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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 7TH, 1918.

*FIELDHOUSE v. CITY OF TORONTO.

Municipal Corporations—Plant for Disposal of Sewage—Erection and Operation—Negligence in Operation—Nuisance to Neighbours—Offensive Odours—Special Damage—Statutory Authority—Municipal Act, sec. 398 (7)—Absence of By-law—Failure to Obtain Approval of Board of Health—Public Health Act, sec. 94 (1).

Appeal by the Corporation of the City of Toronto, the defendants, from the judgment of MULOCK, C.J.Ex., in favour of the plaintiffs, in an action for damages and an injunction in respect of the negligent installation and maintenance of a system of sewerage in the city and the negligent, defective, and inadequate disposal thereof, whereby the plaintiffs suffered special injury.

The defendants denied that they were guilty of negligence and pleaded statutory authority for doing what was complained of.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and CLUTE, J.

Irving S. Fairty and C. M. Colquhoun, for the appellants.

T. R. Ferguson, for the plaintiffs, respondents.

CLUTE, J., read a judgment in which he said that, in order to take care of the effluent of the sewage from the settling tanks, an outfall-pipe was laid from the plant across the marsh to Lake Ontario, a distance of about a mile. This pipe, except in case of emergency, was expected to take care of all the effluent from the tanks; but the trial Judge found that it was of insufficient capacity,

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

and, in consequence, much of the sewage passed by what was called "the storm-overflow passage" into Ashbridge's bay. This passage was intended to meet emergencies, but, owing to the insufficient capacity of the overflow-pipe, the passage was obliged to receive continuously a part of the normal volume of effluent. There was also two serious breaks in the outfall-pipe, and through them large quantities of sewage, instead of passing into the lake, escaped into the bay, and there deposited much fæcal matter, from which offensive gases escaped into the atmosphere.

The defendants contended that they had statutory authority to establish and operate the plant, and that this action would not lie; also, that the plant was being operated with reasonable care in order to prevent a nuisance, and that was all the defendants were required to do.

The trial Judge found that the nuisance was traceable, largely if not entirely, to the negligence of the defendants; and that the nuisance was injurious to the plaintiffs' properties in the neighbourhood of the plant.

These findings were fully supported by the evidence.

It was clear that, while the plant was intended to provide for the disposal of 33,000,000 gallons per day, it was called upon for the disposal of 45,000,000. This caused the overflow and shortened the time allowed for settling.

The serious breakage in the outfall-pipe had continued for a long time without any attempt to repair, and in this way a steady stream of sewage, amounting to 500,000 gallons per day, found its way into the bay.

No excuse was offered for the defendants' failure to repair the break or to provide a sufficient outfall-pipe to the lake.

No by-law was passed—at least none was produced and none could be found—authorising the installation of the plant, and no approval of the plant as installed was obtained from the Board of Health.

See sec. 398 (7) of the Municipal Act, R.S.O. 1914 ch. 192, and sec. 94 (1) of the Public Health Act, R.S.O. 1914 ch. 218.

The works as now established and operated were not authorised by statute; and the defendants could not rely upon any statute as an answer to the plaintiffs' claim.

The general rule of law is, that if something done which is actionable be authorised by statute no action will lie in respect of it if it be the very thing that the Legislature has authorised: see Corporation of Raleigh v. Williams, [1893] A.C. 540; Faulkner v. City of Ottawa (1909), 41 S.C.R. 190; and other cases.

Here, the major part, if not all, of the damage, arose from

negligence in the operation of the plant; and the plaintiffs were not precluded from recovering full compensation in the action.

The defence under the statute failed because: (1) the requirements of the statute in regard to a by-law and sanction by the Board of Health were not complied with; (2) the damages suffered by the plaintiffs were caused by the defendants' negligence; (3) while the evidence established conclusively that the plaintiffs suffered damages, it was impossible to say that any portion thereof necessarily resulted from the exercise of statutory powers.

The appeal should be dismissed.

MAGEE, J.A., agreed with CLUTE, J.

MACLAREN and HODGINS, JJ.A., agreed in the result, for reasons stated by each in writing.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LATCHFORD, J. OCTOBER 8TH, 1918.

*SEAGRAM v. PNEUMA TUBES LIMITED.

Fines and Penalties—Action for Penalties against Company and Secretary—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 134—Default in Making out and Transmitting Summaries to Provincial Secretary—Secretary Wilfully Permitting Default—Finding of Fact of Trial Judge—Penalties—Leave to Apply for Remission.

An action, brought with the written consent of the Attorney-General for Ontario, against Pneuma Tubes Limited, a company duly incorporated under the Ontario Companies Act, 2 Geo. V. ch. 31, by letters patent dated the 2nd December, 1913, and against James Joseph Gray, as secretary of the company, for penalties alleged to have been incurred under sec. 134(6) of the Act, owing to the default of the company and Gray in making out and transmitting to the Provincial Secretary, on or before the 8th February, 1915 and 1916, the summary or statement prescribed by sub-secs. (1) to (5) of sec. 134 of the Act. See Seagram v. Pneuma Tubes Linited (1917), 40 O.L.R. 301.

The action was tried without a jury at Toronto.
George Bell, K.C., for the plaintiff.
Peter White, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that default by the company and by the defendant Gray existed at the date on which the plaintiff brought this action, and for such default the company was clearly liable to the plaintiff as "a private person suing on her own behalf with the written consent of the Attorney-General" (sec. 134 (6) of the Act).

A distinction is made in sub-sec. (6) which is of importance in reaching a conclusion as to whether the defendant Gray is also liable to the plaintiff. While a corporation is liable for mere default, the secretary of a corporation is liable for penalties only when he wilfully authorises or permits the default.

It was contended that, as the defendant Gray deposed that he was willing to make the summary for each of the years mentioned, but could not have it verified in either year by his co-directors, he did not wilfully authorise or permit the default. Certain facts were of importance in determining whether effect could be given to this contention.

Upon a review of the facts, the learned Judge had no hesitation in concluding that the defendant Gray wilfully permitted the default.

Reference to Park v. Lawton, [1911] 1 K.B. 588.

Judgment should be entered for the plaintiff against each defendant for $12,760 and costs.

As the order of Middleton, J., 40 O.L.R. 301, so far as, upon terms, it remitted in part the penalties for which the defendants might be held liable, was not complied with, the matter of remission appeared to be still open, and might be spoken to if there was no appeal from this judgment.

MIDDLETON, J. OCTOBER 9TH, 1918.

*BOWES v. VAUX.

Vendor and Purchaser—Agreement for Sale of Land—Inability of Purchaser to Make Title to Small Portion—Failure to Agree upon Sum as Compensation—Absence of Consent to Performance of Contract and to Fixing of Compensation by Court—Rights of Parties as to Sum Paid by Purchaser on Account of Purchase-money—Rescission—Forfeiture—Repayment to Purchaser—Provisions of Contract—Interest—Costs.

Action to recover $3,000, in the circumstances stated below.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiff.

W. D. McPherson, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff had agreed to purchase a large house and premises from the defendant, and now sought to recover $3,000, the amount of the deposit made with the vendor when the agreement was made, upon the theory that, the vendor being unable to make title to part of the premises, the purchaser was entitled to rescind the contract and claim the money paid as money held by the vendor for the use of the purchaser. The right to recover was also based upon the express terms of the contract itself.

The defendant set up the defence that the portion of land to which he had no title was so small as to be negligible and immaterial; and that the plaintiff, having refused to accept the title offered, was in default and the deposit was forfeited. The defendant also claimed the benefit of an offer made to abate the purchase-price, to a limited extent, and sought to apply the principle underlying the equitable doctrine of specific performance with compensation.

There was not on the part of either party an offer of specific performance with compensation, leaving the amount of compensation to be determined. The defendant in a letter referred in vague terms to the compensation which he was willing to allow—his counsel said he was willing to allow only a small sum, less than $200—while the plaintiff at first asked $2,500 and later $4,000.

Almost immediately after the date fixed for closing, the defendant resold the house and premises for $30,000, being $2,000 less than the plaintiff was to pay. On the resale the contract provided that the defendant should not be called upon to make

title to the small parcel, 160 feet, enclosed with his land, which he did not own.

The defendant pointed out that 160 feet was not much more than one per cent. of the whole area sold, and he regarded it as trivial, as warranting the application of the maxim de minimis. The learned Judge could not so regard it. Not only was there an appreciable loss of area, but a loss of ornamental trees, and the expense of removing about 100 feet of a stone-wall. This could not be ignored: Brewer v. Brown (1884), 28 Ch.D. 309.

The defendant offered to bear the cost of removing the fence and to abate the price by the proportion which the 160 feet bore to the remaining land, based upon the price of the land apart from the buildings. The injury to the premises as a whole could not thus be ascertained. On the other hand, the sums asked by the plaintiff probably largely exceeded any compensation that would be allowed upon a reference in an action for specific performance.

None of the cases cited seemed to justify the forfeiture of a deposit and rescission of a contract by the vendor when he had not title to the property to be conveyed.

Discussion of the equitable principle of compensation. Reference to Rutherford v. Acton-Adams, [1915] A.C. 866; In re Terry and White's Contract (1886), 32 Ch.D. 14, 27; Jacobs v. Revell, [1900] 2 Ch. 858; Tolhurst v. Associated Portland Cement Manufacturers, [1903] A.C. 414, 422; Knatchbull v. Grueber (1817), 3 Mer. 124, 146; Halsey v. Grant (1806), 13 Ves. 73, 76; Mortlock v. Buller (1804), 10 Ves. 292, 305, 315; In re Arnold (1880), 14 Ch.D. 270; Flight v. Booth (1834), 1 Bing. N.C. 370; Lee v. Rayson, [1917] 1 Ch. 613.

The defendant was not in a position to invoke the equitable doctrine, because by the sale of the land he had put it out of his power to resort to equity. He could not now give specific performance even with compensation—he could not do equity.

Again, the contract itself must prevail. It provided that on any objection to title being taken, which the vendor should be unable or unwilling to remove, the agreement should be null and void and the cash payment returned without interest.

When the agreement itself provides for what is to happen upon certain events, it alone is to be resorted to; there cannot be any recourse either to law or equity for any other remedy: Ashton v. Wood (1857), 3 Jur. N.S. 1164.

There should be judgment for the plaintiff for $3,000 with interest from the date of the commencement of the action and costs.

BRITTON, J. OCTOBER 11TH, 1918.

RE CAMPBELL AND TOWN OF RAINY RIVER.

Municipal Corporations—Money By-law—Validity—Submission to Electors—"Ratepayers"—Agreement for Purchase of Power Plant.

Motion by Campbell and others to quash a money by-law (203) of the Town of Rainy River.

The motion was heard in the Weekly Court, Toronto.
Frank Denton, K.C., for the applicants.
W. J. McWhinney, K.C., for the town corporation.

BRITTON, J., in a written judgment, said that the town council had made an agreement with the Rainy River Light and Power Company to purchase that company's plant for $28,000. It was part of the agreement that the ratepayers should approve of the by-law necessary to be submitted for the purpose of raising the $28,000 and an additional $3,000 for expenses of removal etc.

By-law 203 was introduced and read a first and second time in the town council; and by-law No. 204, giving directions for the submission of by-law 203, was passed. The town-clerk, as was his duty under the Municipal Act (see secs. 266, 267, 276), went over the completed list of ratepayers and singled out those who were electors and could vote on by-law 203 and those who were not. The submission was to the electors. The vote was taken, the clerk summed up the votes, declared the result in favour of the by-law, and so notified the council. The council met and read by-law 203 the third time; it was then signed and sealed, became operative, and was acted upon.

The objection to the by-law was, that it was not submitted to the proper persons.

The learned Judge was of opinion that the "ratepayers" mentioned in the agreement were those who had the right to vote upon by-law 203. The by-law, having been submitted to the electors, was submitted to the proper persons, and so was valid.

Motion dismissed with costs.

MINING CORPORATION OF CANADA LIMITED v. IRWIN—MASTEN, J., IN CHAMBERS—OCT. 10.

Jury Notice—Order Striking out—Action for Injunction and Account.]—Motion by the plaintiffs for an order striking out the jury notice filed and served by the defendants. MASTEN, J., in a brief memorandum, said that he had considered the pleadings and the cases cited. The action was, not only in form, but in reality, an action for an injunction and an accounting, and could be best tried by a Judge without a jury. Order made striking out the jury notice; costs in the cause. G. M. Clark, for the plaintiffs. A. G. Slaght, for the defendants Irwin and Cassidy.