

THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF
ONTARIO, APPELLATE AND HIGH COURT
DIVISIONS, FROM AUGUST, 1915, TO
THE END OF FEBRUARY, 1916.

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APPELLATE DIVISION.

MAGEE, J.A., IN CHAMBERS.

AUGUST 28TH, 1915.

*RE ONTARIO AND MINNESOTA POWER CO. AND
TOWN OF FORT FRANCES.

Appeal—Privy Council—Right of Appeal—Amount in Controversy—Assessment and Taxes—Privy Council Appeals Act, R.S.O. 1914 ch. 54, sec. 2—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 48.

Motion by the company for approval of the security lodged by them upon a proposed appeal to His Majesty in His Privy Council from the decision of a Divisional Court of the Appellate Division, 8 O.W.N. 216, whereby it was declared that, in the opinion of the Court, the actual value of the lands of the company assessed should be fixed at \$100,000 and that the amount of the business assessment of the company should be fixed at \$210,000.

The motion was heard in the long vacation by MAGEE, J.A., in Chambers.

Glyn Osler, for the company, contended that the matter in controversy exceeded \$4,000, and an appeal lay as of right: Privy Council Appeals Act, R.S.O. 1914 ch. 54, sec. 2; Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, sec. 48.

Grayson Smith, for the town corporation, shewed by affidavit that the total taxes of the company for 1914 amounted to only \$3,300 on the basis of the Divisional Court's decision, and that the only amount actually in dispute was \$1,206.25, being the school rate of 5 per cent. on \$241,250.

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

MAGEE, J.A., said that, whether or not anything but questions of fact was involved, and whether or not an appeal on questions of assessment was intended to be allowed, the matter in controversy for the purposes of an appeal from the decision of the Divisional Court was not shewn to exceed \$4,000.

Reference was made to *City of Toronto v. Toronto Electric Light Co.* (1906), 11 O.L.R. 310; *Canadian Pacific R.W. Co. v. City of Toronto* (1909), 19 O.L.R. 663; *Beardmore v. City of Toronto* (1910), 2 O.W.N. 479; *Fréchette v. Simoneau* (1900), 31 S.C.R. 12.

Application refused.

HIGH COURT DIVISION.

LENNOX, J.

AUGUST 14TH, 1915.

WELSH v. TORONTO POLICE BENEFIT FUND.

Pension—Benefit Society—Toronto Police Force—Dismissal of Member — Board of Police Commissioners—Investigation without Notice—Rules of Society—Failure of Committee to Comply with—Judgment—Declaration of Right to Pension and Allowance.

Action for a declaration that the plaintiff was a member in good standing of the defendant society, a benefit or friendly society, registered under the Insurance Corporations Act, 1892, and had completed a service as a member of the Toronto police force which entitled him to retire and receive a half-pay pension for life, with an additional allowance for each year of service.

The plaintiff joined the force on the 28th February, 1886, and his service was continuous from that date until the 28th April, 1914, when he was said to have been dismissed by an order of the Board of Police Commissioners.

The action was tried without a jury at Toronto.

M. K. Cowan, K.C., for the plaintiff.

D. T. Symons, K.C., for the defendants.

LENNOX, J., read a judgment in which he dealt with the facts and said that the plaintiff was not entitled to retire in the autumn of 1911 on the ground of ill-health. There was no

evidence that he was unfairly treated at that time; and upon that branch of the case he failed.

As to the dismissal of the plaintiff in 1914, the alleged order of the Board was not put in, and it was not shewn that the plaintiff was notified of any investigation that was made. There was nothing to shew that the dismissal was justified. The only evidence was the plaintiff's, and what he stated was not sufficient cause for a peremptory discharge. If he was dismissed upon an instigation held without notice to him, that course was contrary to the elementary principles of justice.

Section 13 of the rules and regulations of the defendant society provides that every application for a pension or allowance must come before the committee, when the whole circumstances of the case will be fully gone into, and a report of the case sent in for the sanction of the Board of Police Commissioners; and, in case of a difference between the committee and the commissioners, the committee shall be heard by the commissioners, and, if possible, concurrence arrived at; but, in case of failure to concur, the decision of the commissioners shall be final.

The committee did not go into the circumstances of the case, did not hear, deliberate upon, or independently determine anything. The matter of dismissal was not the same thing as the question of the right to a pension. The commissioners have nothing to do with pensions or allowances except by way of appeal.

The defendants pleaded compliance with this section and rested their defence upon it. The plaintiff was *prima facie* entitled to a pension or allowance based upon a service of upwards of 27 years. The defendants had failed to make out their defence.

The question could not be remitted to the defendants for quasi-judicial consideration, as in *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*, [1906] A.C. 535, for there was no reason to believe that justice would be done.

Judgment declaring that the action of the committee was not in accordance with sec. 13, and does not bind the plaintiff; declaring that the plaintiff had on the 28th April, 1914, completed a service of 27 years, 10 months, and 5 days as a member of the force, and that upon that date he became and now is entitled to receive a half-pay pension for life, plus an addition of one-nineteenth of his salary for each year of his service exceeding 25 years; and adjudging that the defendants pay to the plaintiff the said pension and allowance and the costs of the action.

CLUTE, J., IN CHAMBERS.

AUGUST 20TH, 1915.

TOWN OF FORT FRANCES v. ONTARIO AND MINNESOTA POWER CO.

Appeal—Privy Council—Application for Leave to Appeal from Judgment of Supreme Court of Canada—Stay of Execution pending Application — Motion for—Jurisdiction of Supreme Court of Ontario—No Important Question Involved—Refusal of Motion to Stay.

Motion by the defendant company to stay execution of the judgment in this action pending an application to be made by the defendant company for leave to appeal to the King in his Privy Council from the judgment of the Supreme Court of Canada of the 23rd June, 1915.

The action was brought on the 6th March, 1914, to recover the taxes due by the defendant company to the plaintiff town corporation for the years 1911 and 1912. Two months after the commencement of the action, the defendant company paid the taxes for 1911. The question involved in the proposed appeal was only as to the liability of the defendant company for school taxes. The judgment of the trial Judge in favour of the plaintiff corporation had been unanimously affirmed by a Divisional Court of the Appellate Division of the Supreme Court of Ontario and by the Supreme Court of Canada.

Glyn Osler, for the defendant company.

Grayson Smith, for the plaintiff corporation.

CLUTE, J., said that an objection to the jurisdiction of the Supreme Court of Ontario to stay proceedings pending an application to the Privy Council for leave to appeal could not be successfully maintained: *Thompson v. Equity Fire Insurance Co.* (1909), 1 O.W.N. 137; *Hughes v. Cordova Mines Limited* (1915), 8 O.W.N. 372.

The question in the action was purely one of fact, and there was nothing of any magnitude or of any public interest or importance involved; it was not probable that an appeal to the Privy Council would be permitted. There was no doubtful question of law of such general importance as to call for extraordinary interference: *Tabb v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 514.

The following decisions of the Judicial Committee were referred to: Johnston v. Minister and Trustees of St. Andrew's Church Montreal (1877), 3 App. Cas. 159; Valin v. Langlois (1879), 5 App. Cas. 115; Prince v. Gagnon (1882), 8 App. Cas. 103; City of Montreal v. Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal (1889), 14 App. Cas. 660; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A.C. 776; Wilfley Ore Concentrator Syndicate Limited v. N. Guthridge Limited, [1906] A.C. 545, 550.

Motion dismissed with costs.

BLACK V. HOHLSTENS—DENISON V. HOHLSTENS—MASTER IN CHAMBERS—AUGUST 12.

Attachment of Debts—Claim Arising after Service of Attaching Order—Practice.]—Motion by a claimant to set aside an order of the Master making an attaching order absolute. The Master said that from the time the order was served on the garnishee all moneys due by him to the judgment debtor were attached: Parker v. McIlwain (1896), 17 P.R. 84. The claim of the Bank of British North America had priority over the plaintiffs' (judgment creditors') attaching order; but the present applicant was not entitled to have the order set aside, as all the transactions between the defendant (judgment debtor) and the applicant occurred two days after the service of the attaching order on the garnishee. All moneys due by the garnishee over and above the amount required to pay the claim of the bank should be paid to the judgment creditors as they became due. There was no need to direct the trial of an issue. No costs. B. N. Davis, for the applicant. L. F. Heyd, K.C., for the plaintiff Black. Alexander MacGregor, for the plaintiff Denison.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE—MASTER IN CHAMBERS—AUGUST 12.

Execution—Judgment — Variation—Amendment.]—Motion by the defendant to set aside a writ of *fi. fa.* issued by the plaintiffs upon their judgment entered on the 23rd March, 1914. There were several appeals, and the amount due to the plaintiffs was finally fixed by a judgment of a Divisional Court of the Appellate Division of the 21st June, 1915 (8 O.W.N. 525). The Mas-

ter said that the writ should be amended so as to conform with the judgment of the Appellate Division, and made an order accordingly, and dismissing the defendant's motion. A. J. Russell Snow, K.C., for the defendant. A. B. Cunningham, for the plaintiffs.

McCAMMON V. WESTPORT MANUFACTURING AND PLATING CO.
LIMITED—LENNOX, J.—AUGUST 14.

Company—Winding-up—Action by Liquidator to Recover Chattels—Evidence—Sale—Costs.]—Action by the liquidator of a company to recover possession of certain machinery in order that it might be disposed of in the winding-up of the company. The action was tried without a jury. The learned Judge said that the evidence left the facts in a very hazy condition—there was nothing to shew that the company ever sanctioned a sale. He was not satisfied that the plaintiff had made out a case; but there were considerations which justified him in relieving the plaintiff from liability for costs. Action dismissed without costs. J. A. Hutcheson, K.C., for the plaintiff. A. E. Fripp, K.C., for the defendants.

REYNOLDS V. CITY OF WINDSOR—LENNOX, J.—AUGUST 14.

Nuisance—Peculiar Damage—Abatement since Trial of Action—Damages—Costs.]—Action for damages and an injunction in respect of a nuisance. Trial without a jury at Sandwich. The learned Judge finds that the obstruction complained of was not placed in the course of roadmaking, but was primarily a refuse-heap or dump-heap. In places it encroached slightly upon the plaintiff's land, and there were a few heaps well in upon it, which came from the same source. The manner in which the material was dumped and the character of the material constituted a nuisance; and the plaintiff suffered from it in a way and to a degree beyond others in the locality—he suffered special and peculiar damage. There was no justification now for heavy damages, a remedy having been applied by the defendants. The postponement of the plaintiff's marriage was not an element which could be taken into account in assessing the damages. At the time of the trial there was ground for substantial damages or an injunction with damages, and the question of costs was

ruled by this circumstance. Judgment for the plaintiff for \$75 and the costs of the action on the Supreme Court scale. F. C. Kerby, for the plaintiff. F. D. Davis, for the defendants.

CYR V. TOWN OF FORT FRANCES—LENNOX, J.—AUGUST 14.

Contract—Municipal Corporation—Employment of Servant—Damages for Breach.]—Action for damages for breach of a contract to employ the plaintiff. Trial without a jury at Fort Frances. The learned Judge finds that there was a contract of employment; and holds that, notwithstanding the strenuous provisions of the Municipal Act, both parties were bound by it. The defendants had sought the plaintiff's opinion as to the best method of organisation, and he had given it; it was for the defendants to adopt or reject the plaintiff's opinion, whether they engaged him or not. The plaintiff threw up profitable employment in order to enter the defendants' service; and it was neither prudent nor honest for the defendants to refuse to make him any compensation for the loss he incurred at their request. Judgment for the plaintiff for \$450 with costs. A. D. George, for the plaintiff. A. G. Murray, for the defendants.

TRAVATO V. DOMINION CANNERS LIMITED—PATERSON, REGISTRAR
—AUGUST 19.

Writ of Summons—Failure to Serve—Negligence of Solicitors—Renewal after Expiry of Year—Power of Judge or Master in Chambers—Action under Workmen's Compensation for Injuries Act—Expiry of Statutory Period—Bar to New Action—Discretion.]—Motion on behalf of the plaintiff for an order renewing the writ of summons and for leave to serve the defendants. The plaintiff, a minor, on the 6th September, 1913, whilst in the employment of the defendants, was injured. In the autumn of 1913, instructions were given on behalf of the plaintiff to a firm of solicitors to bring an action against the defendants to recover damages under the Workmen's Compensation for Injuries Act and at common law. For some reason, unexplained by the solicitors, they took no proceedings until the 4th March, 1914, when they caused the writ of summons by which this action was commenced to be issued from the local

office at Simcoe, in the county of Norfolk. The writ was not served, and on the 4th March, 1915, an order was obtained on behalf of the plaintiff, on an ex parte application to one of the Local Judges at Hamilton, in the county of Wentworth, renewing the writ. On the 19th March, 1915, the writ was served upon the defendants. On the 26th March, 1915, on the application of the defendants, an order was made by MIDDLETON, J., in Chambers, setting aside the order for renewal and the service of the writ, upon the ground that the Local Judge at Hamilton had no jurisdiction, the action not having been begun in the county of Wentworth. The present application was then made—after the lapse of a year from the issue of the writ and long after the lapse of the six months allowed by the Workmen's Compensation for Injuries Act. The application came before Mr. N. F. Paterson, K.C., Registrar of the Appellate Division, holding Chambers in lieu of the Master in Chambers. The learned Registrar referred to *Doyle v. Kaufman* (1877), 3 Q. B. D. 7, 340; *Hewett v. Barr*, [1891] 1 Q.B. 98; *In re Kerly Son & Verden*, [1901] 1 Ch. 467; and said that he did not regard the cases cited as deciding that a limitation enactment was an absolute bar to a renewal, but rather as recognising a discretion to grant or refuse relief where the statute would be a bar to a new action. The power to grant an order for renewal was perhaps doubtful; but the case was one in which relief should be granted if there was power. The plaintiff did all he could to have the writ served; the blame for delay was attributable solely to his solicitors, who had offered no excuse for their negligence. Order made allowing the writ to be renewed and served, as asked by the plaintiff; costs in the cause. A. W. Langmuir, for the plaintiff. J. W. Morison, for the defendants.