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HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JUNE 17TH, 1918.

RE BUTTERWORTH AND CITY OF OTTAWA.

Municipal Corporations—By-law Requiring Weighing of Coal or Coke—Power of Council to Pass—Municipal Act, sec. 401, clause 13 (8 Geo. V. ch. 32, sec. 8 (1))—"With the Approval of the Municipal Board"—Approval Given after Passing of By-law—Validity of By-law.

Motion to quash by-law No. 4522 passed by the Municipal Council of the City of Ottawa, under the powers given by clause 13 of sec. 401 of the Municipal Act, R.S.O. 1914 ch. 192. Clause 13 was added by sec. 8 (1) of the Municipal Amendment Act, 1918, 8 Geo. V. ch. 32. Section 401 provides that by-laws may be passed by the councils of urban municipalities for a number of purposes set out in 10 clauses; and the amending Act adds several clauses. No. 13 reads: "With the approval of the Municipal Board . . . for requiring all persons who . . . deliver coal or coke within the municipality, by a vehicle, . . . to have the weight of such vehicle and of such coal or coke ascertained prior to delivery . . ."

The motion was heard in the Weekly Court, Ottawa.

T. McVeity, for the applicant.

F. B. Proctor, for the city corporation.

FALCONBRIDGE, C.J.K.B., said, in a written judgment, that the objection to the by-law was, that it was not passed with the approval of the Municipal Board, as required by clause 13, supra.

Since the argument of this motion the by-law had received the approval of the Board; but the applicant contended that such approval should have preceded the passing of the by-law.

In re John Inglis Co. Limited and City of Toronto (1904), 8 O.L.R. 570, was cited in support of this contention. But the language of the Consolidated Municipal Act, applicable to that case (3 Edw. VII. ch. 19, sec. 628), left no room for doubt or misapprehension. It provided, "Without the consent of the Government of . . . Canada no municipal council shall pass a by-law . . .," pointing clearly to a consent obtained in advance.

The opinion of the Board on this point was cited with approval by the learned Chief Justice.

Motion dismissed with costs.

KELLY, J. JUNE 18TH, 1918.

PEPPIATT v. REEDER.

Fraud and Misrepresentation—Sale of Goods—Damages—Ascertainment—Difference between Contract-price and Actual Value of Goods, without Regard to whether whole Price Actually Paid—Chattel Mortgage—Account—Method of Taking—"Protracted and Vexatious Litigation."

Appeal by the defendant and cross-appeal by the plaintiff from the report of the Master in Ordinary of the 1st October, 1917.

For the history of the case, see 7 O.W.N. 753; 8 O.W.N. 84, 257, 332, 447, 517, 526; 9 O.W.N. 121, 263, 476; 10 O.W.N. 87, 263; 11 O.W.N. 100, 356.

The appeal and cross-appeal were heard in the Weekly Court, Toronto.

J. J. Gray, for the defendant.

Edward Meek, K.C., for the plaintiff.

KELLY, J., in a written judgment, said that the defendant's chief objection was based on what he contended to be an improper finding in regard to the effect of his having taken possession of and sold the mortgaged goods after default had taken place in payment of moneys due upon the mortgage. The plaintiff's main grounds of complaint were against that part of the report which allowed the defendant a set-off of $127.66 in respect of the chattel mortgage and against the method adopted in taking the account upon the mortgage.

The action had been before the courts ad nauseam in one form or another—in the Master's office, in the Weekly Court many times, three times in the Appellate Division, and once in the Supreme Court of Canada.

It having been determined that, in making the sale of the goods to the plaintiff and obtaining the chattel mortgage, the defendant was guilty of fraud and misrepresentation, and the plaintiff entitled to damages, the Master was directed to ascertain, according to the principle laid down by the Court, what damages the plaintiff had sustained; and the Master found that the difference between the price the plaintiff agreed to pay and the real value of the chattels was $1,600; but, because the contract-price was only partly paid, he found that the purchaser was not entitled to the whole $1,600, but only to a part in the proportion which the amount which he actually paid bore to the whole contract-price—that part amounting to $720.64.

In allowing only the smaller sum, the Master erred. The mode of calculation adopted left out of account the fact that the plaintiff obligated himself to the extent of $1,600 more than what had been found to be the actual value of the goods at the time of purchase; and that, whether or not he had paid the full amount, his obligation continued.

The contract-price was $3,500; the Master found that the real value of the goods was only $1,900. No reason had been shewn for disturbing the finding in that respect.

In taking the mortgage account, the Master charged against the defendant the value of the goods at the time the defendant repossessed them. In doing so, he proceeded in accordance with the course indicated by the Appellate Division.

The Master's report should be amended by substituting $1,600 for $720.64, and making other changes in accordance with that change.

The plaintiff's appeal was allowed with costs, and the defendant's appeal dismissed with costs.

The learned Judge reprehended this "protracted and in many respects vexatious litigation."

MASTEN, J. JUNE 19TH, 1918.

MARKLE v. MACKAY.

Vendor and Purchaser—Agreement for Exchange of Lands—Time for Completion—Extension—Waiver—Provision in Contract for Rescission—Objection to Title—Question of Conveyance—Negotiations as to Objection—Lapse of Time before Attempted Exercise of Power to Rescind.

Action for specific performance of a contract for the exchange of lands.

The action was tried without a jury at a Toronto sittings.
Gideon Grant, for the plaintiff.
John A. Paterson, K.C., for the defendant.

MASTEN, J., in a written judgment, said that by the contract the defendant was to convey to the plaintiff the equity of redemption in certain lands in Saskatchewan in exchange for lands in Toronto. The offer of exchange was made by the defendant, and the acceptance of his offer by the plaintiff was dated the 28th September, 1917.

The agreement provided that the lands of the defendant were to be conveyed "subject to a first mortgage for $2,500 at 8 per cent. straight till August, 1922." Each party covenanted to assume the incumbrance (if any) on the property conveyed to him by the other. "All objections and requisitions in respect to the title to either property, abstract, or particulars, if any, to be made in writing and delivered within 10 days from the date of this agreement, otherwise title accepted as satisfactory." If any valid objection or requisition should be made which either party was unable or unwilling to remove, "this offer may be cancelled." "This offer to be accepted within 4 days, otherwise void, and, if accepted, this exchange to be completed on or before the 15th October, 1917."

The questions raised were: (1) whether the contract was enforceable, it not having been carried out on or before the 15th October; and (2) whether the defendant had effectively rescinded the contract pursuant to the provision in the agreement.

A certain letter written on behalf of the defendant and an admission of counsel made it plain that, after the 15th October, discussions and negotiations took place between the parties with respect to the carrying out of the transaction, and thus the time was extended and the provision waived.

The solicitor for the plaintiff made to the solicitor for the defendant certain requisitions in regard to the Saskatchewan lands, among which was this: "Required registration before closing of such instruments as shall vest in your client the fee simple" of the Saskatchewan lands, "subject only to the $2,500 to be assumed."

The lands to be conveyed to the defendant were not, at the date of the agreement, subject to a first mortgage of $2,500, but were subject to a first mortgage of $1,000, not due until 1920. The mortgagee refused to take his money, and a first mortgage of $2,500 could not be placed upon the lands. In view of this difficulty, the defendant assumed to "cancel our offer."

The term "objection or requisition," as used in the agreement, did not mean *any* objection or requisition, but an objection or requisition in respect to the title.

Having a good title to the equity of redemption which he had contracted to convey, the defendant was bound by his bargain, and must convey that equity subject to proper adjustments and compensation as to incumbrances. The objection relied on as justifying the rescission raised a question of conveyance, not of title.

Reference to Martin v. Jarvis (1916), 37 O.L.R. 269, 274; In re Jackson and Haden's Contract, [1906] 1 Ch. 412.

A further difficulty in the way of the defendant was the fact that, when the objection was raised, he did not at once assume to exercise his power of rescission, but proceeded to negotiate and allowed much time to elapse before assuming to rescind.

Reference to Crabbe v. Little (1907), 14 O.L.R. 631.

There should be a judgment for the plaintiff for specific performance, with a reference as to title, unless the parties otherwise agree.

Costs up to judgment to be paid by the defendant to the plaintiff; further directions and subsequent costs reserved.

MASTEN, J. JUNE 19TH, 1918.

*LYNCH-STAUNTON v. SOMERVILLE.

Solicitor—Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914 ch. 159, sec. 34—Services Attributed to Professional Character of Plaintiff as Solicitor—Lump Sum Charged for Specific Items of Services Set out in Bill without Specific Charge for each—Non-compliance with Statute in Part of Bill only—Effect as to whole—No Proper Bill Delivered—Action Prematurely Brought—Dismissal with Costs, but without Prejudice to Delivery of Proper Bill and New Action.

Action by a gentleman practising as a barrister and solicitor to recover $1,089.90 for legal services rendered.

The action was tried without a jury at a Hamilton sittings.

J. G. Farmer, K.C., for the plaintiff.

H. S. White, for the defendants.

MASTEN, J., in a written judgment, said that the defence to the action was, that no proper bill of fees, charges, and disbursements was delivered before action, and therefore the action did not lie: Solicitors Act, R.S.O. 1914 ch. 159, sec. 34. The defendants paid $500 into Court.

In the bill rendered there appeared certain items, Nos. 1 to 16, in respect of which no charge was made against each particular item, but at the end of the bill there appeared: "Fee on negotiations as above set out and recovering property of the value of $60,000 subject to a payment of $30,000—$700." The bill contained many other items, in respect of each of which a specific charge was made. For the services rendered by the plaintiff in his capacity of counsel specific charges were made. But the charge for negotiating the settlement was not treated by the plaintiff as a counsel-fee; rather as a charge for a separate and distinct service rendered by him in some capacity other than that of counsel.

Was that service, then, rendered in his professional capacity as a solicitor or was it rendered by him as a lay agent?

Having regard to the whole evidence and to the law laid down by Armour, C.J., in Re McBrady and O'Connor (1899), 19 P.R. 37, at p. 43, it must be held that the employment was so connected with the plaintiff's professional character as to afford a presump-

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

tion that his character as a solicitor formed the ground of his employment by the client; and his claim in this action was subject to the provisions of the Act.

The second question was, whether the bill as rendered complied with the provisions of sec. 34.

The case could not be distinguished from Gould v. Ferguson (1913), 29 O.L.R. 161, and Re Solicitor (1917), 12 O.W.N. 191, and the earlier cases followed in those cases.

If there were no items in the bill other than the items 1 to 16, the case would be absolutely and literally on all fours with the cases cited. The fact that the services related to one single subject-matter made no difference if the services extended intermittently over a period of time; and it could make no difference that in this case the bill of costs contained also items of services in respect of which specific charges were made.

No proper bill having been rendered, the action was prematurely brought, and must be dismissed unless the plaintiff chose to accept the $500 paid into Court.

The dismissal of the action should be without prejudice to any other action which the plaintiff might choose to bring after delivery of a proper bill and the expiry of the 30 days mentioned in the Act.

Costs must follow the result.

BURFORD COAL AND GRAIN CO. v. MCPHERSON—BRITTON, J.—JUNE 20.

Contract—Delivery of Grain—Breach—Damages.]—Action for damages for breach of a contract by not delivering grain purchased by the plaintiffs from the defendant. The action was tried without a jury at Brantford. BRITTON, J., in a written judgment, found that there was a contract; that the plaintiff did not get the car of grain which he ordered; and that the plaintiff suffered damage by reason of the non-delivery of the grain purchased, but not to the amount claimed by him. Damages assessed at $200, and judgment to be entered for the plaintiff for that sum, with costs on the County Court scale, without set-off. A. H. Boddy, for the plaintiff. W. G. Owens, for the defendant.

KARCH v. EDGAR—LENNOX, J.—JUNE, 21.

Reference—Reports—Corporation—Payment out of Money in Court—Alimony—Costs.]—Motion to confirm the report on sale and the final report of the Local Master at Guelph, for a vesting order, and for payment out to the plaintiff of the moneys in Court, on account of her claims for alimony, maintenance of children, and costs, less the costs of the reference as taxed and revised and the costs of the motion. The motion was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that none of the defendants who were served with notice of the motion appeared, and he had reserved judgment to give them an opportunity of being heard; nothing, however, had been heard from the defendants; and there were reasons why the disposal of the motion should not be delayed. There should be an order in terms of the notice of motion, with costs—these costs to be deducted from the money in Court. P. Kerwin, for the plaintiff.

RE KNOWLES AND LAWRASON—LENNOX, J.—JUNE 21.

Vendor and Purchaser—Agreement for Sale of Undivided Interest in Land—Proof of Vendor's Title—Highway Shewn on Registered Plan—Rights of Municipality and of Persons Purchasing according to Plan—Application under Vendors and Purchasers Act.]—Motion by William E. S. Knowles, vendor, for an order declaring that he has a good title to an undivided one-half share or interest in a block of land in the town of Dundas. The purchaser, John W. Lawrason, was the owner of the other undivided half. The motion was based on this requisition: "Required release of the Town of Dundas and the Crown of all claims on the streets and lanes." In 1855, the owners (subject to a mortgage) of a large tract of land in the town, the land now in question being part of it, subdivided the tract into town-lots and laid out streets and lanes thereon, including a lane forming part of the land now in question, now called Rolph street, and registered a plan of the subdivision, shewing the streets and lanes. It was said that the mortgagee refused to recognise the plan, and that he afterwards conveyed lots in the tract without reference to the plan. The lane (Rolph street) was never opened up or used as a street or way. The motion was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, said that the town corporation were not bound to accept a highway, but the change of name suggested some municipal action. There was no doubt as to the bona fides of the application.

It was possible that the purchasers according to the plan might never complain if Rolph street was declared not to be a highway; but the question should not be decided upon an application of this kind. The other purchasers and the municipality should have an opportunity to be heard in an action or otherwise. It was not satisfactorily shewn that the vendor had a good title—such a title as an unwilling purchaser would be compelled to accept. The motion should be dismissed, but without prejudice to its being renewed on other or additional material if the vendor was so advised. There should be no order as to costs. The vendor and purchaser both appeared in person.

THIRD DIVISION COURT OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

ROGER, JUN. CO. C.J. JUNE 10TH, 1918.

AUSTIN v. GRAND TRUNK R.W. CO.

Railway—Farm-crossing—Removal of Planks by Railway Company—Duty to Restore—Order of Board of Railway Commissioners—Railway Act, R.S.C. 1906 ch. 37, secs. 252, 253—Damages.

Action by Harry Austin, a farmer, to recover damages for loss and injury suffered by reason of the failure of the defendants to restore the planks upon the farm-crossing maintained by them for the benefit of the plaintiff.

The action was tried without a jury at Port Hope.
D. H. Chisholm, for the plaintiff.
J. P. Pratt, for the defendants.

ROGER, JUN. CO. C.J., in a written judgment, said that the lines of the Grand Trunk and Canadian Pacific Railways crossed the plaintiff's farm in close proximity, and over both of the railways the plaintiff had farm-crossings. The practice of the defendants has been to remove the planks between the rails of their crossing during the winter; the practice of the other railway company was not to do so. The defendants had usually restored the same, however, when notified by the plaintiff that he required to use the crossing, until this last winter, when the plaintiff, having to draw

a quantity of wood over the crossing, and finding that he could not draw even half-loads in the shape that the defendants had left the crossing, applied to have the planks restored; which, for some unexplained reason, the defendants, contrary to their usual custom, neglected to do, whereby the plaintiff was hindered in his work and suffered damage.

The evidence went to shew that on the Grand Trunk crossing on the farm next to the plaintiff's farm the planks were not removed during that winter, and that the principal difference that the leaving of the planks makes to the railway companies is, that it involves the lifting of the flangers on trains when passing over planked crossings, and also more labour in keeping the space between the planks and rails on the inside free of ice and snow. Beyond this additional attention and labour in the operation of the road, and the possibility of accident resulting from its neglect, the removal of the planks did not seem to involve any question of either necessity or safety.

By an order of the Dominion Board of Railway Commissioners, dated the 14th September, 1909, it was provided as follows:—

(1) In the operation of the railway lines, where the snowfall is such as to require the running of snow-ploughs or flangers, the company may remove the planks from farm-crossings: provided that no such planks shall be so removed unless necessary, and shall be replaced by the company in the spring, or as soon as the snow is off the ground.

(2) Where it is necessary to operate snow-ploughs or flangers over highway crossings upon railway lines, railway companies may remove one plank next to the inside of each rail, the same to be replaced in the spring or as soon as the snow is off the ground.

The learned Judge failed to see that this order served, or was intended, to relieve the defendants of any portion of the duty imposed upon them by sec. 252 of the Railway Act of Canada, R.S.C. 1906 ch. 37.

Reference to Belanger v. The King (1916), 54 S.C.R. 265, at p. 274.

As to the powers of the Board under sec. 253, see Saindon v. Temiscouata R. Co. (1912), 14 Can. Ry. Cas. 326, at p. 329.

The farmer's right to an effective crossing and the Board's power of regulation came from the same source, and it was not to be presumed that these conflicted, or that the latter was intended to negative or restrict the former, nor did the order assume to do so. If a plank crossing was impracticable, then some other provision "convenient and proper for the crossing of the railway for farm purposes" (sec. 252) must be provided. But the order con-

ditioned the right to remove the planks upon its being necessary to do so, and that necessity had not been proved. The fact that it was unnecessary to remove the planks from the adjoining crossings or from this crossing in former years rather negatived such a presumption.

The defendants had failed in their statutory obligation to the plaintiff, for which they were liable under sec. 427 (2); damages assessed at $50.

Judgment accordingly.