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CARTWRIGHT, MASTER. SEPTEMBER 7TH, 1906.

CHAMBERS.

McRAE v. BALLANTYNE.

Writ of Summons—Service out of Jurisdiction—Motion to Set aside — Grounds — Res Judicata—Premature Action —Discretion—Costs.

Motion by defendants Ballantyne and Lowell & Christmas to set aside an order for service on them out of the jurisdiction of the writ of summons and statement of claim, and to set aside the service effected thereunder.

A. W. Ballantyne, for applicants.

Grayson Smith, for plaintiff.

THE MASTER:—This action is a result of that of Gillard v. McKinnon, the facts of which are to be found in 6 O. W. R. 365. It was tried at the Stratford Spring Assizes, before Britton, J., and a jury, and resulted in a verdict and judgment for plaintiff.

This is now in appeal before a Divisional Court. On 6th June the action of McRae v. Ballantyne was commenced, the plaintiffs herein being all those who were defendants in Gillard v. McKinnon, except Duncan J. McKinnon, who is a defendant in this second action.

It is brought against Ballantyne, Lowell & Christmas, and Duncan J. McKinnon, to recover damages for alleged deceit and fraud on their part whereby the plaintiffs were induced to make the note sued on in Gillard v. McKinnon.

The usual order was made for service out of the jurisdiction on Ballantyne and Lowell & Christmas.

These two defendants moved to set aside that order and service thereunder.

The two grounds relied on in support of the motion were: (1) that the matter was res judicata, having been determined in the action brought by Gillard; (2) that in any event this action was premature until the final disposition of that action.

As to the first ground, it was answered that the parties in the two actions are not the same, and that the issues are altogether different.

This, I think is correct. It may be that Gillard would be entitled to recover as being an innocent holder for value, and yet that the plaintiffs might succeed in their action against Ballantyne et al. for inducing them to make it.

In any case the defence of res judicata will be open to defendants, and cannot be disposed of on the present motion. It is really equivalent to a demurrer to the statement of claim, and must be disposed of in Court: see Knapp v. Carley, 7 O. L. R. 409, 3 O. W. R. 187.

As to the second ground, it seemed to me at first to be entitled to considerable weight. It is plain that, if the plaintiffs in this action are successful, the measure of damages will depend largely on the final determination of the Gillard action. Still it does not seem right to delay them on this ground. This point can safely be left to be dealt with by the Court hereafter. Prima facie the plaintiffs have a cause of action, as the allegations in the statement of claim must be assumed to be true at present and for the purpose of this motion. It should therefore be dismissed, and the defendants should forthwith deliver their statements of defence.

The costs of this motion may be in the cause, as it might be thought it was a case for invoking the "discretion in the Court as to allowing service" spoken of in Baxter v. Faulkner, 6 O. W. R. 198.

ANGLIN J. SEPTEMBER 7TH, 1906.

WEEKLY COURT

LONDON AND CANADIAN LOAN AND AGENCY CO. v. NATIONAL CLUB.

Injunction — Interference with Ancient Lights—Interim Injunction—Erection of Building—Speedy Trial.

Motion by the plaintiffs to continue an injunction restraining the defendants from erecting a building close to the plaintiffs' building on Bay street, in the city of Toronto, in such a manner as to exclude light.

S. H. Blake, K.C., and B. N. Davis, for the plaintiffs.

A. C. McMaster, for the defendants.

ANGLIN, J.:—It would not perhaps be wholly satisfactory to determine upon the present material whether or not the construction of the defendants' projected building will so interfere with light to which the plaintiffs claim to be entitled, that the occupation of their premises will be thereby rendered "uncomfortable according to the ordinary notions of mankind." As this action must go down for trial in due course, it seems to me undesirable in disposing of the present motion to enunciate any propositions of law which might prove embarrassing at a later stage. I therefore abstain from stating conclusions to which consideration of the authorities cited, with others, has led me.

But a case of intended substantial interference by the defendants with what are admittedly ancient lights of the plaintiffs has been prima facie established.

In the case of the western aperture this projected interference amounts to total extinction. It is better in the interest of the defendants, quite as much as in that of the plaintiffs, that the question at issue should be determined before, rather than after, the construction of the defendants' building. There need be no difficulty in having a speedy trial of this action. In the exercise of that discretion which always governs the Court in dealing with interim injunctions, it will, I think, be proper to preserve matters in statu quo until the trial is had. Upon the plaintiffs undertaking to bring this

action to trial on the earliest day possible and giving the usual undertaking as to damages, the injunction will be continued until the trial. The costs of this motion will be in the cause unless the trial Judge should otherwise direct.

FALCONBRIDGE, C.J. SEPTEMBER 4TH, 1906.

TRIAL.

CAMPBELL v. TOWNSHIPS OF BROOKE AND METCALFE.

Highway — Non-repair — Injury to Person — Necessity for Guard-rail—Liability of Municipal Corporations—Damages.

Action for damages for personal injuries sustained by one of the plaintiffs, a married woman, by reason of the non-repair of a highway as alleged, and for expenses incurred by the other plaintiff, her husband, in consequence of the injuries.

G. C. Gibbons, K.C., and J. C. Elliott, Glencoe, for plaintiffs.

T. G. Meredith, K.C., R. V. LeSueur, Sarnia, and H. G. Pope, Strathroy, for defendants.

FALCONBRIDGE, C.J.:—I find the issues as to the condition of the road and the necessity for a guard-rail in favour of plaintiffs.

The principles are laid down in Walton v. York, 6 A. R. 181; Foley v. East Flamborough, 26 A. R. 51; Plant v. Normanby, 10 O. L. R. 16, 6 O. W. R. 31. The subject is discussed and the authorities are collected in Mr. Denton's valuable work on this branch of Municipal Negligence, p. 113 et seq.

And I find that the defects in the highway caused the accident. I prefer the evidence of plaintiffs and Myrtle Leach to that of Archibald Compbell, Christina Leach, and W. H. Leach. Campbell's partizanship was illustrated by his taking the trouble to play the part of eavesdropper at a conversation on the Saturday before the trial between plantiffs' solicitor and another.

The violent and irreconcilable conflict of medical testimony as to the more serious symptoms of the female plaintiff render the question of damages very difficult to decide.

I award the male plaintiff $500 (which of course takes into account the expense which he has incurred and will incur in and about his wife's treatment), and to her I give $1,500.

Judgment accordingly against both townships with costs.

ANGLIN, J. SEPTEMBER 8TH, 1906.

CHAMBERS.

RE RODNEY CASKET CO.

Company—Winding-up—Service of Petition on Assignee for Benefit of Creditors—Resignation of Directors.

Petition by creditors for an order for the winding-up of the company under the Dominion Act.

G. M. Clark, for the petitioners.

R. C. H. Cassels, for the assignee for the benefit of creditors and for nine creditors.

ANGLIN, J.:—Creditors' petition for a winding-up order. The company have made an assignment for benefit of creditors to one Hugill. Service of the petition has been effected only upon the assignee. Mr. Cassels objects that this is not service upon the company as required by sec. 8 of the Dominion Winding-up Act, and also opposes the application as contrary to the wishes of creditors holding, as he states, three-fourths of the total claims against the company. Mr. Clark supports the service on the assignee, urging that he is an agent of the company within the meaning of Con. Rule 159, which, he contends, applies to proceedings under the Winding-up Act.

In my opinion, service upon the assignee is not service upon the company as required by the statute. Although in the present instance the views of the assignee are said to accord entirely with those of the directors of the company, many cases may arise in which this will not be the position. The company are entitled to notice and to be represented and

heard upon the petition. To hold service on an assignee for the benefit of creditors to be a good service upon the company might in many instances deprive the company of this important right.

It is said that the directors gave the assignee "instructions to act for them and for the company, and to carry on the business of the company," and that they resigned their offices immediately after the execution of the deed of assignment.

The unaccepted resignation of the directors is ineffective to denude them of their character and responsibilities as officers of the company. Their alleged instructions to the assignee fall far short of an authority to him to accept service or or to represent the company in winding-up proceedings, which, if successful, will terminate his functions as assignee.

It would, I think, be straining Rule 159 much beyond anything contemplated by its framers, were this assignee to be held an agent, service upon whom would be service upon the company, notwithstanding the fact that the president and directors are admitted to be readily accessible and easily to be served.

Upon this ground I must refuse the petition with costs, which I shall fix at the sum of $5.

ANGLIN, J. SEPTEMBER 8TH, 1906.

WEEKLY COURT.

LEES v. TORONTO AND NIAGARA POWER CO.

Railway—Expropriation of Land—Defective Proceedings—Injunction—Special Act—Incorporation of Provisions of General Act Subsequently Passed—Notices of Expropriation—Failure to State Extent of Estate or Interest to be Acquired—Uncertainty—Warrant for Immediate Possession—Proof of Notice under sec. 171 of Railway Act, 1903—Necessity for.

Motion by defendants to dissolve an interim injunction restraining them from entering upon the lands and premises of the plaintiffs.

R. B. Henderson, for defendants.

R. McKay, for plaintiffs.

ANGLIN, J.:—This injunction was originally granted because of defects in expropriation proceedings instituted by defendants. They now allege that by fresh procedings they have cured these defects, and they claim . . . a warrant for immediate possession under sec. 170 of the Dominion Railway Act of 1903.

When the present motion was launched, it seems clear that the defendants were not in a position to sustain it. They have since filed plans and given the requisite notice by newspaper advertisement, under sec. 152 of the Railway Act, as is shewn by material filed by leave upon the argument.

The Chief Justice of the King's Bench has held in Davidson v. Toronto and Niagara Power Co. (17th January, 1906), that the provisions of the Railway Act of 1903 corresponding to the sections of the Railway Act of 1888, which are in the special Act of the defendants (2 Edw. VII. ch. 107 (D.) must now be deemed to be incorporated in this special Act in lieu of the repealed provisions of the former Railway Act. This decision precludes any consideration of Mr. McKay's able argument in support of his contention that the enumerated sections of the Railway Act of 1888 still apply to the defendants.

But Mr. McKay objects to the new notices of expropriation given by the defendants, on the ground that they do not define the interests in the plaintiffs' lands which the defendants seek to acquire. He also contends that, the notices prescribed by sec. 171 of the Railway Act of 1903 not having been given, defendants are not entitled to a warrant under sec. 170.

While it may be held, in the case of a railway company not enjoying such special powers as are conferred on defendants by sec. 21 of 2 Edw. VII. ch. 107, that under a notice for the expropriation of lands, without definition of the interest to be taken, the owner should understand that the acquisition of the fee simple is intended, it by no means follows that a like notice given by a company having power to acquire "any privilege or easement required by the company for constructing the works authorized by this Act, or any portion thereof, over and along any land, without the necessity of acquiring a title in fee simple thereto," and whose special Act defines the word "land" as including

any such privilege or easement, etc., is open to no other construction.

The notices of expropriation given by defendants do not state whether it is the fee simple of plaintiffs' lands, or merely some easement or privilege over and along them, which they seek to acquire. On the contrary, these notices intimate that the company propose to acquire the lands described in the notices "to the extent required for the corporate purposes of the company." It may well be that these purposes require only the expropriation of the privilege or easement of a right of way for the poles and wires of defendants, and not the acquisition of the title in fee simple.

In my opinion, such notices are too uncertain to serve as the foundation for proceedings instituted to effect forcible deprivation of property.

I do not find either in Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co., 26 O. R. 667, 27 O. R. 46, or in Maclean v. James Bay R. W. Co., decided by Street, J., 20th February, 1905, both cited . . . as authorities for the granting of a warrant under sec. 170 of the Railway Act without proof of notice under sec. 171, anything which would countenance such a course. . . . For my part, I entertain a very strong view that the extraordinary powers conferred by sec. 170 should be exercised only upon proof of strict compliance with the requirements of sec. 171, and that the presence of the parties in Court to answer another motion affords no ground for dispensing with a notice which is made a condition precedent to jurisdiction, and which, quite within their rights, plaintiffs here decline to waive.

Not only because defendants were not in a position to sustain their motion when launched, but also for other reasons indicated, I must decline to dissolve the injunction, and I dismiss defendants' motion with costs to plaintiffs in any event of this action.