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CARTWRIGHT, MASTER. OCTOBER 1ST, 1904.

CHAMBERS.

CITY OF TORONTO v. TORONTO R. W. CO.

(TWO ACTIONS.)

Trial—Postponement — Determination of Questions Arising in another Action Pending.

Motion by the defendants to postpone the trials of these actions.

James Bicknell, K.C., for the defendants.

J. S. Fullerton, K.C., for plaintiffs.

THE MASTER.—In these, and several other similar actions, the plaintiffs seek to recover a penalty of $100 a day for a period of 4 months more or less, amounting to about $12,000. The cause of each action is the alleged violation by defendants of the terms of the contract made between the parties on 1st September, 1891.

These violations may be shortly described as non-observance by defendants of the time table approved by the city council on 11th April, 1904, and forwarded to defendants on the following day.

The parties have from the first differed and continued to differ as to the true meaning and interpretation of the original agreement.

An action was commenced on 20th April, 1903, to have a declaration of the rights of the parties under that agreement. This action is still pending; and in it a special case has been stated "to obtain the opinion of the Court upon certain questions of law arising in the construction of the agreement on which the action" (known, I may remark, as "the omnibus action") "is brought."

These questions are as follows:

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon, and direct—

2. What time tables and routes shall be adopted and observed by the company?

The final answer to this question will practically settle all these actions brought to recover the $100 a day penalty.

The statement of defence disputes the interpretation of the agreement relied on by the plaintiffs. It admits non-compliance with the time table of 12th April, 1904, but excuses it, on the ground that the defendants had not sufficient cars, and were unable to procure any, as their contract with the plaintiffs obliged them to have all their cars manufactured in Toronto.

The policy of the law now requires the determination of all questions between the same parties arising out of the one contract to be disposed of in one action and at one time as far as possible.

Here there can be no objection to postponement on the usual grounds of loss of claim or loss of evidence, as the fact of non-compliance is admitted by defendants.

From the past and present attitude of the parties it is almost certain that this question, No. 2 of the special case, will be carried as far as the parties can take it. It arises fairly and unavoidably in the special case to which the parties have agreed, and it does not seem that any good result can accrue from a trial of the penalty actions before the special case has been finally disposed of.

The motions will therefore be granted with costs of same in the cause.

CARTWRIGHT, MASTER. OCTOBER 3RD, 1904.

CHAMBERS.

ARMSTRONG v. ARMSTRONG.

Costs—Depriving Successful Party—Good Cause—Misleading Conduct before Action.

Motion by plaintiff for leave to discontinue the action and for an order on defendant to pay the costs, or for such disposition of costs as might seem fit.

J. H. Spence, for plaintiff.

Shirley Denison, for defendant.

THE MASTER.—The solicitors for the parties reside in different county towns. The evidence of the facts on which plaintiff relies is wholly documentary. Although affidavits have been filed on both sides, there is no conflict between them on any material point. . . .

It is clear from Huxley v. West London Extension R. W. Co., 14 App. Cas. 26, that the successful party cannot be deprived of costs unless there is good cause.

The question therefore is: Do the facts of this case establish the existence of such good cause?

To answer this question intelligently the facts must be stated at some length.

Plaintiff is the widow of defendant's son George, who died 1st October, 1903.

At the time of his death there were two policies on his life, one for $500 and another for $2,000. These were handed over after his death by the widow to her husband's brother Joseph. He afterwards sent her $600, with which the funeral expenses of deceased and other liabilities were paid.

The widow was under the impression that she was entitled to receive $1,500 from the proceeds of the insurances. In consequence, on 26th January, 1904, her solicitor wrote to Joseph Armstrong stating that the widow understood that her husband had policies of $500 and $2,000 respectively on his life, out of which, by his dying declaration and attempted disposition, she was to receive $1,500, and that

if these policies "were originally payable to deceased's mother" and were not altered by Mr. A., through illness and reliance on the assurances that his wishes would be carried out, it would be a fraud upon his widow. To this letter the only reply sent was a letter from the solicitor who is acting for defendant. It was as follows, and bears date 1st February, 1904.

"Dear Sir, "Re Estate late George C. Armstrong.

"Your letter to Mr. Joseph D. Armstrong has been handed to me for reply and to inform you that there was no $1,000 policy in force that he knows of on his late brother's life, but there were policies for $500 and $2,000, both of which were originally and always payable to his mother, and so formed no part of his estate. The $600 was sent by Mr. Joseph D. Armstrong to his brother's widow as a matter of kindness on his part and out of sympathy to her and not because of any responsibility to pay her anything."

On receipt of the above plaintiff's solicitor wrote at once a letter bearing date 4th February, 1904, the material parts of which are as follows:—

"Dear Madam,—

"On instructions of Mrs. Claribel Armstrong, your daughter-in-law, I recently addressed to your son, Joseph D. Armstrong, a letter upon the subject of the remittance to my client of the further sum of $900 due to her, to make up the $1,500 which, by her husband's dying declarations, was set apart for her out of the $2,500 of insurance he carried on his life. To that letter (your solicitor) has replied setting up the claim that all of the $2,500 was by the terms of the policies payable to you, and I presume contending that for that reason my client could have no claim upon it.

"If, as alleged, the policies provided that the insurance moneys when due thereunder should be paid to you, I must take it that your son Joseph has been acting as your agent and under your instructions in the way he has dealt therewith, as he could only get possession of these funds through you."

To this letter a reply was sent by the same solicitor dated 5th February, 1904:—. . .

"Dear Sir,— "Re Estate George C. Armstrong.

"Your letter to Mrs. Mary Ann Armstrong has been handed to me. Of course we cannot prevent your bringing

an action, if so advised, although we cannot imagine the grounds upon which it is likely to be sustained. However, it you insist upon doing so and send the writ to me, I will accept service and undertake to appear for the defendant."

On receipt of this plaintiff's solicitor commenced the present action against the mother of her husband, relying on the statement made by her solicitor in his letter of 1st February, 1904, that there were policies for $500 and $2,000, both of which were originally and always payable to his mother. It was not until some time in June that it was discovered that the policies had been assigned to Joseph Armstrong, with the consent of the mother, to whom they were originally payable. Thereupon plaintiff applied to defendant's solicitor to be allowed to discontinue without costs. This was refused. The present motion was therefore necessary under Rule 430 (4).

It was strongly argued for defendant that plaintiff's solicitor was in fault in relying on the statements made by the other side. Mr. Denison pointed out that the true facts might easily have been obtained from the insurance companies, and the present mistake thereby avoided. It must be conceded that defendant's solicitor might have declined to give any information and have advised plaintiff's solicitor to have applied elsewhere. This, however, he did not do. On the contrary, the language of his letter of 1st February is clear and unambiguous. There can be only one interpretation of the words that both the policies "were originally and always payable to the mother." After that had been received plaintiff's solicitor wrote to defendant stating that her present solicitor had written that the policies were payable to her. This letter was handed by defendant to her solicitor, as he says, so that he knew that plaintiff's solicitor was relying on a statement made by him, which was incorrect. Whether he knew this to be so or not, does not seem material. He cannot be heard to excuse himself in this way, so as to free his client from the responsibility arising from her erroneous instructions, to which alone his mistake must be attributed. It is to be observed that in this case there is no conflict as to what occurred between the parties. They and their respective solicitors lived in different towns, and, so far as appears, there were no interviews or conversations, about which parties may and often do honestly differ. Here fortunately everything material is in writing, and the result which I have reached is that the plaintiff's

motion should prevail, and that the action should be discontinued without costs to either party.

By the letter of 1st February, plaintiff's solicitor was led to believe that the policies "were originally and always payable to the mother," not as he had thought (and rightly) to Joseph, as appears from the letter of 4th February from plaintiff's solicitor to Mrs. Armstrong, the defendant.

I cannot but think that the incorrect statement of defendant's solicitor was the direct cause of the present action. He was not obliged to make any statement. But, having done so and misled plaintiff, his client must not complain of the result of this motion. I cannot give plaintiff more, but I do not think her entitled to less.

IDINGTON, J. OCTOBER 3RD, 1904.

CHAMBERS.

RE SMITH.

Will—Construction—Devise—Estate in Tail Male—Restrictions on Sale—Repugnancy.

Motion by John Smith Read, a devisee under the will of John Smith, late of the township of St. Vincent, farmer, deceased, for an order construing the will and codicil, and declaring the rights and interests of all parties mentioned therein.

The will was made on 7th January, 1865. By it the testator devised the north half of lot 26 in the 10th concession of St. Vincent and all other real estate he might die possessed of to his wife Jane Smith for her natural life, and on her death to John Smith Read, his heirs and assigns forever. In the event of his wife's death before or at the time of his own death he directed his executors to take possession and charge of all his real and personal estate as aforesaid, to collect or to receive all rents, debts, and other revenues accruing therefrom, and to invest the proceeds for the benefit of John Smith Read until 7th December, 1878, when they should pay over the same to him, less expenses and compensation for their trouble. The 5th paragraph said: "I will,

order, and direct that the said John Smith Read shall not be entitled to the possession of such real estate until the said 7th day of December, 1878." Paragraph 6: "Should the said John Smith Read die before coming into possession of my said real estate as above mentioned, I hereby authorize and empower my said executors to sell and dispose of all my said real and personal property and to divide and pay the proceeds thereof equally among the then surviving brothers and sisters of the said John Smith Read."

The testator made a codicil on 5th October, 1871, which expressly directed that it should be taken as part of the will, and which republished and confirmed the will so far as not altered thereby. The codicil provided: "If the said John Smith Read die without male issue, I will and bequeath the said real estate be not sold, but that it become the property of George McCleave Read, brother of the said John Smith Read, and should the said George McCleave Read die without male issue I will and bequeath the said real estate to Nicholas Robert Read, brother of the said John Smith Read and George McCleave Read. It is also my wish that the said real estate be not sold during the lives of the above named John Smith Read, George McCleave Read, and Nicholas Robert Read."

The testator died childless on 28th October, 1871, leaving as his widow her to whom he had by the will devised the land for life, and she survived until 7th August, 1886, and then John Smith Read entered into possession of the land and had since continued in possession.

At the time of this application John Smith Read had five children and his brothers also had each a child or children.

W. E. Middleton, for applicant.

R. W. Evans, Owen Sound, for adult respondents.

J. W. Frost, Owen Sound, for infant respondents.

IDINGTON, J.—It is to be observed that the will and codicil were both made and came into effect by the testator's death before sec. 32 of the Wills Act, or its original enactment, introduced into this country the change it made in regard to such expressions as used in this codicil.

The first question is, whether . . John Smith Read takes an estate in fee simple free from all restrictions.

To answer that affirmatively would be, in effect, to declare the codicil a nullity. Now, reading both together, I think not only that some effect can be given to the codicil, but that some if not all of what the testator intended can be carried out.

I therefore answer this question in the negative.

I also answer the second question in the negative. I think if the testator had intended to limit his purposes in the making of the codicil to the time of "coming into possession" he would have referred thereto in words that in some way imported that. Those he did use are obviously intended to have a wider scope, and point altogether in a different direction.

The third question is, whether the words in the codicil "die without male issue" create an estate tail male in favour of the applicant, which would enable him to bar the entail under R. S. O. 1897 ch. 122, and so become the owner in fee simple.

My answer to this question is, that the words "die without male issue" do not, of and by themselves, create an estate tail male, but that, the will and codicil being read as a whole, these words define, as the law then stood, the limitations of the estate that the will and codicil were intended when read together to create.

Evidently, they give, I think, an estate tail male to John Smith Read in remainder after the life estate to the widow. That came into possession of John Smith Read in 1886, and can be barred by John Smith Read as provided for by the statute referred to, and by virtue thereof he can convey the fee simple.

The 8th question is, whether the restrictions on sale are not repugnant and void in any event.

I think the restrictions on the sale of the lands are so repugnant to the estate or estates created as to be void. . . .

In answer to the 9th question, I think a valid conveyance of the said lands in fee simple can be made if executed by John Smith Read and his brothers Nicholas Robert Read and George McCleave Read and the surviving executors. . . .

[Reference to Theobald on Wills, 4th ed., pp. 341, 344; Little v. Billings, 27 Gr. 353; Nason v. Armstrong, 21 A. R. 182; O'Reilly v. Currie, 11 U. C. R. 55; Fraser v. Bell, 21 O. R. 455; Jarman on Wills, 5th ed., p. 860; Re Brown and Slater, 5 O. L. R. 386; In re Rosher, 26 Ch. D. 601.]

MEREDITH, J. OCTOBER 4TH, 1904.

CHAMBERS.

RE WEST ALGOMA VOTERS' LISTS.

Parliamentary Elections — Preparation of Voters' Lists — Unorganized District—Franchise Act, 1898, sec. 9—Order in Council—Powers of Governor-General in Council—Appointment of Officers to Prepare Lists—Proceedings of Officers—Prohibition—Powers of High Court.

Motion by A. C. Boyce, an elector in the district of West Algoma who proposed to be a candidate for its representation in the House of Commons, for prohibition to Jacob Stevenson, appointed enumerator for that district by an order of the Governor-General in council, and to the junior Judge of the County Court of Algoma, and to W. G. Quibell, police magistrate for Algoma, to prohibit these persons from proceeding with the preparation of voters' lists.

J. W. St. John, for applicants.

W. Barwick, K.C., for the Minister of Justice for Canada.

J. H. Moss, for the Secretary of State.

A. Mills, for the respondents.

MEREDITH, J.—There are involved in this application two questions of considerable importance: (1) whether the order in council in question is, or the proceedings of the respondents, acting under it, are, ultra vires; and, if so, (2) whether this Court has power to prohibit such proceedings.

The more correct way of dealing with these questions is to consider the latter first, because, if this Court have no jurisdiction, it is better to express no opinion upon the merits of the application; if there has been bad faith or any sinister or improper conduct, such as has been charged, in matters quite within the powers of those whose conduct has been called in question, they are answerable, not to this Court, but to Parliament, and Parliament to the people; and any alleged wrong-doing may perhaps also be the subject of investigation, and of some measure of relief, if established, in the Federal Election Courts.

Then, is there jurisdiction in this Court?

If the circumstances which warrant the Governor in council in acting under sec. 9 of the Franchise Act, 1898, never existed, I would have little doubt of such jurisdiction. One of the foremost duties of this Court is the prevention of the exercise of usurped judicial power. It can hardly be doubted that if any one, without colour of right, should usurp the judicial functions pertaining to the preparation of voters' lists, the power and duty to prohibit must rest somewhere; and I know of no other Court than this in which such power and duty exist, in respect of such an usurpation within this Province.

But it is said that in the North Perth Case, 21 O. R. 538, there was a decision of a Divisional Court to the contrary. With that statement I am unable to agree. The two cases are widely different. When that case was decided there existed officers and Courts appointed and constituted under Federal legislation for the very purpose of dealing with the whole subject of voters' lists for Parliamentary elections: the whole of that legislation has been repealed: no such officers or Courts now exist. The holding in the North Perth Case was that this Court could not interfere with such Federal Courts in respect of such voters' lists. In this case the main question is, does any Federal Court exist? Have the respondents any authority whatever in law for the exercise of any judicial functions in respect of such lists? If not, there must be power somewhere to prohibit, and that power can be found in this Court only.

Whether the respondents have, or have not, any such power depends upon the proper interpretation of sec. 9 of the Franchise Act, 1898. That Act entirely repealed the Electoral Franchise Act, under which the Federal Courts were constituted. It changed completely the whole law in regard to the preparation of the voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared, as provided for in the repealed enactment. But, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, the 9th section of the Act was passed: it is—as amended—in these words:—

"Where under the laws of a province the voters' lists for any provincial electoral district or division or any of them are prepared not at regular intervals, but at such times as are fixed by the Lieutenant-Governor in council or some other provincial or local authority or only from time to time

for the purpose of any Dominion election in the territory comprised in such provincial electoral district or division or the parts thereof for use in which they were prepared, if such lists have been prepared not more than one year before the date of the writ for such Dominion election; otherwise new voters' lists shall be prepared, and for the purpose of preparing and giving effect to such voters' lists the Governor in council may appoint all necessary officers and confer upon them all necessary powers, and in the preparation and revision and bringing into force of such new voters' lists the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial voters' lists in such cases shall, as far as possible, be observed and followed: Provided that, if in any such case voters' lists have been prepared under this section not more than one year before the date of the writ for such election, new lists shall not be prepared, but the lists so prepared shall be used unless there are lists of a later date prepared under the provincial laws."

For the district in question there are in existence no lists prepared at any regular intervals, but there are lists in course of preparation under a provincial enactment which requires their preparation at regular intervals.

The purpose of the section is to ensure reasonably recent lists for parliamentary elections: it can, therefore, hardly mean that when a provincial enactment requires the lists to be prepared at regular intervals those lists only shall be used no matter how long it may be necessary to wait until they are prepared; it means rather that when such lists exist—"are prepared" in fact—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. It was, therefore, on the facts of this case, within the power of the Governor in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a Federal Court, just as the revising barristers were under the repealed enactment; but they are expressly required by the enactment to observe and follow as far as possible the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists.

But it is said that the order in council appointing the respondents presumes to give directions to them in conflict with the latter statutory requirement. The answer to that is, if it be so, the order, to that extent, has no effect; the statute, not the order in council, is to be obeyed.

Then it is urged that, assuming the appointment of the respondents to be valid, they are not proceeding in some respects in accordance with the statute, but are acting to some extent in contravention of it. The answer to that—if it be so—is the answer which was given to the applicant in the North Perth Case—the subject is one committed to them exclusively by Federal legislation, and one affecting matters particularly within the exclusive powers of Parliament; they are answerable to Parliament, not to this Court, on such an application as this.

A point of some importance—not argued—is whether Parliament has, in sec. 9, delegated to the Governor in council the constitution of a Federal Court, and if so, whether there was power to do so. The answer is, there is no such delegation, that the enactment itself constitutes the Court and prescribes its procedure, and that to the Governor in council is committed nothing substantially but the appointment of the officers; the putting in motion of the provincial machinery operated by Federal officers.

The application therefore fails and must be dismissed.

OCTOBER 4TH, 1904.

DIVISIONAL COURT.

RE WILLIAMS v. BRIDGMAN.

County Court—Jurisdiction—Attachment of Debts — Assignment of Moneys Due to Judgment Debtor by Garnishee—Assignee as Claimant—Issue—Amount Involved—Claim for Equitable Relief — Prohibition — Transfer to High Court.

Appeal by claimant from order of TEETZEL, J., ante 53, dismissing appellant's motion for prohibition against further proceedings in a garnishee matter pending in the County Court of Elgin, or in the alternative to transfer the issue directed to be tried to the High Court.

W. M. Boultbee, for appellant.

W. J. Tremeear, for judgment creditor.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. OCTOBER 7TH, 1904.

CHAMBERS.

PERRINS (LIMITED) v. ALGOMA TUBE WORKS (LIMITED).

Discovery—Examination of Officer of Foreign Corporation—Provisional Director—Officer out of the Jurisdiction—Rule 439 (a).

Motion by plaintiff for leave to examine for discovery, at Philadelphia, one John S. Freeman, a director of the defendant corporation.

C. A. Moss, for plaintiffs.

W. E. Middleton, for defendants.

THE MASTER.—The motion was resisted on two grounds. The first was, that Mr. Freeman was only a provisional director of the defendant company, which was incorporated under R. S. O. 1897 ch. 191, by letters patent dated 30th December, 1902, but that no steps had been taken "for organizing the company for commencement of business."

To this it was replied that sec. 41 of the above Act is a sufficient answer. It provides that "the persons named as provisional directors in the special Act, or in the letters patent, shall be the directors of the company until replaced by others duly elected in their stead." With that contention I agree.

The second ground of opposition was, that there is no provision in the Rules for the examination for discovery of an officer of a foreign corporation, who is himself resident out of the jurisdiction. The argument was developed in the way following. In the Rules, at p. 65, we find that chapter VII. is headed "Discovery." This is then subdivided.

1. Examination for Discovery (439-462).

2. Production and Inspection of Documents (463-474).

3. Miscellaneous (475-477).

It was argued that all the provisions for examination for discovery are to be found under the first sub-head,

and that the language of Rule 439 (*a*), as it now stands (amended by Rule 1250), is inapplicable to a case like the present, because an officer out of the jurisdiction cannot "be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness." That this is the case is shewn by Central Press Association v. American Press Association, 13 P. R. 353.

It was further argued that recourse must, therefore, be had to Rule 477; but that this Rule only speaks of "parties residing out of Ontario;" and that an officer of a litigant corporation is not a party, nor in a similar position in regard to discovery, as his examination cannot be used as evidence at the trial.

These objections, though sufficiently formidable to require attention, are perhaps not insuperable.

Against them all is, first, the uniform practice heretofore to the contrary. This is entitled to great weight, though the maxim "communis error facit jus" may not be strictly applicable.

It has, however, often been said by Judges of eminence that it is more necessary that the practice should be settled than that it should be technically correct.

The argument based on the heading and sub-heads of chapter VII. seems to be displaced by Rule 7, which says that "the division, etc., of these Rules shall not affect their construction."

The more serious argument founded on the language of Rule 439 (*a*) can reasonably be met by considering the origin of the practice as to discovery, and the method of obtaining it in the case of corporations.

The matter is discussed in Bray on Discovery, pp. 73-77, and in the judgment of Jessel, M.R., in Wilson v. Church, 9 Ch. D. at pp. 555, 556.

Formerly it was necessary to make an officer of the defendant corporation a party for purposes of discovery.

This is no longer necessary after Order XXXI., r. 5, which is the equivalent of our Rule 439 (*a*).

At present, therefore, in such cases, some suitable officer of the corporation is to be deemed to be a party for the purposes of discovery, and is substantially covered by the word "parties" in Rule 477 to that extent.

It was further urged that, if Mr. Freeman refused to attend, the order would be nugatory and therefore should not be issued.

As to this it is sufficient to say that the Court will not presume that the defendant company has come in and submitted to the jurisdiction only to set its order at defiance. When this contempt has manifested itself, it will be time enough to consider what relief (if any) can be given to the plaintiff company.

In the meantime the order will go with costs in the cause.

If the view of the learned counsel for the defendants is right, he will have rendered good service by calling attention to an evil which will doubtless be promptly met by an adequate remedy. See as to this Macdonald v. Norwich Union Ins. Co., 10 P. R. 462 at p. 464, last paragraph.

BRITTON, J. OCTOBER 7TH, 1904.

WEEKLY COURT.

ASKWITH v. CAPITAL POWER CO.

Evidence—Reference to Master for Trial—Rulings on Evidence—Interlocutory Appeals—Admission and Rejection of Evidence—Interpretation of Contract—Form of Questions.

Appeal by plaintiffs from report of local Master at Ottawa upon a reference to him for trial under sec. 29 of the Arbitrations Act, R. S. O. 1897 ch. 62.

W. J. Code, Ottawa, for plaintiffs.

T. A. Beament, Ottawa, for defendants.

BRITTON, J.—The appeal was against the ruling of the Master in admitting and rejecting evidence, that is, in allowing certain questions to be put to a witness called on behalf of defendants, and in disallowing a certain question put on cross-examination of that witness. . . . Following Markle v. Ross, 13 P. R. 135, I hold that an appeal lies

in such a case. . . . In a case being tried by the Master upon a reference to him for that purpose, there should not be an appeal upon every interlocutory ruling.

On the merits, the ruling of the Master was right in each instance. The question put by counsel for plaintiffs to the witness R. W. Farley and disallowed by the Master was in form wrong. It was stated on the argument that the witness under examination is the person who, as between plaintiffs and defendants, is to interpret the contract. He may be asked what he did in reference to the work done or omitted, or what he said to plaintiffs in reference to the contract or work done or to be done. It is objectionable to ask this witness the meaning of any clause in the contract and still more objectionable to ask him what a clause "was intended to mean."

Appeal dismissed with costs to defendants in the cause.