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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 21ST, 1919.

JOHNSON v. McKAY.

Account—Judgment—Reference—Report—Opening up—Appeal—Further Directions—Costs—Shares in Ship—Disbursements.

Appeal by the defendant from the judgment of MIDDLETON, J., upon further directions, declaring the interests or shares of the parties in the ship "Sarnor."

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

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

R. S. Cassels, K.C., for the plaintiffs, respondents.

HODGINS, J.A., reading the judgment of the Court, said that this action was brought pursuant to leave granted by the Second Divisional Court in a judgment of the 16th January, 1918, in an action between the present appellant as plaintiff and the respondents, who were then defendants. By that judgment the Court declared that the plaintiff (McKay) was now the sole owner of all shares in the ship "Sarnor," but subject to and without prejudice to the right of the defendants to acquire from and have transferred by the plaintiff to the defendants Johnson 20 per cent. and Bonham 40 per cent. and to be adjudged and declared the owners of 20 per cent. and 40 per cent. of such shares and of the earnings, if any, of the "Sarnor" for salvage or otherwise, upon the plaintiff being reimbursed such amount as should, upon a due accounting by all parties and upon the taking of an account of all the earnings of and all expenditures made on behalf of the ship, be payable to the plaintiff under the agreements of the 1st June, 1916; and the Court adjudged that, unless such accounting should be directed in any other action now pending between the parties to that

action, an action for an account should be commenced by the defendants on or before the 1st April, 1918, and should be prosecuted with due diligence, and the amount, if any, which should be found payable to McKay should be paid by the defendants within 60 days after being so ascertained.

This action was accordingly begun on the 28th March, 1918, for an account and a declaration that the plaintiffs, upon payment to the defendant on the basis of the account, were the owners respectively of 20 and 40 per cent. interests in the steamship.

The judgment now appealed against declared that, subject to and upon payment by the plaintiffs of the sums found by the Master, the plaintiffs and the defendant were, on the 1st August, 1917, and had been since and were now co-owners of the ship "Sarnor" in these proportions: 20 per cent. to Johnson and 40 per cent. each to Bonham and McKay. The learned Judge (Middleton, J.) did not fix the date of the vesting of the shares, and the judgment as entered included something that he did not actually decide.

Upon the argument of this appeal, it was obvious that the account taken was incomplete and not in accordance with the judgment in the former action, and it was intimated that leave would be given to appeal from the report, and the Court would deal with the matter as if that leave had been taken advantage of and the report was before the Court.

The judgment and the report should then be set aside, and the case should go back to the Referee with instructions to take the whole account directed by the judgment of the Second Divisional Court in the previous action.

Further directions should be reserved until after report, whereupon a judgment can be pronounced for payment of the amount due to the defendant over and above the amount already paid into Court, if anything, vesting the shares of the plaintiffs in them, and declaring the date at which such vesting should take place, together with any other directions respecting the incidence of the disbursements said to have been made by the plaintiffs as against any of the parties to the action.

When the case came before Middleton, J., the defendant refused to appeal from the report or apply for leave to do so; and so the present judgment was an indulgence to him. On the other hand, the plaintiffs had taken out a judgment containing a finding not made by the learned Judge. In these circumstances, there should be no costs of the appeal nor of the motion before Middleton, J., to either party. The costs of the previous reference and the reference now directed should be reserved to be dealt with on further directions after the making of the new report.

Appeal allowed.

FIRST DIVISIONAL COURT. OCTOBER 21ST, 1919.

*HUDSON AND HARDY v. TOWNSHIP OF BIDDULPH.

Municipal Corporations—Claim against Township Corporation for Injury to Sheep by Dogs—Owner Unknown—Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, secs. 17, 18—Dog Tax Collected but Sheep Valuers not Appointed—Ascertainment of Damages by Council—Proceedings of Council—Refusal to Continue after Passing of New Act, 8 Geo. V. ch. 46—Repeal of Former Act—Injury Occurring before Passing of New Act—Application of New Act—Remedy by Mandatory Order to Council to Award Compensation—Order not Obtainable in Action—Members of Council not Parties to Action—Appeal—Reversal of Judgment at Trial—Costs.

An appeal by the defendants from the judgment of ROSE, J., 45 O.L.R. 432, 16 O.W.N. 177.

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

T. G. Meredith, K.C., and W. R. Meredith, for the appellants.

J. M. McEvoy, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the Act in force when the injury to the sheep occurred was the Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, as amended by 6 Geo. V. ch. 56, sec. 3. The principal question on the appeal was as to the application of the Act of 1918, 8 Geo. V. ch. 46, which repealed the former Act. The trial Judge held that it was applicable, basing his conclusion upon the provisions of sec. 15 (*b*) of the Interpretation Act. The Chief Justice was unable to see how any of the provisions of the Act of 1918 could be applied to the claim of the plaintiffs, which arose before the passing of the Act.

The provisions of the Interpretation Act which, in the Chief Justice's opinion, were applicable, were those contained in sec. 14 (*c*): "Where an Act is repealed or wherever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided . . . (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked."

When the revised statute with its amendments was repealed,

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

the plaintiffs had a vested right to be compensated for the loss they had sustained to the extent to which the council was bound to award compensation, and the defendants were under a liability to award and pay compensation, and this right of the plaintiffs and this liability of the defendants was not affected by the repeal of the earlier legislation.

Reference was made to the recent decisions in Re Hogan v. Township of Tudor (1915), 34 O.L.R. 571; Hogle v. Township of Ernesttown (1917), 41 O.L.R. 394; and Noble v. Township of Esquesing (1917), 41 O.L.R. 400; and the Chief Justice said that in coming to his conclusion he was not differing from the reported opinion of any Judge except that of the trial Judge in this case.

There remained the question of the right of the plaintiffs to the mandatory order which they claimed. It was contended by the appellants that such an order could not be made in an action. The weight of judicial opinion was against the right to invoke the remedy of the prerogative writ in an action: Toronto Public Library Board v. City of Toronto (1900), 19 P.R. 329; Rich v. Melancthon Board of Health (1912), 26 O.L.R. 48; City of Kingston v. Kingston etc. R.W. Co. (1897-8), 28 O.R. 399, 25 A.R. 462, 468, 469; Eastview Public School Board v. Township of Gloucester (1917), 41 O.L.R. 327.

The mandamus ought not to be awarded, for two reasons: (1) because it cannot be awarded in an action; and (2) because the members of the council, to whom, if issued, it would be directed, were not parties to the action.

The only mandamus which the plaintiffs would be entitled to, on a proper application, would be a mandamus to the members of the council to make the inquiry and the award which, by sec. 18 of R.S.O. 1914 ch. 246, the council is required to make, and the members of the council would be the respondents in any such application, and not the corporation. That being the case, no declaration of the right of the plaintiffs to such a mandamus could or ought to be made in a proceeding to which the members of the council were not parties.

The appeal should be allowed and the action dismissed without prejudice to any other proceedings which the plaintiffs might be advised to take in respect of their claim for compensation.

There should be no costs of the action or of the appeal to either party. The plaintiffs had failed, but the merits were with them to some extent at least, and the council was at fault for not having performed the duty which rested upon it under sec. 18 of the revised statute.

Appeal allowed.

FIRST DIVISIONAL COURT. OCTOBER 21ST, 1919.

MELDRUM v. MARTENS.

Contract—Brokers—Sale of Company-shares—Dispute as to Share of Profits—Ascertainment of Net Amount Realised from Sale—Sale by Defendants to Employee and Resale by him—Bona Fide Sale—Accounting on Basis of Price Realised upon First Sale.

Appeal by the defendants from the judgment of MIDDLETON, J., 15 O.W.N. 302.

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

D. L. McCarthy, K.C., for the appellants.

G. H. Kilmer, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the question in dispute was as to the liability of the appellants to account to the respondent on the basis of there having been a sale of the shares in question at $3.33 per share or on the basis of the purchase of the shares by Edwards at $3.75 per share.

It was argued that the appellants were agents of the respondent or trustees for him for the sale of the shares, and that was the view of the trial Judge as to the relation of the parties to each other; but the Chief Justice was not able to agree with that view. In his opinion, the appellants were the owners of the shares, with a contractual obligation to pay to the respondent one quarter of "the profits made in the underwriting or marketing" of the shares.

The real question was, whether or not the sale to Le Doit was an actual sale or a mere sham. While the trial Judge seemed to have doubted the actuality of the sale, he had made no finding against it.

The Chief Justice was unable to agree with the contentions of the respondent's counsel that there was no real sale to Le Doit. The oral testimony was all the other way, and there was nothing in the circumstances surrounding the transaction which would justify the Court in finding that there was no real sale to Le Doit. The relations between the appellants and Le Doit were peculiar; but there was no reason to doubt that, although Le Doit was the manager of the appellants' Chicago office, he transacted business—some of it on a large scale—on his own account, business with which the appellants had nothing to do.

After the agreement was made, the appellants found themselves in difficulty owing to the panicky condition of the stock-market, and were alarmed lest on that account they would not be

able to sell the shares within the time during which their option to purchase them ran, and would forfeit the $10,000 which they had paid for the option. Le Doit was informed of this and of the appellants' anxiety on account of it. He had had transactions with Edwards, and thought that it might be possible, if the option were extended, to get Edwards to buy the shares, and the arrangement was then made that he should himself buy them at $3.33 per share, and for the risk he took in assuming that obligation it was not unreasonable that he should have the benefit of any profit he might make on the resale of the shares.

It was immaterial, as regarded the result, whether there was a firm sale to Le Doit before he sold to Edwards or only an arrangement to sell if Le Doit was able to sell to Edwards, completed after the sale to the latter.

The judgment below should be varied by substituting for the words "on the basis of the sale thereof to Edwards and not on the basis of an alleged sale thereof to Le Doit" the words "on the basis of the sale thereof to Le Doit at the price of $3.33 per share."

The respondent should pay the costs of the appeal, and there should be no costs of the action to either party.

Appeal allowed.

HIGH COURT DIVISION.

RIDDELL, J. OCTOBER 20TH, 1919.

*RE NAUBERT.

Insurance (Life)—Contract Made and Parties Domiciled in Province of Quebec—Agreement of all those Interested that Contest as to Disposition of Policy Moneys be Decided according to Law of Ontario—Validity—Claim of Creditors—Claim of Widow as Beneficiary—Ontario Insurance Act, sec. 178 (4)—Amending Act, 6 Geo. V. ch. 36, sec. 5—Designation by Will—Costs.

Motion by Marie Albina Naubert, the widow of Wilfrid Clodomire Naubert, deceased, for an order declaring her entitled to the moneys payable under an insurance policy upon the life of the deceased.

The motion was heard in the Weekly Court, Ottawa.

O. A. Sauvé, for the applicant.

J. U. Vincent, for creditors of the deceased.

A. F. May, for the insurance company.

RIDDELL, J., in a written judgment, said that the deceased, in January, 1905, being then domiciled in the Province of Quebec, procured a policy of assurance upon his life from the Sun Life Assurance Company, whose head office is in Montreal, which contained the following provision for payment: "This company by these presents assures the life of Wilfrid Clodomir Naubert, of St. Gérôme, Province of Quebec, manager, . . . for . . . $2,000, payable at its office in the city of Montreal to Albina Hermine Naubert, wife of the assured, or, in case of her decease, to the heirs, executors, administrators, or assigns of the assured, upon the receipt at its head office of proofs of the fact and of the cause of the death of the assured, deduction being made of all debts due to the company by the assured or the beneficiary, and the balance of the premium for the current year, if any is due."

The assured had then a wife, the above-named Albina Hermine, a son, and a daughter. His wife died in 1906, and in 1907 he married his second wife, Marie Albina, the present applicant. His children also survived him. In 1911, he came, with his wife, to Ottawa, became domiciled there, and there died, in May, 1919, leaving a will, executed in April, 1919, and reading as follows: "I hereby give devise and bequeath (1) to my son Jean Marie Naubert all my shares in different companies and also my watch . . . ; (2) to my wife Marie Albina Naubert . . . my insurances, my furniture, and all my other property real and personal . . ."

The creditors of the deceased maintained that the proceeds of the Sun Life policy formed part of the estate available for the payment of debts. The widow, who was domiciled in Ottawa at the time of the death, but was living in Montreal at the time of the application, contended that she was entitled to the money.

The contract having been made in the Province of Quebec between parties there domiciled, and the money being payable by the company at its head office in Montreal, the Quebec law should govern. But all parties desired that the case should be decided on the law of Ontario, and had signed an agreement to that effect. Such an agreement is valid: Quilibet renuntiare potest juri pro se introducto; and here there were no third parties whose rights were derogated from, no statutory direction violated, and no public interest injuriously affected.

Admittedly the estate of the deceased could not pay the debts unless the insurance money was available for that purpose.

The will was a sufficient designation of the widow as beneficiary under the policy, and there should be a declaration that she was entitled to the proceeds thereof.

Sub-section 4 of sec. 178 of the Ontario Insurance Act, as enacted by the amending Act 6 Geo. V. ch. 36, sec. 5, did not apply so as to affect the rights of a widow as against the children.

The insurance company should be allowed a fee of $25 as for a watching brief; this they might deduct from the insurance money; and the widow might add it as a disbursement to her costs. The creditors should pay the costs of the widow, including the $25.

LATCHFORD, J. OCTOBER 25TH, 1919.

PARRY v. BUTLAND.

Assignments and Preferences—Agreement for Sale of Land—Death of Vendee—Conveyance of Land to Creditor—Impeachment by another Creditor—Powers of Vendor—Forfeiture and Resale upon Default—Action Brought within Sixty Days—Onus—Intent to Defraud—Promissory Note—Executor de son Tort—Husband and Wife.

Action by a builder, residing in Belleville, against Lillie Butland, as administratrix of the estate of P. K. Butland, deceased, and against Lillie Butland and William Simpson, as executors de son tort, to recover $385, the amount due upon a promissory note for $300, dated the 26th September, 1917, made by the deceased, and bearing interest at the rate of $5 a month both before and after maturity; and also for a declaration that a conveyance of land, dated the 8th January, 1919, made by one Ketcheson to the defendant Simpson, was null and void as against the plaintiff and other creditors of P. K. Butland, deceased; and for a declaration that the defendant Simpson held the land described in the conveyance as a trustee for the estate of P. K. Butland, and that the land was chargeable in Simpson's hands with the debts of the deceased. Ketcheson was not a party to the action.

The action was tried without a jury at a Belleville sittings.

A. Abbott, for the plaintiff.

E. G. Porter, K.C., and C. A. Payne, for the defendants.

LATCHFORD, J., in a written judgment, said that in June, 1917, the plaintiff and one Arnott were the equitable owners of a lot in the town of Trenton, and on that day entered into an agreement for the sale thereof to P. K. Butland, who paid $150 at the time, and made a promissory note for $350 to the plaintiff and Arnott. The amount of the purchase-money was $2,650. Later in the same year, the plaintiff and Arnott caused the legal owner of the lot in Trenton to convey it to Ketcheson, and at the same time

assigned to Ketcheson the agreement of purchase and sale with the moneys payable under it, except $300, for which the plaintiff obtained a promissory note from Butland and Lillie Butland, his wife—the note sued on. In an action upon that note, judgment had been recovered against Lillie Butland.

In May, 1918, Butland was killed. Shortly before his death, he had obtained from Simpson $350 to pay off the note for that amount, and had paid part of the purchase-money to Ketcheson.

Butland had, at the time of his death, no property of any value except his interest in the Trenton lot.

Payments under the agreement had not been kept up, and Ketcheson might have enforced the agreement as against the widow. He did not for a time press for payment; but, later on, insisted on having at least the interest paid. Time was of the essence of the agreement, and Ketcheson had the power, on default, to resell. Lillie Butland saw no prospect of being able to pay off what was due. She asked her father, the defendant Simpson, to come to her assistance. The $350 which he had advanced had not been repaid, and he declined to accede to her request unless the property were conveyed to him. Lillie Butland agreed, and, out of moneys of her own, advanced $800 to her father, who added $600 of his own money, and paid Ketcheson what was due to him under the agreement. Ketcheson and his wife then executed the conveyance to Simpson which was impeached.

Ketcheson, by transferring the property to Simpson, exercised the powers which he possessed under the forfeiture clauses of the agreement, and put an end to any right which the deceased had in the land. His decision to regard the right of the deceased as forfeited was not questioned by either of the defendants.

The conveyance was not taken by Simpson with the intention of defrauding the plaintiff: the intent of both defendants was merely to secure Simpson for the $350 which he had lent to the deceased and for the $600 which he paid to Ketcheson.

The transaction did not fall within the scope of the Assignments and Preferences Act: although the transaction was attacked within 60 days after the execution and delivery of the conveyance, the onus of proving a wrongful intent was on the plaintiff. It was impossible to set aside the conveyance from Ketcheson. So far as the action affected that issue, it was absolutely without foundation.

Neither of the defendants at any time did any act which would constitute either of them an executor de son tort of the deceased.

Whatever might be Simpson's position as between his daughter and himself, he was not now and never was a trustee for the estate of the deceased.

Action dismissed with costs.

MASTEN, J. OCTOBER 25TH, 1919.

NORMAN McLEOD LIMITED v. ORILLIA WATER LIGHT AND POWER COMMISSION.

Contract—Building—Action for Balance of Price—Extras—Work Done under Contract—Counterclaim—Penalties for Delay—Recovery for Actual Loss and Damage only—Reference—Costs.

An action on a building or construction contract. The plaintiffs, the contractors, claimed a balance due for work done, and the defendants, duly incorporated as a commission, set up a counterclaim for penalties for delay etc.

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

J. A. Paterson, K.C., for the plaintiffs.

R. McKay, K.C., and A. B. Thompson, for the defendants.

MASTEN, J., in a written judgment, set out the facts and referred to the evidence with particularity. In respect of the plaintiffs' claim he found: (1) that the work was done under a written contract and subject to its provisions, and not otherwise; (2) that no extras were recoverable by the plaintiffs unless covered by a written order of the engineer; (3) that the plaintiffs were not entitled to recover anything in respect of the "Berm" after the first removing, spreading, and levelling on the beach in front of the building of the material excavated; (4) that the plaintiffs were not entitled to recover two sums of $170.89 and $25 claimed by them. Subject to deductions made by the learned Judge and to the admissions made in the defendants' statement of defence and counterclaim, the several items in the plaintiffs' claim were referred to the Master to inquire and report what, if anything, was due to the plaintiffs in respect thereto.

With regard to the counterclaim of the defendants for penalties for delay, the learned Judge found that unexpected difficulties were discovered in the course of the work, and that the consequent changes in plan largely contributed to the delay in finishing the work; but that the conduct of both the plaintiffs and the defendants was also a contributory cause to this delay, and that the plaintiffs were chargeable with three months of the total delay. The penalties provided by the contract were not recoverable as such. The defendants were entitled to recover for the delay, but only the actual loss and damage occasioned to them by the three months' delay. Upon the reference the Master should inquire and report the amount of the loss and damage so occasioned to the defendants. Further directions and costs should be reserved.

VOSKOBOINIK v. DYKE—FALCONBRIDGE, C.J.K.B.—OCT. 20.

Contract—Sale of Goods—Breach of Contract—Evidence—Finding of Fact of Trial Judge—Money in Court—Payment out—Costs.]—Action to recover damages for an alleged breach of contract and for the return of $620 paid by the plaintiff to the defendant on account of furs purchased from the defendant. The action was tried without a jury at Sault Ste. Marie. FALCONBRIDGE, C.J.K.B., in a written judgment, said that both on the preponderance of evidence and on the demeanour of witnesses he found all the facts in controversy in favour of the defendant. It was very considerate and more than fair on the part of the defendant's son to accede to the request of the plaintiff (who was already in default) to give him half an hour to procure the money. On the plaintiff's statement he did not tender it until 40 minutes had elapsed. According to Maurice Dyke and Douglas, more than an hour had gone by before the sale to the latter took place. The action should be dismissed with costs. There should be an order for payment out of Court to the defendant of his taxed costs and to the plaintiff of the balance. J. L. O'Flynn, for the plaintiff. W. G. Atkin, for the defendant.

PROZELLER v. WILTON—LENNOX, J.—OCT. 20.

Sale of Goods—Accounting for Goods Received—Conversion—Damages—Counterclaim—Costs—Indemnity.]—Action to recover from the defendant Wilton $2,282.22 and interest and for an accounting in respect of seven car-loads of potatoes and in the alternative for damages, and to recover from the defendant the Union Bank of Canada $3,000 for alleged wrongful conversion and breach of trust. The defendants asserted counterclaims against the plaintiff. The action and counterclaims were tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, after a thorough examination of the evidence, made findings of fact upon which he based a judgment for the plaintiff against both defendants for $1,729.08, with interest from the 26th April, 1917, and dismissing the counterclaims of the defendants, except as to certain items which were deducted from the plaintiff's claim in arriving at the sum of $1,729.08, with costs of the action and counterclaims to the plaintiff, less the sum of $50 allowed as costs in respect of the items of the counterclaims upon which the defendants succeeded. Should the defendant bank desire to have judgment against the defendant Wilton for indemnity, the Judge will consider an application therefor, if made before the entry of judgment. J. W. Bain, K.C., and M. L. Gordon, for the plaintiff. A. C. McMaster, for the defendant Wilton. D. C. Ross, for the defendant bank.