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JUNE 12TH, 1902.

DIVISIONAL COURT.

BOCK v. TOWNSHIP OF WILMOT.

Master and Servant—Municipal Corporation—Pathmaster—Fellow Servant—Caving in of Gravel Pit—Negligence.

Appeal by plaintiffs from order of Judge of County Court of Waterloo setting aside verdict and judgment entered thereon for $125 in action for damages for injuries sustained by infant plaintiff, S. Bock, 14 years old, and loss occasioned by his father, plaintiff D. Bock, by reason of a bank of gravel falling upon S. Bock, who was at the time in the employment of one Zimmerman. Bock was directed by Zimmerman, who was liable to do statute labour, to do as instructed by one Cassell, the pathmaster, and it is alleged while so engaged was injured. The jury found in answer to questions that the infant was not guilty of negligence and did not undertake to work in the gravel pit with knowledge of the danger, and did not voluntarily undertake the risk: that the defendants were guilty of negligence which consisted in the pathmaster allowing the boy to work in the gravel pit. The Judge below held that the pathmaster was a fellow servant with S. Bock, and defendants were not liable.

E. E. A. DuVernet, for plaintiffs.

A. Millar, for defendants.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

FALCONBRIDGE, C.J.:—I do not think that under the circumstances the relationship of employer and employed existed between the township and the infant plaintiff. The latter was a servant in husbandry to John Zimmerman. He was not hired by the defendants; defendants had no power of dismissing him ; he was not paid by defendants; and neither they nor their pathmaster gave him any particular order: Rourke v. White Moss Colliery Co., 2 C. P. D. 205; Jones v. Liverpool, 14 Q. B. D. 890; Donovan v. Laing, 94 L. T. Jour. 436.

The plaintiffs cannot therefore maintain this action under the Workmen's Compensation for Injuries Act, and they must rely on the other grounds set up in the statement of claim, and per contra the infant plaintiff, not being a workman of defendants, is not embarrassed or deprived of redress, if otherwise entitled thereto, by the application of the common law rule as to negligence of a fellow workman.

The infant plaintiff occupies the much higher position of one of the general public who has come upon premises which are defendants' property quoad this action, at defendants' invitation, on business in which they were concerned.

And for damage done to him either by the personal negligence of defendants or by the negligence of a servant acting within the scope of his employment, defendants are liable: Thomas v. Quartemaine, 18 Q. B. D. at p. 69; Beven on Negligence, 2nd ed., p. 532 et seq.

A municipal corporation may be liable in this capacity of property owner or of one having control of property: Dillon, 4th ed., sec. 985.

And a pathmaster is a servant for whose negligence in the course of his employment defendants would be liable: Stalker v. Township of Dunwich, 15 O. R. 342.

The answers of the jury find negligence on the part of defendants, and negative the question as to volenti non fit injuria, and find against negligence or contributory negligence of plaintiff. We are not favoured with a copy of the charge, but the evidence was no doubt placed before them fairly, and it was certainly placed before them in such a manner that defendants have not seen fit to complain thereof. The jury, therefore, considered the matter in all its bearings with regard to the warning and alleged warning to plaintiff and in other respects, and I do not think their findings ought to have been set aside.

The only difficulty that arises is on the answer to the 3rd question.

Having regard to the evidence and to what the learned Judge's charge must have been, the answer seems to me to be pregnant with the suggestion that the pit was dangerous and unfit for plaintiff to work in.

In this sense there is perhaps no particular cogency in the use of the word "boy" except to designate the infant plaintiff, as the jury knew that both he and his father were parties to the action.

But if the jury did mean to say that more care ought to have been adopted by the pathmaster in view of this plaintiff's tender years the value of the finding is not thereby impaired.

I think the appeal ought to be allowed and the verdict for $125 restored with costs here and below.

Bowlby & Clement, Berlin, solicitors for plaintiff.

Millar & Sims, Berlin, solicitors for defendants.

BOYD, C. JUNE 12TH, 1902.

TRIAL.

ANDERSON v. CHANDLER.

Contract—Breach—Dismissal of Contractor—Architect's Notice of —Time—Sunday.

Action tried at Toronto, brought to recover damages for breach of contract for erection of a mausoleum and for work done and materials provided therefor.

G. T. Blackstock, K.C., W. R. Riddell, K.C., and A. Fasken, for plaintiff.

D. E. Thomson, K.C., and W. N. Tilley, for defendants Chandler.

H. L. Drayton, for defendant Gibson.

BOYD, C.:—The notice given to plaintiff by the architect under clause 25 of the conditions of the contract and mailed 23rd November, 1899, advising plaintiff that, unless he "proceeded satisfactorily with the work within 72 hours after mailing of the letter," the architect would certify the facts to the owner, was lacking in the element of specific objection, and does not indicate in what respect the work was to be prosecuted. The 23rd November, 1899, was a Thursday, and we have not the precise hour of mailing given; but in any event the last hour of the 72 would fall on Sunday. Should this *dies non* be counted against the contractor and in favour of a forfeiture? Brown v. Johnson, Car. & M. 444; Sadler v. Barber, 20 Wend. 207; Wharton on Contracts, vol. 2, sec. 897. There was unquestionably an application made on 27th November, if not before, and an attempt to remove undressed stones for the purpose of fitting them for the structure. But, apart from this, work of a substantial kind was being prosecuted in pursuance of the contract in the yard of the plaintiff, of which the architect took no notice, and of which he was not aware when he gave his notice and certificate; and therefore the stoppage of the work was not justifiable, and the plaintiff is entitled to $650 in respect of it. Improper charges of fraud were made against the architect and not substantiated, and against him the action is dismissed with costs. Judgment for plaintiff without costs for $650, with lien on the lot in question.

JUNE 12TH, 1902.

DIVISIONAL COURT.

PEGG v. HAMILTON.

Mortgage—Collateral Security—Promissory Notes—Payment.

Appeal by plaintiff from judgment of ROBERTSON, J., dismissing the action brought on a covenant to pay in a mortgage dated 20th October, 1888, given by defendants to plaintiff as collateral security for the payment of certain promissory notes.

C. C. Robinson, for plaintiff.

T. H. Lennox, Aurora, for defendants.

THE COURT (STREET, J., BRITTON, J.) held that the evidence established that the notes had been paid. Judgment below dismissing the action with costs and directing a discharge of the mortgage affirmed and appeal dismissed with costs.

JUNE 12TH, 1902.

DIVISIONAL COURT.

DAVIS v. HORD.

Costs—Taxation—Apportionment—Proper Method of—Slander Action—Issues—Failure of Some—Success of Others—Set-off.

Appeal by defendant from order of MEREDITH, C.J., dismissing defendant's application for order to review taxation of local Registrar at Stratford, and appeal from certificate of taxation of local Registrar, upon the ground that the principle upon which said taxation is based is wrong, ir. that the taxing officer declined to allow defendant his full costs of the action under the judgment of the trial Judge. Action for slander, in which four separate claims are made for alleged slanders on different occasions. By the judgment the plaintiff recovered against the defendant in respect of the matters set forth in the third and fifth paragraphs of the statement of claim, the sum of $1 and costs to be taxed; and the defendant recovered from the plaintiff in respect of the matters set forth in the fourth and sixth paragraphs of the statement of claim, his costs to be taxed. It was claimed for the plaintiff that he is entitled to the general costs of the action except so much of it as was occasioned by or referable to the causes of action upon which he has failed, with a set-off to the defendant of his costs of the issues upon which he has succeeded; while the defendant contends that the plaintiff should recover one-half only of the costs of the action against which he (the

defendant) is entitled to set off one-half his costs of defence. The taxing officer found in favour of the plaintiff's contention.

D. L. McCarthy, for defendant.

C. A. Moss, for plaintiff.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held, following Sparrow v. Hill, 7 Q. B. D. 362, 8 Q. B. D. 479, that the taxing officer had adopted the proper mode of taxing the costs of the parties.

Appeal dismissed with costs.

Dent & Thompson, Mitchell, solicitors for plaintiff.

Mabee & Makins, Stratford, solicitors for defendant.

JUNE 11TH, 1902.

DIVISIONAL COURT.

DECKER v. CLIFF.

Life Insurance—Assignment of Policy—Change of Beneficiary—Creditor.

G. M. Macdonnell, K.C., for defendant.

J. R. Roaf, for plaintiff.

Appeal by defendant from judgment of FALCONBRIDGE, C.J., ante p. 354, dismissed with costs.

JUNE 11TH, 1902.

DIVISIONAL COURT.

BURKE v. BURKE.

Master and Servant—Liability of Master for Act of Servant—Trespass to Person—Unnecessary Force—Solicitor.

P. H. Bartlett, London, for plaintiff.

J. M. McEvoy, London, for defendants Burke and Cook.

J. Montgomery, for defendant Robinson.

Appeals by plaintiff and by defendants Burke and Cook from judgment of FERGUSON, J., ante p. 127, dismissed with costs.

JUNE 11TH, 1902

DIVISIONAL COURT.

SHARKEY v. WILLIAMS.

Sale of Goods—Conditional Sale—Hire Receipt—Removal for Non-payment.

P. H. Bartlett, London, for plaintiff.

J. C. Judd, London, for defendant.

Appeal by plaintiff from judgment of FERGUSON, J., ante p. 135, dismissed with costs.

JUNE 9TH, 1902.

DIVISIONAL COURT.

LONG v. EBY.

Contract—Specific Performance—Delay—Time Essence of Contract —Waiver.

Appeal by the plaintiff from a judgment of MEREDITH, J., dismissing without costs an action for specific performance.

The plaintiff by a writing dated 30th January, 1901, offered to purchase certain town lots in Eglington for $1,000, payable $200 in cash to the vendors on acceptance of title, and the balance in instalments with interest at certain dates specified; deed to be given on payment of the $200; and the remainder to be secured by mortgage, with the privilege of paying it at any time. The vendors were not to be required to furnish abstract of title or to produce any deeds or copies of deeds or papers not in their possession or control. The purchaser to be allowed ten days to examine title at his own expense. All objections to title to be made in writing within that time. If no objection be made within this time, purchaser should be deemed to have accepted the title. Sale to be completed on or before 15th February, 1901, on which date possession of the premises was to be given to him or he was to accept the present tenancies and to be entitled to rents. The contract was upon a printed form, and ended with the printed words, "Time shall be of the essence of this offer," but the following words were interfiled in writing immediately before them, "This offer good for one day."

The defendants signed an acceptance of the offer on the same day, and the plaintiff named Mr. Swayzie as the solicitor who would act for him.

On the 14th February, 1901, Mr. Vandervoort wrote to Mr. Swayzie as follows: "Mr. Faulkner tells me you are solicitor for Mr. Long, who has purchased certain property on Glen Grove avenue. The 15th is the last day for closing, and I would be glad to hear from you to-day if you are acting as Mr. Long's solicitor in this matter, and I will therefore send you the draft deed."

On the 15th February, 1901, Mr. Vandervoort, the solicitor for the defendants, wrote to Mr. Swayzie as follows: "I enclose draft deed of Glen Grove avenue property from the Eby-Blain Co., Limited, to your client John Long. Sale proceedings under charge No. 26750 were taken by the Eby-Blain Co., Limited, and the property put up by auction,

the sale proving abortive. I have the sale papers in my possession, and I think they are all regular. Without admitting any liability on our part to procure release from Emily Bonning Willoughby, our mortgagor, I propose endeavouring to get her to sign the deed, releasing any claim which she may have, but whether I will be successful in this direction I cannot at present say. Will you kindly let me have draft mortgage by return mail, also state a time at which it would be convenient to you and your client to close the purchase?"

No answer being received to this letter, Mr. Vandervoort on the 18th February, 1901, wrote as follows to Mr. Swayzie: "Re Glen Grove property. I beg to remind you that the last day for completing the purchase of the above property by Mr. Long expired on the 15th inst. While not desirous of calling the deal off, I must request you to close the same forthwith. Will you kindly revise and return draft transfer. also draft mortgage, your client to the Eby-Blain Co., and make an appointment with me to close the purchase."

Upon receiving this letter Mr. Swayzie went to see Mr. Vandervoort, and explained to him that he had been ill and had not been at his office, or the earlier letter would have been answered. He also stated that his client expected to receive money from England by 1st March, and wished an extension of time to that date in order that he might pay all the purchase money in cash.

On 20th February, 1901, Mr. Swayzie wrote to Mr. Vandervoort: "Referring to our conversation of yesterday, in which the closing of this matter was enlarged by mutual arrangement until the 1st March, to enable Mr. Long to pay the total amount of the purchase money in cash, I wish you would also let the settling of the conveyance stand a day or two, and I will revise and return it to you this week. I would like to glance over the title before doing so, and have been under the weather lately."

On the same day Mr. Vandervoort replied as follows: "I have your favour of the 20th instant. Under the agreement entered into between Mr. Long and my clients time is strictly the essence of the same, and in granting the extension until the 1st March I wish it distinctly understood that it is entirely without prejudice to our rights."

Nothing further happened until 2nd March, 1901, when Mr. Vandervoort wrote to Mr. Swayzie as follows: "I am instructed by the Eby-Blain Co., Limited, to advise you that the deal between them and your client Mr. John Long under agreement dated 30th January, 1901, is off, and that the said agreement is hereby rescinded."

To this Mr. Swayzie immediately replied that he had been ill, and only able to attend to the most urgent matters; he denied the vendors' right to rescind, and offered to carry out the contract at once, tendering the money and a conveyance. The vendors refused to proceed further with the matter, and the present action was brought on the 15th March, 1901, asking for specific performance of the contract.

* * * * * * * * *

S. H. Bradford, for plaintiff.

T. Mulvey, for defendants.

STREET, J. (after stating the facts as above):—There appears to be nothing in the nature of the property in question here which would justify us in holding that time must necessarily be treated as being of the essence of the contract between the parties, in the absence of a special provision to that effect.

The language of the plaintiff's offer to purchase, and of the clause relied on by the defendants as making time the essence of the contract, is so clumsy that I have had some difficulty in coming to the conclusion at which I have arrived, that the intention expressed in it is to make time of the essence of all the terms of the offer, and not merely of the period of one day allowed for its acceptance. Reading the words "time shall be the essence of this offer" most strongly against the plaintiff, who uses them, they may, I think, be fairly construed to mean, "time shall be the essence of the terms of this offer in case of its being accepted."

The letter of Mr. Vandervoort of the 15th February, 1901, seems to me, however, to contain the clearest possible intimation to the plaintiff's solicitor that the stipulation as to time being of the essence would not be insisted on. That was the day fixed for completion by the terms of the contract, but the writer merely asks the plaintiff's solicitor to let him have the draft mortgage by return mail and to state a time at which it would be convenient to the solicitor and his client to close the purchase. His letter, moreover, contemplates some efforts which he was to make to get a release from Mrs. Willoughby of any possible claim, and impliedly puts off the completion of the matter until the result of these efforts should be ascertained. The letter in effect says: "We are not quite sure that we have everything ready on our part yet, but fix a convenient time for yourselves to close the purchase, and no doubt we shall then be ready."

In my opinion, there was here an absolute waiver of the stipulation in the contract by which the defendants would have been entitled to rescind for non-completion on 15th

February, 1901, and no new date for completion was substituted. The plaintiff was then freed from the obligation of completing the contract on 15th February, 1901, and became subject to a new obligation to complete it within a reasonable time. The defendants, having waived their right to rescind the contract in case of non-completion on 15th February, 1901, were entitled only to insist that there should be no unreasonable delay; and in case the plaintiff should unreasonably delay the completion they might have given him a notice to complete within a reasonable time to be fixed by them or that they would treat the contract as rescinded. But such a notice could only be given after the plaintiff had been guilty of unreasonable delay, and could not be given in anticipation of such delay. The authorities upon this question are collected in Green v. Seven, 13 Ch. D. 599.

The notice relied on by the defendants as fixing a peremptory day for completion is the letter of Mr. Vandervoort to the plaintiff's solicitor of 20th February, 1901. That letter appears to have been written under the mistaken idea that the letter of 15th February, 1901, had not affected the defendants' right to insist upon a strict performance of the contract. It may, however, be treated as a notice to the plaintiff that if he failed to complete the matter by 1st March, the defendants would consider themselves at liberty to treat the contract as at an end. But the plaintiff down to the date of the letter had not been guilty of any unreasonable delay, and so there was no right in the defendants peremptorily to fix a new day for completion, and Mr. Vandervoort's letter of 20th February did not entitle the defendants to forfeit the contract on 1st March.

The defendants, therefore, in my opinion, were not justified in refusing to complete the contract when the plaintiff pressed for completion on 2nd March, and the plaintiff is entitled to succeed. The appeal should, in my opinion, be allowed with costs, and the plaintiff should have the usual judgment for specific performance, with costs to the trial inclusive. Further directions and subsequent costs reserved till after report.

BRITTON, J., referred as to waiver to Harris v. Robinson, 21 O. R. 43, 19 A. R. 134, 21 S. C. R. 390; as to making time the essence of the agreement by notice, to Green v. Seven, 13 Ch. D. 589; as to delay after waiver, to Macdonald v. Elder, 1 Gr. 513, 526; as to reasonableness of notice and its terms, to Compton v. Bagley, [1892] 1 Ch. 313, Reynolds v. Nelson, Meddows & Geldert's R. 18,

Simons v. James, 1 Y. & C. 490: and agreed in allowing the appeal.

FALCONBRIDGE, C.J.:—The law is quite well settled, and I think this case must be treated as a decision on questions of fact arising upon the letters and conversations of the solicitors.

Such being the case, I see no reason for dissenting from the learned Judge's conclusion, and I would dismiss the appeal with costs.

Appeal allowed with costs; FALCONBRIDGE, C.J., dissenting.

B. E. Swayzie, Toronto, solicitor for plaintiff.

M. P. Vandervoort, Toronto, solicitor for defendants.

JUNE 13TH, 1902.

DIVISIONAL COURT.

McLAUGHLIN v. McLAUGHLIN.

Costs—Partition Proceeding—Taxed Costs—Special Circumstances.

W. A. Skeans, for adult defendants.

F. W. Harcourt, for infant defendants.

J. G. O'Donoghue, for plaintiffs.

Appeal by adult defendants from order of ROBERTSON, J., ante p. 378.

THE COURT (MEREDITH, C.J., MACMAHON, J., LOUNT, J.) made an order directing that the costs of plaintiffs, of official guardian, and of adult defendants, as between party and party, be taxed and paid out of the estate of John McLaughlin, deceased, in lieu of commission, and dismissing the appeal without costs.