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APPELLATE DIVISION.

MAY 18TH, 1915.

*DALE v. TORONTO R.W. CO.

Trial—Jury—Address of Counsel for Plaintiff—Inflammatory Language—Verdict for Plaintiff—Motion by Defendants for New Trial—Objection not Taken at Trial—Waiver—Duty of Trial Judge.

Appeal by the defendants from the judgment of DENTON, Jun. Co. C.J., in favour of the plaintiff, upon the findings of a jury, in an action brought in the County Court of the County of York, to recover damages for injuries sustained by the plaintiff by being thrown from the step of one of the defendants' street cars, by its being negligently started with a jerk, as she alleged, when she was about to alight. The jury accepted the plaintiff's account of the occurrence, as against that of the defendants, which was that she got off voluntarily while the car was in motion; the jury also found that there was no contributory negligence on her part; and they assessed her damages at $925.

The defendants asked for a new trial, upon affidavits stating that the language used by the plaintiff's counsel in addressing the jury at the trial was improper and inflammatory; these affidavits were answered by affidavits filed by the plaintiff.

The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and KELLY, JJ.

D. L. McCarthy, K.C., for the appellants.

N. F. Davidson, K.C., for the plaintiff.

RIDDELL, J., read a judgment, in the result of which the other members of the Court concurred, in which he said that the

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

facts, as he saw them, were: that counsel for the plaintiff (1) "made a very impassioned appeal . . . on behalf of" his client; (2) and referred in an allegorical but unmistakable way to the defendant railway company as a "giant called 'Stranglehold' . . . whose subjects had to pay him a silver toll," and whose "tentacles were spread over the city;" that (3) no objection was at the trial taken to these remarks; (4) that counsel discussed the evidence fully and in such a way that the trial Judge did not find it necessary to refer to it in any detail; and (5) that the verdict was not unsatisfactory.

The learned Judge went on to say that the allegorical statements were objectionable, and that the trial Judge would have been justified, proprio motu, in stopping and rebuking counsel, if he thought proper; but this course or any other must, within reasonably wide limits, be in the discretion of the trial Judge; and counsel for the defendants, not having raised any objection at the trial, must be considered as having waived all objections and taken his chance of a favourable verdict—so that it was now too late to raise the objection as a ground of a motion for a new trial, no injustice being apparent: Sornberger v. Canadian Pacific R.W. Co. (1897), 24 A.R. 263.

The appeal should be dismissed, but, to shew disapprobation of the language employed by the plaintiff's counsel, the dismissal should be without costs.

Appeal dismissed without costs.

MAY 18TH, 1915.

*PARSONS v. TOWNSHIP OF EASTNOR.

Arbitration and Award — Motion to Set aside Award — Claim under Municipal Drainage Act, R.S.O. 1914 *ch.* 198, *sec.* 80 *— Notice — Damages — Mistake in Law of Arbitrator — Written Reasons of Arbitrator—Mistake Appearing on Face of Award—Jurisdiction to Set aside Award.*

Appeal by the plaintiff from the order of HODGINS, J.A., sitting in the Weekly Court at Toronto, refusing to set aside an award: ante 381.

The appeal was heard by RIDDELL, LATCHFORD, MIDDLETON, and KELLY, JJ.

G. H. Kilmer, K.C., for the appellant.
W. H. Wright, for the defendants, respondents.

THE COURT was of opinion that there was error in law apparent on the face of the award. The arbitrator found that the plaintiff was not entitled to damages sustained before the service of his notice—and that was a finding on a question of law. In the notice two distinct classes of claim were set out: (1) original mal-construction; (2) negligent up-keep or non-repair. As to the second class, sec. 80(2) of the Municipal Drainage Act, R.S.O. 1914 ch. 198, provides that the municipality shall not be liable "by reason of the non-repair of such drainage work, unless and until after service . . . of notice. . ." There is no such provision respecting the first class; and that the first class is such as gives a right to complain is obvious. The damages, if any, accruing to the plaintiff before the service of the notice under sec. 80 must be determined.

THE COURT was also of opinion that the reasons of the arbitrator might be read as part of the award. Upon this point, the authorities, beginning with Kent v. Elstob (1802), 3 East 18, were reviewed.

The arbitrator having died, it was impossible to do anything but set aside the award.

The appeal was, therefore, allowed with costs, and the motion to set aside the award granted with costs.

(Written reasons were given by RIDDELL, MIDDLETON, and KELLY, JJ., respectively.)

MAY 20TH, 1915.

TAYLOR v. MULLEN COAL CO.

Nuisance—Smoke, Dust, and Noise from Industrial Works—Interference with Enjoyment of Neighbouring Dwelling-houses—Direct and Peculiar Injury to Individuals—Evidence—Sunday Work—Damages — Injunction — Appeal — Variation in Form of Judgment.

An appeal by the defendant company from the judgment of LENNOX, J., 7 O.W.N. 764.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.

I. F. Hellmuth, K.C., and A. R. Bartlet, for the appellant company.

T. Mercer Morton, for the plaintiffs, respondents.

THE COURT varied the judgment by adding to para. 3 the words "so as to create or constitute a nuisance," and in other respects affirmed the judgment, and dismissed the appeal with costs.

HIGH COURT DIVISION.

LATCHFORD, J. MAY 18TH, 1915.

MAJOR HILL TAXICAB AND TRANSFER CO. LIMITED v. CITY OF OTTAWA.

Municipal Corporation—Police Commissioners' By-laws Imposing License Fees on Owners and Drivers of Motor Vehicles —Prosecutions under—Motion for Injunction.

Motion by the plaintiffs for an injunction restraining the defendants, the Corporation of the City of Ottawa and the Board of Commissioners of Police of the City of Ottawa, from enforcing against the plaintiffs two by-laws passed by the defendants the Board of Commissioners of Police for the City of Ottawa, intituled respectively "Carriage By-law" and "Express Waggon By-law," being by-laws requiring the payment of license fees, and from proceeding with prosecutions of the plaintiffs for offending against the by-laws.

See Re Major Hill Taxicab and Transfer Co. Limited and City of Ottawa (1915), 7 O.W.N. 747 and ante 59.

The motion was heard at the Ottawa Weekly Court.

W. C. McCarthy, for the plaintiffs.

F. B. Proctor, for the defendants.

LATCHFORD, J., said that the object of the application was to prevent the defendants from proceeding with certain prosecutions instituted against the plaintiffs before the Police Magistrate for the City of Ottawa for operating motor cars and trucks for hire without the licenses which owners and drivers of such vehicles are required to take out under the by-laws mentioned;

and it was quite clear that the injunction should not be granted: Grand Junction Waterworks Co. v. Hampton Urban District Council, [1898] 2 Ch. 331, 344; Merrick v. Liverpool Corporation, [1910] 2 Ch. 449.

No special circumstances existed which would warrant the interference of the Court. One by-law had been held valid by a judgment binding on a single Judge, and the other was not distinguishable.

Motion dismissed with costs.

MEREDITH, C.J.C.P. MAY 19TH, 1915.

*PEPPIATT v. PEPPIATT.

Constitutional Law—Marriage Act, R.S.O. 1914 *ch.* 148, *sec.* 36 *—Jurisdiction of Supreme Court of Ontario to Declare Marriage Void—Prior Known Decision—Reference to Divisional Court—Judicature Act, R.S.O.* 1914 *ch.* 56, *sec.* 32.

The plaintiff, who was born on the 24th November, 1895, sued by her mother and next friend, alleging that on or about the 16th January, 1913, she went through a form of marriage with the defendant, at the city of Hamilton, being at that time under the age of 18 years, without the consent required by sec. 15 of the Marriage Act, R.S.O. 1914, ch. 148; that after the ceremony the defendant left the infant plaintiff, and that since the ceremony she and the defendant had not cohabited and lived together as man and wife; and she asked for a judgment declaring that a valid marriage had not been effected, or for annulment of the marriage, if any.

The action came on for trial without a jury at Hamilton.

G. S. Kerr, K.C., for the plaintiff.

No one appeared for the defendant.

Edward Bayly, K.C., for the Attorney-General for Ontario.

MEREDITH, C.J.C,P., after discussing the question of the constitutionality of sec. 36 of the Marriage Act, in a written opinion, said that his conclusions were that the Act was ultra vires; and that, therefore, the Supreme Court of Ontario had not power under it, nor had it power otherwise, to consider the matters in

question in the action; and that, though the Court had the power to make a declaratory judgment in a case over which it had jurisdiction, that power was not applicable to the plaintiff's claim. The learned Judge made no finding on the facts involved. And he said that he was precluded, by sec. 32 of the Judicature Act, R.S.O. 1914 ch. 56, from giving effect to his opinion on the question of jurisdiction, by reason of the existence of a prior known judgment of a Judge of co-ordinate jurisdiction which he could not disregard (Lawless v. Chamberlain (1889), 18 O.R. 296).

Therefore, acting under sec. 32, and deeming the case of sufficient importance to go further, he referred it to a Divisional Court.

MEREDITH, C.J.C.P. MAY 19TH, 1915.

*RE CIMONIAN.

Alien Enemies — Right to Naturalisation — Application under Naturalisation Act, R.S.C. 1906 *ch.* 77, *sec.* 19—*Duty of Judge Hearing Application.*

Applications by Pishak Cimonian and twelve other persons for naturalisation in Canada, under the provisions of the Naturalisation Act, R.S.C. 1906 ch. 77.

The applications came before MEREDITH, C.J.C.P., at the Waterloo Spring Assizes, on the 16th and 17th February, 1915.

M. A. Secord, K.C., for the applicants.

No one opposed the applications.

MEREDITH, C.J.C.P., in a considered judgment, said that, after perusing the naturalisation papers presented, he found that twelve of the applicants were described as formerly of Armenia and one of them as formerly of Macedonia; and, as no more information was given as to the monarch or State to whom or which they now owed allegiance, it seemed very probable that they were all Turkish subjects, and so alien enemies. At the assizes an opportunity was given to each of the applicants to shew whether he was or was not an alien enemy; but no further evidence was given nor was any further argument presented by counsel for the applicants.

The learned Chief Justice, dealing now with the applications, says that naturalisation was properly sought under R.S.C. 1906 ch. 77; for, although that enactment had been repealed by the

Naturalisation Act, 1914, 4 & 5 Geo. V. ch. 44 (D.), it had, by sec. 34, been kept alive for three years in regard to aliens resident in Canada on the 1st January, 1915, who complied with the requirements of the earlier enactment; and the applicants, according to their affidavits, having been so resident and having so complied, were entitled to naturalisation if they were not alien enemies—or, if alien enemies, were entitled to its benefits.

The learned Chief Justice, then, referring to sec. 19 of R.S.C. 1906 ch. 77, says that it is the duty of a Judge hearing such an application to decide whether the applicant is or is not within the provisions of the Act.

In dealing with naturalisation matters, an alien enemy is the subject of a nation which is at war with the nation in which naturalisation is sought; and each of these applicants, if a Turkish subject, is, and must be treated as, an alien enemy, in the consideration of his case.

The learned Chief Justice goes on to consider the question whether the earlier statute (R.S.C. 1906 ch. 77) is applicable to an alien enemy; and says that, apart from judicial authority, he has no difficulty in considering the Act inapplicable to an alien enemy; and the decided cases abundantly support that conclusion. He refers to Rex v. Lynch, [1903] 1 K.B. 444; Piggott on Nationality, p. 137; general ruling of the Judges of the Supreme Court of Alberta against the naturalisation of any alien enemy; Ex p. Newman (1813), 2 Gall. (U.S.) 11; Ex p. Overington (1812), 5 Binn. (Penn.) 371; Ex p. Little (1812), 2 Bro. (Penn.) 218.

The learned Chief Justice declines to follow the decision of Archambault, J., in a Circuit Court of the Province of Quebec, in In re Herzfeld (1914), Q.R. 46 S.C. 281; and refers to Porter v. Freudenberg, [1915] 1 K.B. 857.

The conclusion is that the applicants are alien enemies and not entitled to naturalisation.

The learned Chief Justice also expresses a wish to facilitate an appeal from his decision, if an appeal is desired; and gives leave, for what it may be worth, to appeal in any possible way.

If no steps towards an appeal be taken within 30 days, the result will be that no direction such as sec. 19 of the Act provides for will be made, and so the applicants must fail in their efforts to become naturalised in Canada; but, if any such steps be taken, the applications will be held in abeyance for a reasonable time to obtain the opinion of some appellate Court, which, if favourable to the applicants, can then be given effect to by the Chief Justice.

LENNOX, J. MAY 22ND, 1915.

COLE v. COLE.

Assignments and Preferences—Assignment for Benefit of Creditors—Right of Secured Creditor to Rank upon Estate in Hands of Assignee—Notice of Contestation—Forfeiture—Assignments and Preferences Act, R.S.O. 1914 *ch.* 134, *secs.* 25, 26, 27.

The plaintiff, as assignee for the benefit of creditors of one Paisley, brought this action against himself, as assignee for the benefit of creditors of the Carleton Hotel Company, for a declaration of the rights of the Paisley estate as a creditor of the hotel company's estate.

Cole, purporting to act under the Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 25 (4) and sec. 26 (1), furnished an affidavit proving a total indebtedness of the company to the Paisley estate of $17,215, and valued the security held by the company (a chattel mortgage) at $13,000.

Cole, as assignee of the company, evidently intending to act under sec. 27, gave the Paisley estate notice of contestation, and by the notice purported to impose upon the Paisley estate the obligation of bringing an action within 30 days upon pain of forfeiting its claim to rank upon the estate of the company: sec. 27 (2), (3).

The action was tried without a jury at Ottawa.

R. G. Code, K.C., for the plaintiff.

H. P. Hill, for the defendant.

LENNOX, J., said that the defendant had misconceived the meaning of sec. 27. It is a penal provision, must be construed strictly, and is not aimed at the forfeiture of a security, but is intended to secure the speedy determination of the right to rank and vote as a creditor and share in the distribution of assets, and to authorise a contestation of the indebtedness in whole or in part. As inducing a forfeiture the notice had no effect; but it was a fairly clear notice that a substantial part of the plaintiff's alleged rights was in dispute—it amounted to an assertion that the plaintiff must rank as an unsecured creditor for his total claim.

The plaintiff may have a judgment declaring that the de-

fendant's notice is irregular and served without statutory provision threfor, and that it does not create a forfeiture in respect of the plaintiff's rights under the chattel mortgage, without costs to either party.

If the parties agree, the action will be treated as one for the determination of the status of the plaintiff under the chattel mortgage, and the trial will be continued and concluded upon that basis.

If the parties do not agree, the judgment will be as above.

MIDDLETON, J. MAY 22ND, 1915.

HERRINGTON v. CAREY.

Promissory Note—Accommodation Makers — Duress — Agreement to Stifle Prosecution—Failure to Shew—Findings of Fact of Trial Judge.

Action to recover the amount of a promissory note, made by the three defendants, for $1,450, bearing date the 1st August, 1913.

The defence was by two of the defendants, who were sisters of the third defendant, a solicitor. The sisters signed the note at the request of their brother, and the plaintiff accepted it in satisfaction of his claim against the solicitor-defendant for moneys of the plaintiff, his client, which that defendant had misappropriated.

The sisters alleged that there was an agreement to stifle the prosecution of their brother; secondly, that there was duress, to which the plaintiff was a party.

The action was tried without a jury at Toronto.

R. J. McLaughlin, K.C., for the plaintiff.

Gordon Waldron, for the defendants.

MIDDLETON, J., finds, upon the evidence, that there was no duress or pressure exercised upon the sisters saye the knowledge of the brother's crime. The facts do not implicate the plaintiff in anything said or done by the brother. The plaintiff was offered the note, with the sisters as security, and he agreed to accept it. There was no bargain not to prosecute. The sisters

were women of maturity and experience, accustomed to think and act for themselves, and not shewn to have been subject to the domination of their brother.

Williams v. Bayley (1866), L.R. 1 H.L. 200, and Jones v. Merionethshire Permanent Benefit Building Society, [1891] 2 Ch. 587, [1892] 1 Ch. 173, distinguished.

Judgment for the plaintiff for the amount of the note (subject to a credit of $100), with interest and costs.

BRITTON, J. MAY 22ND, 1915.

RE NAGRELLA MANUFACTURING CO. LIMITED

Company—Winding-up—Contributories—Evidence—Estoppel.

Appeals by A. E. Petty, R. A. McInnis, J. G. Weldon, and E. H. Moyer, from the findings of the Local Master at Hamilton that each of the appellants was properly placed upon the list of contributories of the company in a winding-up order under the Winding-up Act, R.S.C. 1906 ch. 144.

The company was incorporated under the Ontario Companies Act; and the winding-up order was made on the 15th September, 1914.

The appeals were heard in the Weekly Court at Toronto.

C. V. Langs, for the appellant Petty.

J. E. Jones, for the appellant McInnis.

W. M. Brandon, for the appellant Weldon.

J. Marshall, for the appellant Moyer.

T. B. McQuesten, for the liquidator, respondent.

BRITTON, J., said that the facts were extraordinary. The so-called stock of the company was hawked about by William A. Welsh, at first a promoter, then president of the company, who carried with him blank forms, to which was attached the seal of the company. These forms he filled up as certificates, in favour of the persons with whom he succeeded in bargaining, that these persons were the holders of fully paid and non-assessable shares. The company did not commence business in accordance with its undertaking; but, when Welsh had secured as much as he could in cash and promissory notes, he disappeared with

some of the books and papers of his own and of the company relating to these transactions. It was not shewn that the company had the necessary certificate to enable it to commence or carry on business. The whole matter of pretending to issue stock was wholly without the authority of by-laws or resolutions or even of meetings of directors or shareholders. The liquidator contended that the appellants were estopped from denying that they were shareholders. There was no application for shares on behalf of McInnis, Moyer, or Weldon; and the application signed by Petty—which he did not know was an application—was an uncompleted document.

The main features of the transactions as summarised by the learned Judge were: (1) an illegal and unauthorised issue; (2) a want of application or subscription for shares; (3) an agreement not complied with on the part of the company or of the person assuming to sell shares; (4) promissory notes made by the persons purchasing, intended by them to be in full satisfaction, and accepted as such by the person selling—these notes being payable to the order of the company and endorsed by the company, and some of them in the hands of strangers, presumably for value; (5) certificates issued for fully paid shares; (6) no allotment of shares, and no evidence on the part of the person making the sales. In these circumstances, an estoppel could not be found, and the appeals should be allowed; costs of the trial of the issues and of the appeals to be paid by the liquidator out of the assets of the company.

CHAMBERS v. LE BURTIS—LENNOX, J.—MAY 20.

Mortgage—Power of Sale—Pretended Exercise of—Fraud—Setting aside Conveyance.]—Action by Diana Chambers to set aside a conveyance of land by the defendant Susan Le Burtis to the defendant Henry Read Sealey, purporting to be in pursuance of a sale made under the power of sale contained in a mortgage executed by the plaintiff in favour of the defendant Le Burtis. The action was tried without a jury at Woodstock. The learned Judge finds that the alleged sale was a collusive and pretended one, and gives judgment declaring that the impeached transaction is fraudulent and void against the plaintiff and setting aside the conveyance with costs. W. T. McMullen, for the plaintiff. S. G. McKay, K.C., for the defendants.

ALLEN v. CROWE—MIDDLETON, J.—MAY 21.

Vendor and Purchaser—Agreement for Sale of Land—Mistake as to Quantity of Land—Parties not ad Idem—Return of Purchase-money Paid or Specific Performance with Abatement of Price—Election of Vendor—Costs.]—Action for specific performance of an agreement in writing whereby the defendant agreed to sell to the plaintiff "six acres more or less on the Lake Shore road, having a frontage on the Lake Shore road of 1,220 feet," for $13,500. The land was a triangular parcel, with the apex of the triangle to the north. The chief element of value was the frontage on the Lake Shore road. The Toronto and York Radial Railway Company operated a trolley line along the road, the tracks being laid immediately in front of the land in question. The agreement was made on the 6th March, 1912. The defendant had acquired title to the southerly four acres on the 24th November, 1909, paying $3,500 for it. She acquired title to the northerly two acres by conveyance of the 17th November, 1910, paying $3,200. On the 16th November, 1910, the defendant sold and conveyed to the railway company a strip 25 feet wide along the Lake Shore frontage of the four acres for $3,500, the same amount which the whole parcel of four acres had cost her. There were some difficulties about the title; and, before the defendant was in a position to convey, the plaintiff advanced to her nearly $3,000, receiving some security from her. When the title was finally quieted, another sum of about $7,000 was paid by the plaintiff to the defendant—$10,000 in all thus passing to the defendant. The plaintiff's story was that the defendant told him that she had obtained a reconveyance of the 25-foot strip from the railway company, and that, relying upon this, he paid over the money. He afterwards discovered that this was a mistake. This was early in 1913; but nothing was done until August, 1914, when this action was begun. The plaintiff claimed specific performance, with an abatement of price, or the return of the $10,000. The action was tried without a jury at Toronto. MIDDLETON, J., after reviewing the evidence in a written opinion, said that the parties never were ad idem as to the subject-matter of the bargain, and that the defendant must now be put to her election whether she would accept the plaintiff's demand for specific performance with an abatement, or whether she would return the money received by her, with interest at 5 per cent. If she agreed to the former course, the abatement should be of the amount paid by the rail-

way company, $3,500, which would mean that the defendant should now convey without receiving any further price; and that the plaintiff should then restore the security which he held. As neither party could be held blameless with regard to the confusion which resulted in this litigation, there should be no costs, no matter which election the defendant might make. G. T. Walsh, for the plaintiff. J. J. Maclennan, for the defendant.

WEDDELL v. DOUGLAS—BRITTON, J.—MAY 22.

Chattel Mortgage—Validity against Execution Creditor of Mortgagor — Partnership — Interpleader Issue.] — An interpleader issue, directed upon the application of a sheriff, to try the right to certain goods and chattels seized by him under an execution upon a judgment in favour of the defendant in the issue (execution creditor) against W. D. McQuoid and others, and claimed by the plaintiff (claimant) under a chattel mortgage. The issue was first tried by FALCONBRIDGE, C.J.K.B., who found in favour of the plaintiff (7 O.W.N. 92). The defendant appealed, and a new trial was ordered (7 O.W.N. 216). The second trial was before BRITTON, J., without a jury, at Cobourg. The learned Judge finds that, at the time of the death of Hugh McQuoid, a partnership existed between him and W. D. McQuoid and H. W. McQuoid; and that the surviving partners were entitled as such to the possession and control and disposition of the property; and that the chattel mortgage made by W. D. McQuoid in favour of the plaintiff was valid. Judgment for the plaintiff. The defendant to pay all costs except those ordered by the appellate Court to be paid by the plaintiff. C. A. Moss and W. L. Payne, for the plaintiff. W. N. Tilley and A. S. Humphries, for the defendant.