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HIGH COURT DIVISION.

LENNOX, J. JANUARY 21ST, 1919.

*YEOMANS v. KNIGHT.

Contract—Agreement to Remunerate Plaintiff for Use of Influence with Servants of Crown to Obtain Benefit for Defendants—Action upon Agreement—Summary Dismissal—Agreement Contrary to Public Policy.

Motion by the defendants other than the defendant Schuch for a judgment dismissing the action as against them, upon the pleadings and admissions of the plaintiff upon his examination for discovery, upon the ground that the agreement upon which the plaintiff sued, as disclosed by the examination, was an agreement whereby the plaintiff, for valuable consideration, agreed to use his political influence with the Minister of Militia and other members of the King's Privy Council for Canada and members of the Shell Committee, being servants of the Crown, to obtain a benefit for the defendants, and that the agreement and consideration were contrary to public policy, illegal, and void; and motion by the defendant Schuch for a like judgment, upon the same ground and also upon the ground that the statement of claim disclosed no cause of action against him.

The motions were heard in the Weekly Court, Toronto.
Glyn Osler, for the defendants other than Schuch.
L. Davis, for the defendant Schuch.
M. L. Gordon, for the plaintiff.

LENNOX, J., in a written judgment, said that the admissions of the plaintiff clearly established that the remuneration which he

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

was to receive and which he claimed in this action was to be paid in consideration of political influence which he was supposed to possess, agreed to exert, and asserted that he had successfully exerted, in obtaining from the servants of the Crown a contract for the defendants or some of them.

It was not a question of the effect of what the plaintiff did. What he bargained to do was vicious in principle; the agreement was one calculated to prejudice honest and efficient public service.

It is the duty of the Court to stop the case as soon as it is disclosed that the contract is contrary to public policy.

The case was on all fours with Montefiore v. Menday Motor Components Co. Limited, [1918] 2 K.B. 241, recently followed by Falconbridge, C.J.K.B., in Garfunkel v. Hunter, not reported.

The action should be dismissed as against all the defendants with costs.

LATCHFORD, J. JANUARY 21ST, 1919.

DAWSON v. QUINLAN & ROBERTSON LIMITED.

Contract—Employment of Plaintiff as Superintendent of Works—Agreement to Give Promissory Note for Amount of Claim against Company—Purchase of Shares of Company—Claim for Salary and Amount of Promissory Note—Counterclaim for Damages for Deceit—Finding of Absence of Fraud or False Representations.

On the 26th March, 1917, the parties to this action agreed in writing: (1) that the plaintiff should act as superintendent for the defendants in manufacturing munitions in Campbellford during such time as they should require his services, but for not more than 12 months; (2) that the plaintiff should accept in full satisfaction of a claim which he had against the Dickson Bridge Works Company (the defendants being the purchasers of 495 of the 500 shares of the stock of that company) a promissory note of the defendants for $22,353.61, payable on the 31st December, 1917; (3) that the plaintiff should transfer to the defendants 5 shares which he held in the capital stock of the Dickson company; (4) that the defendants should deliver to the plaintiff the promissory note aforesaid; (5) that the defendants should pay to the plaintiff as salary, during such time as they might require his services, $250 a month, and, at the end of his term, a monthly bonus of $250 also.

The plaintiff acted as superintendent of the works from the 26th March to the 26th September, 1917, and earned $1,500 as

salary and $1,500 as bonus. No more than $1,000 was paid to him; and the note for $22,353.21 was not delivered to him.

The plaintiff sued for $2,000 and also for $22,353.61, the amount of the note.

The defendants alleged that they were induced to enter into the contract by false representations made by the plaintiff; and they counterclaimed for damages.

The action and counterclaim were tried without a jury at Peterborough.

Daniel O'Connell and G.N. Gordon, for the plaintiff.

R. A. Pringle, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that, unless the defendants were successful in their counterclaim, they must be declared liable to pay to the plaintiff the $2,000 and the amount of the note. The defendants claimed $85,000 damages, but at the trial they were content that the damages should be limited to whatever amount the plaintiff should recover against them.

The learned Judge, after reviewing the evidence, found that there was no fraud; that all the plaintiff's representations as to past events or as to existing facts were, on reasonable grounds, believed by him to be true; his promises as to the future were not false pretences; they were mere expressions of expectation; and the defendants knew that the realisation of these expectations depended on conditions other than the mechanical efficiency of the plant and the ability of the plaintiff as superintendent.

As a matter of law, a promise may amount to a representation, as where the agent of a bank promised that no portion of the proceeds of certain acceptances which he was procuring would be applied in the extinction of any obligation to his bank, and then, having secured the acceptances, applied some of them in payment of his own bank: Clydesdale Bank v. Paton, [1896] A.C. 381; or where the promise is based on what is stated to be an existing practice: Kettlewell v. Refuge Assurance Co., [1908] 1 K.B. 545; Refuge Assurance Co. v. Kettlewell, [1909] A.C. 243. In the one case there was a false pretence; in the other a false representation of fact.

In the absence of fraud or false representation, an action for deceit cannot be maintained: Derry v. Peek (1889), 14 App. Cas. 337; Gardner v. Merker (1918), 43 O.L.R. 411.

The counterclaim should be dismissed with costs.

There should be judgment for the plaintiff for $24,353.61 and costs, with interest on $22,353.61 from the 31st December, 1917.

LATCHFORD, J. JANUARY 21ST, 1919.

MATHER v. BANK OF OTTAWA.

Guaranty—Directors of Company Guaranteeing Account with Bank—Alleged Extinction of Guaranty by Payment—Finding of Fact—Counterclaim—Judgment against Executors of Deceased Directors—Limitation to Estates in Hand for Administration.

In consideration of advances made or to be made by the defendants to the Ontario and Manitoba Flour Mills Limited, an incorporated company, the plaintiff and 4 other men, directors of the company, on the 15th November, 1911, executed and delivered to the defendants an instrument guaranteeing the account of the milling company to the amount of $150,000. The defendants made advances amounting to more than that sum; but the plaintiff asserted that he and his co-directors had paid in full; and brought this action for an account, a declaration that the defendants had been paid in full, and for delivery up of the instrument.

The defendants alleged that a large amount was still due by the guarantors, and counterclaimed against those who were living and the estates of Fraser and Orme, who were dead, for the sum of $98,631.10, with interest from the 31st May, 1918.

The action and counterclaim were tried without a jury at an Ottawa sittings.

G. F. Henderson, K.C., for the plaintiff and for George S. May, one of the defendants to the counterclaim.

I. F. Hellmuth, K.C., for the defendants.

G. D. Kelley, for the other defendants to the counterclaim.

LATCHFORT, J., in a written judgment, said that the only fact in issue was, whether or not the direct indebtedness of the company to the defendants had been paid. Upon the statements and admissions of counsel, supported by the documents filed as exhibits, the learned Judge found as a fact that, while $90,000 and other large sums paid by the plaintiff and his fellow-directors were applied upon the direct indebtedness of the company to the defendants, yet, owing to additional advances made from time to time by the defendants, the amount of the company's direct liabilities to the defendants, secured by the guaranty, amounted on the 31st May, 1918, to $98,631.10. Of this but $61,672.95 was for principal. Neither the plaintiff nor the other defendants by counterclaim had established any defence to the counterclaim.

The plaintiffs' claim should be dismissed with costs, and there should be judgment for the defendants upon the counterclaim for

$98,631.10, with interest on $61,672.95 from the 31st May, 1918. The judgment as against the executors of deceased directors should be limited to the respective estates in their hands to be administered.

LENNOX, J., IN CHAMBERS. JANUARY 22ND, 1919.

BLATCHFORD v. WILLIS.

Executors and Administrators—Action to Set aside Will—Survival of Cause of Action without Aid of Trustee Act.

The action was to set aside the will of William Dayman, deceased, on the ground that it was not duly executed, and, alternatively, that execution was obtained by undue influence. The original plaintiff, who had died, was a sister and heiress-at-law of the deceased, and entitled to share in his estate if he had died intestate. William Blatchford was a son of the plaintiff and administrator of her estate; he was her sole heir-at-law and entitled to the share his mother would have taken, if any, in the estate of the deceased William Dayman. An order was made reviving the action in the name of William Blatchford as plaintiff. The defendants moved before the Local Judge at Goderich to set aside the order. The motion was dismissed, and the defendants appealed.

W. Lawr, for the defendants.
William Proudfoot, K.C., for the plaintiff.

LENNOX, J., in a written judgment, said that it might be that the provisions of the Trustee Act as to continuing actions in the name of the personal representative had no application to this action. But, notwithstanding the well-presented argument of counsel for the defendants, the learned Judge was of opinion that the cause of action alleged here survived without the aid of any statutory enactment.

Appeal dismissed with costs.

MASTEN, J. JANUARY 23RD, 1919.

*BAILEY v. BAILEY.

Husband and Wife—Alimony—Wife Leaving Husband on Account of Cruelty—Offer to Receive her back—Bona Fides—Findings of Fact as to Cruelty—Dismissal of Action—Undertaking of Husband.

Action for alimony, tried without a jury at North Bay.

G. L. T. Bull, for the plaintiff.
G. A. McGaughey, for the defendant.

MASTEN, J., in a written judgment, said that the defendant was a bridge-foreman in the employment of the Canadian Pacific Railway Company, residing at North Bay. The parties were married on the 8th September, 1892. The plaintiff was 52 years of age, and the defendant probably about the same age. They had seven children.

The plaintiff was not at the time of the trial living with her husband. She left him on the 24th March, 1917, and this action was begun on the 2nd May, 1917.

The plaintiff, at the trial, firmly asserted that she had no notion of going back to live with her husband. The husband, on the other hand, offered to take back his wife and family at any time and desired them to return to his home and live with him. The learned Judge found that this offer was bona fide. As to its effect, see Evans v. Evans (1916), 27 O.W.R. 69, at p. 70, 11 O.W.N. 34, 35, and Forster v. Forster (1909), 1 O.W.N. 93.

The question therefore was, whether, upon the evidence, the plaintiff had shewn that the defendant had subjected her to treatment likely to produce and which did produce physical illness and mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that there was a reasonable apprehension that the same state of things would continue so that there should be an absolute impossibility that the duties of the married life could be discharged.

The learned Judge had, with much doubt, arrived at the conclusion that the case had not been brought within the principles established in the jurisprudence of Ontario relative to the granting of alimony; the circumstances, he said, brought it very close to the line.

He found as a fact that the conduct of the defendant in his family had been habitually imperious, arrogant, and dictatorial, and at times mean and unreasonable, to such a degree that he

had permanently alienated the affections not only of the plaintiff but also of all his children. He admitted that they were all against him, and he characterised all their evidence as to his violent actions as sheer inventions.

In this statement he was incorrect; acts of violence were established.

The learned Judge's conclusion, however, was based upon the finding that these acts of violence were not of such a character as to have produced in the plaintiff physical illness or mental distress of a nature calculated permanently to affect her bodily health or endanger her reason, and that it was not established that there was reasonable apprehension that in the future acts would occur likely to produce such a result. She was not afraid of him, and she would not be in any danger if she continued to live with him.

The statements made in evidence on behalf of the plaintiff as to the violence of the assaults upon her were seriously exaggerated. The defendant was a sober, industrious, hardworking man, holding an excellent and important position as foreman of bridge-construction on a section of the Canadian Pacific Railway.

The learned Judge also found against the allegations as to the husband's failure properly to maintain his family; the evidence shewed that he did furnish the plaintiff with all proper necessaries according to his position in life.

Upon the whole testimony, and considering the demeanour of the witnesses, and the manner in which their evidence was given, the learned Judge found that the acts of violence proved were not such as to cause reasonable apprehension of danger to the life, limb, or health of the wife. In the witness-box the plaintiff appeared a strong and healthy woman, both able and willing to maintain her views and enforce her rights, real or supposed, in the domestic forum.

For a summary of the law, reference was made to the judgment of Riddell, J., in McIlwain v. McIlwain (1916), 35 O.L.R. 532, at p. 538.

Upon the defendant signing and filing an undertaking to receive back his wife and children and to treat his wife in all respects with consideration and as a wife should be treated and to abstain from all acts of violence, the action is to be dismissed. There is to be the usual order for costs in case of dismissal as provided in Rule 388.

SUTHERLAND, J. JANUARY 24TH, 1919.

ST. ONGE v. L'UNION ST. JOSEPH DU CANADA.

Insurance (Life)—Benefit Society—Suspension of Member for Non-payment of Dues—Refusal of Application for Reinstatement—Notice to Member—Subsequent Payment and Receipt of Dues and Payment of Sick Benefits—Error and Inadvertence—Absence of Intention to Reinstate—Failure to Establish Waiver or Estoppel—Blamable Carelessness of Officers of Society—Repayment of Dues—Dismissal of Action Brought by Beneficiary after Death of Assured—Costs.

Action by the mother of Abraham St. Onge, deceased, to recover from the defendants the amount ($1,000) of an insurance upon the life of the deceased, under a policy of the 21st June, 1911, in which the plaintiff was designated as beneficiary.

The action was tried without a jury at an Ottawa sittings.

R. J. Slattery, for the plaintiff.

H. St. Jacques, for the defendants.

SUTHERLAND, J., in a written judgment, after stating the facts, said that it was clear that, according to the terms of the defendants' code, the plaintiff's son, who died from tuberculosis on the 21st January, 1918, had made such default in payment of dues as properly caused his suspension and deprived him and his beneficiary of all benefits unless he were reinstated. He applied for reinstatement, his application was refused, and he was struck off the list of members. He was never thereafter, in any legal way or in accordance with any mode prescribed by the defendants' code, restored to membership. Having regard to the nature of the malady from which he was suffering when he was suspended and from which he died, it was hard to believe that he could have been restored to membership. There was cast upon those in authority, in a society such as the defendants,' a duty to all the members thereof to prevent the improper and unconstitutional reinstatement of a member who had been suspended.

Reference to Wells v. Independent Order of Foresters (1889), 17 O.R. 317; Marantette v. L'Union St. Joseph du Canada (1916), 11 O.W.N. 218; Horton v. Provincial Provident Institution (1888-9), 16 O.R. 382, 17 O.R. 361.

In the present case notice of the refusal to reinstate after suspension was definitely communicated to the suspended member, the plaintiff's son. He was not, at the time of his suspension or thereafter at any time up to the date of his death, in a position to

secure reinstatement. While the receipt of money for dues by the local receiver, and through him by the defendants' head office, after the plaintiff's son had ceased to be a member, disclosed a careless mode of conducting the defendants' business, no official who had the power to do so consented to a reinstatement of the member, nor did the society (the defendants), and it was clear from the evidence that there was no such intention. No one had been really prejudiced; of course the payments improperly made and received must be refunded. All that was done was the result of error and inadvertence—there was no waiver and no estoppel.

It was clear from the evidence that the plaintiff's son could not, by appeal or otherwise, have obtained reinstatement.

The repayment, with interest, of the sums actually received by the defendants subsequent to January, 1916, would make good to the plaintiff or her husband (one or other of them paid the dues for their son) the money loss sustained. From the amount to be repaid there should be deducted what was paid by the defendants for "sick benefits." Upon such payment being made by the defendants, the action should be dismissed. The difficulty and litigation had been to some extent caused by the defendants' carelessness, and so there should be no costs to either party.

HUNTER v. PERRIN—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JAN. 20.

Judgment—Execution—Motion to Set aside—"Renewal" of Former Application.]—Motion by the defendant Perrin for an order dismissing the summary application upon which a Local Judge directed that judgment should be entered for the plaintiff, and setting aside the execution issued upon the judgment. On the 27th April, 1917, an order was made by FALCONBRIDGE, C.J.K.B., upon the application of the defendant Perrin to set aside the aforesaid judgment, setting aside the judgment and allowing the defendant Perrin to defend, on the terms of the execution standing in the meantime as security: Hunter v. Perrin (1917), 12 O.W.N. 200. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, in his opinion, counsel for Perrin sought to put too narrow a construction on the order of the 27th April, 1917, as to "renewal" of the motion. To give effect to his contention would certainly not be within the spirit of the order. The present motion should be dismissed—costs to be disposed of by the Judge who should hear the substantive application. H. D. Gamble, K.C., for the defendant Perrin. W. Lawr, for the plaintiff.

RE DAMOD AND BANK OF HAMILTON—LENNOX, J., IN CHAMBERS—JAN. 21.

Bank—Deposit of Money—Supposed Death of Depositor—Rival Claims—Order Directing Trial of Issue—Money Paid into Court.]—In 1890 an account was opened in the Bank of Hamilton at Simcoe in the name of John Damod, and then and thereafter there were deposits and withdrawals made. On the 12th November, 1896, the books of the bank shewed a balance of $2,414.25 to the credit of John Damod. These moneys, with subsequent interest, less costs of paying in, had been paid into Court; and there was now in Court the sum of $4,647.91. The bank claimed a lien upon this fund for costs, $150. Herman W. Kreplin, administrator of the estate of John Cole, deceased, claimed the moneys in Court for that estate, alleging that the moneys were deposited in the bank by John Cole, and were his own moneys—"John Damod" was a fictitious name. Kreplin moved for payment out of the moneys in Court to him. The Attorney-General for Ontario, having obtained a grant to him of letters of administration of the estate and effects of "John Damod," claimed the moneys in Court—death being assumed by reason of silence and lapse of time. One Harry Damod also claimed the moneys, as sole legatee and executor of John Damod, his brother. LENNOX, J., in a written judgment, said, after setting out the facts, that this was not a case to be disposed of on summary application, but on viva voce evidence so far as available. The learned Judge directed the trial of an issue (Kreplin to be plaintiff and the Attorney-General and Harry Damod defendants) to determine which of the parties was entitled to the money; the claim of the bank to remain in abeyance until after the issue has been determined; and the costs of this application to be disposed of by the trial Judge. J. R. Roaf for Kreplin. Edward Bayly, K.C., for the Attorney-General. J. M. Telford, for the Bank of Hamilton.