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HIGH COURT DIVISION.

BRITTON, J., IN CHAMBERS. JULY 24TH, 1916.

FOSTER v. MACLEAN.

Discovery—Examination of Plaintiff—Time for—Rule 336—Statement of Defence Delivered, but Particulars Ordered and not Delivered.

Appeal by the plaintiff from an order of the Master in Chambers directing that the plaintiff should attend for re-examination for discovery and answer certain questions put to him by counsel for the defendants, upon his examination, which questions the plaintiff refused to answer, on the ground that they were irrelevant. The order of the Master also extended the time for delivery of particulars of the defence. See ante, pp. 101, 187.

W. E. Raney, K.C., for the plaintiff.
K. F. Mackenzie, for the defendants.

BRITTON, J., in a written judgment, said that it was not intended by Rule 336 that the defendant should be allowed to examine the plaintiff for discovery immediately after delivery of the statement of defence, when particulars thereof had been ordered, but not delivered. When particulars are ordered, they necessarily form part of the defence, and the statement of defence is not complete without them. Upon the particulars depend the issues to be tried: Bullen v. Templeman (1896), 5 B.C.R. 43; Zierenberg v. Labouchere, [1893] 2 Q.B. 183 (C.A.)

Appeal allowed and order of the Master set aside, with costs of motion and appeal to the plaintiff in any event.

The particulars of defence must be delivered within one week.

KELLY, J. JULY 24TH, 1916.

CUTHBERTSON v. ROSS.

Assignments and Preferences—Assignment for Benefit of Creditors —Landlord's Claim for Taxes for Period during which Demised Premises Occupied by Assignee—Claim for Taxes for Current Year—Conduct of Assignee—Estoppel—Personal Liability —Preferential Claim on Insolvent Estate—Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38(2).

Action by the landlord of Redferns Limited against the assignee for the benefit of the creditors of that company: (1) to recover payment of the taxes in respect of the demised premises during the time the defendant occupied them—from the 15th October, 1915, to the 15th January, 1916; (2) for a declaration that, out of the assets of the insolvent company in his hands, the defendant should pay the plaintiff, as a preferred creditor, the sum due for taxes from the 1st January, 1915, to the 15th October, 1915; (3), in the alternative, for a declaration that the plaintiff was entitled to rank as an ordinary creditor for the amount due in respect of the taxes from the 1st January, 1915; (4), in the alternative, if it should be held that the plaintiff was not entitled to the judgment first above asked for, for a declaration that the plaintiff was entitled to rank as a preferred creditor or as an ordinary creditor in respect of the last mentioned taxes.

The action was tried without a jury at Toronto.

N. Sommerville and V. H. Hattin, for the plaintiff.

F. J. Dunbar, for the defendant.

KELLY, J., in a written judgment, after setting out the facts, said that, in respect of the taxes from the 15th October, 1915, to the 15th January, 1916, the plaintiff was entitled to succeed. The defendant had the statutory right to elect to retain possession of the premises for the unexpired part of the term of the lease, or for such portion of the term as he should see fit, "upon the terms of the lease and subject to payment of the rent therefor provided by the lease:" Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38(2). One of the terms of the lease was the payment of taxes, local improvement rates, and all municipal rates and charges. Paying rent only was not a full compliance with the terms of the lease. Whether the rent reserved by the lease included taxes was immaterial. The right to retain was given not merely on

payment of rent, but expressly upon the terms of the lease and subject to payment of rent.

As to the taxes from the 1st January to the 15th October, 1915, the learned Judge finds that the defendant, while in possession of the goods of the insolvent upon the demised premises, acted as treating the liability for those taxes as a preferential claim, and by his promises and conduct so quieted and assured the plaintiff as to induce him to refrain from making use of the means at his disposal to secure payment of these taxes out of the goods of the insolvent estate.

Judgment for the plaintiff against the defendant: (1) for payment to the plaintiff of the taxes from the 15th October, 1915, to the 15th January, 1916, and interest from the 4th March, 1916; and (2) for payment out of the assets of the insolvent estate to the plaintiff of such taxes in respect of the demised premises as the insolvent company did not pay for the period from the 1st January to the 1st October, 1915, with interest from the 4th March, 1916; and, to the extent that the assets may be insufficient, for payment by the defendant.

Costs of the action should be paid by the defendant.

RE PHERRILL—BRITTON, J.—JULY 24.

Will—Construction—Division of Farm among Sons—Appointment of Trustee to Make Division if Sons should not Agree—Land Vesting in Trustee—Powers of Trustee—Sale of Land—County Court Judge—Right of Appeal—Share of Deceased Son.]—Motion on behalf of Jane Isabella Walton and James Albert Pherrill, children of David Pherrill, deceased, for an order determining certain questions concerning the distribution of the estate of the deceased, arising out of the terms of his will. The motion was heard in the Weekly Court at Toronto. The will directed a fair and equitable division of the testator's farm and effects thereon among his four sons after his wife's decease; and, if they could not agree upon a division, he referred all matters in difference between them to the Senior Judge for the time being of the County Court of the County of York, and he gave the estate and effects to the said Judge upon trust to sanction the division agreed upon or to make a division and to execute all necessary deeds The testator also provided for the event of any of his sons dying before his wife; and one son, Stephen, predeceased his mother, leaving no lawful issue. The learned Judge disposed of the questions in a written judgment, as follows: (1) There was not an intestacy as to the goods and chat-

tels of the testator; he disposed of all of his "estate and effects" by his will. (2) The farm is vested in John Winchester, Senior Judge of the County Court. (3) The division of the farm is to be made by the persons entitled to it if they can agree. If they do agree, it will be the duty of the County Court Judge to sanction that agreement and give effect to it by executing the necessary conveyances. If they do not agree, the Judge, in carrying out the trust imposed upon him, must distribute, and in doing this he may divide the property into parcels. If that cannot be done so as to have a proper and equitable division, he may sell the land and divide the proceeds. (4) If the Judge accepts the trust, the question of an appeal from his decision may never arise. (5) The share of Stephen passes to the three brothers living at the time of the death of their mother, in equal shares. Order declaring accordingly; costs of all parties out of the estate. L. F. Heyd, K.C., for the applicants. K. F. Mackenzie, for Thompson Pherrill and Hannah Pherrill.

JONES v. NIAGARA ST. CATHARINES AND TORONTO R.W. CO.—FALCONBRIDGE, C.J.K.B.—JULY 24.

Negligence—Collision between Automobile and Street Railway Car—Failure to Display Light and Sound Gong—Absence of Contributory Negligence—Findings of Fact of Trial Judge—Damages.] —Action for damages for injuries to the plaintiff's automobile by a collision with a car of the defendants driven by electricity upon a tramway laid in the highway, owing, as the plaintiff alleged, to the negligence of the defendants' servants in charge of the car. The action was tried without a jury at St. Catharines. The learned Chief Justice (in a written judgment) said that the case presented the conflict of testimony usual when it is asserted that an accident was caused by the negligence of a railway company in not ringing a bell or having proper lights. After reviewing the testimony, the Chief Justice said that his finding must be in favour of the plaintiff; negligence was proved in respect of the absence of the head-light and the failure to sound the gong; there was no contributory negligence. Judgment for the plaintiff for $1,000 and costs. A. C. Kingstone and F. E. Hetherington, for the plaintiff. G. F. Peterson, for the defendants.

MCMILLAN V. RYAN—KELLY, J.—JULY 24.

Contract—Purchase of Shares in Company—Action for Rescission—Grounds—Failure to Make full Disclosure of Facts—Finding of Trial Judge.]—Action for rescission of a contract for purchase by the plaintiff from the defendant of a block of shares in an incorporated company, for repayment of the money paid by the plaintiff, and for damages for non-disclosure of facts by the defendant. The action was tried without a jury at Toronto. KELLY, J., in a written judgment, said that the only ground of attack as to which there was any semblance of liability was the assertion that the defendant neglected to make full disclosure to the plaintiff when negotiations for the contract of sale were in progress. After discussing the evidence in regard to this, the learned Judge stated his conclusion that the defendant did not knowingly withhold any information which he was in duty bound to give to the plaintiff. The plaintiff had failed to establish any ground for his action; and it should, therefore, be dismissed with costs. R. McKay, K.C., and F. C. L. Jones, for the plaintiff. H. E. Rose, K.C., for the defendant.

THORNE V. HODGSON—CLUTE, J.—JULY 26.

Contract—Timber—Delivery not Made as Agreed—Deduction from Price—Quality of Timber — Inferiority — Counterclaim—Damages—Extinction of Plaintiff's Claim—Dismissal of Action —Costs.]—Action to recover the amount due upon two contracts; and counterclaim by the defendant to recover sums overpaid and damages for the inferior quality of the timber delivered. The action and counterclaim were tried without a jury at Parry Sound. The plaintiff's first claim was upon a contract for the delivery of 847 cords of wood at $2.75 a cord. There was no dispute as to the number of cords delivered or the price, but the defendant contended that under the contract he was entitled to have the wood delivered f.o.b. on the cars. There was no dispute, the learned Judge said, in a written judgment, that the contract signed by the parties, under seal, called for such delivery, and that the wood was not so delivered, but was delivered on the siding. The plaintiff endeavoured to offer some excuse, and alleged that he was not able to obtain cars on which to load the wood, and that he notified the plaintiff that he would not load the wood on the cars. The plaintiff failed to satisfy the learned Judge of any just

cause or excuse for not loading the wood upon the cars as contracted for by him; and the learned Judge found that 40 cents was a reasonable price for such loading, and that the defendant was entitled to have deducted from the contract price 40 cents per cord. The plaintiff was, therefore, entitled to $1,990.45. He admitted the receipt of $2,327.38, which would leave a balance due the defendant on this account of $336.83.—The second branch of the case had reference to the taking out of certain timber by the plaintiff for the defendant from the defendant's land, the contract in regard to which was by no means clear, made up, as it was, of certain correspondence and conversations between the parties. The difficulty arose, the learned Judge said, from the fault of both parties. The defendant did not appear to have known, or, if he did know, he did not state with reasonable definiteness, what was the quality and kind of wood which should be delivered; and the plaintiff did not deliver timber of the quality called for by the contract. The defendant received $100.63 for the timber; deducting this from the $336.83 due to the defendant upon the first contract, there was a balance in favour of the plaintiff of $218.80; deducting this from $455, the amount due to the plaintiff upon the second contract, there was a balance in favour of the plaintiff of $218.80; but he was not entitled to recover that sum—the defendant had suffered a loss at least equal to it by reason of the timber delivered being inferior in quality to that agreed upon, and unfit for the purpose for which the plaintiff knew it was to be used. The action should be dismissed, but, having regard to all the circumstances, without costs. A. R. Hassard and W. L. Haight, for the plaintiff. M. B. Tudhope, for the defendant.

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