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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 8TH, 1917.

*FOSTER v. TOWNSHIP OF ST. JOSEPH.

Assessment and Taxes—Exemptions—Buildings on "Mineral Land"—Assessment Act, R.S.O. 1914 ch. 195, sec. 40 (4)—"Mineral"—Trap-rock—Quarry Workings—Question of Exemption Raised in Action—Remedy by Appeal from Assessment under sec. 83 of Act.

Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 38.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

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

W. E. Raney, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MAY 9TH, 1917.

ELLIS v. CITY OF TORONTO.

Highway—Nonrepair—Accumulation of Snow and Ice—Injury to Pedestrian by Fall—Evidence—Failure to Establish "Gross Negligence"—Municipal Act, R.S.O. 1914 ch. 192, sec. 460.

Appeal by the plaintiff from the judgment of KELLY, J., ante 128.

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

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

Gideon Grant, for the appellant.

Irving S. Fairty, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. MAY 8TH, 1917.

JOHNSTON v. STEPHENS.

Contract—Lease of Shop—Defect in Title of Lessors—Refusal to Give Lessee Possession—Damages—Actual Expense—Nominal Sum Awarded—Costs.

Action for specific performance of a lease or in the alternative for damages.

The action was tried without a jury at Chatham.

G. A. Sayer, for the plaintiff.

O. L. Lewis, K.C., and W. G. Richards, for the defendant Stephens.

T. Scullard, for the defendent Douglas.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was a pool-room keeper and barber. The defendant Stephens was the administrator of the estate of George Stephens, deceased (who was the owner of an undivided interest in the premises in question), and one of the heirs at law of the deceased. The defendant Douglas was the owner of an undivided one-third part or share of the premises.

By indenture of lease bearing date the 21st February, 1917, the defendants purported to demise and lease unto the plaintiff the premises, being a shop on the south side of King street, in the city of Chatham, for the term of two years, at a rent of $60 a month in advance, and the plaintiff on the same day paid the first month's rent, $60, in advance. Both defendants signed and executed the lease in good faith and in the honest belief that the defendant Stephens had the right as administrator to lease the premises, under the terms aforesaid; but, before possession was delivered to the plaintiff, a very strong protest was made by some of the heirs at law against the carrying out of the lease, and the attention

of the defendants was called to the fact that under the Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 25, the personal representative had only power to lease from year to year without the approval of the Supreme Court or a Judge thereof.

The defendant Stephens offered to repay the $60 to the plaintiff, which offer the plaintiff declined to accept, and this defendant paid $60 into Court.

Where the breach of a contract consists only of a defect in title, the purchaser cannot claim damages for the loss of the profit or benefit of the contract, even though the vendor knew of the defect, provided he acted bona fide. The lessee can recover only the actual expense to which he has been put: Halsbury's Laws of England, vol. 18, p. 380; Leake on Contracts, 6th ed., p. 788; Halsbury, vol. 10, p. 338.

If the lessors, at the time of entering into the contract, knew that they had no title and no means of acquiring one, and the circumstances are such as to make their contract fraudulent, the purchaser can recover damages in an action of deceit: Halsbury, vol. 25, p. 410; but that is not this case.

If, however, the rule as to the measure of damages did not intervene, it would be impossible to fix any substantial sum by way of damages. The plaintiff did not pretend to name any sum; his only suggestion on the matter of damages is that he could put more pool-tables into these premises, which were somewhat larger than those which he was occupying, and probably make more money thereby. There was no advantage in situation, the two premises being almost opposite each other in the same street.

In no point of view, therefore, could it be found that the plaintiff had suffered substantial damage. It cost him $2 for his share of the charge for drawing the lease; and his damages should be assessed in all at the sum of $5.

Judgment should therefore be entered for the plaintiff for $5, with Division Court costs; the defendants to have the usual set-off of costs. The defendant Stephens should be allowed to take the $60 out of Court, and apply it pro tanto on the balance of costs in his favour.

LATCHFORD, J. MAY 9TH, 1917.

RE HARPER.

Will—Executors and Trustees—Substituted Appointment—Non-Acceptance by Substitute—Appointment as Executor and Trustee under Will of Testator's Widow—Confirmation—Acceptance of Office by Petitioning for and Accepting Letters Probate.

Application by Charles Godfrey Harper, under Rule 600, for an order determining the question whether he is or is not a trustee under the will of his deceased father, William Francis Harper, as confirmed by the will of his deceased mother, Margaret Harper.

The application was heard in the Weekly Court at London.
T. J. Murphy, for the applicant.
R. G. Fisher, for Frederick Faber Harper, respondent.

LATCHFORD, J., in a written judgment, said that the testator, who died in 1896, appointed his wife Margaret and his son Frederick "trustees and executrix and executor" of his last will. He further provided that, in the event of the death of one of the executors and trustees, his son Charles should be trustee and executor in place of the one dying. All the estate, real and personal, was to be used for the benefit of Margaret during her natural life, with power of appointment of remainder among such of the testator's children as she deemed proper. Probate of the will was duly granted to Margaret and Frederick. Until her death, four years later, Margaret enjoyed the benefits conferred upon her by the testator and by her will exercised the power of appointment by directing that her executors and trustees—her sons Frederick and Charles—should hold the estate for 15 or 20 years, not more, and expend the income for the benefit of the children of the testatrix and her late husband, and, when the time for distribution arrived, as it now had, divide the estate of her husband among the persons and in the proportions set forth in the 6th paragraph of her husband's will. Another paragraph of Margaret's will read: "I confirm the will of my said husband as to executors and trustees investments of money . . . and generally in all other respects." Probate of the will of Margaret was granted to both her executors, but Charles deposed that he never "acted in the capacity of executor or trustee" of either of the estates.

Upon his mother's death, Charles could, under his father's

will, have accepted the office of executor and trustee and have acted jointly with his brother: Halsbury's Laws of England, vol. 14, p. 212; but he did not accept the office nor (so far as appeared) do anything indicating any intention to accept it—he could not be regarded as having acted as an executor and trustee of his father's will.

But Charles was in error when he stated that he did not act as executor or trustee under his mother's will. He joined with his brother in applying for probate of that will and in accepting probate when granted; and thus, in the most formal manner, accepted the office of executor and trustee of and under her last will. It was nothing to the point that he allowed his co-executor and co-trustee to do alone all the work of administering the estate. Notwithstanding this, the obligations incidental to his position continued, modified, in the absence of neglect or default on his own part, by the protection and indemnity provided by sec. 35 of the Trustee Act, R.S.O. 1914 ch. 121. He was undoubtedly an executor and trustee under the will of his mother.

Neither the confirmation (so-called) of the earlier will by the later one, nor the adoption by the donee of the power of a scheme of distribution suggested by the testator William, operated to constitute Charles an executor or trustee under William's will.

Costs of both parties out of the estate of Margaret.

MASTEN, J. MAY 10TH, 1917.

RE DARDIS.

Will—Construction—Gifts to Brothers and Sisters after Death of Widow—Alternative Gifts to Children of Deceased Brothers and Sisters and Heirs of those Dying Childless—Time of Vesting—Period of Distribution—Ascertainment of Persons Entitled to Share—Divestment of Vested Estates.

Further argument upon the questions raised as to the construction of the will of Thomas Dardis (see Re Dardis (1917), 11 O.W.N. 331) was heard in the Weekly Court at Toronto on the 24th April, 1917.

I. Hilliard, K.C., for the administrators with the will annexed.

Arthur Flynn, for T. L. Dardis, Elizabeth Allen, and others.

G. W. Mason, for Agnes Gormley and others.

J. G. Harkness, for R. J. Dillon and others.

R. F. Lyle, for the children of James Allen, a deceased nephew.

F. W. Harcourt, K.C., for the infants.

MASTEN, J., in a written judgment, said that he had already determined that the remainders bequeathed to the brothers and sisters of the testator vested on the testator's death. This view was confirmed by Re Ward (1915), 33 O.L.R. 262, and Re Bennett Trusts (1857), 3 K. & J. 280.

Upon the question since argued, viz., whether the gift over to nephews and nieces was to be construed as if the will had read, "to my brothers and sisters and children of any who may have died *prior to the period of distribution*," or whether the reference was to the period of vesting, the learned Judge referred to Halsbury's Laws of England, vol. 28, p. 822, para. 1477; Maddison v. Chapman (1858), 4 K. & J. 709, 721; Re Wood (1881), 43 L.T.R. 730, 732; In re Roberts, [1903] 2 Ch. 200, 204; In re Firth, [1914] 2 Ch. 386, 394.

As Lawrence, John, and Ellen were unmarried at the date of the will and died without children, the learned Judge thought that, by the words of the will directing a gift over "to the heirs of any brother or sister dying without children," the testator intended to divest their shares and make a direct gift of them to the heirs of Lawrence, John, and Ellen, respectively. But, in the case of the gift by the words, "children of any of said brothers or sisters as may have died . . . to receive the portion that would have been due their parent," the learned Judge thought that, as Bridget Gormley, a sister of the testator, had died in 1878, leaving children, and as the testator knew the facts when he made his will in 1884, the last-quoted words ought to be taken to refer to the Gormley family and to that of any other brother or sister who predeceased the testator leaving children; that the testator did not intend to deprive such of his brothers and sisters as died leaving children of their right to deal with their shares; and that the Court ought to lean against the divesting of the interests vested in those brothers and sisters who left children.

Order declaring that Eliza McNulty and Ann Allen had each the right to will the portion of the estate coming to her, and the share of Andrew Dardis passed as part of his estate.

Costs of all parties out of the estate.

MASTEN, J., IN CHAMBERS. MAY 10TH, 1917.

RAT PORTAGE LUMBER CO. v. HARTY.

Attachment of Debts—Moneys to Credit of Judgment Debtor in Bank —Collateral Account—Suspension—Payment into Court.

Appeal by the plaintiffs from an order of the Local Judge at Fort Frances, refusing to direct payment over to the plaintiffs of a fund in the hands of the garnishees, the Canadian Bank of Commerce, but directing the garnishees to pay the money into Court to abide further order.

R. T. Harding, for the plaintiffs, judgment creditors.
A. A. Macdonald, for the defendant, judgment debtor.

MASTEN, J., in a written judgment, said that on the hearing of this motion, as the bank admitted $144.90 to have been in their hands to the credit of the judgment debtor James Harty (collateral account) at the date of service of the attaching order in December, 1916, and as this sum was not required for the satisfaction of Harty's note then current in the bank, and still remained to his credit, he (the learned Judge) thought that the motion was governed by Sparkes v. Younge (1858), 8 Ir. C.L.R. 251—but further consideration had convinced him that the principle to be applied was that illustrated by Hutt v. Shaw (1887), 3 Times L.R. 354.

As to the costs awarded by the local Judge, the learned Judge did not see his way to interfere.

Appeal dismissed with costs.

MASTEN, J. MAY 11TH, 1917.

CANADIAN JOHNS MANVILLE LIMITED v. KNIGHT BROS. CO. LIMITED.

CANADIAN JOHNS MANVILLE LIMITED v. HENRY KNIGHT.

Assignments and Preferences—Conveyances of Land by Insolvent Debtor to Creditors—Preferences—Absence of Intent to Prefer.

Actions by creditors of the defendant Hunt to set aside two certain conveyances of land made by that defendant to the de-

fendant company and the defendant Henry Knight as preferential within the meaning of the Assignments and Preferences Act, R.S.O. 1014 ch. 134, sec. 5.

The actions were tried together, without a jury, at Toronto.
D. Inglis Grant, for the plaintiffs.
A. G. Slaght, for the defendants.

MASTEN, J., in a written judgment, found as facts that on the 25th November, 1915, when the conveyances were made, the defendant Hunt was insolvent and unable to pay his debts as they accrued due and that he was well aware that he was unable to meet his liabilities; that the intent of the grantees was to secure what would be in law a preference; but that the defendant Hunt honestly in his own mind believed that he could pull through if only he were given an opportunity.

Upon these findings the case fell within the principle established by Craig v. McKay (1906), 12 O.L.R. 121, 123, and Long v. Hancock (1885), 12 S.C.R. 532; and the absence, on the part of the debtor, of an intent to prefer, was fatal to the plaintiffs' claim. The rule suggested by Garrow, J.A., in Windsor Auto Sales Agency v. Martin (1915), 33 O.L.R. 354, at p. 367, could not be applied here, there being in fact no intent to prefer.

Actions dismissed with costs.

HERRON BROTHERS LIMITED v. CANADIAN STEWART CO. LIMITED —MASTEN, J.—MAY 10.

Contract—Supply of Piles for Government Works by Subcontractors to Principal Contractors—Acceptance—Subsequent Rejection by Government Engineer—Property Passing—Deterioration—Account—Reference—Costs.]—The defendants were contractors with the Crown, represented by the Department of Public Works of Canada, for the construction of certain harbour improvements at Toronto. The plaintiffs were subcontractors under the plaintiffs for the supply of certain piles to be used by the defendants in the performance of their contract. The plaintiffs sued for 90 per cent. of the price of piles which they alleged that they had delivered in the months of June and July, 1915. The action was tried without a jury at Toronto. MASTEN, J., in a written judgment, set out the facts and the correspondence between the par-

ties, and made findings thereon. His opinion was, that, upon receipt by the defendants of the piles, when unloaded at the cars, the property in the piles passed to the defendants, and the piles were then in their custody and at their risk, so that they were chargeable with any subsequent deterioration, but subject always to the defendants' right to return any pile and require it to be replaced, if subsequently rejected by the Government engineer in consequence of defects existing at the time of its delivery by the plaintiffs to the defendants. Judgment declaring accordingly. If the plaintiffs so desire, there will be a reference to the Master in Ordinary to take the accounts between the parties generally and on matters raised by the counterclaim, except so far as withdrawn; the Master to report specially as to whether the piles, or any of them, which were rejected in August, September, and October, 1915, by the Department of Public Works, were so rejected in consequence of defects existing at the date of the delivery to the defendants, or in consequence of deterioration after delivery. The defendants succeeded on the main issue, and were entitled to costs down to and including the trial, but excluding any costs of the issue relating to a certain agreement of the 31st March, 1915. If a reference is taken, further directions and costs subsequent to the trial will be reserved. R. McKay, K.C., and G. S. Hodgson, for the plaintiffs. W. N. Tilley, K.C., and A. W. Langmuir, for the defendants.

SHAKELL v. HARBER—BRITTON, J.—MAY 10.

Penalty—Action by Informer—Failure of Partners to File Declaration—Partnership Registration Act, R.S.O. 1914 ch. 139, sec. 10—Reduction of Penalties—Judicature Act, sec. 19—Costs.]—Action by an informer to recover from each of the two defendants the sum of $100 as a penalty for not filing the declaration required by the Partnership Registration Act, R.S.O. 1914 ch. 139. The penalty is imposed by sec. 10. The action was tried without a jury at Barrie. BRITTON, J., in a written judgment, said that, considering all the facts and circumstances brought out upon the trial, while he was obliged to give judgment for the plaintiff, he would reduce the amount of the penalty to $25 to be paid by each defendant: Judicature Act, R.S.O. 1914 ch. 56, sec. 19. One-half of each sum of $25 to be paid to the Treasurer of the Province of Ontario for the Crown. The plaintiff's costs of the action, fixed at $25, to be paid by the defendants; no set-off. J.G. Guise-Bagley, for the plaintiff. M. Smith, for the defendants.

TORONTO SUBURBAN R.W. CO. v. BEARDMORE—BRITTON, J.—MAY 12.

Contract—Electric Railway—Agreement to Build through Yard of Tanning Company—Consideration—Right to Maintain Railway Constructed without Objection—Validity of Agreement—Authority of Managing Director of Company—Evidence—Corroboration—Evidence Act, R.S.O. 1914 ch. 76, sec. 12.]—Action for a declaration that the plaintiffs are entitled to construct, operate, and maintain their railway through the defendants' land at Acton, in terms of an agreement alleged to have been made between the plaintiffs and one Walter D. Beardmore, now deceased, who was a member of the defendant firm, Beardmore & Co., and managing director of the defendant the Acton Tanning Company, and for the specific performance of that agreement, and for a declaration that the defendants had no right to compensation or damages in respect of land of the defendants taken by the plaintiffs or land injuriously affected; and, in the alternative, for $150,000 damages. The alleged agreement was that the plaintiffs should change the situs of their line through the village of Acton, adopting a more expensive route, through the defendants' yard, and, in consideration thereof, that the plaintiffs would not be required to pay anything as compensation for the land taken or damages for the operation and maintenance of the railway. The action was tried without a jury at Toronto. BRITTON, J., in a written judgment, finds that the plaintiffs, in consideration of the agreement mentioned, resurveyed their line, adopted the more expensive route, and built their railway according to it; that Walter D. Beardmore had authority to make the agreement; and that the railway was built through the defendants' yard without any objection or protest on their part. The learned Judge was of opinion that sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76, requiring corroboration in an action against the representatives of a deceased person, had no application. Judgment for the plaintiffs with costs. Wallace Nesbitt, K.C., and Christopher C. Robinson, for the plaintiffs. H. M. Mowat, K.C., for the defendants.