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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 11TH, 1918.

*MOLSONS BANK v. CRANSTON.

Guaranty—Liability of Trading Company to Bank—Bond Executed by Certain Directors on Condition that all Directors should Execute—Knowledge of Bank—Failure of one Director to Execute—Provision in Bond that Individual Signers Bound—Conditional Delivery of Bond—Notice—Delivery to Agent of Bank—Escrow—Evidence—Personal Liability of one Director—Estoppel—Knowledge of Condition.

Appeal by the plaintiffs from the judgment of BRITTON, J., 14 O.W.N. 345.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., and A. Abbott, for the appellants.

M. H. Ludwig, K.C., F. E. O'Flynn, and B. W. Essery, for the several defendants, respondents.

The judgment of the Court was read by HODGINS, J.A., who said that the chief argument addressed to the Court was, that parol evidence of a condition that all those present at the first meeting in Trenton should sign before the bond sued on became operative, was inadmissible. This was founded upon a provision in the instrument that the individual signers should be bound notwithstanding the non-execution by any other proposed guarantor. But the clause relied on was not binding on any one unless and until the document itself became operative. The rule against

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

contradicting a written document applies only to an agreement which has actual vitality, and not to one which is in a state of suspended animation, ineffective and undelivered.

The evidence supported the position that the delivery was a conditional one.

Reference to Johnson v. Baker (1821), 4 B. & Ald. 440; Bowker v. Burdekin (1843), 11 M. & W. 128, 147; Corporation of Huron v. Armstrong (1868), 27 U.C.R. 533; Trust and Loan Co. v. Ruttan (1877), 1 S.C.R. 564, 583.

The guaranty sued on provided for the exact situation which had arisen; and, if it were operative, would control it, as it made each individual liable, even though others failed to do what was expected of them. Something more, then, was necessary, if the desired inference was to be drawn, than the fact that the circumstances pointed to a conditional delivery. Express and clear notice should be required to prevent the delivery of such a document from taking immediate effect, because its terms shewed that it was intended to come into effect as to each party as soon as he put his hand to it.

Such a notice had been established here; and the conclusion followed that the delivery was conditional only, and that the guaranty never became effective as against any one of the parties.

Carter v. Canadian Northern R.W. Co. (1911), 23 O.L.R. 140, 24 O.L.R. 370, Anning v. Anning (1916), 38 O.L.R. 277, and Great Western Railway and Midland Railway v. Bristol Corporation (1918), 87 L.J. Ch. 414, distinguished.

It was argued that delivery to Webb (the bank-manager) was delivery to the bank, the plaintiffs, who were to take the benefit under the contract, and that no escrow could be established in those circumstances. But the ancient rule on the subject has not survived: Millership v. Brookes (1860), 5 H. & N. 797; Watkins v. Nash (1875), L.R. 20 Eq. 262; London Freehold and Leasehold Property Co. v. Baron Suffield, [1897] 2 Ch. 608, 621, 622; Scandinavian American National Bank v. Kneeland (1914), 8 W.W.R. 61, 73, 77

The evidence established that, when the bond was finally handed to Webb, he undertook to get Farley's signature, and so held it as the agent of all parties until the time when, if he got that signature, he could properly retain the instrument for the plaintiffs.

The defendant Brownridge was in no different position from that of his co-defendants; he did not make himself personally liable to the plaintiffs for the amount advanced.

There was no ground for applying the doctrine of Ewing v.

Dominion Bank (1904), 35 S.C.R. 133. The plaintiffs, through Webb, were all along aware of the condition; and, therefore, if any duty might have existed in other circumstances, its performance here would not have informed the plaintiffs of anything they did not already know.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 14TH, 1918.

HASSARD v. ALLEN.

Husband and Wife—Conveyance of Land by Husband to Wife—Fraud upon Creditors—Evidence—Findings of Fact of Trial Judge—Appeal.

An appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., ante 16.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

C. R. McKeown, K.C., for the appellants.

J. Callahan, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. NOVEMBER 14TH, 1918.

*MILLS v. CONTINENTAL BAG AND PAPER CO.

Building Contract—Excavation Work—Exception—"Rock"—Large Boulders Encountered in Progress of Work—Inclusion in Term "Rock"—Evidence—Functions of Architect—Classification of Work.

An appeal by the plaintiff from the judgment of the Junior Judge of the County Court of the County of Carleton dismissing without costs an action brought in that Court to recover $659.90 for excavating rock for the foundations of a building erected for the defendants.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

E. A. Gleeson, for the appellant.
W. L. Scott, for the defendants, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the appellant was a contractor, and agreed to "do the excavating of all materials, excepting rock, under the entire factory building of the owners (in) Ottawa and remove same from the premises, disposing of same as he may see fit." The price was to be "$1 per cubic yard for all material removed by the said contractor."

During the work, the appellant encountered large boulders and removed them. His claim in this action was for payment of the cost thereof, upon the ground that the contract did not include them.

The County Court Judge dismissed the action because he concluded that boulders were not "rock" as that word is used in the contract. He properly discarded evidence given as to the practice and custom in Ottawa or under contracts which specifically classify material. None of that evidence was admissible—it did not profess in any way to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.

The word "rock" must, in the circumstances of the case, be considered as having its usual meaning. "Rock" was not to be excavated—and this word, according to the dictionaries, includes both stratified and loose rock. See the Imperial Dictionary (1859); Murray's Dictionary (1910); the Century Dictionary (1914); the Encyclopædia Britannica.

There is no judicial authority as to the meaning of the word save in Drhew v. Altoona City (1888), 121 Penn. St. 401, in which the Supreme Court of Pennsylvania in appeal decided that "rock" excavation included "all the divers qualities of what was properly called rock, encountered in the progress of the work" (p. 421).

The same rule should be applied in this case: rock, either in stratified or boulder form, was not included in the written contract, and might be recovered for, in the circumstances in evidence. Enough evidence was given to enable the Court to conclude that the boulders charged for were of sufficient size to distinguish them from stones or small boulders such as were buried.

The case cited also refers to a limitation upon the functions of an architect, i.e., he cannot make a new contract for the parties, and they are not bound by his classification or certificate unless they have expressly agreed to accept it as final.

The appeal should be allowed, and the appellant should recover $395 with costs throughout.

Appeal allowed.

FIRST DIVISIONAL COURT. NOVEMBER 15TH, 1918.

FORBES v. LUMBERS.

Principal and Agent—Agent's Commission on Sale of Goods—Commission Confined to Goods actually Delivered—Failure to Prove Substituted Contract—Findings of Fact of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York to recover $420.01, alleged to be the balance due to the plaintiffs as commission on the sale of goods for the defendants.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

E. G. Porter, K.C., for the appellants.

H. H. Davis, for the defendants, respondents.

The judgment of the Court was read by HODGINS, J.A., who said that the question was, whether the appellants were entitled to be paid on the quantity guaranteed to be delivered or only on what was actually delivered. He agreed with the learned County Court Judge that the defendants had failed to prove a parol contract in substitution for that under which they had worked since the 17th March, 1914.

After a close examination of the evidence, and particularly the correspondence between the parties, the learned Justice of Appeal stated his conclusion that the appellants had failed to shew that the judgment below was wrong.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. NOVEMBER 15TH, 1918.

SMITH v. TOWNSHIP OF TISDALE AND BRINTON. SMITH v. TOWNSHIP OF TISDALE AND CHARETTE.

Security for Costs—Consolidation of Actions—Amount of Security.

Appeals by the defendants from orders made by MIDDLETON, J., in Chambers, on the 8th March, 1918, in respect of security for costs.

Leave to appeal was given by MEREDITH, C.J.C.P.: see 14 O.W.N. 111.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. G. Slaght, for the appellants.

J. M. Ferguson, for the plaintiff, respondent.

THE COURT allowed the appeals, and ordered that the plaintiff should give security in the usual amount for the defendants' costs in both actions as if the actions were one; the plaintiff undertaking if the defendants consent, to consolidate the actions and have them tried together; with liberty to the defendants to apply for additional security if occasion should arise; costs to be costs in the cause to the defendants.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 11th, 1918.

ALLAN v. RECORD PRINTING CO. LIMITED.

Libel—Newspaper—Pleading—Statement of Defence—Series of Letters from Correspondents—Provocation.

Appeal by the plaintiff from an order of a Local Judge refusing to strike out the portions of the statement of defence in an action for libel.

R. S. Robertson, for the plaintiff.

Featherston Aylesworth, for the defendants.

MIDDLETON, J., in a written judgment, said that the alleged libel was a letter published in the defendants' newspaper, one of a series of letters in a correspondence which was begun by the

plaintiff himself, in the newspaper, by a letter attacking the person who wrote the letter complained of.

The defendants set up that they allowed the plaintiff and his opponent equal privileges of abuse, and that the plaintiff, as the attacking party, provoked the defamatory language used by his opponent, which was the libel complained of.

The learned Judge said that there were limits, even in the letters of newspaper correspondents, which could not be transcended with impunity either by the newspaper or the correspondent. These limits are not fixed by law, but by the opinion of the jury. The publisher of the newspaper has the right to shew the whole circumstances attending the publication, and the plaintiff is not embarrassed by being warned that it is intended to do so. The result might shew that the abusive matter complained of ought never to have been published.

In view of the decision of the Court in Wilson v. London Free Press Printing Co. (1918), ante 102, that the Libel and Slander Act authorises a verdict for the defendant even where the publication is proved and is plainly defamatory and false, if, in the opinion of the jury, the plaintiff's conduct is such as to disentitle him to a verdict, it was impossible to regard this pleading as improper.

The appeal should be dismissed with costs to the defendants in any event.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 11TH, 1918.

BUSINESS REALTY LIMITED v. LOEW'S HAMILTON THEATRES LIMITED.

Easement—Building—Access of Air and Light—Infringement—Pleading—Statement of Claim—Unity of Seisin—Implied Grant—Prescription—Alternative Claims—Amendment.

Motion by the defendants for an order striking out the statement of claim as embarrassing.

A. J. Thomson, for the defendants.
E. D. Armour, K.C., for the plaintiffs.

MIDDLETON, J., in a written judgment, said that the statement of claim set out that Hugh Brennan, in 1912, being then the

owner of a large parcel (or several contiguous small parcels) of land, sold the plaintiffs a part thereof, upon which there was a building, erected before 1860, having windows on all sides thereof, the land to the east (part of Brennan's holding) being vacant. In 1917, Brennan's executors conveyed the vacant land to the defendants' predecessor in title; and the defendants, having acquired title, had built a theatre thereon, the wall of which obstructed the access of light and air to the plaintiffs' building.

It was not said how the plaintiffs claimed the right which they said was infringed. They said that they were "by law entitled," and in para. 3 they said that the building, since its erection in 1860, "is in the same plight and condition as to structure and windows as when it was erected."

From the fact that unity of seisin in 1912 was alleged, the learned Judge would have inferred that the claim intended to be relied upon was based upon an implied grant; but counsel for the plaintiffs intimated that he was not willing that the claim should be confined in this way, as he intended to contend that the unity of seisin here did not have the effect of extinguishing the easement. It was not shewn when the unity began; it may have existed before the building.

For the reasons pointed out in Harris v. Jenkins (1882), 22 Ch. D. 481, the defendants were entitled to know upon what the claim was based. This would not prevent the making of alternative claims.

If there was any intention of shewing that an easement by prescription arose before there was unity of seisin, and that the consequences which usually flow from unity of seisin did not here follow, these facts should be pleaded.

There should be an order allowing an amendment within the usual time; and, in default, striking out the pleading; the time for delivery of the statement of defence to run from the amendment; and costs of the motion to be costs to the defendants in the cause in any event.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 11TH, 1918.

SUTTER v. SUTTER.

Security for Costs—Plaintiff out of Ontario—Counterclaim—Onus—Defendant Regarded as Attacking Party.

Appeal by the plaintiff from an order of a Local Judge refusing to set aside an order requiring the plaintiff to give security for the defendant's costs of the action. The plaintiff lived in Manitoba.

H. H. Davis, for the plaintiff.
J. H. Spence, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff was the wife of the defendant; certain land stood in the plaintiff's name; the defendant claimed it as his own, alleging that the deed was taken in the plaintiff's name by her fraud and contrivance.

The husband and wife having separated, he retained possession of the land; she sued to recover possession; and he counterclaimed to have the deed reformed or for the value of improvements.

The learned Judge said that, in this situation, the onus was on the defendant, and in substance he was plaintiff. If the action was dismissed, the plaintiff might still set down the counterclaim for trial. The defendant must prosecute the counterclaim, for he could not well leave the title in his wife, and it would be idle to have two trials.

Because the onus was on the defendant, and he was in substance plaintiff, the appeal should be allowed and the order for security for costs vacated; costs to the plaintiff in the cause.

MIDDLETON, J. NOVEMBER 11TH, 1918.

REA v. POLAK.

Mortgage—Action by Mortgagee on Covenant for Payment—Motion to Stay Proceedings—Foreclosure—Present Ability to Reconvey Mortgaged Premises—Absence of Prejudice to Mortgagor.

Motion by the defendant for an order directing a stay of proceedings.

The motion was heard in the Weekly Court, Toronto.

P. E. F. Smily, for the defendant.

A. C. Heighington, for the plaintiff.

MIDDLETON, J., in a written judgment, referred to Re Thuresson (1902), 3 O.L.R. 271, as shewing that a mortgagee who has foreclosed, and after foreclosure has so dealt with the property that he cannot restore it unaltered in character and quantity, cannot pursue his remedy on the covenant, but may be permitted to obtain a reconveyance or release so as to enable him to comply with his obligation, and that the fact that during some period of time he was unable to discharge his duty is not enough to work an absolute discharge of the covenant. The mortgagor must shew that he is prejudiced by the conduct of the mortgagee.

The motion should be dismissed with costs fixed at $25.

RIDDELL, J. NOVEMBER 14TH, 1918.

*REX v. DI FRANCESCO.

Criminal Law—Manslaughter—Motion for New Trial Made to Trial Judge after Verdict—Affidavit of Witness Contradicting Testimony Given at Trial—Power of Trial Judge—Leave to Move Court of Appeal for New Trial—Criminal Code, sec. 1021—Weight of Evidence—Refusal of Leave—Reservation of Question of Law for Court of Appeal—Suspension of Sentence—Code, sec. 1023.

The defendant was indicted for murder and tried before RIDDELL, J., and a jury, at a Toronto sittings, on the 4th November, 1918.

At the trial, a young girl, Gertrude Dyson, was called for the Crown; she had seen the beginning of the fracas between the defendant and the deceased. The defence was, that the prisoner acted in self-defence on being threatened by the deceased with a knife. The girl swore that she did not see any knife in the hand of the deceased. No knife was found on the deceased when examined a few hours after his death. The girl had, on a preliminary investigation, sworn that she had seen a knife in the deceased man's hand; but she said at the trial that this was not true.

The jury rendered a verdict of manslaughter, and the prisoner was remanded for sentence.

An application was afterwards made to RIDDELL, J., on behalf of the prisoner, for a new trial or for leave to move the Court of Appeal for a new trial, upon an affidavit in which the girl Dyson swore that she did see a knife in the hand of the deceased, but that she had given the evidence she had at the trial because of threats.

T. C. Robinette, K.C., for the prisoner.

T. J. Agar, for the Crown.

RIDDELL, J., in a written judgment, said that he had no power to grant a new trial nor to grant leave to move for a new trial.

After a brief historical statement of the law and practice as to granting new trials in criminal cases, the learned Judge said that, when the Canadian Criminal Code was enacted in 1892—55 & 56 Vict. ch. 29—power was given on the refusal of the trial Judge to reserve a case for the convict—with the leave of the Attorney-General given in writing—to move the Court of Appeal for such a case: when a stated case should come before the Court of Appeal, that Court might order a new trial or make such order as it should deem proper.

Some changes had been made in the practice. The "Court of Appeal" in Ontario is now the Appellate Division of the Supreme Court; and there is no need for a convicted person to obtain the leave of the Attorney-General.

Nowhere is any power given by statute to the trial Judge to grant a new trial.

As to giving leave to move the Court of Appeal for a new trial, no such practice is known to the Common Law; and the sole statutory authority is to be found in sec. 1021 of the Code, R.S.C. 1906 ch. 146, which permits such leave only on the ground of verdict against the weight of evidence.

In this case, not only was the verdict not against the weight of evidence, but the whole evidence, with the exception of that of the

prisoner (which was not credible and was inconsistent with the results of the post mortem examination) was in favour of a verdict of "guilty."

On an application for a new trial in a civil case, an affidavit from a witness contradicting his evidence at the trial cannot be received: Rushton v. Grand Trunk R.W. Co. (1903), 6 O.L.R. 425, and other cases.

Even if the affidavit were believed, the verdict was not against the weight of evidence. Leave to appeal under sec. 1021 of the Code should be refused.

But, at the request of the prisoner's counsel, there should be reserved for the opinion of the Court of Appeal the question of law whether the trial Judge was bound as a matter of law to give leave to move for a new trial on the ground that the verdict was against the weight of evidence.

The prisoner was sentenced to 15 years' imprisonment; but, under sec. 1023 of the Code, the sentence should be suspended that the opinion of the Court of Appeal may be had—the prisoner to remain in custody.

HARRIS v. GARSON—LENNOX, J., IN CHAMBERS—NOV. 11.

Judgment—Defendant not Appearing at Trial—Judgment for Plaintiff on Proof of Claim—Setting aside—Terms.]—Motion by the defendant to set aside a judgment directed to be entered for the plaintiff at the recent sittings for trials in London, the defendant not appearing and the plaintiff giving evidence in proof of claim. LENNOX, J., in a written judgment, said that, upon the defendant, within one week, giving security for payment of the amount of the judgment and costs, to the satisfaction of the Registrar at London, or, within one week, paying the amount of the judgment and costs into Court to the credit of this action, the judgment should be vacated and a new trial had between the parties, and the costs of this application and of the recent trial should be costs in the cause to the plaintiff in any event. If the defendant failed to comply with any one of the conditions imposed, within the time limited, the motion should stand dismissed with costs. Ford, for the defendant. E. C. Cattanach, for the plaintiff.

DOUGLAS v. SMART—KELLY, J.—NOV. 16.

Receiver—Equitable Execution—Order to Receive Judgment Debtor's Share of Estate of Deceased Person—Defendant Executor and Residuary Legatee under Will—Application for Order for Payment over—Unnecessary Order—Transfer to another Creditor of Benefits under Will.]—The plaintiff, being a judgment creditor of the defendant, an order was made by a Local Judge on the 11th October, 1918, appointing the plaintiff receiver, to the extent of his judgment debt and costs, of all moneys coming to the defendant under the will of Sara Jane Tabb, deceased, the defendant being executor and residuary legatee under the will. The receivership was continued by an order of LATCHFORD, J., of the 19th October, 1918. The testatrix died on the 10th September, 1918. One week later, and before letters probate of the will had been obtained, the defendant, by a written instrument, purported to transfer to a creditor of his the benefits to which he became entitled under the will. The plaintiff now moved for an order requiring the plaintiff to pay to the plaintiff as receiver all moneys coming to the defendant from the estate of the testatrix, to the extent of the plaintiff's judgment and costs. The motion was heard in the Weekly Court, Ottawa. KELLY, J., in a written judgment, said that if, since the making of the receiving order, the defendant had paid out or disposed of, or should hereafter while the order remained in force pay out or dispose of, any moneys or other part of the estate of the testatrix to which he was or should become entitled beneficially, he had done so or would do so at the risk of having disobeyed or of disobeying that order. While the haste with which the alleged transfer was effected might excite some suspicion, it was made, whether valid or not, before the receiving order was obtained. The learned Judge said that he was not called upon to consider whether that disposal was valid, or whether, if valid, it amounted to an undue preference. The order, if granted in the form asked for, would not add to or enlarge the effect of the order of the 19th October. Motion dismissed, but without costs. F. A. Magee, for the plaintiff. H. Fisher, for the defendant.