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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 19TH, 1918.

MANIE v. TOWN OF FORD.

Municipal Corporations—Drainage—Cellar of House Connected with Municipal Drains—Injury by Flooding—Defective System—Action for Damages—Finding of Jury—Jurisdiction—Statutory Remedy—Costs of County Court Action.

Appeal by the defendants from the judgment of LENNOX, J., 14 O.W.N. 83.

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

F. D. Davis, for the appellants.

J. Sale, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs, and ordered that the costs of the County Court action referred to in the judgment below should be added to the plaintiff's costs of this action and paid by the defendants to the plaintiff, after taxation.

SECOND DIVISIONAL COURT. SEPTEMBER 20TH, 1918.

CURRY v. GIRARDOT.

Mortgage — Foreclosure — Title of Mortgagor — Remedy upon Mortgagor's Covenant for Payment—Statute of Limitations—Counterclaim—Breach of Agreement—Statute of Frauds.

Appeal by the defendant Girardot from the judgment of MIDDLETON, J., 7 O.W.N. 642.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.
F. D. Davis, for the appellant.
A. R. Bartlet, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 17TH, 1918.

WHITE v. BELLEPERCHE.

Fraud and Misrepresentation—Agreements to Purchase Land—Action by Purchasers for Rescission—Laches and Acquiescence—Dismissal of Action—Costs.

Action for the rescission of certain agreements for the sale by the defendants and purchase by the plaintiffs of lots of land in the township of Sandwich West, the plaintiffs alleging that they were induced to enter into the agreements by the false and fraudulent representations of the defendants or their agents

The action was tried without a jury at Sandwich and Toronto.
T. Mercer Morton, for the plaintiffs.
J. H. Rodd, for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the first false representation alleged was, that the plan of subdivision upon which the lots in question were shewn, which was laid before the plaintiffs, did not represent the physical condition of the subdivision. This related to the width and condition of Vine street, which runs along the north side of the subdivision; this complaint was met by the judgment of a Divisional Court in Fox v. Belleperche (1917), 12 O.W.N. 275.

The other false representation was, that arrangements had been made for the opening and grading of Vine street and of Josephine avenue, a street which ran through the subdivision, and for the laying of water-mains and sidewalks along these streets; it was said that the work was to be done as soon as the weather permitted, and not later than the spring of 1913. Three of the agreements, those with the plaintiffs White, Eddington, and Rogers,

were entered into on the 28th February, 1913; those of Goldberg and his son on the 8th March, 1913.

The learned Chief Justice finds that these representations were made to the plaintiffs by one St. Onge, an agent of the defendants, and by Wanless and Halstead, who were the sub-agents working for St. Onge. The defendants gave St. Onge no authority to make these representations. It might be that these representations were an inducing cause of the plaintiffs making the agreements; but it was a very significant fact that the announcement of the coming of the steel plant to the district was made early in January, 1913, and there was, in consequence, what is commonly called a "boom" in real estate, and many persons were induced to buy on this account. At least two of the plaintiffs, Rogers and Goldberg, noticed that these representations were not embodied in the written agreements, but they made no complaint or remonstrance. The boom never actually burst. There came a lull in the movement of real estate. If it had not been for war-conditions, the plaintiffs would, no doubt, have had good reason to be satisfied with their purchases; and a witness for the plaintiffs said that the property was worth what they agreed to pay.

All the plaintiffs made payments upon their contracts up to January or March, 1914; they failed to make subsequent payments, and the defendants assumed to cancel the agreements in 1915 or 1916. Nothing by way of complaint was heard from the plaintiffs until this action was begun in March, 1917.

Their delay, laches, and acquiescence had been so great as to disentitle the plaintiffs to succeed.

The action should be dismissed, but without costs.

ROSE, J., IN CHAMBERS. SEPTEMBER 21ST, 1918.

REX v. RANKIN.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 51—Physician—Prescription—"Actual Need"—Evidence.

Motion by the defendant to quash a magistrate's conviction, under sec. 51 of the Ontario Temperance Act, for prescribing whisky, "the occasion not being a case of actual need."

R. T. Harding, for the defendant.
Edward Bayly, K.C., for the magistrate.

Rose, J., in a written judgment, said that a physician is authorised by sec. 51 to give a prescription for intoxicating liquor, if he deems it necessary for the health of his patient; "but no such prescription shall be given except in cases of actual need, and when in the judgment of such physician the use of liquor is necessary." What was alleged by the complainant was that, whether or not the physician believed that the use of the prescribed liquor was necessary, as he swore he did, there was, in fact, no actual need of it; and, therefore, an offence was committed.

There was no evidence that it was not a case of actual need; and, therefore, the conviction must be quashed. There should be an order for the protection of the magistrate.

Kelly, J., in Chambers. September 21st, 1918.

PEPPIATT v. REEDER.

Payment into Court—Money Found Due to Plaintiff by Defendant—Finding not Subject to Appeal—Appeal Pending in Regard to other Matters—Order for Payment into Court—Application for Payment out of Court.

Motion by the plaintiff for an order for payment of money out of Court and for leave to issue execution.

Edward Meek, K C., for the plaintiff.
J. J. Gray, for the defendant.

Kelly, J., in a written judgment, said that the plaintiff had, finally and beyond the right of further appeal, established his right to payment by the defendant of $1,000 and interest thereon at 3 per cent. from the 28th July, 1914, and $724.98 and interest thereon at 5 per cent. from the 13th March, 1915. In respect of other matters in this litigation he had a further finding in his favour, against which, however, an appeal to the Appellate Division was pending.

He now moved: (1) for a fiat or order for the payment to him out of Court of $369.71 (and accrued interest) paid into Court by him on the 10th February, 1915, under an order of the 6th February, 1915; and (2) for an order allowing him to issue execution against the defendant for the two sums of $1,000 and $724.98 and interest.

No order should now be made for payment out; but there was ample material to warrant the making of an order that the de-

fendant should pay into Court forthwith, to abide further order, the sums above mentioned, namely, $1,000 and interest thereon at 3 per cent. per annum from the 28th July, 1914, and $724.98 and interest thereon at 5 per cent. per annum from the 13th March, 1915, until payment in; and an order should be issued accordingly. Costs of this application reserved.

CITY OF TORONTO v. TORONTO R. W. CO.—LENNOX, J.—SEPT. 16.

Street Railway—Agreement with City Corporation—Percentage of Gross Receip's—Action for—Counterclaim—Account—Items—Interes —Costs.]—Action to recover $95,859.25, being 20 per cent. of the gross receipts of the defendants for the month of May, 1915, and interest thereon. The defendants counterclaimed for the amounts of two accounts made up of many items, the aggregate amount claimed, exclusive of interest, being $84,219.54. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, said that the plaintiffs' claim was not disputed by the defendants; and there should be judgment for the plaintiffs for $95,859.25, with interest on $93,790.71 from the 15th November, 1915, and the costs of the action. The learned Judge went over the items of the two accounts comprised in the counterclaim, and disallowed some of them. He directed that judgment should be entered for the defendants upon the counterclaim for $82,040.51, with interest on $70,686.97 from the 3rd May, 1915, and on $11,353.54 from the 6th December, 1915, and the costs of the counterclaim. W. N. Tilley, K.C., and C. M. Colquhoun, for the plaintiffs. D. L. McCarthy, K.C., for the defendants.

RE HARRIS—MIDDLETON, J.—SEPT. 18.

Will—Direction for Sale of Property to Person Named—Executors—Vendor's Lien.]—Motion by a brother of one Harris, deceased, for an order determining a question arising upon the will of the deceased in the sale of a part of the estate. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., made an order declaring that the executors are entitled to a vendor's lien upon the property to be sold to E. J. Harris, and that he is, upon exercising his option to buy, entitled to take only subject to that lien. This declaration does not preclude any arrangement

satisfactory to the executors. Costs out of the estate. F. J. Hughes, for the applicant. G. G. S. Lindsey, K.C., for the widow, executrix. W. K. Murphy, for the co-executor. F. W. Harcourt, K.C., for the infants.

RE DALY—ROSE, J.—SEPT. 20.

Will—Construction—Widow's Annuity—First Charge on Net Income of Residuary Estate—Costs.]—Motion by the executors of the will of Francis J. Daly for an order det rmining questions arising upon the terms of the will. The motion was heard in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that there should be a declaration that the widow's annuity, including arrears, was a first charge upon the net income of the residuary estate. It was inexpedient to answer, at the present time, the other questions submitted. Costs of all parties to be paid out of income. Daniel O'Connell, for the executors. D. W. Dumble, K.C., for E. J. Brady and others interested. V. J. McElderry, for the widow of the testator and for others interested. F. W. Harcourt, K.C., for the infants.

NATIONAL TRUST CO. v. MATHESON—ROSE, J.—SEPT. 20.

Executors and Administrators—Settlement—Approval of Court.]—Motion by the plaintiffs, administrators of the estate of an intestate, for an order approving of a settlement. The motion was heard in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that further consideration had convinced him that the view suggested at the hearing, that the Court ought not to express an opinion upon the advisability of making the proposed settlement, but ought to leave the administrators to act upon their own judgment, was the correct one. There should be no order. R. McKay, K.C., for the applicants. F. Watt, for Martha Tytler and others. G. H. Sedgewick, for Mary Matheson.

RE BACQUE TRUSTS—ROSE, J.—SEPT. 20.

Trusts and Trustees—Purchase of Residence for Cestui que Trust —Departure from Terms of Trust Deed—Consent of all Persons Interested—Declaration—Costs.]—Motion by Mrs. H. A. Bacque for a direction to the Toronto General Trusts Corporation, trustees, to purchase a residence for the applicant in Newmarket. The motion was heard in the Weekly Court, Toronto. ROSE, J., in a written judgment, said that the trust deed authorised the trustees to purchase a residence, in Toronto, for the use of Mrs. Bacque. Mrs. Bacque had requested them to purchase one in Newmarket instead; and her two children, who appeared to be the only other persons interested in the trust property, joined in the request. The trustees, however, were unwilling to deviate from the course laid down in the trust deed, without some direction from the Court. It was said that they would be satisfied with a declaration that, if they were furnished with a document sufficiently evidencing the consent of all the cestuis que trust, they might safely do what was requested. Such a declaration might be made. It did not seem to be a very necessary one, but the cestuis que trust had consented to the payment of the costs out of the trust fund, and the order might provide accordingly. J. F. Edgar, for the applicant. E. T. Malone, K.C., for the trustees.