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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 26TH, 1917.

REX v. WALKER.

Criminal Law—Summary Conviction—Case Stated by Magistrate —Forum—Jurisdiction.

Case stated by Thomas H. Brunton, Esquire, Police Magistrate for the County of York.

The prosecution was for an offence against sec. 242 of the Criminal Code (neglect to provide necessaries for wife or children), which is punishable on summary conviction.

The case came on for hearing before MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

W. A. Henderson, for the defendant.

No one appeared on behalf of the Crown or the prosecutor.

MEREDITH, C.J.O., reading the judgment of the Court, said that the Supreme Court of Ontario, Appellate Division, had no jurisdiction to hear the stated case. A case stated by a magistrate where he summarily convicts is stated for the opinion of "the Court," which means in Ontario the High Court Division of the Supreme Court of Ontario: Rex v. Henry (1910), 20 O.L.R. 494.

HIGH COURT DIVISION.

HODGINS, J.A. NOVEMBER 28TH, 1917.

*REX v. BAINBRIDGE.

Criminal Law—Indictment for Seditious Libel—Single Count—Amendment — Particulars — Jury — Conviction — Duplicity —Two Separate Printed Papers—Intent Essential Part of Offence—Objections—No Substantial Wrong or Miscarriage—Criminal Code, secs. 134, 852, 853, 855, 860, 861, 1019—*Refusal of Trial Judge to Reserve Case.*

Motion by the defendant in arrest of judgment and for a reserved case.

The motion was heard at the Toronto assizes.

R. T. Harding, for the defendant.

Peter White, K.C., for the Crown.

HODGINS, J.A., in a written judgment, said that the accused was tried before him and a jury on the 22nd November, 1917, and convicted, upon an indictment for a seditious libel.

As amended by the learned Judge, at the beginning of the trial, the indictment read: "That Isaac Bainbridge in the year of our Lord 1917 at the city of Toronto in the county of York did publish a seditious libel contrary to the Criminal Code section 134 to wit the matters contained in the annexed particulars."

The particulars mentioned 7 publications. The jury found the accused guilty on the above indictment with regard to 2 of these publications.

On the 9th November, 1917, when the accused pleaded "not guilty" to the indictment, it did not contain the words "to wit the matters contained in the annexed particulars;" the particulars were not delivered until the 20th November, 1917. Objection having been taken to the indictment, by way of motion to quash, on the ground that it was too wide and not specific enough, and that it was not stated against whom the libel was directed, the amendment was made as above, and the tria proceeded.

The motion in arrest of judgment and for a reserved case was made after verdict, on the grounds: (1) That the indictment, as

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

found by the grand jury, did not state an indictable offence, as required by the Criminal Code. (2) That the indictment, before amendment, did not state the details and circumstances required by sec. 853 of the Code, and the amendment was not in regard to a matter of form, but of substance. (3) That the indictment, as found, could not be enlarged by particulars. (4) That the indictment, as amended, charged 7 offences under one count, contrary to sec. 853 (3) of the Code. (5) That the indictment, as amended, and the verdict of the jury, taken together, had found the defendant guilty of publishing 3 seditious libels under one count, contrary to the Code.

The most serious objection was that of duplicity, and it was urged that that was not cured by the verdict.

Intent is essential in seditious libel. The jury had found that two publications were seditious, which involved the finding that the accused was guilty of a libel expressive of a seditious intent. Whether or not one of the two would in itself justify that finding was a question, not for the Judge, but for the jury, and they might have deduced the seditious intent from both together.

Reference to Rex v. Benfield (1760), 2 Burr. 980; Regina v. Bleasdale (1848), 2 C. & K. 765; Nash v. The Queen (1864), 4 B. & S. 935.

The indictment followed sec. 852 (3) of the Code, and sufficiently described the offence: see secs. 855, 861. The effect of the amendment was merely to put the record in form for the purposes of the trial, and was probably unnecessary, in view of sec. 860.

Several offences should not be charged in the same count: Rex v. Thompson, [1914] 2 K.B. 99. If the offence in this case was one which depended merely on the doing of an act, and did not lie in the intent with which it was committed, that case would be applicable; but, on that point, it is to be distinguished.

It is doubtful, also, whether this objection is open to the accused after verdict.

At the trial, the publications were produced and proved, and the accused gave evidence regarding each one; only two reached the jury, and upon these two the accused was found guilty.

No prejudice was suffered by the accused, and no substantial wrong or miscarriage was occasioned by anything that was objected to.

The indictment and conviction might properly be treated as for a single offence—there were two separate printed papers, united as to intent: Rex v. Yee Mock (1913), 21 Can. Crim. Cas. 400.

Section 1019 of the Code being effective where no substantial wrong or miscarriage has been occasioned: Regina v. Hazen (1893), 20 A.R. 633; Rex v. Michaud (1909), 17 Can. Crim. Cas. 86; Kelly v. The King (1916), 54 S.C.R. 220; Rex v. Thompson, *supra*; no good purpose would be served by reserving a case.

Motion refused.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 28TH, 1917.

*REX v. HANLEY.

Ontario Temperance Act—Offence against sec. 41—Having Intoxicating Liquor in Possession—Conviction by Magistrate—Arrest without Warrant—Subsequent Proceedings not Invalidated—Second Offence—Improper Reception of Evidence of Former Conviction—Stenographer's Notes—Secs. 74 (2), 96—Directory or Imperative—Evidence to Support Conviction—Credibility of Witnesses—Question for Magistrate.

Motion to quash the conviction of Walter Hanley, by the Police Magistrate for the City of Hamilton, for that the accused had intoxicating liquor in his possession, at a certain place in that city, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, the conviction being for a second offence.

T. N. Phelan, for the accused.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that it was argued, first, that the accused was wrongfully arrested without warrant, which invalidated all that was subsequently done. But this point had been determined adversely to the accused by Rex v. Hughes (1879), 4 Q.B.D. 614. The subsequent proceedings were not invalidated if there was no right to arrest without a warrant; and, *semble*, there was no such right.

It was contended, next, that the magistrate had violated the provisions of sec. 96 of the Act by receiving evidence of the earlier conviction before determining the guilt of the accused of the second offence. This had not been established. If the stenographer's notes were a complete record of all that took place, the proceedings would appear to be defective; but, by sec. 74 (2), the stenographer is called upon only "to take down the evidence

* * * in shorthand." The stenographer's notes are not necessarily a record of all that takes place; and, the conviction being in due form, there is nothing to shew a transgression of sec. 96.

But, even if the magistrate erred in this respect, that would not invalidate the conviction, the provisions of sec. 96 being merely directory: Rex v. McDevitt (1917), 39 O.L.R. 138; Rex v. Coote (1910), 22 O.L.R. 269.

The third contention was, that there was no evidence upon which the magistrate could find guilt; but there was evidence which justified the conviction, and the question of credibility was entirely for the magistrate.

Motion dismissed with costs.

MASTEN, J. NOVEMBER 28th, 1917.

*FREEMAN v. TOWNSHIP OF CAMDEN.

Easement—Grant of Land to Township Corporation for Highway—Reservation of Cattle-pass under Highway—Agreement—Liability for Maintenance and Repair—Easement Passing under Devise of Dominant Tenement—Severance—Use of Cattle-pass by Owners of both Halves.

Action for a declaration of the plaintiff's right to a cattle-pass under a highway in the township of Camden and to have it maintained and kept in repair by the defendants, the township corporation, and to compel the defendants to repair and maintain it.

The action was tried without a jury at Napanee.

R. S. Robertson and U. M. Wilson, for the plaintiff.

J. L. Whiting, K.C., and J. E. Madden, for the defendants.

MASTEN, J., in a written judgment, stated his findings: (1) that an easement by way of a cattle-pass under the highway was validly created in favour of Thomas McDonagh at the time the highway was built, and that the obligation to maintain the structure necessary to the existence of the easement then rested on the defendants; (2) that the highway was laid out in or about 1857, and that the lands for the highway were granted by McDonagh to the defendants, reserving the easement now in question; (3) that the cattle-pass had been used at all times since the construction of the highway until now, and during that time had been repaired,

restored, and generally maintained by the defendants; (4) that there was a statutory obligation on the defendants to maintain and keep in repair the highway; (5) that the onus was upon the defendants to shew that their statutory obligation to repair the highway had been shifted to the plaintiff, and that onus had not been discharged; and (6) that it was a term of the agreement relating to the easement that the repairs should be done by the defendant.

A duty to repair was not imposed on the defendants by a separate and independent covenant in McDonagh's favour, but an obligation on the part of the defendants arose out of the grant by McDonagh, reserving the easement, and as part and parcel of the easement as originally created; and that distinguished this case from Austerberry v. Corporation of Oldham (1885), 29 Ch.D. 750.

The easement passed with the land, and as an integral part of the easement the obligation to maintain existed in favour of the owner of the dominant tenement, i.e., the remaining parts of McDonagh's farm.

The easement existed in full effect, and was enjoyed by McDonagh during his lifetime; and the easement passed by his will to the plaintiff, with the lands to which it was appurtenant: Coke on Littleton, 121. *b*; Sheppard's Touch. 89; Gale on Easements, 9th ed., p. 131.

Polden v. Bastard (1865), L.R.I.Q.B. 156, distinguished.

The easement having been enjoyed throughout the whole period since it arose, the severance in ownership of the north and south halves could not affect the easement, because the right always existed in the owner of each half to go upon the other half.

Judgment for the plaintiff as prayed, with costs.

MIDDLETON, J. NOVEMBER 29th, 1917.

*PETERSON LAKE SILVER COBALT MINING CO. LIMITED v. DOMINION REDUCTION CO. LIMITED.

Land—"Tailings" from Ore Reduction—Deposit on Land by Permission of Owner—Claim of Depositor to Recover Tailings as Chattels—Intention to Transfer Title—Tailings Becoming Part of Land.

Action for an injunction restraining the defendant company from removing or interfering with the tailings, residues, slimes,

and other material deposited on the property of the plaintiff company, and from trespassing on the plaintiff company's property, and for an account and damages.

The action was tried without a jury at Toronto.

I. F. Hellmuth, K.C., McGregor Young, K.C., and W. J. McCallum, for the plaintiff company.

R. McKay, K.C., and P. E. F. Smily, for the defendant company.

MIDDLETON, J., in a written judgment, said that the title to a large quantity of tailings deposited by the defendant company in Peterson Lake was in question. By Crown patent, the plaintiff company was the owner of the bed of the lake. The tailings were deposited in the lake by the Nova Scotia Silver Cobalt Mining Company Limited and its successors; that company made an assignment for the benefit of its creditors; the assignee sold the property and assets to one Steindler, who in turn sold to the defendant company.

The defendant company's claim to all tailings deposited by the Nova Scotia Company failed by reason of there being no devolution of title.

The plaintiff company made no claim to the tailings deposited since the 2nd July, 1915.

The right to the tailings deposited by the defendant company before July, 1915, remained to be determined. As to these tailings there was no bargain or understanding save such as might be inferred from a request, upon one side, for permission to dump the tailings in the lake, and, on the other side, the granting of this permission.

The tailings, when deposited on the land of the plaintiff company, became its property.

Reference to Boileau v. Heath, [1898] 2 Ch. 301, 305.

When the defendant company returned this ore, won from the earth and earthy in its nature, to the bosom of the earth, the right to regard it as chattel property was lost—it became part of the land owned by the plaintiff company.

There was an intention of transferring the title to the tailings to the plaintiff company—it was not technically an abandonment: 12 Co. Rep. 113.

Reference to Whitman v. Muskegon Log Lifting and Operating Co. (1908), 152 Mich. 645, and other American cases.

Judgment for the plaintiff company upon the main question, with costs.

MIDDLETON, J. NOVEMBER 30th, 1917.

TORONTO GENERAL TRUSTS CORPORATION v. PETERSON.

Evidence—Action upon Mortgage Brought by Executors of Deceased Mortgagee—Release of Part of Mortgage-moneys Asserted by Mortgagor-defendant—Fabrication of Documents in Corroboration of Story of Defendant—Perjury in Face of Court—Effect as to Weight of other Evidence—Disbelief of Trial Judge—Effect of Corroborative Testimony Given on Foreign Commission.

Action by the executors of James J. Foy, deceased, upon a mortgage for $9,000 made by the defendant in favour of the deceased.

The action was tried without a jury at Toronto.

D. L. McCarthy, K.C., and T. L. Monahan, for the plaintiffs.

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

MIDDLETON, J., in a written judgment, said that the defence was, that, by agreement between the defendant and the deceased, credit was given to the defendant upon the mortgage of an amount which reduced the principal to $4,000; and that, in addition, the defendant had rendered services to and incurred expense at the request of and for the benefit of the deceased, the value of which should be set off against any balance which the plaintiffs might claim. At the trial, the defendant testified that the deceased had signed a release of $5,000, part of the principal money; that she gave the document to the deceased for safekeeping; and that it could not now be found. The claim for services and expenses was not supported at the trial.

The existence of the release depended entirely upon the defendant's evidence and that of a Miss Beach. The defendant sought to corroborate her evidence by the statement that each gale-day after the alleged rebate of principal, she made out and gave the deceased a cheque for interest computed on the balance only, but that the deceased either destroyed the cheques or did not cash them. She produced stubs of cheque-books which shewed, apparently in due course, the entry of these cheques, and identified the stubs as the actual stubs of the various cheques.

It appeared, in the course of the trial, to the surprise of counsel for the defendant, who was of course not informed of it, that the

cheque-stubs produced were not genuine, but recent fabrications, and that the evidence relating to them was false.

In regard to this, the learned Judge said that he could not deal with the case as though the discovery of the fabrication of evidence eliminated only that part of the evidence, or at most should cause caution in accepting the rest. The case, as to the essential matters, rested almost altogether on the defendant's own testimony; and, when he found that there was an ingenious attempt to support the case by deliberate and elaborate forgery and perjury, his mind passes from a condition of grave doubt to one of unhesitating disbelief.

Miss Beach sought to corroborate the story told, by her recollections of conversations with the deceased, in which he stated to her that he had released the mortgage to the extent stated. Her testimony was taken on commission in New York. With the suspicion begotten in the mind of the Judge by the perjury committed in his presence, he could not accept this evidence. It did not ring true; and there was no real opportunity to test the truth upon cross-examination. No doubt the witness had met the deceased, but what was said at the meeting was known only to her.

Judgment for the plaintiffs as prayed.

MIDDLETON, J. DECEMBER 1ST, 1917.

*CONSOLIDATED PLATE GLASS CO. v. McKINNON DASH CO.

Damages—Admitted Breach of Contract—Manufacture and Sale of Goods—Loss of Profits—Duty to Minimise Damages—Performance of Duty—Evidence.

Action to recover $14,482.50 damages for breach of contract. The defendants admitted liability, but said that the plaintiffs' demand was too large.

The plaintiffs entered judgment for the recovery of damages upon the breach.

The case was heard as to assessment of damages by MIDDLETON, J., without a jury.

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

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

MIDDLETON, J., in a written judgment, said that in May, 1916, the defendants thought they had secured an order for the manufacture of windshields from the Chevrolet Automobile Company, but had not then a firm bargain. On the faith of the supposed order, the defendants made a firm contract with the plaintiffs to purchase from the plaintiffs 75,000 feet of polished plate glass. This contract having been made, the plaintiffs went upon the American market and secured a contract for the supply of the glass required from a Toledo company. Upon this basis, the plaintiffs, if their contract with the defendants had been carried out, would have made a net profit of $11,482.50.

When the defendants found that they had no binding order from the Chevrolet concern, they gave instructions to the plaintiffs not to manufacture, and refused to give definite instructions as to the exact dimensions required, as called for by the contract between the plaintiffs and defendants. Negotiations followed, and were conducted with good faith on both sides.

The plaintiffs did not desire to damage their credit by seeking relief from the contract with the Toledo company, but placed the whole situation before them. The Toledo company insisted upon their contract, but suggested that the glass might be marketed. Every endeavour was made by the defendants to market it, but without success.

In the end, the plaintiffs had to negotiate the best settlement they could with the Toledo company; that company finally abandoned their contract with the plaintiffs on payment of $3,000 cash.

The plaintiffs now sought to recover this $3,000, which they had paid, and the profit of $11,482.50, which they had lost.

Reference to British Westinghouse Electric and Manufacturing Co. Limited v. Underground Electric Railways Co. of London Limited, [1912] A.C. 673; Roper v. Johnston (1873), L.R. 8 C.P. 167; In re Vic Mill Limited, [1913] 1 Ch. 183, 465.

Here it was unquestionable that the arrangement made with the Toledo company minimised the loss; for, if the goods had been manufactured as called for by the contract, they would have been scrap and waste material merely, and the loss would have been many times the $3,000 paid for the release from the contract.

In all aspects of the case, there was nothing to justify any reduction from the damages claimed.

Judgment for the plaintiffs for the sums claimed and costs.

STINSON v. INTERNATIONAL BRIDGE AND TERMINAL CO. LIMITED —KELLY, J., IN CHAMBERS—NOV. 26.

Parties—Addition of Defendants after Commencement of Action —Statement of Claim—Matters of Complaint Arising after Commencement of Action—Striking out Statement of Claim as against Added Defendants.]—Appeal by the defendants the Municipal Corporation of the Town of Fort Frances from an order of the Local Judge at Fort Frances dismissing the application of the appellants for an order striking out the statement of claim as against the appellants, on the ground that they could not properly have been originally made parties defendants. KELLY, J., in a written judgment, said that the action was commenced on the 25th July, 1917. The amending order by which the appellants and others were made defendants was made on the 12th September, 1917. A perusal of the statement of claim shewed that the happenings which the plaintiff complained of and on which he founded his claim were subsequent to the issue of the writ of summons. The appellants could not properly have been made defendants originally, and the appeal should be allowed with costs. Frank Denton, K.C., for the appellants. R. T. Harding, for the plaintiff.

RE BOURNE AND DUNN—MIDDLETON, J.—NOV. 29.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Incumbrance—Execution—Abandonment of Claim by Execution Creditor—Recital in Order Made under Vendors and Purchasers Act.]—Motion by the vendor, in respect of an agreement for the purchase and sale of land, for an order, under the Vendors and Purchasers Act, declaring invalid an objection made by the purchaser to the title. The motion was heard in the Weekly Court at Toronto. MIDDLETON, J., in a written judgment, said that, notice having been given to the execution creditor, whose possible claim formed the subject-matter of the objection, and the execution creditor, by counsel, now abandoning any possible claim, an order should go reciting this fact, and declaring that the execution creditor has not any claim against the land, and that a good title can be made, notwithstanding the matter mentioned as the objection. J. M. Ferguson, for the vendor. C. Carrick, for the purchaser. A. E. Knox, for the execution creditor.