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HIGH COURT OF JUSTICE.

BOYD, C. FEBRUARY 5TH, 1910.

RE CLINTON THRESHER CO.

Company—Winding-up—Preferred Claims of Lien-holders—Mechanics' Lien Act—Liens Existing but not Registered until after Commencement of Winding-up.

Appeal by the liquidator from the report of the local Master at Goderich, in a winding-up, allowing preferential claims upon the assets of the company of certain holders of mechanics' liens.

J. F. Boland, for the liquidator.

W. Proudfoot, K.C., for the directors of the company.

W. Brydone, for shareholders and certain lien-holders.

C. Garrow, for Drummond McCall & Co., lien-holders.

G. W. Mason, for the A. R. Williams Machinery Co., lien-holders.

BOYD, C.:—The scheme of the present Act is that the lien arises or is created by the doing of the work or the supply of the materials: sec. 4.

This lien so existing may be registered, and this registration gives the lien-holder the statuts of a purchaser pro tanto and the protection of the Registry Act, but it adds nothing to his lien as between him and the owner: secs. 17 and 21.

The lien may not be registered and is good for 30 days after the completion of the work, but, if not prosecuted by action within that period (under sec. 23), it ceases to exist.

Mr. Holmested's comment on the Act is terse and accurate: "The commencement of the lien is coincident with the commencement of the work:" Act, ed. 1899, p. 34. And this is stated as the law by Osler, J.A., in McNamara v. Kirkland, 18 A. R. 276

(1891). The liens claimed by the different lien-holders were in respect of work and services done and rendered prior to the date of the service of the petition to wind up, which was on the 18th February, 1908. The winding-up order was made on the 28th February. The liens were registered at different dates, but all within 30 days after the commencement of the liens, viz., on the 11th February, 12th February, 19th February, 21st February, 27th February, and 3rd March. The winding-up begins at the time of service of notice under sec 5 of the Act R. S. C. 1906 ch. 144, and by sec. 22 no proceeding shall be commenced against the company except by leave. By sec. 133 all remedies sought for enforcing any lien upon property in the hands of the liquidator shall be by way of summary petition. And by sec. 84 no lien on the property shall be created in respect of issue of execution or registry of judgment or making of any attachment, etc., if before actual payment of the money the winding-up of the business of the company has commenced. This last section does not apply to mechanics' liens, but it indicates that the particular privilege shall not arise if the issue of the process or the taking of the proceeding has been after the notice to put the company into insolvency has been served: Re Empire Co., 8 Man. L. R. 424. Here, all the liens existed by force of the Ontario statute prior to that notice being served on the 18th February, and their efficacy and precedence is not disturbed by the subsequent proceedings in insolvency. In other words, the estate and assets of the company came to the hands of the liquidator with this existing lien, which is to be recognised as a valid claim attaching upon the land in question and to be paid in priority to ordinary creditors. Quoad the lien, the liquidator represents no higher claim than that of the insolvent company.

I would affirm the order in appeal with costs.

SUTHERLAND, J., IN CHAMBERS. FEBRUARY 11TH, 1910.

MACKENZIE MANN CO. v. SCOTT.

Local Judge—Jurisdiction—Provisional Judicial District—Creation of New District—Rules 45, 47, 48, 76 —Appeal to Judge of High Court in Chambers.

Appeal by the plaintiffs from an order of the local Judge of the High Court at Fort Francis.

Featherston Aylesworth, for the plaintiffs.

W. H. Price, for the defendant.

SUTHERLAND, J.:—The writ of summons in this action was issued on the 22nd January, 1909, at Kenora, then the district town of the provisional judicial district of Rainy River. By ch. 38 of the Ontario statutes of 1909, part of that district was separated therefrom, and a new district created under the name of Fort Francis. The new district was to come into actual existence later by proclamation, and did so on the 20th March, 1909, and its district town is Fort Francis.

The plaintiffs in their statement of claim, dated the 15th May, 1909, and filed at Kenora, laid the venue at Fort Francis, but all subsequent pleadings were also filed at Kenora. Notice of trial was served on behalf of the plaintiffs on the 3rd December, 1909, for the sittings at Fort Francis commencing on the 13th of that month, and on the same day a præcipe to enter the action for trial for the said sittings was left with the local registrar at Fort Francis.

On the 9th December, 1909, by special leave obtained from the local Judge at Fort Francis, a notice of motion was served by the defendant returnable on the 11th December, for an order that the statement of claim be struck out, on the ground that it disclosed no reasonable cause of action, and that, except for the purposes of the order to be made on the application, all proceedings in the action be stayed as against the defendant, or for an order that certain paragraphs of the plaintiffs' statement of claim be struck out as embarrassing and irrelevant, or for such further or other order as might be deemed meet.

The action is against one John C. Scott, the grantee in a tax deed from the municipality or township of McIrvine, and the plaintiffs, who claim to be the owners of the land covered by the deed, did not join the municipality as defendants. The hearing of the motion was adjourned until the 13th December, and on that day the local Judge at Fort Francis made an order that the defendant be at liberty to add the municipality of McIrvine as parties defendant to the action by inserting their name as defendants in the style of cause, and by serving their clerk with a copy of the plaintiffs' statement of claim within 15 days from the date of the order; and, further, that, in case the defendant should add the said municipality as party as aforesaid, the plaintiffs be at liberty within 15 days therafter to make such amendments to their statement of claim as they might be advised; and, further, that the defendant be at liberty to make such amendments to his statement of defence as he might be advised, within 8 days after such amendment, if any, by the plaintiffs; and, further, that the said municipality of McIrvine, if added as parties defendant, should

deliver their statement of defence, if any, within 8 days after such amendment, if any, by the plaintiffs; and, further, that the costs of the application be payable by the defendant to the plaintiffs in any event of the cause.

From this order the plaintiffs appeal on the grounds: (1) that the local Judge at Fort Francis for the district of Fort Francis had no jurisdiction to make said order; and (2) that the township of McIrvine was improperly added as a party defendant against the will of the plaintiffs.

The plaintiffs contend that under Con. Rule 45 of the Supreme Court of Judicature for Ontario, this action having been brought in the original provisional judicial district of Rainy River, of which Kenora was the district town, the local Judge at Fort Francis had no jurisdiction to hear the motion and make the order appealed from.

I think this contention on the part of the plaintiffs is correct. I do not think that the mere fact that the venue was laid at Fort Francis, which, at the time the statement of claim was filed, had become the district town for another judicial district, gave the local Judge of such district jurisdiction, even though the new district at the time the writ itself was issued was part of the original judicial district. Neither do I think, upon the facts disclosed before me, that the defendant has brought himself within the scope of Rule 47.

It was contended on the part of the defendant that, under Rule 48, I had no jurisdiction, sitting in Chambers, to hear this appeal. I think, however, that under Rule 767 I have the power to do so. The appeal will therefore be allowed with costs, to be payable to the plaintiffs in any event of the cause.

BOYD, C. FEBRUARY 14TH, 1909

GILLETTE v. REA.

Patent for Invention—Sale of Patented Article—Restriction as to Price—Patent Act, sec. 38—Condition on Purchase—Injunction—Evidence.

Motion by the plaintiff to continue till the trial an injunction granted ex parte restraining the defendants from selling the Gillette safety razor at a lower price than $5 and Gillette safety razor blades at a lower price than $1 per dozen.

G. F. Henderson, K.C., for the plaintiff.

J. A. Ritchie, for the defendants.

Boyd, C.:—In Hildreth v. McCormick Manufacturing Co., 10 Ex. C. R. 378, Mr. Justice Burbidge held that the Patent Act, sec. 38, meant that the patentee was to manufacture the subject of his invention in Canada and in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price (1906). The judgment below was reversed on a point not now material in 41 S. C. R. 246, but on the matter above quoted the judgment was affirmed: 39 S. C. R. 499. Mr. Justice Maclennan said "that the obligation imposed by the statute was an obligation to sell, if required, and that the right given to the public is to buy, to acquire the absolute property in the invention;" and with him agreed the majority of the Court. Does this not mean that when once the sale is made, be it to a private person or a wholesale dealer, the purchaser holds the article as his absolute property by an unconditional title? If so, that would be fatal to any attempt to impose conditions as to price extending beyond the first purchaser; and it would be accordingly fatal to the plaintiff's right of action in the present case.

Apart from this, there is another ground which interferes with a present right to an injunction. I state in the language used by Mr. Justice Buckley in Badische Anilin und Soda Fabrik v. Isler, [1906] 1 Ch. 605, 611: "If the patentee sells imposing no restriction or condition upon his purchaser at the time of sale, he cannot impose a condition subsequently by a delivery of the goods with a condition indorsed upon them or on the package in which they are contained. Unless the purchaser knows of the condition at the time of the purchase and buys subject to the condition, he has the benefit of the implied license to use free from condition."

The affidavits in support of the motion are by A. W. Greene, verifying the issue of a patent for the Gillette safety razor, No. 91954, and that he had purchased from the defendants at Ottawa a package of 12 razor blades on which appeared the words of a "notice" that the blades were under the patent sold and accepted by purchaser as subject to restrictions to be sold at retail only in original package at $1 a package, and that a violation of the condition terminates the license and constitutes an infringement of the patent. Affidavit of N. M. Retallack to the same effect and verifying an advertisement by which the defendants offer the razors at a less price than $5, and the blades at a less price than $1. Also is filed an examination of the manager of the defendants in which he says he got the razors from a Montreal firm at a price of $3.50 for the razors, and that he was advertising them for sale at $3.75. He had paid no attention to any condi-

tion on the box; it had not been brought to his attention, nor had he signed any agreement.

On the part of the defence an affidavit of Jones is filed, that he for the defendants had bought from Smith and Patterson Co., Montreal, some of the razors at $3.50, and that no stipulation was made or entered into as to the price at which they, the defendants, were to sell, and that he had purchased others from Brockett & Sons, Ottawa, at $3.50, and there was no stipulation or agreement then made as to the price on re-selling; that these were the articles advertised which called forth the motion for injunction.

Here, on this evidence, proof fails as to the terms on which the companies who first sold to the defendants had acquired or had sold the goods, and similarly there is proof that no stipulation was made on the purchase of the goods by the defendants.

Altogether it is not a case, to my mind, in which the injunction should be continued. Such stringent relief should be only given in a case clear in point of law and only doubtful on the facts. Here the facts as a substratum are lacking, and as to the law it will probably require a good deal of further litigation before it is clearly settled.

The injunction is dissolved; costs in cause.

CLUTE, J. FEBRUARY 15TH, 1910

REID v. CITY OF TORONTO.

Highway — Non-repair — Injury to Pedestrian — Liability of Municipal Corporation—Relief over against Third Party — Indemnity—Contractor or Servant.

On the 2nd May, 1909, when the plaintiff was walking along the sidewalk on the east side of Sorauren avenue, in the city of Toronto, about one o'clock in the morning, returning from his work as a street car conductor, he tripped over an obstruction across the sidewalk, and seriously injured his knee and leg. The obstruction consisted of two pieces of 2 x 4 scantling, about 4 ft. long, laid about 4 ft. apart, and at right angles to the roadway. Placed across these two pieces of scantling, parallel with the road, was a board upon which, in the early evening, had been placed a lighted lantern, which had gone out some little time before the accident occurred. The obstruction had been placed upon the sidewalk to protect a bit of cement, 10 feet square, which had been put down to repair the sidewalk. The night was not a dark one, but the sidewalk was obscured by trees. The repair had been directed a few days before by the engineer in charge of that par-

ticular work. There was some evidence that the lantern had sufficient oil in it when left there. It had been upset an hour or two before the accident, and when the accident happened there was no oil in it, nor was it shewn that oil was spilled upon the sidewalk. There was evidence that there was a heavy wind from the early evening, which might have upset the lantern, as it was not secured or fastened in position in any way.

The plaintiff brought this action against the city corporation to recover damages for his injuries, and the defendants brought in one Payne as a third party under sec. 609 of the Municipal Act.

Payne had a contract in 1904 for the laying down of this sidewalk, under which he indemnified the defendants against all liability for accidents by reason of his negligence. This liability continued for five years, and expired on the 26th April, 1909. About the middle of April, prior to the expiration of the contract, Payne and the city engineer examined the sidewalk, which had been broken down by a driveway across it, which was not there at the time the sidewalk was built. This was done with a view to ascertain whether Payne was bound to repair under his contract, and, after an examination, the engineer reported that he was not; that the breaking was not due to any defect in the work; and he thereupon instructed Payne to repair this sidewalk, and agreed that it would be paid for at 15 cents per square foot, and it was subsequently certified and paid for at that rate. Payne carried on the business of putting down cement walks and roads. He had his own plant, materials, and men, and paid his men for the work they did for him. He had done a large amount of work in past years for the defendants, and did repairs for them from time to time, and was paid therefor at the rate aforesaid.

The action and the claim of the defendants against Payne were tried before CLUTE, J., without a jury.

T. L. Monahan, for the plaintiff.

H. Howitt, for the defendants.

J. Shilton, for Payne.

CLUTE, J., found in favour of the plaintiff against the defendants, and assessed the plaintiff's damages at $650, for which amount he gave judgment for the plaintiff against the defendants with costs.

In considering the question of the liability of Payne to the defendants, he said (after setting out the facts as above) :—

The first question is whether Payne in making this repair was a servant of the corporation or whether he was acting under contract. . . . I think it clear under the cases that he was a contractor, and not a servant: Saunders v. City of Toronto, 26 A. R. 265; Caston v. Consolidated Plate Glass Co., 26 A. R. 63, reversed 29 S. C. R. 624; Jones v. Corporation of Liverpool, 14 Q. B. D. 890; Donovan v. Laing, etc., Syndicate, [189?] 1 Q. B. 629; Waldock v. Winfield, [1901] 2 K. B. 596; Kirk v. City of Toronto, 8 O. L. R. 730; . . . Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72; The Snark, [1900] P. 105.

In the present case the obligation, in my opinion, still rested on the defendants to take all necessary precautions to see that the obstruction placed upon the sidewalk was properly guarded and protected so as to prevent an accident by persons having occasion to use the sidewalk. Here the contract, as I find, to do the repairs existed, but there was no indemnity clause, as in the Kirk case. . . .

[Reference to Balzer v. Township of Gosfield South, 17 O. R. 700; Stilliway v. City of Toronto, 20 O. R. 98; McKelvin v. City of London, 22 O. R. 70; Homewood v. City of Hamilton, 1 O. L. R. 266; Minns v. Village of Omemee, 2 O. L. R. 579, 8 O. L. R. 508; Holland v. Township of York, 7 O. L. R. 533.]

I think this is a case within the statute for recovery over. Judgment will, therefore, be that the defendants recover against Payne the amount which they have to pay to the plaintiff for damages and costs, together with their costs of the defence and the costs of the third party proceedings as between them and the third party.

DIVISIONAL COURT. FEBRUARY 15TH, 1910.

*DENHAM v. PATRICK.

Master and Servant — Dismissal of Servant — Justification — Confidential Relationship — Domestic Duties—Immoral Conduct of Servant.

Appeal by the defendant from the judgment of the County Court of Middlesex in favour of the plaintiff for the recovery of $120 damages, in addition to $200 paid into Court by the defendant, in an action for breach of a contract of yearly hiring by the dismissal of the plaintiff, the servant, in the middle of a year. The defendant justified the dismissal.

* This case will be reported in the Ontario Law Reports.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

G. S. Gibbons, for the defendant.

P. H. Bartlett, for the plaintiff.

BOYD, C., set out the facts at length, shewing that the plaintiff had been for seven years in the employment of the defendant as confidential assistant in his (the defendant's) business of raising and selling a high breed of sheep; that the plaintiff, in the course of his duties, was frequently in the defendant's dwelling-house when the defendant himself was absent from home; that the defendant's family and household consisted of his wife, his daughter, younger children, and a maid-servant; that the defendant, from the plaintiff's own admission or boasting, believed that the plaintiff had been guilty of two acts of immorality, one committed in the defendant's house; that one of these was not denied by the plaintiff, who explained it as "an accident."

The act not denied by the plaintiff was said to have occurred shortly after he entered the defendant's service, but was related to the defendant only a few days before the dismissal.

The Chancellor said that, judging from the whole of the evidence, he should deem the defendant to be more worthy of credit than the plaintiff; but, taking it that only the first statement was made, he was not able to agree with the view of the law which requires the master to keep a servant who so "boasts," in his confidential service. . . . That the occurrence, whatever it was, happened eight years ago, and that it was apparently an isolated episode in the servant's history, are by no means sufficient exculpations in a legal point of view—if the master's knowledge is but recent, as in this case. . . .

[Reference to Lomax v. Arding, 10 Ex. 734, 736; Pearce v. Foster, 17 Q. B. D. 536, 542; Clouston & Co. Limited v. Corry, [1906] A. C. 122, at p. 129; Baster v. London and County Printing Works, [1899] 1 Q. B. 901, 904; Boston Deep Sea Fishing and Ice Co. v. Ansell, 39 Ch. D. 339, at pp. 358, 363, 370; Callo v. Brouncker, 4 C. & P. 518; Read v. Dunsmore, 9 C. & P. 588, 594.]

The master may well have inferred that the mind of the servant was dwelling with satisfaction on this indecent occurrence—and very outspoken in reference to it—though he only knew of it shortly before the dismissal. The plaintiff was judged from his own admissions or boastings, and the master thought him a person of lewd mind and habit whom it was not desirable to admit into the family circle. I cannot account this to be setting too

high a standard to be observed in the relationship of service, whether wholly or partly domestic.

In my opinion, the master was justified, and the action fails.

Appeal allowed with costs, and the action, except as to the amount paid into Court, dismissed with costs.

LATCHFORD, J., briefly stated his reasons for agreeing.

MAGEE, J., also agreed in the result.

TITCHMARSH V. WORLD NEWSPAPER CO.—MASTER IN CHAMBERS FEB. 10.

Libel—Pleading—Innuendo—Notice of Action.]—Motion by the defendants in an action for libel to strike out the whole of the statement of claim as embarrassing, because the notice of action was not alleged; or to strike out the innuendo in the statement of claim, because it was not set out in the notice of action. The Master said that Conmee v. Weidman, 16 P. R. 239, was conclusive against the defendants on the first branch of the motion; and as to the second branch, that, although it might be expedient, as suggested in King on Libel, p. 385, to indicate in the notice of action the defamatory sense of the alleged libel, it could not be said to be necessary: R. S. O. 1897 ch. 68, sec. 6 (2). Obernier v. Robertson, 14 P. R. 553, and Gurney Foundry Co. v. Emmett, 3 O. W. R. 382, 554, do not support either branch of the motion. Motion refused with costs to the plaintiff in any event. K. F. Mackenzie, for the defendants. A. E. Knox, for the plaintiff.

GENERAL CONSTRUCTION CO. V. NOFFKE—MASTER IN CHAMBERS FEB. 11.

Pleading—Default—Leave to Defend—Particulars.]—Motion by the defendants for leave to defend, after noted default, and for particulars of the statement of claim. The Master, following Muir v. Guinane, 10 O. L. R. 367, made an order allowing the defendants in to defend and allowing them to renew the motion for particulars after they have had discovery, if they so desire. The time for trial to be shortened so that the trial may come on as if the defendants had pleaded in due course. All costs lost or occasioned by this order to be to the plaintiffs in any event. J. T. White, for the defendants. G. H. Kilmer, K.C., for the plaintiffs.

DEVANEY V. WORLD NEWSPAPER CO.—MASTER IN CHAMBERS— FEB. 11.

Parties—Joinder of Defendants—Pleading—Conspiracy—Defamation.]—Motion by the defendant Fasken to set aside the

statement of claim as embarrassing and for improper joinder of causes of action, or for particulars. Action against several defendants for libel, slander, and conspiracy. The Master held, that the causes of action for conspiracy and slander could not be joined: Pope v. Hawtrey, 85 L. T. R. 263: nor can there be a joint action for oral slander against several defendants, though uttered at the same time: Carrier v. Garrant, 23 C. P. 276; they can only be joined in an action for conspiracy to defame. Order that the plaintiff amend or deliver a new statement of claim within a week; costs to the applicant in any event. H. E. Rose, K.C., for the applicant. J. T. White, for the plaintiff.

WOODS V. ALFORD—MEREDITH, C.J.C.P., IN CHAMBERS—FEB. 11.

Mortgage—Covenant—Judgment — Amendment — Costs.]—An appeal by the plaintiff from the order of the Master in Chambers, ante 434, was allowed with costs; no costs of the original motion. F. E. Hodgins, K.C., for the plaintiff. A. R. Hassard, for the defendant Brennand.

REX EX REL. MOONEY V. ROBERTSON—MASTER IN CHAMBERS—FEB. 15.

Municipal Election — Proceeding to Avoid — Disclaimer — Costs.]—Upon a summary application in the nature of a *quo warranto* to void the election (by acclamation) of the respondents as mayor and councillors of a town, the respondents disclaimed, and asked to be relieved of costs. The Master held that, the respondents having acted after notice of their disqualification, the relator was entitled to his costs: Regina ex rel. Mitchell v. Davidson, 8 P. R. 434; Rex ex rel. Jamieson v. Cook, 9 O. L. R. 466; Rex ex rel. O'Shea v. Letherby, 16 O. L. R. 581. J. A. Macintosh, for the relator. H. S. White, for the respondents

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TITCHMARSH V. WORLD NEWSPAPER CO—MASTER IN CHAMBERS—FEB. 17.

Security for Costs—Libel—Criminal Charge.]—Motion by the defendants in an action for libel for security for costs. The Master held that the newspaper article complained of did not involve a criminal charge within the decision of Smyth v. Stephenson, 17 P. R. 374; that the statements complained of were not such as are found in any of the following cases, where security was refused: Harman v. Windsor World Co., 2 O. W. R. 442; Gordon v. Star Printing and Publishing Co., 6 O. W. R. 887;

Pringle v. Financial Post Co., 12 O. W. R. 912; Mackenzie v. Goodfellow, 13 O. W. R. 30; Kelly v. Ross, ante 48, 116; and that the present case resembled Evoy v. Star Printing and Publishing Co., 2 O. W. R. 91, 119; Marsh v. McKay, ib. 522, 614; and Mackenzie v. McKittrick, not reported, affirmed on appeal 9th November, 1909. Order made for security. T. L. Monahan, for the defendants. A. E. Knox, for the plaintiff.

RE SOVEREIGN BANK AND KEILTY—TEETZEL, J.—FEB. 17.

Mortgage—Collateral Security—Exercise of Power of Sale—Demand—Vendor and Purchaser.]—Motion by the vendors for an order under the Vendors and Purchasers Act determining a question of title. The question was whether the vendors were in a position to give a good title under the power of sale contained in the mortgage upon the land sold. The answer depended upon whether the mortgage was in default when the notice was served. Held, that, apart from default occasioned by breach of the covenant to insure, the proper construction of the terms of the mortgage was, that the mortgagees (vendors) were entitled to exercise the power of sale, at any time after the mortgage was given, upon non-payment after demand. The demand was embodied in the notice of intention to exercise the power, and, not being complied with, the mortgagees were entitled to sell after the expiration of one month. It is impossible to hold that the mortgagees were bound to realise upon all the assets of the principal debtors before exercising any rights under the mortgage, which was given as collateral security. Question answered in the affirmative. No order as to costs. Shirley Denison, for the vendors. W. S. Morden, for the purchaser.

D. v. D.—MULOCK, C.J.EX.D.—FEB. 17.

Alimony—Cruelty—Evidence.]—An action for alimony. The Chief Justice analysed the evidence given at the trial and found that the defendant had been guilty of conduct amounting to legal cruelty, which justified the plaintiff in leaving him and in refusing to return to live with him. Judgment for the plaintiff for permanent alimony at the rate of $10 a month. If either party is not satisfied with the amount, the Master will fix an amount; in such event the costs of the reference to be in the discretion of the Master. The plaintiff to have her costs of the action. R. A. Pringle, K.C., and A. L. Smith, for the plaintiff. D. B. Maclennan, K.C., and C. H. Cline, for the defendant.