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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JUNE 10TH, 1919.

CRAVEN v. CAMPBELL.

Fraud and Misrepresentation—Contract—Inducement—Evidence—Reckless Statements—Delay in Asserting Rights—Absence of Prejudice—Estoppel—Refusal of Leave to Amend—Rescission.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., ante 71.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL and LATCHFORD, JJ., and FERGUSON, J.A.

R. S. Robertson, for the appellant.

George Lynch-Staunton, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JUNE 11TH, 191.9

REX v. GRIFFITHS.

Criminal Law—Keeping Common Gaming-house—Summary Trial by Police Magistrate—Jurisdiction without Consent—Refusal of Magistrate to State Case—Appeal—Criminal Code, secs. 226, 228, 773, 774—5 Geo. V. ch. 12, sec. 8—8 & 9 Geo. V. ch. 16, sec. 2.

The defendant was summarily tried and convicted by a Police Magistrate for keeping a common gaming-house.

Section 773 of the Criminal Code provides that whenever any person is charged before a magistrate . . . (*f*) with keeping

. . . any disorderly house . . . the magistrate may, subject to the subsequent provisions of Part XVI. of the Code, hear and determine the charge in a summary way.

Section 773 (*f*) was amended in 1915, by 5 Geo. V. ch. 12, sec. 8: it now reads "with keeping a disorderly house under section 228."

Section 774 of the Code provides that the jurisdiction of the magistrate is absolute in the case of any person charged with keeping . . . any disorderly house . . . and does not depend on the consent of the person charged.

Section 226 of the Code defines a common gaming-house as a house, room, or place kept or used for playing therein any game of chance, or any mixed game of chance or skill; and the amending Act of 1918, 8 & 9 Geo. V. ch. 16, sec. 2, adds "in which the whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room, or place."

And sec. 228 of the Code enacts that every one is guilty of an indictable offence . . . who keeps any disorderly house, that is to say, any . . . common gaming-house.

After his conviction, the defendant applied to the magistrate to reserve for the opinion of the Court the question, whether there was any evidence upon which he (the defendant) could be convicted lawfully. The application was refused.

The defendant then moved for leave to appeal against the refusal to reserve the question.

The motion was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ., and FERGUSON, J.A.

T. C. Robinette, K.C., for the defendant.

Edward Bayly, K.C., for the Crown, submitted that there was no power to reserve a question in such a case as this, referring to Rex v. Booth (1914), 31 O.L.R. 539, at p. 541.

The judgment of the Court was delivered by MEREDITH, C.J.C.P.:—We are unable to find that any appeal lies to this Court in such a case as this

Motion dismissed.

SECOND DIVISIONAL COURT. JUNE 13TH, 1919.

*RE OTTAWA GAS CO. AND CITY OF OTTAWA.

Highway—Closing and Sale of Part of Highway in City—Municipal Act, R.S.O. 1914 ch. 192, sec. 472 (1) (c)—Pipes of Gas Company Laid under Soil of Highway—29 Vict. ch. 88 (Can.)—Powers of Municipal Council and Gas Company—Expense of Removal of Pipes—Compensation—Award Set aside.

Appeal by the Corporation of the City of Ottawa from the award of an arbitrator fixing at $1,699.11 the compensation or damages to be paid by the appellants for the injury suffered by the Ottawa Gas Company by the closing up of a portion of Hawthorne avenue, in the city of Ottawa, under a by-law of the city council.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and MIDDLETON, JJ.

F. B. Proctor, for the appellants.

G. F. Henderson, K.C., for the respondents.

MEREDITH, C.J.C.P., in a written judgment, said that the main question was, whether there was any conflict between the power conferred by legislation upon the municipal council and the power in like manner conferred upon the gas company, upon which powers the parties' rights in this matter depended.

Broadly stated, the power conferred upon the municipal council enabled them lawfully to stop up the highway and sell the "soil and freehold" of it; and that conferred upon the gas company enabled them to "lay down" in that highway their gas-pipes, and, "at all times and from time to time," to open up and "dig up" the highway for the purpose of repairs or renewals, "or laying down new plant and pipes."

The rights conferred upon the gas company are highway rights only—there is no power to expropriate land; the company got only that which, in another but less convenient form, they already had in common with the rest of the public; they already had the right to carry their goods or services, on foot or in vehicles, over the highway; but for the much greater convenience, not only of seller and buyer but of the public using the highway, they were permitted to carry their gas in pipes under the surface of high-

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

ways. There is not a word in the only enactment upon which the company rely—29 Vict. ch. 88 (1865), the company's Act of incorporation—which confers any right except in connection with a highway.

The power conferred upon the municipal council is, to stop up any highway or part of a highway and lease or sell the soil and freehold of it—the Municipal Act, R.S.O. 1914 ch. 192, sec. 472 (1) (*c*)—and that is quite consistent with the power conferred upon the gas company.

When a new highway is opened, under the power conferred on municipal councils to establish and lay out highways, or otherwise, the company's power extends to them, as their needs and interests also do; and, when a municipal council, under its powers, closes a highway, the company's powers there end, as do their needs and interests generally in regard to it also.

The closing of a highway having gas-pipes in it is not an every day occurrence; it seems to have been unheard of before. Gas-mains are laid in the occupied highway, and the occupied highway is seldom closed.

Whether the gas-pipes are or are not part of the soil is not the question. The logical and determining question is, for how long? And in this case that which seems to be the obvious answer is, as long as the highway lasts.

There is no right to compensation; the gas company are deprived of nothing, and no injurious effect is caused to any of their legal rights. Their rights in the highway end when the highway's existence ends.

The appeal should be allowed and the award set aside, and the appellants' costs throughout should be paid by the respondents.

RIDDELL, J., was also of opinion, for reasons stated in writing, that the gas company were not entitled to compensation.

BRITTON and MIDDLETON, JJ., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 13TH, 1919.

*PARSONS v. TORONTO R.W. CO.

Negligence—Collision between Automobile and Street-car in Highway—Negligence of Driver of Street-car—Negligence of Driver of Automobile—Street-car Driven at too High Speed—Car not under Control—Findings of Jury—Primary and Ultimate Negligence the same—Result of Findings.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff in an action for damages for injuries sustained by him when an automobile which he was driving was struck by a street-car of the defendants'. The plaintiff alleged negligence on the part of the employees of the defendants in charge of the street-car. The action was tried with a jury; the findings of the jury were in favour of the plaintiff; the damages of the plaintiff were assessed at $700, for which sum the trial Judge directed judgment to be entered with costs.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON and RIDDELL, JJ.

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

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

RIDDELL, J., read a judgment in which he said that the plaintiff, driving a Ford touring car, on the afternoon of the 5th June, 1918, stopped on the south side of Dundas street, a few feet behind another motor-vehicle, in order to make some purchases in a shop adjoining. His car was, of course, facing east. Coming out of the shop, he looked to the west, and saw a street-car some 250 to 300 yards away; he then passed around the back of his car and entered it on the north or left side. Before starting his car, he looked in the mirror, and judged the street-car then to be about 150 yards west. He then started up his car to pass around the car immediately in front, and therefore turned to the north. In this way he placed the left wheel of his car on the railway track, although apparently there was room to pass between the standing car and the rail. He had got up a speed of 8 or 10 miles an hour, and had turned to the right or south of the standing car, when his car was struck by the street-car and driven 18 or 20 yards against a trolley-pole.

The evidence of the plaintiff indicated that the street-car was going very fast, from 20 to 25 or 30 miles an hour; the evidence for the defence made it much less.

The jury answered questions as follows:—

1. Was there any negligence on the part of the defendants or their motorman which caused the collision? A. Yes.

2. In what did such negligence consist? A. In that he did not have his car under control to stop in case of an emergency.

3. Was there any negligence on the part of the plaintiff which caused or contributed to the collision? A. Yes.

4. In what did such negligence consist? A. He misjudged the distance the street-car was from him when he started from the kerb.

5. Notwithstanding the negligence, if any, of the plaintiff, could the defendants' motorman, by the exercise of reasonable care, have prevented the collision? A. Yes.

6. Could the motorman, by the exercise of reasonable care, have prevented the collision, and, if so, what should he have done which he did not do or left undone which he did? A. He should have had his car under control.

Upon these findings, the County Court Judge (Winchester) directed judgment to be entered for the plaintiff with costs.

The main ground of appeal was, that the jury had made the same negligence answer for primary negligence and ultimate negligence—the only negligence found was the great speed at which the street-car was going.

The fair result of British Columbia Electric R.W. Co. v. Loach, [1916] 1 A.C. 719, and Columbia Bitulithic Limited v. British Columbia Electric R.W. Co. (1917), 55 Can. S.C.R. 1, is, that, if the motorman was running his car at so great a speed that he could not, by the exercise of proper care, avoid the result of a negligence of the plaintiff which might be anticipated, this excessive speed was, in itself, the efficient, the proximate, the decisive cause of the accident, and the contributory negligence of the plaintiff did not neutralise its effect.

In the present case, the jury intended to find that the motorman did not succeed in stopping his car by reason of the fact that he was going too fast; and, if that were so, the defendants were liable. There is no perceptible difference between sending a car out without proper brakes and running a car at such a speed that proper brakes are useless.

Reference to Brenner v. Toronto R.W. Co. (1907-8), 13 O.L.R. 423, 15 O.L.R. 195, 40 Can. S.C.R. 540.

The appeal should be dismissed.

MEREDITH, C.J.C.P., was of the same opinion, for reasons stated in writing.

MAGEE, J.A., and BRITTON, J., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. APRIL 25TH, 1919.

*REX v. AVON.

Criminal Law—Keeping Disorderly House—Summary Trial and Conviction by Police Magistrate—Absence of Information and Summons — Foreigner — Waiver — Jurisdiction — Sentence — Imprisonment for one Year in Reformatory—Power of Magistrate Exceeded—Criminal Code, secs. 228, 773 (f), 774, 777, 781—Habeas Corpus—Power of Court to Amend Conviction by Reducing Term and Changing Place of Imprisonment—Criminal Code, secs. 754, 1120, 1124 — Conviction and Proceedings before Magistrate Brought before Court but not on Certiorari—Discharge of Defendant from Custody.

Appeal by the defendant from the order of MIDDLETON, J., ante 162.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON and RIDDELL, JJ., and FERGUSON, J.A.

R. L. McKinnon, for the appellant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P., read a judgment in which he said that the defendant, who attended a Police Court as a mere spectator, found himself, without information, summons, or warrant, immediately tried and convicted of a grave offence and sentenced to one year's imprisonment at hard labour in the Ontario Reformatory. The man was an Italian, so unfamiliar with the English language that the magistrate called upon an interpreter to explain to him (the defendant) the nature of the charge upon which he was being tried. To say that the prisoner was voluntarily before the magistrate, or that he waived any of his rights, was manifestly untrue. The man did not know enough of the English language or of Canadian law to waive anything of the kind.

There was, of course, a reason for the prosecution. The magistrate had been investigating a charge in respect of immoral conduct on the part of a girl, and, having failed to convict the men involved in it, turned his inquiry to the prisoner, in whose house the immoral conduct was said to have taken place.

The magistrate, although he assumed "absolute jurisdiction" over the case, not giving the man a choice of trial by jury, proceeded, after convicting him, to pass sentence upon him as if he had been tried by a jury and to impose upon him the severest penalty possible in such a case, though the limit under his absolute jurisdiction was only about half as much, and then fell into

the further error of adjudging imprisonment in the Ontario Reformatory for a definite term, although both provincial and federal legislation permits only "an indeterminate period:" see the Ontario Reformatory Act, R.S.O. 1914 ch. 287, sec. 19; and the Prisons and Reformatories Act, R.S.C. 1906 ch. 48, sec. 44 (enacted by 3 & 4 Geo. V. ch. 39, sec. 1).

On the 4th April, 1919, a writ of habeas corpus was obtained, and notice of motion for the discharge of the prisoner was given on the next following day; but the writ was not served upon any one, nor was any return to it made. On the motion for the discharge of the prisoner, affidavits by and on behalf of the prisoner were filed in support of the motion, and by the magistrate in opposition to it; the magistrate was cross-examined on his affidavit, and his depositions were used upon the motion.

The Judge in Chambers ruled that the punishment inflicted was greater than the magistrate had power to inflict, but ruled also that he (the Judge) had power to order an amendment of the conviction so as to impose a penalty within the magistrate's power, and the issue of a new warrant of commitment in accordance with the amended conviction, and to remand the prisoner to the custody of the gaoler, to be held under the new warrant; and an order was issued accordingly.

The learned Judge had no such power on the application before him; but, considering that he might direct the issue of a certiorari, and that, upon the conviction and warrant being brought up, he would have power to impose the new punishment, took the short course of doing it without having the papers regularly brought before him—adding the observation that the papers were already actually before him.

By whatever irregular means the papers were taken from their proper place of custody, "among the records of the general or quarter sessions of the peace" of the County of Wellington (Criminal Code, sec. 793), they were not properly before the Judge, and were not before him "on being removed by certiorari," and therefore there was no power to rectify an error, as the Judge purported to do, under sec. 1124 of the Code.

A sentence of one year in the Ontario Reformatory at hard labour was changed to one of six months in the common gaol at Guelph, apparently without hard labour.

There was no power in the Judge in Chambers to change the warrant or conviction; without the change the warrant was bad and the conviction also; and, accordingly, this appeal should be allowed, the order appealed against set aside, and an order directing the discharge of the prisoner out of custody should be made—unless the Court should now see fit, acting under sec. 1120 of the Code, to direct the magistrate to impose a proper punishment;

but that was out of the question, having regard to the manner in which the man was tried and convicted; and, that being so, it was not needful to consider whether the magistrate ever had any jurisdiction over the prisoner.

The appeal should, therefore, be allowed and an order made as above mentioned.

The other members of the Court agreed in this disposition of the case—MAGEE, J.A., and RIDDELL, J., giving reasons in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. JUNE 13TH, 1919.

*BROWN v. WALSH.

Contract—Sale of Goods—Action by Buyer for Damages for Breach by Seller—Failure on Facts—Claim for Return of Money Paid by Buyer on Account of Price—"Deposit"—Forfeiture—Absence of Agreement for Retention of Money Paid—Return of Amount Paid, less Damages Sustained by Buyer's Breach of Contract.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Huron dismissing an action to recover $135 damages for breach of a contract and $100 for money had and received.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., BRITTON, J., and FERGUSON, J.A.

R. C. H. Cassels, for the appellant.

L. E. Dancey, for the defendant, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the defendant agreed with the plaintiff to sell to him "one car cast iron and stove plate mixed and all wrought iron and steel and malleable, price $22 per ton for cast and stove plate, $17 for wrought and steel and malleable, f.o.b. Blyth." Two writings evidencing the agreement were made, one signed by the plaintiff and the other by the defendant, and in each it was said that there had been "deposited on this contract that is to say $60 on the balance of iron left in yard f.o.b. when loaded on car," and that "before loading this iron" the defendant "will pay $40 on contract." The iron was to be "loaded in January," but after-

wards that was changed by the parties, and in the writing signed by the plaintiff the word "January" was struck out and the word "February" was written over it. The sum of $60 was paid when the agreement was made, and the $40 "some time in January." The whole of the cast iron and stove plate was delivered to a purchaser of it from the plaintiff, the plaintiff being present, and the full price of it was paid by the sub-purchaser to the defendant. The rest of the goods were never delivered to the plaintiff, and eventually the defendant sold and delivered them, at the same price and on the same terms as agreed with the plaintiff, to another purchaser, and was paid for them by him.

This sale was made because the plaintiff failed to carry out his agreement to purchase: in making the sale the defendant was quite within his legal rights, and acted reasonably in the interests of the plaintiff as well as of himself.

The plaintiff's action, for damages for breach of contract to deliver the second lot of the goods, failed in fact; and the only question which remained was—"What were the rights of the parties in regard to the $100 paid by the plaintiff to the defendant? The trial Judge considered the money forfeited, and dismissed the action altogether—apparently thinking that all money paid by a purchaser, who ultimately fails to carry out his contract, belongs to the seller. That, of course, is not so.

The seller can become entitled to it only if the purchaser has agreed that he shall; and, even in such a case, the Court may relieve against a forfeiture.

The measure of damages for breaches of contracts is the loss directly and naturally resulting in the ordinary course of events from the breach. There is no power in the Courts to add a penalty.

There was no evidence of any agreement that the payments which were made should be the seller's if the purchaser failed to carry out the contract—the defendant's own testimony proved the contrary.

Dealing with the case upon principle only, the money should be returned, less such damages as the defendant was proved to have sustained by reason of the plaintiff's breach of the contract. The sum of $25 should well compensate the defendant.

It was argued for the defendant that the cases were against the view that the seller could not retain the deposit.

The learned Chief Justice considered Howe v. Smith (1884), 27 Ch.D. 89; Walsh v. Willaughan (1918), 42 O.L.R. 455; Brickles v. Snell, [1916] 2 A.C. 599; and Steedman v. Drinkle, [1916] 1 A.C. 275; and said that the Judicial Committee, at all events, had gone pretty near to the rule that if the seller be fully compensated that is enough.

The appeal should be allowed with costs, and judgment should be entered in favour of the plaintiff for $75 damages, with costs as provided for by the Rules.

Appeal allowed.

HIGH COURT DIVISION

LENNOX, J., IN CHAMBERS. JUNE 9TH, 1919.

ANDERSON v. CLARKSON.

BURK v. CLARKSON.

Appeal—Leave to Appeal from Orders of Judge in Chambers—Rule 507—Orders Striking out Paragraphs of Reply—Unnecessary Pleading—Unimportant Question.

Motion in each action by the plaintiff for leave to appeal from orders of SUTHERLAND, J., in Chambers, affirming orders of the Master in Chambers striking out paragraphs of the reply in each action.

T. R. Ferguson, for the plaintiff.
Hamilton Cassels, K.C., for the defendants.

LENNOX, J., in a written judgment, said that the plaintiff in both actions was the same person, "Evangeline Medora Anderson" or "Evangeline Medora Burk." In the first action she asked to have it declared that she was entitled to one half of the real and personal estate of Daniel Francis Burk, deceased, under a writing (set out in the statement of claim) alleged to be under the hand and seal of the deceased. In the second action she asked, as executrix of the last will of the deceased, to have the will established and letters probate thereof granted. The defendants delivered statements of defence in the two actions. The plaintiff replied, joining issue, and (in the first action) adding this paragraph: "The plaintiff will object at the trial that no evidence is admissible to support the allegations contained in the latter part of paragraph 3 of the defence . . . in that no facts are pleaded to support the conclusions of law therein alleged." In the second action the plaintiff also joined issue and added: "(2) The plaintiff does not by her claim herein allege that she is the widow of the said Daniel Francis Burk, deceased. (3) The plaintiff will object that no evidence is admissible to support the

allegations contained in the latter part of paragraph 3 of the said defence in that the defendants do not allege that the plaintiff was the wife of the said Daniel Francis Burk, deceased."

The paragraphs quoted were struck out by the Master, and his orders were affirmed by Sutherland, J., in Chambers. Leave to appeal was now asked for, under Rule 507.

It was admitted that there was no conflict of judicial decisions. The plaintiff, under Rule 507, must establish that there was good ground to believe that Sutherland, J., came to a wrong conclusion, and also that the question involved was of sufficient importance to justify an appeal.

The point was of no general importance, and it was of no practical consequence to the plaintiff whether the paragraphs in question were in or out. And there was no reason for saying that Sutherland, J., erred in affirming the orders of the Master.

The motions for leave to appeal should be dismissed, with costs as in the orders of Sutherland, J.

RE SECURITIES LIMITED AND OSTER—LENNOX, J., IN CHAMBERS—JUNE 9.

Mortgage—Sale under Power—Distribution of Surplus Proceeds—Contest as to Priorities—Costs.]—Motion by Charles E. Oster for payment out of Court to him of a sum of $400, the surplus proceeds of a mortgage sale. The motion was opposed by one Carlaw and one Shaw; each for himself claimed the money in Court. LENNOX, J., in a written judgment, after discussing the facts as they appeared upon affidavits, found that, as between themselves, Carlaw had priority over Shaw; and, as a matter of justice, as well as legally, Oster had priority over both, and was entitled to the money in Court. Order made for payment out to Oster. Costs of the motion to be paid by the other claimants. Order not to issue for 10 days. T. J. Agar, for Oster. D. S. Constable, for Carlaw. M. C. Pritchard, for Shaw.

MCRAE V. SUTHERLAND—CLUTE, J.—JUNE 12.

Vendor and Purchaser—Agreement for Sale of Land—Action by Purchaser for Specific Performance—Defences—Failure of—Subsequent Sale by Vendor to Bona Fide Purchaser for Value—Registration of Conveyance—Damages in Lieu of Specific Performance.]—Action for specific performance of an alleged agreement of the 23rd October, 1918, for the sale by the defendant to the plaintiff of a farm of 100 acres in the township of Roxborough for $4,350. The defendant alleged that the agreement relied upon by the plaintiff was only an option for 30 days, which the plaintiff had not accepted within that time; and, alternatively, that the agreement had been terminated by a subsequent agreement. The action was tried without a jury at Cornwall. CLUTE, J., in a written judgment, found, upon the evidence, that neither of the defences had been substantiated. It appeared that the defendant had, on the 11th November, 1918, sold and conveyed the farm to one Tait for $4,500. The deed to Tait having been registered, and it appearing that he was a bona fide purchaser for value, the plaintiff could not have specific performance, but he was entitled to damages for breach of the agreement. The farm, if properly advertised, would have sold for at least $5,000, and the plaintiff was entitled to recover the difference between the price he agreed to pay and $5,000, namely, $650. Judgment for the plaintiff for $650 and costs of the action. C. H. Cline, for the plaintiff. W. B. Lawson, K.C., for the defendant.

FIELDHOUSE V. CITY OF TORONTO—FALCONBRIDGE, C.J.K.B.—JUNE 14.

Nuisance—Judgment Directing Abatement—Motion to Extend Time for Abatement—Direction that Motion be Heard with Motion to Compel Compliance with Judgment.]—Motion by the defendants for an order amending the judgment in this action—Fieldhouse v. City of Toronto (1918), 43 O.L.R. 491—and extending the time allowed for abating the nuisance. The motion was heard in the Weekly Court, Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, in view of the fact that it would be necessary for the plaintiffs to move the Court for an order to compel compliance by the defendants with the judgment or to impose a penalty for non-compliance therewith, he should now direct that this motion stand over to be heard by the Court or Judge who shall hear the plaintiffs' motion, and who will then dispose of the costs of this motion. Irving S. Fairty, for the defendants. T. R. Ferguson, for the plaintiffs.