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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

OCTOBER 23RD, 1916.

*TORONTO ELECTRIC LIGHT CO. v. CITY OF TORONTO.

Contract—Municipal Corporation—Electric Light Company—Overhead System—Erection of Poles in Highways—R.S.O. 1877 ch. 150—45 Vict. ch. 19, sec. 2—"Only upon"—Condition Precedent—Formal Agreement—Acquiescence — Estoppel — Agreement as to Underground System—Construction and Effect—Subsequent Agreements—Abandonment of Right (if any) as to Overhead System.

Appeal by the plaintiffs from the judgment of the First Divisional Court of Ontario, 33 O.L.R. 267, 8 O.W.N. 87, reversing the judgment of MIDDLETON, J., 31 O.L.R. 387, 6 O.W.N. 349, and dismissing the action.

The appeal was heard by VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

Sir John Simon, K.C., I. F. Hellmuth, K.C., and A. W. Anglin, K.C., for the appellants.

Sir Robert Finlay, K.C., and G. R. Geary, K.C., for the defendants, respondents.

The judgment of the Board was delivered by LORD ATKINSON, who, after setting out the facts and referring to the statutes R.S.O. 1877 ch. 150 and 45 Vict. ch. 19, said that, in order to determine the question whether the decision of Middleton, J., or that of the Appellate Division was right, it was necessary to decide what was the true meaning of the words "only upon and

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

subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively," as used in sec. 2 of 45 Vict. ch. 19. It was admitted by the respondents that this agreement need not be under seal. It was not expressly required even to be in writing. But it must be at least a formal agreement, as distinguished from mere silent acquiescence or implied consent; and the one thing apparently certain about it was, that, by the use of the words "only upon," its existence was made a condition precedent which must be fulfilled by the company before it could become entitled to enter upon the streets and public places of the city to construct its works.

His Lordship referred to the agreement of the 13th November, 1889, which was the origin of the appellants' underground system, and said that it was not disputed that an absolute indefeasible right was by this agreement conferred upon the appellants to maintain, use, and enjoy their underground system until the respondents should exercise their right of purchase; but it was contended by the appellants that, owing to the presence in the agreement of the words in brackets, "in addition to their other works," etc., and to the provisions touching the purchase of all the "interest and assets" of the company, comprising plant, buildings, and material, a right equally absolute and indefeasible was conferred upon them to use, maintain, and enjoy their overhead system for the same period. This involved a rather forced construction of the language of the agreement; but, even if this were its true construction, it would be competent for the parties, by a subsequent agreement, to rescind the agreement so far as its provisions related to the overhead system, and to give up the right claimed to be acquired by it in reference to that system.

If such a right was conferred by that agreement, it was, by the later agreement of the 10th December, 1900, absolutely abandoned, and the right of the respondents again asserted to require the overhead system to be removed if they so pleased.

The specification for the agreement of the 29th December, 1905, touching the supply of electricity for street lighting for five years from the 1st January, 1906, similarly required that all the poles used by the contractor should, at the expiration of the contract, be removed, or, at the option of the respondents, purchased.

The absolute right conferred upon the respondents by sec. 2 of 45 Vict. ch. 19 to permit or prohibit the erection or maintenance of an overhead system of wires for electric supply on the streets, squares, and public places of the city, had thus been asserted,

guarded, and preserved; and the provision touching the purchase of overhead plant contained in the agreement of the 13th November, 1889, meant no more than that the respondents should be entitled to purchase, when they purchased the underground system, such poles and plant of the overhead system as might be then found lawfully erected on the streets and public places.

No estoppel arose, as there was no evidence whatever that both the contracting parties were not fully aware of their respective legal rights.

Appeal dismissed with costs.

OCTOBER 23RD, 1916.

*TORONTO AND YORK RADIAL R.W. CO. v. CITY OF TORONTO.

Street Railway—Agreement with Municipal Corporations—Construction—Ontario Railway Act, R.S.O. 1914 ch. 185, secs. 105 (8), 250—Order of Ontario Railway and Municipal Board—Approval of Plans for Construction of Turn-outs and Switches to Cross Sidewalk of Highway—Franchise — Location and Construction—Operation—Necessity for Consent of City Corporation—Engineering Grounds.

Appeal by the Toronto and York Radial Railway Company from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, Re Toronto and York Radial R.W. Co. and City of Toronto (1915), 35 O.L.R. 57, 9 O.W.N. 254, allowing the appeal of the Corporation of the City of Toronto from an order of the Ontario Railway and Municipal Board.

The appeal was heard by a Board composed of VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

Sir Robert Finlay, K.C., and I. F. Hellmuth, K.C., for the appellants.

A. C. Clauson, K.C., and G. R. Geary, K.C., for the Corporation of the City of Toronto, respondents.

The judgment of the Board was delivered by LORD PARMOOR, who, after referring to the facts and to the provisions of secs. 105 (8) and 250 of the Ontario Railway Act, R.S.O. 1914 ch.

185, said that the respondents' appeal to the Appellate Division from the order of the Ontario Railway and Municipal Board, approving plans to provide the necessary switches and turn-outs to the appellants' property in crossing a portion of the sidewalk on the west side of Yonge street, for the purpose of terminal accommodation on a site purchased by them, was on two grounds: (1) that the appellants had no operating franchise in respect of the street and adjoining land proposed to be used; and (2) that in any event the consent of the municipal council was necessary. The question of the jurisdiction of the Corporation of the County of York to revive the agreement of 1894, as affecting the franchise of the appellants, was not properly before the Appellate Division; it was not raised before the Railway and Municipal Board; if it had been raised, it would have been open to the appellants to have called evidence in answer to the case made against them; and the respondents should not be allowed now to rely upon the alleged absence of jurisdiction.

On the first ground of appeal, that the appellants had no operating franchise in respect of the street and adjoining land proposed to be used, the majority of the Court of Appeal did not pronounce a final opinion. The clause of the agreement of 1894 which determined the extent and nature of the appellants' franchise for the purpose of operating their railway—as distinct from its location and construction—was clause 7, and sub-clause 3 thereof conferred a wide authority. The works approved by the Board were within the terms of the franchise vested in the appellants under the statutory agreement, if they were acquired for the purpose of operating the railway of the appellants—and of that there could be no doubt; the finding of the Board would be conclusive on a question of fact. Clause 11 of the agreement also gave a considerable power of constructing turn-outs.

The decision of the Judicial Committee in Toronto and York Radial R.W. Co. v. City of Toronto (1913), 25 O.W.R. 315, is not inconsistent with the construction now adopted of the franchise conferred by clause 7(3) of the agreement of 1894.

The finding of their Lordships therefore was, that, for the purpose of operating the railway, the appellants had the franchise which they claimed in respect of the streets and adjoining lands proposed to be used, and they determined in the appellants' favour the question on which the majority of the Court below preferred not to give a final opinion.

Upon the second question, their Lordships referred to clauses 2, 3, 4, 5, 8, 9, 10, 17, 27, and 28 of the agreement of 1894; and said that the Board, before approving the plans of the appellants,

took care to ascertain whether they were satisfactory on engineering grounds to the city corporation. In effect, there was no difference on engineering grounds between the city corporation and the appellants when the Board finally approved the plans for carrying a spur-line on the level across the sidewalk on the west side of Yonge street; and, in these circumstances, no further consent was required. In the event of any difference arising between the parties as to anything to be done under the terms of the agreement, the agreement contains an ample arbitration clause.

The appeal should be allowed with costs here and in the Court below.

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 20TH, 1916.

BALDRY YERBURGH & HUTCHINSON LIMITED v. WILLIAMS.

Contract—Indemnity and Guaranty—Action to Enforce—Defence—Fraud and Misrepresentation—Failure to Prove—Finding of Trial Judge—Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., 10 O.W.N. 309.

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

C. V. Langs, for the appellants.

W. N. Tilley, K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

MIDDLETON, J. NOVEMBER 20TH, 1916.

ANDERSON v. ANCIENT ORDER OF UNITED WORKMEN.

Insurance—Life Insurance—Friendly Socirty — Ontario Statute 6 Geo. V. ch. 106, secs. 5, 6, 9—Interpretation—Reduction of Amounts Insured—Option of Continuance upon Payment of Increased Premiums—Election — Tender — Death of Member before Ascertainment of Amount Payable.

Special case, heard in the Weekly Court at Toronto.
G. F. Henderson, K.C., for the plaintiff.
A. G. F. Lawrence, for the defendants.

MIDDLETON, J., in a written judgment, said that the case turned upon the construction of the Ontario statute 6 Geo. V. ch. 106—an Act respecting the Ancient Order of United Workmen of the Province of Ontario.

This society had conducted insurance upon too low a schedule of premiums, the result being that, unless some drastic remedy could be found, insolvency would inevitably result. To remedy this situation the Act provided that from and after the 1st July, 1916, the amount of the then outstanding certificates should be reduced to the amount justified by the assets of the association, each certificate being proportionately cut down, but (by sec. 5) the right is given to any member to maintain his insurance at the original amount, paying the additional premium proper upon his attained age upon the difference between the new and the original amount of his insurance.

The amount of the reduction in the insurance represented by the certificates, and consequently the amount of the premiums to be paid, could be ascertained only by actuarial calculation, and a statement is required to be prepared and filed on or before the 1st October, 1916.

Anderson died on the 17th July, before this statement was prepared, but after the 1st July he stated to the society his intention to continue his policy at the larger amount and his readiness to pay the increased premium—and this case was argued upon the footing that there was a tender of any sum which could be demanded by way of increased premium.

The statute provides (sec. 9) that, when death takes place

between the 1st July and the filing of the statement, the amount to be paid shall be the reduced amount.

This is in conflict with the absolute right which the member has, under sec. 6, to maintain his certificate at the original amount, paying the increased premium. The sections can best be reconciled by holding that sec. 9 does not apply where the assured has exercised the right given him by sec. 6.

The election to maintain the policy at the increased amount, coupled with the readiness to pay as soon as the increased amount could be ascertained, and the tender of any increased sum, is enough to bring the assured within the proviso of sec. 6.

The Legislature could not have intended that there should be a period between the 1st July and the filing of the list during which the members, notwithstanding readiness to pay the increased premium, should be compelled to carry decreased insurance.

The question submitted should be answered in favour of the plaintiff.

MULOCK, C.J.Ex., IN CHAMBERS. NOVEMBER 21ST, 1916.

GOODMAN v. BRULL.

Practice—Service of Writ of Summons—Defendant out of the Jurisdiction—Order for Substituted Service on Person in Jurisdiction—Form of Writ.

An appeal by the plaintiff from an order of the Master in Chambers setting aside the service and an order authorising substituted service of the writ of summons upon the defendant Albert B. Brull.

The action was begun by writ of summons in the form applicable to the case of a defendant within the jurisdiction, although at the time of the issue of the writ the defendant Albert B. Brull was out of the jurisdiction, and a writ for service upon him without the jurisdiction could not have issued except on an order of the Court.

The plaintiff, being unable to serve the defendant personally, applied for and obtained an order for substituted service of the writ, and served it upon the person named in the order. Upon the application of the defendant Albert B. Brull, the order and service were set aside by the Master; and the plaintiff appealed.

C. M. Herzlich, for the plaintiff.

M. L. Gordon, for the defendant Albert B. Brull.

MULOCK, C.J.Ex., in a written judgment, said that it was not competent for the plaintiff to serve the defendant out of the jurisdiction with a writ issued for service within the jurisdiction; but the plaintiff's contention in effect was, that what he might not do directly, he might do indirectly. That view could not be assented to. Where a defendant is out of the jurisdiction, you cannot effect substituted service upon him of a writ which the plaintiff is not entitled to serve personally: Field v. Bennett (1886), 56 L.J.Q.B. 89; Fry v. Moore (1889), 23 Q.B.D. 395.

The Master's order was right, and this appeal should be dismissed with costs.

MASTEN, J., IN CHAMBERS. NOVEMBER 22ND, 1916.

CANADIAN HEATING AND VENTILATING CO. LIMITED v. T. EATON CO. LIMITED AND GUELPH STOVE CO. LIMITED.

Appeal—Extension of Time for Appealing from Judgment of Trial Judge to Appellate Division—Special Circumstances—Rule 176—Intention of Officer of Appellant Company to Bring Question of Appealing before Directors—Delay—Excuse for —Leave to Appeal—Terms.

Motion by the plaintiff company for leave to appeal and to extend the time for appealing to the Appellate Division of the Supreme Court of Ontario from the judgment of SUTHERLAND, J., of the 14th July, 1916, dismissing the action: 10 O.W.N. 439.

The application was made under Rule 176.

H. W. Mickle, for the plaintiff company.

H. S. White, for the defendant the Guelph Stove Company Limited.

The plaintiff did not desire to appeal as against the other defendant.

MASTEN, J., in a written judgment, said that the appeal should have been brought not later than the 15th September. The excuse was that the chief officer of the plaintiff company was

not notified of the judgment—which was given some time after the trial—until the 20th July, and that within a day or two thereafter he was obliged to depart to the Pacific coast; that he expected to be back by the 1st September, but his return was delayed until the 15th September, and thereafter he was ill for two weeks; that he had no authority to appeal without the sanction of the directors; and that no conclusion was reached as to appealing until the 25th October, though there was always the intention to consider the question of an appeal.

In such a case as the present, the learned Judge said, it is sufficient if the officer of the incorporated company whose duty it is to deal with the matter has entertained, within the time allowed for appeal, the bona fide intention of submitting the question of appealing to the directors, and is prevented by special circumstances from so doing.

In the circumstances of the case, the learned Judge did not feel bound by the rule laid down in Smith v. Hunt (1902), 5 O.L.R. 97; he considered that the broader rule, that to do justice in the particular case is above all other considerations, ought rather to be applied.

Difficult questions of law, questions of very considerable general importance, would arise upon the appeal; there need be no delay in bringing on the appeal; and, while the inconvenience and loss to the respondent company might be great, full indemnity could be provided.

Leave to appeal should be granted and the time extended, upon terms (set out in the judgment) as to payment of costs, indemnity, etc.

SUTHERLAND, J. NOVEMBER 22ND, 1916.

BOON v. FAIR.

Deed—Conveyance of Land—Illegal Consideration—Stifling Prosecution—Threats—Duress—Agreement to Hold Deed as Security.

Action by two elderly spinsters, the sisters of Thomas J. Boon, to set aside a conveyance of land made by them to the defendant, upon what was alleged to be an illegal consideration, viz., an agreement on the part of the defendant to abstain from prosecuting Thomas J. Boon for criminal offences, and upon the ground that the deed was obtained by fraud and duress, and upon other grounds.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiffs.

T. J. Rigney, for the defendant.

SUTHERLAND, J., stated the facts in a written judgment, and found that the defendant promised and agreed that the deed from the plaintiffs should be subject to a term that he would not dispose of the lands thereby conveyed to him, but hold them as security for the payment to him by Thomas J. Boon of his indebtedness to the defendant.

The learned Judge said also that the plaintiffs were cognizant of the criminal offences of their brother, had heard of the threats of the defendant to prosecute, and were actuated by a desire to prevent his doing this. On the very day that the deed was executed, he repeated the threats to prosecute, and this became known to the plaintiffs. Having learned on that day that the concern of the plaintiffs was such as to lead them to offer their property to be used for the purpose of raising the money, the defendant asked for a deed. He must have known that the deed he thus obtained was made in view of his threats to prosecute, and that there was an implied term of the agreement under which it was given that there should be no prosecution.

Reference to Jones v. Merionethshire Permanent Benefit Building Society, [1891] 2 Ch. 587, [1892] 1 Ch. 173; Flower v. Sadler (1882), 10 Q.B.D. 572, 576; Lound v. Grimwade (1888), 39 Ch.D. 605; Leggatt v. Brown (1898-9), 29 O.R. 530, 30 O.R. 225; Leake on Contracts, 5th ed. (1906), p. 510; Halsbury's Laws of England, vol. 7, p. 398.

Judgment for the plaintiffs as prayed with costs.

SUTHERLAND, J. NOVEMBER 22ND, 1916.

NORTH-WESTERN NATIONAL BANK OF PORTLAND v. FERGUSON.

Promissory Note—Action against Maker—Defence—Fraud and Collusion—Failure to Prove—Guaranty—Time Extended for Definite Period by Arrangement with Principal Debtor—Release of Guarantor.

Action against two defendants, father and son, upon a promissory note for $3,000 made by the son in favour of the plaintiffs,

and upon a written guaranty given by the father to the plaintiffs, who claimed $3,001.98 with interest as against both defendants.

The action was tried without a jury at North Bay.

M. G. V. Gould, for the plaintiffs.

R. McKay, K.C., for the defendants.

SUTHERLAND, J., said, in a written judgment, that the defendant W. W. Ferguson, the son, charged the plaintiffs with fraud and collusion with one Smith whereby the said defendant was induced to enter into certain transactions for the carrying on of which the money represented by the note sued on was obtained from the plaintiffs. As to this the learned Judge said that, while the evidence suggested that the plaintiffs should have been more candid than they were about Smith's financial condition, he was unable to come to the conclusion that the defendants had made out any case of misrepresentation or concealment which would constitute a defence to the note. Reference to Pollock on Contracts, 8th ed. (1911), p. 567.

As to the defendant John Ferguson, the father, he knew that his son was going into the transactions with Smith, and that he was undertaking to make himself liable to the plaintiffs for the advances which they would make in connection therewith. While the guaranty was in respect of advances to the son, the father knew that the son was associated with Smith in the transactions, and must also be taken to have known that Smith was joining in the note taken by the bank to evidence the advances.

The defence of the father, that the plaintiffs, by entering into an arrangement with the principal debtor under which they accepted from him and Smith a note in renewal of and substitution for the original note, and by extending the time for payment for a definite period of 30 days, raised a difficult question. It was argued that from the use in the guaranty of the words "advances up to the sum of $10,000" it might reasonably be considered in the contemplation of the parties that, as loans were from time to time made to the son, notes would be given in the ordinary course of banking business, and that these would be renewed from time to time. Calder & Co. v. Cruickshank and Rattray (1889), 27 Scots L.R. 65, 68, 69, referred to.

While a mere delay does not discharge a surety, a binding agreement to give time does. The plaintiffs, in extending in favour of the principal debtor the time for payment of the note given for the advances, without the consent of the guarantor, made a binding agreement to give time, which in law released the latter.

Reference to Thompson v. McDonald (1859), 17 U.C.R. 304; Wilson v. Brown (1881), 6 A.R. 87; Devanney v. Brownlee (1883), 8 A.R. 355; and other cases; also to De Colyar on Guaranties, 3rd ed. (1897), p. 422; Chalmers on Bills of Exchange, 7th ed. (1909), p. 244; Halsbury's Laws of England, vol. 2, p. 557; Maclaren on Bills Notes and Cheques, 5th ed. (1916), pp. 381, 382.

Judgment for the plaintiffs against the defendant W. W. Ferguson with costs.

Action dismissed as against the defendant John Ferguson without costs.

BANK OF OTTAWA v. DICK AND WALKER—KELLY, J.—NOV. 20.

Banks and Banking—Money Applied by Bank for Purposes of a Business — Ownership of Business — Liability for Money — Evidence — Finding of Fact of Trial Judge.]—Action to recover moneys alleged to have been lent by the plaintiffs to the defendants. The action was tried without a jury at Ottawa. KELLY, J., in a written judgment, said that the question of the defendants' liability depended on whether the business carried on in the name of "The Dick & Walker Company" belonged to the defendants, or whether it was the business of the plaintiffs, the defendants being merely the plaintiffs' employees. The plaintiffs asserted that there was a sale of the business to the defendants; that the defendants carried on the business and borrowed for the purposes of the business from the plaintiffs, and so incurred the indebtedness now sued for. Upon the evidence, the learned Judge found that a sale of the business to the defendants by the plaintiffs' nominee was contemplated, but was never carried through. The plaintiffs had failed to establish their claim, and the action must be dismissed with costs. Wentworth Greene, for the plaintiffs. N. G. Larmonth, for the defendant Dick. The defendant Walker was not represented.

BULMER v. BULMER—MASTEN, J., IN CHAMBERS—NOV. 21.

Husband and Wife—Alimony — Pleading — Statement of Claim—Amendment.]—Appeal by the plaintiff from an order of the Master in Chambers striking out portions of the statement of claim in an action for alimony. MASTEN, J., in a written judg-

ment, said that, the plaintiff asking leave to amend para. 15 of the statement of claim by alleging that she returned to her husband's house and now lives there under an agreement that such action shall not prejudice her claim to alimony, and undertaking forthwith to amend her pleading accordingly, paras. 14, 15, and 16 should be restored, and the appeal allowed to that extent; paras. 5 to 13 inclusive to remain deleted. Costs to the defendant. T. N. Phelan, for the plaintiff. T. R. Ferguson, for the defendant.