, dated the 16th October, 1917, payable at Milwaukee, 6 months after date. In the note was a statement that the maker had deposited therewith, as collateral security for the payment thereof, a certificate for 15,000 shares of the fully paid capital stock of the said company; and a power to sell the shares on default in payment of the note and to apply the proceeds on the maker's indebtedness, was added. It was admitted that the instrument was, by the laws of both Minnesota and Canada, a negotiable promissory note: Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 783.

The certificate for 15,000 shares was handed to the plaintiff by Hunter on the 29th October, but was not then complete; it was handed back to Hunter to be completed and did not in fact

come to the plaintiff in a completed form until between the 13th and 28th December, 1917; and on the 4th December, 1917, the Sheriff made a seizure, under an execution in his hands, of all the shares standing in the name of Hunter on the books of the company. The sale of the shares by the sheriff was postponed from time to time; on the 1st February, 1918, the defendant McTavish became the purchaser for $750.

The money which the plaintiff lent to Hunter he procured by discounting Hunter's note with a bank in Milwaukee. It was understood between the plaintiff and the bank that the shares should be held by the bank as security, but the bank left it to the plaintiff to get the certificate from Hunter. The note being unpaid at maturity, a renewal note was signed by Hunter, dated the 16th April, 1918. It also was endorsed by the plaintiff to the bank. When it was dishonoured, the bank sold the shares at auction, and the plaintiff bought them, paying the bank, on the 28th October, 1918, $5,160.

What McTavish got at the Sheriff's sale was merely the interest which Hunter had in the shares on the date of the seizure: Re Montgomery and Wrights Limited (1917), 38 O.L.R. 335. If the shares which the note purported to pledge were not pledged at any earlier date, they were certainly identified and pledged on the 29th October, when Hunter handed to the plaintiff the certificate. All that the defendant McTavish got at the Sheriff's sale was such right, if any, as Hunter still had to redeem the shares upon paying the amount due in respect of the note.

At the trial the plaintiff submitted to be redeemed; and the judgment should declare the plaintiff the owner of the 15,000 shares, subject to the right of the defendant to redeem the same, upon paying, within one month, the proper amount, which the learned Judge takes to be $5,160, with interest at 5 per cent. from the 28th October, 1918, until payment, but which either party may have ascertained by a reference at his own risk as to costs, if not satisfied with the amount mentioned.

The plaintiff should have costs against both defendants. The defendant company did not submit its rights to the Court, but in its pleading made common cause with the defendant McTavish, and there was no reason why it should be relieved from liability for costs, particularly as it alleged that the sale of the shares by the bank to the plaintiff was fraudulent.

RE RANGER—KELLY, J., IN CHAMBERS—MAY 21.

Husband and Wife—Dower—Application for Order Dispensing with Concurrence of Wife to Bar Dower in Conveyance of Land—Dower Act, sec. 14—Issue Directed to Determine Facts.]—Motion by Alfred Ranger for an order, under sec. 14 of the Dower Act, R.S.O. 1914 ch. 70, dispensing with the concurrence of the applicant's wife for the purpose of barring her dower in land of the applicant which he was about to convey. KELLY, J., in a written judgment, said that the matters involved in this application were such and the material filed so contradictory as to justify an issue. He therefore directed the trial of an issue to determine: (1) whether, when the applicant and Sarah Ann Mitchell went through the form of marriage, she was a married woman whose husband was then living; and (2), if she was not, whether she had been living apart from the applicant for two years in such circumstances as to disentitle her to alimony. Costs of the application reserved to be disposed of on the trial of the issue. T. F. Slattery, for the applicant. A. C. Heighington, for Sarah Ann Mitchell or Ranger.

RE LEWIS—LEWIS V. STOKES—MIDDLETON, J., IN CHAMBERS —MAY 22.

Administration Order—Application for Leave to Appeal from——Small Estate—Sale of Land by one Executor—Ratification by the other—Possession of Land—Costs.]—Motion by the defendants (executors) for leave to appeal from the order of KELLY, J., ante 217, directing administration of the estate of Lillie Ann Lewis, deceased. MIDDLETON, J., in a written judgment, said that the case was one in which the estate was so small and the circumstances were such that the cruelty of an administration by the Court ought to be avoided if possible. The whole property was a small piece of land. The plaintiff and her daughter, both beneficiaries, were in possession; they had attempted to buy from the executors, but one of the executors accepted a slightly better offer, and began an action against the plaintiff to recover possession. This executor's wife, who was also a beneficiary, wrote a letter indicating her readiness to purchase at the price offered and to arrange that the plaintiff and her daughter should have the right to occupy the property free of rent. The learned Judge thought that, when the facts were placed before the purchaser and his attention was drawn to the fact that he had not a binding contract, he would forgo any claim to the land and allow this scheme to be carried

out. The solicitor for the executors had, however, now put in a formal ratification by the co-executor of the contract made and an affidavit made by her shewing her desire to have the sale carried out. Plainly the executors were not actuated by the same motives as the wife of the acting executor; and the learned Judge thought that he ought not in any way to interfere so as to destroy any advantage that the plaintiff might have by reason of the launching of the administration proceedings and the making of the administration order before the ratification. The motion for leave to appeal should, therefore, be dismissed, with costs to be taxed and set off pro tanto against any costs or commission allowed to the executors. C. W. Plaxton, for the defendants. R. L. McKinnon, for the plaintiff.