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HIGH COURT DIVISION.

MEREDITH, C.J.C.P. JUNE 1ST, 1918.

*RE KENDREW.

Will—Construction—Real and Personal Property Devised and Bequeathed to Granddaughter "to be Held by her during her Life and at her Death to her Heirs and Assigns forever"—Absolute Estate in Fee Simple in Real Property—Same Result in Regard to Chattel Property—Application by Trustee for Order Declaring Construction of Will—Personal Interest of Trustee—Costs.

Motion by Arthur Tipling, who had been appointed, by an order of the Court, trustee to complete the execution of the trusts of the will of William Kendrew, deceased, upon the death of the remaining executor, for an order determining a question arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.
T. R. Ferguson, for the applicant.
A. R. Clute, for Louisa Tipling.
T. N. Phelan, for Mark Tipling.

MEREDITH, C.J.C.P., in a written judgment, said that the applicant had made an attack upon the claims of his sister, Louisa Tipling, under the will of William Kendrew, who was their grandfather.

Under one clause of the will, two houses and half of the residue of the estate were to go to the applicant, the grandson, "and his heirs." And, under the next following clause, two stores and the

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

other half of the "property" were devised and bequeathed to the granddaughter, Louisa, "to be held by her during her life and at her death to her heirs and assigns forever."

The sister contended that she took the property absolutely—the brother, that she took a life-estate only.

The testator may have meant to give Louisa a life-estate only; but, in so far as lands are affected, the question is not, what did the testator mean? but, what meaning does the law attach to the technical words which he used?

It was clear that the testator had used words which carried the fee simple: Van Grutten v. Foxwell, [1897] A.C. 658.

But a considerable part of the property was not land. What rule was to be applied to the chattel property?

Smith v. Butcher (1878), 10 Ch. D. 113, and Comfort v. Brown (1878), ib. 146, referred to.

Realty and personalty were comprised in the one gift. The ruling being that the testator gave the land to the granddaughter absolutely, it must be held that the chattels went in the same manner: see De Beauvoir v. De Beauvoir (1852), 3 H.L.C. 524.

Therefore, Louisa Tipling took absolutely the property devised and bequeathed to her.

There should be no order as to costs.

After 10 days, if there should be no appeal, an order for payment out of the moneys in Court to the credit of the estate, in accordance with the above rulings, may be taken out.

ROSE, J., IN CHAMBERS. JUNE 1ST, 1918.

RE CRUSO v. BROWN AND DOLGOFF.

Mortgage—Motion for Leave to Bring Action for Foreclosure where Principal only in Arrear—Mortgage Made before August, 1914—Mortgagors and Purchasers Relief Act—Leave Granted unless Principal Reduced and Rate of Interest Increased.

In the matter of a proposed action by Catherine Margaret Cruso against Oscar J. Brown and Jacob Dolgoff, and in the matter of the Mortgagors and Purchasers Relief Act, 1915, a motion was made on behalf of Catherine Margaret Cruso for an order, under the said Act, giving her leave to institute and prosecute an action for foreclosure in respect of a mortgage made by Jacob Dolgoff to her, dated the 15th November, 1912, to secure $2,300; Oscar

J. Brown being now the owner of the mortgaged lands subject to the mortgage. In support of the motion, an affidavit of the applicant's agent was filed, from which it appeared that no principal had been paid on account of the mortgage since November, 1913, and that there was now due for principal $2,150, the whole of which became payable on the 15th November, 1917; that the property was deteriorating in value; and was not worth more than $3,100.

J. F. Edgar, for the plaintiff.
L. C. Smith, for the defendant.

ROSE, J., in a written memorandum, said that the applicant should have leave to proceed with an action for foreclosure, unless within one month Brown should pay $250 on account of principal, together with the costs of the motion, fixed at $20, and agree that interest hereafter should be at the rate of 7 per cent. per annum.

If the above-mentioned sums should be paid, the mortgagee might renew this motion at any time after the 15th November, 1918.

SUTHERLAND, J. JUNE 4TH, 1918.

*FERGUSON v. EYER.

Sale of Goods—Contract—Lumber in Yard of Vendor—Property Passing to Purchaser—Destruction of Goods by Fire—Risk of Purchaser—Insurance Moneys Paid to Vendor—Cheque Given for Price of Lumber—Payment Stopped—Action on Cheque—Defences—Counterclaim—Negligence in Causing Fire—Warehouse Receipt—Bailment—Degree of Care Required from Bailee—Evidence—Cause of Fire—Accounting for Insurance Moneys—Undertaking of Vendor.

Action to recover the amount of a cheque drawn by the defendant upon a bank, in favour of the plaintiffs, for $61,998.97.

The cheque was dated the 27th June, 1910, and was given in payment for the plaintiffs' "cut of white pine lumber," sold by the plaintiffs to the defendant upon the terms contained in a written agreement of the 14th June, 1910.

The action was commenced in November, 1910; the trial was delayed for unavoidable reasons.

The lumber was sold as in the yards of the Tomiko Mills Limited, in the district of Nipissing, and was there on the 30th June, 1910, when a fire occurred in the mills and yards, which destroyed the whole of the lumber. The cheque had not then been presented, and the defendant stopped payment of it.

The defendant counterclaimed against the plaintiffs and the Tomiko Mills Limited for damages for negligence in causing the fire, and, in the alternative, for an account of the insurance moneys which they had collected or should have collected in respect of the lumber destroyed.

The action and counterclaim were tried without a jury at Toronto.

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

W. N. Tilley, K.C., for the defendant.

SUTHERLAND, J., in a written judgment, after setting out the facts, and referring to the grounds of defence, said that he was of opinion that the property in the lumber had, at the time of the fire, passed to the defendant, and thereafter was at his risk as to loss by fire.

At the time of the fire, the plaintiffs had existing insurance upon the lumber in the yards, including that sold to the defendant, to the extent of $50,000, and the insurers paid that sum to the plaintiffs, exacting from the plaintiffs, however, an undertaking to sue the defendant upon his cheque, and (if successful) to reimburse the insurers to some extent.

Upon the evidence, the learned Judge was unable to find that a representation was made by the plaintiffs to the defendant that the lumber was fully insured or would be kept insured in whole or part for the benefit or protection of the defendant; and there was no term in the contract requiring them to insure for the defendant's benefit.

The plaintiffs were entitled to bring this action upon the cheque, even though the insurers should have the benefit of the result of the action.

Reference to Castellain v. Preston (1883), 11 Q.B.D. 380, and other cases.

The plaintiffs signed a warehouse receipt for the lumber, which, the learned Judge said, was to be regarded as a receipt under the provisions of the Bank Act, 53 Vict. ch. 31. The plaintiffs were thus bailees for the defendant—gratuitous bailees. The prima facie presumption against a bailee in whose possession chattels are injured or lost may be rebutted by proving

that he was not to blame. He is required to shew that degree of care "which men of commom prudence generally exercise about their own affairs:" Halsbury's Laws of England, vol. 1, para. 1082; Beale on Bailments, p. 56; Bullen v. Swan Electric Engraving Co. (1907), 23 Times L.R. 258, 259.

The Tomiko Mills Limited operated on rails in their mill-yard a small engine or motor, equipped with a boiler, smoke-stack, ash-pan, etc.; but the Act to preserve the Forests from Destruction by Fire, R.S.O. 1897 ch. 267, did not apply to the yard so as to make it obligatory that the engine should be furnished with the best means of preventing the escape of fire from the ash-pan and smoke-stack. And there was no evidence from which it could be reasonably inferred that the fire originated from the engine. The exact manner in which the fire started was not shewn by the evidence. It was not necessary for the plaintiffs to prove how the fire occurred to exonerate themselves—so long as they shewed that they were not negligent.

Reference to Schwoob v. Michigan Central R.W. Co. (1905-1906), 9 O.L.R. 86, 10 O.L.R. 647, 13 O.L.R. 548.

The defendants to the counterclaim had negatived the charge of negligence preferred against them.

Judgment for the plaintiffs for the amount of the cheque, $61,988.97, with appropriate interest, and with costs. Counterclaim dismissed with costs.

MULOCK, C.J.Ex. JUNE 6TH, 1918.

*A. J. REACH CO. v. CROSLAND.

Way—Easement—Private Right of Way Appurtenant to Land—Extinction by Sale of Servient Tenement for Taxes — Assessment Act, R.S.O. 1897 ch. 224, secs. 7, 149—Municipal Act, R.S.O. 1897 ch. 223, sec. 2 (8)—"Land."

Action for a declaration that the defendants were not entitled to a right of way over a strip of land owned by the plaintiffs, being the southerly 10 feet of the plaintiffs' lot fronting on Macdonald avenue, in the city of Toronto, and for further relief. The defendants were the owners of land fronting on the north side of Rideau avenue, which intersects Macdonald avenue, the defendants' land extending northward to the southerly limit of the plaintiffs' land. The strip extended easterly from Macdonald avenue to the defendants' land.

The action was tried without a jury at Toronto.

W. J. Tremeear, for the plaintiff.

J. H. Cooke, for the defendant.

MULOCK, C.J.Ex., in a written judgment, said that, among other things, the plaintiffs alleged that the strip in question was sold for arrears of taxes and purchased by the Corporation of the City of Toronto on the 24th April, 1901; that, by a tax-deed of the 1st October, 1902, the Mayor and Treasurer of the city sold and conveyed the strip to the corporation, and that the effect of the sale and conveyance was to extinguish whatever right of way over the strip the defendants may have possessed.

It was argued for the defendants that the alleged easement was not assessable, and that by the tax-deed the city corporation acquired the land subject to the defendants' right of way.

The learned Chief Justice referred to the Act passed by the Ontario Legislature in 1903 and 1907 validating tax sales, prior to 1902 and 1904, of lands in the city of Toronto: 2 Edw. VII. ch. 86, sec. 8; 7 Edw. VII. ch. 95, sec. 9.

By deed of the 15th June, 1909, the city corporation granted the strip in question to one Kent, and the plaintiffs derived title thereto through a subsequent purchaser from Kent. Thus the plaintiffs were now entitled to whatever passed to the city corporation by the deed of the 1st October, 1902, or to Kent by that of the 15th June, 1909.

The Assessment Act in force at the time of the sale and conveyance for taxes was R.S.O. 1897 ch. 224; and sec. 7 enacted that, subject to certain exemptions, all property in the Province should be liable to taxation. A right of way appurtenant was not one of the exemptions, and therefore was an interest in land not entitled to escape taxation, and must be assessed as a separate interest in land or be included in the assessment of land. Whatever is assessable under the provisions of the Assessment Act is saleable for arrears of taxes, but a right of way appurtenant cannot be transferred by tax-deed apart from the dominant tenement. It exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. Thus, not being saleable, it is not (as such) assessable—nor is it covered by an assessment of the dominant tenement. By sec. 149 of the said Assessment Act, taxes are made a special lien on the land taxed, not on any other land.

The assessment of the servient tenement creates a charge on every interest in the land itself: see sec. 2 (8) of the Municipal Act, R.S.O. 1897 ch. 223, defining "land" as including an easement.

Reference to Tomlinson v. Hill (1855), 5 Gr. 231; Soper v. City of Windsor (1914), 32 O.L.R. 352; Re Hunt and Bell (1915), 34 O.L.R. 256, 263.

The taxes assessed against the strip of land in question became a charge upon that land and every interest in it, including any right of way to which the defendants may have been entitled, and the sale and conveyance of the strip for taxes extinguished that right.

This conclusion being reached, it was unnecessary to consider whether the defendants had acquired a right of way.

Judgment for the plaintiffs for the relief claimed with costs.

LATCHFORD, J. JUNE 6TH, 1918.

*ROE v. TOWNSHIP OF WELLESLEY.

Highway—Nonrepair—Injury to Person in Motor-vehicle—Failure to Establish Negligence of Rural Municipality in Regard to Condition of Highway—Duty in Respect of Motor-vehicles—Rate of Speed—Driver under Statutory Age—Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 13 (7 Geo. V. ch. 49, sec. 10)—Unlawful Use of Highway—Want of Reasonable Care—Action for Damages for Injuries—Dismissal.

Action for damages for injury sustained by the plaintiff Margaret Roe by reason of a motor-car in which she was being driven along a road in the township of Wellesley dropping into a hole at the edge of a bridge forming part of the roadway, and for the expense to which her husband and co-plaintiff was put by rrason of her injury.

The action was tried without a jury at Toronto.

A. E. Knox, for the plaintiffs.

Gideon Grant, for the defendants, the Municipal Corporation of the Township of Wellesley.

LATCHFORD, J., in a written judgment, said that the plaintiff Margaret Roe was injured when the motor-car in which she and her husband were being driven by their son, a boy under 16, passed at a rapid rate off the bridge, on the 5th June, 1916. For all the injury actually sustained by her $500 would be liberal compensation; and the total damage suffered by her husband would not exceed $100.

But the plaintiffs were not entitled to recover any damages, although the road was not in good repair for automobile traffic at the speed at which the plaintiffs were travelling—between 15 and 20 miles an hour. The hole spoken of was a "drop" at the bridge caused by a downward grade and heavy rains. The boy drove carelessly, and his carelessness caused the accident to his mother.

The plaintiffs were as a matter of law identified with their driver. The car was owned by the plaintiff James Roe, who knew that his son was prohibited by law, owing to his age, from driving a motor-vehicle. Yet it was by Roe's authority and with the concurrence and sanction of his co-plaintiff that the boy was driving the car. Even if the prohibition did not exist, the negligence of the driver affected his parents, as he was acting by their authority.

The Motor Vehicles Act, R.S.O. 1914 ch. 207, sec. 13, as amended by 7 Geo. V. ch. 49, sec. 10, provides that no person under the age of 16 years shall drive a motor-vehicle.

As the plaintiffs' son was, at the date of the accident, prohibited by the statute from driving a motor-vehicle, the use of the highway which he was making, at the instance of the plaintiffs, who were aware of his age, was unlawful.

Reference to Cannan v. Bryce (1819), 3 B. & Ald. 179, 184, 185; Grand Trunk R.W. Co. of Canada v. Barnett, [1911] A.C. 361, 369; Greig v. City of Merritt (1913), 24 W.L.R. 328; Etter v. City of Saskatoon, [1917] 3 W.W.R. 1110; Babbitt on Motor Vehicles, 2nd ed., para. 1087; Koonovsky v. Quellette (1917), 226 Mass. 474.

No liability attaches to a rural municipality such as these defendants to maintain their roads in such repair that they shall be safe for automobiles driving at the speed at which the plaintiffs were proceeding.

Dictum of Meredith, C.J.O., in Davis v. Township of Usborne (1916), 36 O.L.R. 148, at p. 151, explained.

Reference to De Guise v. Corporation de Notre-Dame-des-Laurentides (1916), Q.R. 50 S.C. 31, and Fafard v. Cité de Quebec (1916), ib. 226.

The plaintiffs' case failed because negligence on the part of the defendants was not established, and because the accident could have been avoided by the exercise of reasonable care by the plaintiffs' son, who, moreover, was prohibited by statute from driving a motor-vehicle.

Action dismissed with costs.