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HIGH COURT OF JUSTICE.

BRITTON, J., IN CHAMBERS. FEBRUARY 6TH, 1912.

STAVERT v. CAMPBELL.

Appeal to Divisional Court—Leave to Appeal from Order of Judge in Chambers—Stay of Execution upon Appeal to Privy Council—Construction of 10 *Edw. VII. ch.* 24, *secs.* 3, 4, 5.

An application by the defendant for leave to appeal from the order of CLUTE, J., ante 591, dismissing an application by the defendant to set aside a writ of fieri facias issued against the goods and chattels of the defendant, after the defendant had given security and perfected the same pursuant to 10 Edw. VII. ch. 24, secs. 3 and 4.

F. Arnoldi, K.C., and F. McCarthy, for the defendant.
F. R. MacKelcan, for the plaintiff.

BRITTON, J.:—The order allowing the sum of $2,000 paid into Court as sufficient security on the appeal herein to His Majesty in His Privy Council was made in the Court of Appeal on the 15th November, 1911.

The defendant contended that the security given so operated, under the Act cited, as a stay of proceedings. The plaintiff contended otherwise.

On the 19th December, 1911, the plaintiff's solicitors, having issued a writ of fieri facias against the defendant, notified the defendant's solicitors of the same, and stated that they were holding the writ in order that the defendant's solicitors might move to set it aside. The defendant's solicitors moved accordingly, and Mr. Justice Clute, who heard the defendant's motion, dismissed it.

I am asked to grant leave to appeal from that decision and order.

The case involves a large amount of money, and is otherwise important because of the question of law raised. The construction of secs. 3 and 4 of the Act cited is asked. Section 4, if it stood alone, is perfectly plain and unambiguous. The words are, "Upon the perfecting of such security" (that is, the security required by sec. 3, which in this case has been given), "unless otherwise ordered, execution shall be stayed in the original cause."

Section 5 creates the difficulty, if difficulty there be: "Subject to rules to be made by the Judges of the Supreme Court, the practice applicable to staying execution upon appeals to the Court of Appeal shall apply in an appeal to His Majesty in His Privy Council."

"The practice applicable" is subject to rules. What rules? The rules are not, in express terms, referred to, so that they can override or be of equal force with the statute. The rules, however, may be applicable, because the practice "shall apply," and the practice apparently is under Con. Rule 832. "Unless otherwise ordered," as found in sec. 4, can hardly apply to what is ordered by a rule, but may apply to some order made in the cause in Court or by a Judge. It may be argued that mere "practice" in obtaining an order authorised by a rule cannot control the express terms of a statute.

In this case, sec. 4 is not interfered with by anything "otherwise ordered," unless these words mean that rules are to govern where rules have been made. I am not attempting to give a considered opinion upon the construction of this statute, as would be necessary were the case before me as or in an appellate Court. I have a doubt, and so can not satisfy myself in withholding the leave asked.

Leave to appeal granted. Costs in the cause.

DIVISIONAL COURT. FEBRUARY 6TH, 1912.

*HELLER v. GRAND TRUNK R.W. CO.

Railway—Injury to Passenger—Exemption of Company from Liability as to Passenger—"Traffic"—Special Contract—Approval by Board of Railway Commissioners—Shipper of Animal—Privilege of Travelling at Reduced Rate—Railway Act, secs. 2(31), 284, 340—"Impairing."

Appeal by the plaintiff from the judgment of MULOCK, C.J. Ex.D., ante 275, 25 O.L.R. 117.

*To be reported in the Ontario Law Reports.

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

W. S. Brewster, K.C., for the plaintiff.

I. F. Hellmuth, K.C., for the defendants.

RIDDELL, J.:— . . . I am wholly in accord with the judgment, and think it cannot be set aside. Even were the conclusions of the learned trial Judge erroneous in respect of the meaning of the word "impairing" in the statute—and I am of opinion that they are not—the clause in the contract is not, in my view, such as that it destroys the "liability in respect of the carriage of any traffic." "Traffic" means the traffic of passengers, goods, and rolling stock without discrimination: Railway Act, sec. 2(31). Both the plaintiff and his horse were "traffic," and carried under the one contract. The provision that the company should not be liable for injury to him is not a destruction of all liability under the contract of carriage, but a limitation to the goods carried. This, I think, comes within sec. 340(2) of the Act. . . .

The word "impairing" is a generic term, including "destruction," and there is nothing which indicates that "impairing" is used in a less narrow sense.

I agree also in the reasoning of the learned trial Judge.

FALCONBRIDGE, C.J., for reasons stated in writing, agreed that "there is some liability left under the original contract, and it is destroyed only as to the carriage of the passenger." He did not wish to be understood as in other respects not agreeing with the reasoning of the trial Judge. As to the meaning of the word "impair," he referred to Blair v. Williams, 4 Littell (Ky.) at p. 69.

BRITTON, J., agreed in the result.

Appeal dismissed with costs.

DIVISIONAL COURT. FEBRUARY 6TH, 1912.

STERLING BANK OF CANADA v. LAUGHLIN.

Banks and Banking—Bill of Exchange—Indorsement by Payee to Bank—Presentment for Payment through Clearing-house—Delay—Failure of Drawee Bank—Acceptance of, as Debtor—Rights against Indorser—Absence of Evidence to Render Indorser Subject to Usages of Clearing-house.

An appeal by the plaintiffs from the judgment of the Third Division Court in the County of Peel dismissing an action to

recover the amount of a draft for $115.50 upon the Farmers Bank of Canada, in favour of the defendant, and indorsed by her to the plaintiffs. The plaintiffs paid the amount to the defendant; but, owing to the Farmers Bank of Canada stopping payment, the draft was not honoured when presented for payment through the Toronto clearing-house.

The appeal was heard by Boyd, C., LATCHFORD and MIDDLETON, JJ.

Casey Wood, for the plaintiffs.

B. F. Justin, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—

I think the judgment should not be disturbed. Treating this as an isolated transaction, the defendant is not in any way to blame. She sells the draft from the Farmers Bank and indorses it to the plaintiffs at Alton in order to receive its value. She knows nothing more of the transaction, and funds were then in the Farmers Bank available for its payment: but the plaintiffs failed to collect the amount from the Farmers Bank because of their failure to pay on the 19th December. She received the money on the 16th December, and the draft was forwarded to the Toronto office of the Sterling Bank on the same day, and was received at 8.30 a.m. on the morning of the 17th, too late to be sent to the clearing-house that day, which was Saturday. It went through the clearing-house at 10 a.m. on Monday, and was received by the Farmers Bank and stamped as their property on the 19th. This indicated a change in the relations of the two banks, which, I think, may be properly considered as exonerating the defendant from any liability to refund the money to the Sterling Bank. There is no evidence given that she is or was aware of or is to be bound by the dealings sanctioned as between the banks by their voluntary association in the clearing-house system. That is a matter not binding per se on the public unless it can be assumed or proved that the party sought to be charged has been dealing with the bank subject to the usages of the clearing-house. No such evidence was given in this case, and the inference to be drawn from what was in evidence was, that the Farmers Bank had become debtor to the plaintiffs for this instrument.

Appeal dismissed with costs.

DIVISIONAL COURT. FEBRUARY 7TH, 1912.

McKINLEY v. GRAHAM.

Limitation of Actions—Action to Enforce Charge on Land—Will—Legacy—Executors—Devisee—Trust—Devolution of Estates Act—Limitations Act.

Appeal by the plaintiff from the judgment of BRITTON, J., ante 256.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

J. Shilton, for the plaintiff.

H. L. Ebbels, for the defendants the executors.

H. C. Macdonald, for the defendant Charles Harper junior.

The judgment of the Court was delivered by BOYD, C.:—The provisions of this will were considered in April, 1890 (see Harper v. Graham, in my book of that date), in an action wherein the plaintiff was a party and the other beneficiaries and the executors. It was then held that the land devised to the son William was charged with the payment of $200 per year for five years after the death of the testator towards satisfaction of the legacies—including that of the plaintiff. These payments for the five years have been made, and the executors have administered the personalty, and turned over the other land devised to Charles to him in 1891, which was charged with an annuity for the life of the widow as a first charge and as a second charge any unpaid balance remaining due on the legacies. That act of transfer concluded the duties of the executors, and thenceforth the devisee Charles took the land subject to the lien for legacies. This lien was, by the terms of the will, exigible at the end of the five years from the testator's death, so far as the balance then unpaid was concerned. The land might have been resorted to subject to the lien of the widow, and sold, but this course was not taken—it may be because it was considered that the land would not realise sufficient to pay anything on the legacies, if sold subject to the widow's annuity. But of this there is no explanation in the evidence, and all that appears is, that from 1894, when the five years expired, until the issue of the writ in October, 1907, nothing has been done to relieve the plaintiff from the bar imposed on this action to recover the

legacy charged on the land, which arose at the end of ten years from 1894.

I see no other way in which the legal effect of the whole transaction can be viewed, and I see no way in which any case of express trust can be raised as against the executors or the other defendant.

Costs were given below. I would not think it a case for costs of this appeal as against Charles, who holds his land exempt from the payment of $600, which the testator intended should be made. The executors should get costs of appeal.

DIVISIONAL COURT. FEBRUARY 8TH, 1912.

CANADIAN BANK OF COMMERCE v. GILLIS.

Promissory Note—Absence of Consideration—Sale of Worthless Shares—Misrepresentations—Defence to Action on Note by Indorsees for Value—Indorsement on Note Restricting Negotiability—Notice to Transferees—Transferees Taking Subject to Equities—Foreign Company—License to Do Business in Ontario.

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 359.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

Glyn Osler, for the plaintiffs.

J. C. Makins, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The note sued on was taken by the International Snow Plough Manufacturing Company upon the condition, written upon the back of the note, that it was to be held by Lett, the secretary of the company, till it was due. In breach of this, it was hypothecated to the plaintiffs' bank, who must be affected with notice of the condition written upon the note; so that the position of the bank is that of holding the note subject to all the equities that might attach to it if taken when it was overdue. The position of the plaintiffs is, therefore, not superior to that of the payee; and, upon the evidence, it is clear that the note was obtained from the maker by means of a series of fraudulent

misrepresentations of material matters which effectually vitiated the transaction as between the original parties to the note. It would be a futile attempt for the Snow Plough Company to seek the intervention of a Court to enforce payment from the deceived person, and the bank occupies, in the circumstances, no superior position; so that I would entirely agree in the judgment in appeal. It should be affirmed with costs.

The foreign company licensed to do business in Ontario has not the same name as the company to whom this note was given, but it is not necessary to deal with the possible effect of that upon this transaction, taking the view we do of this appeal.

RE SOLICITOR—MASTER IN CHAMBERS—FEB. 5.

Solicitor—Change—Right of Majority of Administrators to Choose Solicitor for Estate—Solicitor's Charges.]—Motion by two administrators for delivery of papers by a solicitor. The solicitor was originally retained by three administrators. Two of them afterwards employed another solicitor, but the remaining administrator still adhered to the first choice, and forbade the delivery of the papers and documents of the deceased to the new solicitor. The original solicitor's costs had been paid, as he admitted, except the charge for publication of an advertisement for creditors. This, the Master thought, should be paid, as it was a proper step and necessary for the protection of the sureties. The Master said that he had not found any authority on the question, and none was cited. But it would seem on principle that the will of the majority must prevail. The solicitor would probably act on this without the formality of an order. In that case, there would be no costs of this motion, leaving the matter to be dealt with when the estate should be wound up and the compensation of the administrators settled. H. T. Beck, for the applicants. H. J. Martin, for the solicitor.

SKILL v. LOUGHEED—MASTER IN CHAMBERS—FEB. 5.

Security for Costs—Action Brought by Creditor in Name of Assignee for Creditors—Creditor out of the Jurisdiction—Affidavit of Assignee—Dispute as to Place of Residence.]—Motion by the defendant Frances M. Lougheed for an order for secur-

ity for costs. By an order made by a County Court Judge on the 6th December, 1911, a creditor of the defendant J. Lougheed was authorised (at his, the creditor's, own risk and expense) to bring this action, in the name of the assignee, to set aside a conveyance of land made by the defendant J. Lougheed to his wife, the defendant Frances M. Lougheed. The order provided that the assignee should be indemnified by the creditor; and this had been done. The main support of the motion was an affidavit from the assignee and nominal plaintiff. He had already refused to bring this action, and was supported in that view by the three inspectors of the estate. In his affidavit, he said that the assignment from Lougheed was made on the 17th June, 1908, five months after the conveyance attacked in the present action. He gave no information as to what dividend was paid, or if the estate had been wound up. He said that for some time past he had been employed as a traveller in Western Canada, and that his "permanent place of residence is at Winnipeg, so far as a traveller can have a permanent place of residence." This affidavit was made in Toronto, to which, he said, he returned occasionally, but at rare intervals, and he was not transacting any business in Ontario. He also said that he had no property in Ontario, and had no interest in the litigation, and was not in a position to pay and did not intend to pay any costs of the same. The affidavit in answer of the plaintiff's solicitor stated that the moving creditor had indemnified the plaintiff, and also said that Mr. Skill was and for a long time had been a resident of Toronto. The Master said that the matter came up in rather an unsatisfactory way, and one which raised an uncomfortable suspicion that Skill was not unwilling to hamper the creditor. Upon the special facts, the best disposition of the motion would seem to be to direct the plaintiff to assign to the defendant Frances M. Lougheed the indemnity which the plaintiff had from the creditor, assuming that it would give her as much protection as security according to the usual practice of the Court. Failing this, it would seem right to require security to be given in the usual way, as the creditor resided at Montreal. Costs in the cause. J. W. Mitchell, for the applicant. George Kerr, for the plaintiff.

COYNE v. METROPOLITAN LIFE INSURANCE CO.—MASTER IN CHAMBERS—FEB. 6.

Security for Costs—Plaintiff out of the Jurisdiction—Con. Rule 1198(*a*)*—Moneys in Hands of Defendants—Reduction of*

Amount of Security.]—Motion by the defendants, under Con. Rule 1198(*a*), for an order requiring the plaintiff to give security for the costs of the action, which was brought to recover the amount of a policy on the life of the plaintiff's husband. The Master said that the plaintiff, after her husband's death, left Ontario and went to British Columbia. She made her affidavit of documents at Vancouver on the 17th October. So far as appeared, she had never returned to Ontario; and the affidavits filed in support of the motion made it reasonably certain that she did not intend to do so. The policy was for $1,000, and the plaintiff's husband died 13 months after it was issued. Only $43.65 was paid in premiums during the husband's life. The Master said, with regard to the amount of security, that it might be a question whether the defendants, if successful, would be bound to return the premiums. That could not be decided now; but the plaintiff would be entitled to the benefit of the sum of $43.65; and should be allowed to proceed with the action on paying into Court $150 or giving a bond for $300, in the usual time. Michaelsen v. Miller, 13 O.W.R. 422, referred to. F. S. Mearns, for the defendants. H. H. Davis, for the plaintiff.