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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 25TH, 1917.

UNION NATURAL GAS CO. v. CHATHAM GAS CO.

Costs—Appeal—New Trial.

A new trial having been directed by the judgment of the Court delivered on the 12th June, 1917—noted ante 286—the following memorandum as to costs was afterwards made by HODGINS, J.A.:—The view of the Court is, that in this case the costs of the action up to the time when the parties were at issue should be reserved to be dealt with in the discretion of the new trial Judge, and that there should be no costs of the action from that time up to and including the trial and judgment. The costs of the appeals should be to the defendants in any event.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. JULY 23rd, 1917.

*REX v. OBERNESSER.

Ontario Temperance Act—Tenant of Apartment Having Intoxicating Liquor in Cellar of Apartment-house—"Dwelling-house"—Separation of Cellar from Apartment—6 Geo. V. ch. 50, sec. 41 (1).

Motion to quash a conviction of the defendant by the Police Magistrate for the City of Hamilton.

The conviction was, for that the defendant "did unlawfully

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

have, keep, or give liquor in other than a private dwelling-house, contrary to the provisions of the Ontario Temperance Act."

Section 41 (1) of the Act, 6 Geo. V. ch. 50, is: "Except as provided by this Act, no person by himself, his clerk, servant, or agent, shall have or keep or give liquor in any place wheresoever other than the private-dwelling-house in which he resides, without having first obtained a license . . .".

H. S. White, for the defendant, contended that the cellar under the apartment-house in which the defendant resided was a proper and legal place in which he might keep intoxicating liquor.

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

FALCONBRIDGE, C. J. K. B., in a written judgment, said that under the apartment-house in which the defendant resided there was a cellar. It was entered by means of an open stairway from the back verandahs of the apartments, like a rear entrance to the cellar of an ordinary dwelling. There was no stairway inside the building leading to the cellar. Each of the tenants or occupants of the different suites of apartments had a key to this outside door. The cellar was partitioned off into what the officers called "fruit-cellars," and one of these divisions was allotted to each of the occupants. There was a number on each, one corresponding with the number of the apartment to which it belonged; and the tenant had his own separate and individual key to his own compartment, of which he had the sole use and occupation.

The intention and effect of this arrangement was to bring this cellar within the curtilage, and to give the occupant the same rights as he would have if he had a cellar of his own. The defendant was therefore, within the saving clauses of the Act, and the conviction, must be quashed and the confiscated liquor returned to him.

The defendant pleaded guilty to having liquor in his garage, and he had a suspiciously large quantity and assortment of liquor in the cellar, and also *a measure*.

There should be no costs of the motion, and the order should contain a clause protecting the magistrate and officers.

RE SOLICITORS—FALCONBRIDGE, C.J.K.B.—JULY 24.

Solicitors—Bill of Costs—Taxation between Solicitor and Client—Agreement—Lump Sum—Retainer-fee—Consultation-fee—Tariff of Costs—Discretion of Taxing Officer—Review—Appeal—Costs of Reference and Appeal.]—Appeal by William Crawford, client, from

the report of a local officer upon taxation of a bill of costs of the solicitors for services in and relating to an action brought on behalf of the client. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, in all the circumstances, the agreement by which the solicitors were to retain $1,000 for their fees was an eminently fair one—that money was well-earned—and Crawford was a very ungrateful and extremely ill-advised man to seek to disturb the arrangement. With some hesitation (Re Totten (1880), 8 P.R. 385, being regarded as still law), the learned Chief Justice disallowed item 1 of the bill—$50—as being covered by, and included in the first item of Tariff A—"For the institution of an action, $20;" and also, on the same principle, item 2 objected to—"Fee to Mr. ——— on consultation, $20." As to all the other items complained of, the Master had, under the "Note" on p. 208 of the Rules of 1913, discretion to make additional allowances; and, on review thereof, his exercise of such discretion should be confirmed and approved. In the result there should be a further deduction of $70 from the amount taxed by the Master. This was very unsubstantial, and the client must pay the costs of the appeal. There should also be a substantive order for payment by the client of the costs of the reference. Daniel O'Connell, for the client. H. S. White, for the solicitors.

HOLINESS MOVEMENT CHURCH IN CANADA v. HORNER—SUTHERLAND, J.—JULY 19.

Church—Deposition of Bishop by Conference—Bishop Continuing to Act—Injunction till Trial of Action to Determine Rights.] —Motion by the plaintiffs for an interim injunction restraining the defendant R. C. Horner from acting as bishop of the plaintiff church. The motion was heard in the Weekly Court at Toronto. SUTHERLAND, J., delivering judgment at the conclusion of the hearing, said that he had no doubt that the defendant Horner should be enjoined until the trial. He had been deposed by the General Conference of the church, his successor had been elected, and was acting as bishop, and must be treated as such. If the defendant Horner wished to contest the action of the Conference, he should have taken proceedings with that view, instead of continuing to act as if he were still bishop and had not been deposed. It must be assumed for the present that the Conference proceeded regularly under the constitution. Injunction granted until the trial with costs in the cause to the plaintiffs, unless otherwise ordered by the trial Judge. W. N. Tilley, K.C., for the plaintiffs. G. F. Henderson, K.C., for the defendant Horner.

CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v. LEONARD-PARMITER LIMITED—CANADA BONDED ATTORNEY AND LEGAL DIRECTORY LIMITED v. G. F. LEONARD—FALCONBRIDGE, C.J.K.B.—JULY 25.

Trade Publications—Piracy—Evidence—Injunction—Damages—Contract—Employee—Misconduct—Remuneration for Services—Reference.]—The first action was brought for an injunction and damages in respect of the use of a book and the piracy of the plaintiffs' publications and business. The second action was brought for the return of moneys paid by the plaintiffs to the defendant while the defendant was acting as a traveller for and a director of the plaintiffs, because of misconduct of the defendant in the formation of a rival company. The actions were tried together without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs were entitled to succeed as to all matters in controversy in both actions. The intrinsic evidence of the lists showed conclusively the use made of the plaintiffs' material in the preparation of the defendants' production; and there was satisfactory and convincing evidence of: (*a*) the improper retention by the defendants of one of the plaintiffs' lists of subscribers; (*b*) the surreptitiously obtaining from the plaintiffs typewritten lists of the present subscribers, and of the plaintiffs' subscribers whose contracts had been cancelled; (c) the soliciting by the defendants of the business of the plaintiffs' subscribers and in so doing using the lists, information, and material wrongfully and surreptitiously obtained from the plaintiffs; (*d*) the individual defendants endeavouring to entice away employees from the plaintiffs. In the first action, judgment should be entered in favour of the plaintiffs in terms of the prayer of the statement of claim and of the amended statement of claim, with costs, and with a reference as to damages. As to the second action, the learned Chief Justice finds the facts in controversy in favour of the plaintiffs, both as to the contracts and as to the matter of misconduct charged in the amendment made at the trial, which misconduct disentitles the defendant to remuneration for his services. There must be a reference in this action unless the parties can agree on figures. Costs to the plaintiffs. Both parties to have leave to amend the pleadings in accordance with the draft put in at the trial. A. C. McMaster and E. H. Senior, for the plaintiffs. J. P. MacGregor, for the defendants.

LEARIE v. GAUDET—GAUDET v. LEARIE—FALCONBRIDGE, C.J.K.B. —JULY 26.

Assignments and Preferences—Money Given by Husband to Wife to Purchase Land—Ante-nuptial Promise, not in Writing—Insolvency of Husband—Assignment for Benefit of Creditors—Action by Assignee to Bring Land into Estate of Husband—Absence of Fraudulent Intent.]—The first action was brought by Thomas W. Learie, assignee for the benefit of creditors of the estate and effects of Fidele J. Gaudet, against Letitia Mary Gaudet, wife of the assignor, for a declaration that certain land conveyed to the defendant was purchased with the money ($2,900) of her husband; that he was really the owner of it, and she a trustee for him; and for a conveyance or vesting order in favour of the plaintiff as assignee. The second action was brought by the wife against the assignee to recover $1,775 said to have been lent by the wife to her husband. The actions were tried together without a jury at Sault Ste. Marie. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the account given by the defendant of the transaction which was attacked in the first action was uncontradicted, and it was perfectly credible and reasonable. The gist of the action was the alleged intent to defeat or defraud creditors—and it had not been proved that there was such intent in the minds of either the defendant or her husband. The case was not at all on the lines of McGuire v. Ottawa Wine Vaults Co. (1913), 48 S.C.R. 44; In re Butterworth (1882), 19 Ch. D. 588; or Alexandra Oil Co. v. Cook (1909), 1 O.W.N. 22, 14 O.W.R. 604. This was not done with the intent of protecting the property from the claims of possible or probable creditors of a hazardous business. The business was not then in contemplation, and, when embarked on, it was a fairly prosperous one for about 5 years, i.e., until the war broke out. The $2,900 in question was paid in pursuance of an ante-nuptial verbal promise. A writing is not necessary to rebut the charge of fraud: Montgomery v. Corbit (1896), 24 A.R. 311. Learie's action should be dismissed with costs. As to the action of Mrs. Gaudet, she was content, on getting judgment in her favour in the other case, to have her action dismissed without costs. If the finding had been against her in the other action, judgment would have been given in her favour in her action, with costs. J. Ewart Irving and U. McFadden, for Learie. J. L. O'Flynn, for Letitia Mary Gaudet.

RE TAGGART—SUTHERLAND, J., IN CHAMBERS—JULY 28.

Infant—Custody—Rights of Mother—Interest of Infant—Access.] —Application by Margaret Taggart, the mother of the infant Mary Frances Stella Taggart, for an order giving the applicant the custody of the infant, a child of nine years. The father died in February, 1917. He had placed the infant in the care of his sister, Hannah Taggart. The father was a Protestant, and the mother (applicant) a Roman Catholic. The father, in the summer of 1916, signed a statement to the effect that he wished the child to remain with his sister. SUTHERLAND, J., in a written judgment, after stating the facts, said that the interest of the child was a matter of the gravest importance; and he could not but conclude, upon the whole material before him, that the mother was not a suitable person to whom to commit the custody of the child or that it would be in the interest of the child to take her away from the care and custody of the aunt. Application refused. No order as to costs. The order dismissing the application may contain a provision that the mother shall see the child at such reasonable times as may be agreed upon, or fixed by the Judge upon failure to agree. J. E. Day, for the applicant. Harcourt Ferguson, for Hannah Taggart, the respondent.