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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 1ST, 1917.

ROOS v. SWARTS.

Evidence—Judgment—Foreclosure — Reference — Parties — Execution Creditors—Costs.

Appeal by the defendant from the judgment of SUTHERLAND, J., 10 O.W.N. 446, ante 166.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

L. E. Dancey, for the appellant.

C. Garrow, for the plaintiff, respondent.

W. Proudfoot, K.C., for subsequent incumbrancers, execution creditors, not made parties to the action, and having no notice of the proceedings in the Master's office, asked that the case should be referred back, and that they should be made parties.

THE COURT made an order opening up the judgment and directing the entry of a judgment for foreclosure in the ordinary form, with a reference to DICKSON, Local Judge at Goderich. The evidence taken before DOYLE, Local Judge, to stand quantum valeat, and all parties to have the right to call the witnesses already examined for examination or cross-examination, and also such other witnesses as they may be advised to call. Costs throughout to be costs in the cause. The costs of the execution creditors to be added to their claims.

NOTE: The above note is to be substituted for that appearing ante 363.

SECOND DIVISIONAL COURT. FEBRUARY 12TH, 1917.

NAIRN v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Negligence—Street Railway—Injury to Automobile—Personal Injuries—Contributory Negligence—Ultimate Negligence—Findings of Jury—Damages—Costs—New Trial.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of SUTHERLAND, J., ante 91, in an action tried with a jury.

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

T. Mercer Morton, for the plaintiff.

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

THE COURT directed a new trial; costs to be costs in the cause.

SECOND DIVISIONAL COURT. FEBRUARY 13TH, 1917.

*RE TOWN OF ALLISTON AND TOWN OF TRENTON.

Municipal Corporations—Bonus to Manufacturing Business—By-law—Motion by another Municipal Corporation to Quash—Injurious Affection—Municipal Act, R.S.O. 1914 ch. 192, sec. 285—"Business Established elsewhere in Ontario"—Sec. 396(c) of Act—Ownership of Business—Identity—Company—Practical Control.

Appeal by the Corporation of the Town of Trenton from the order of HODGINS, J.A., in the Weekly Court, ante 288.

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

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

W. A. J. Bell, K.C., for the respondents.

THE COURT dismissed the appeal with costs.

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

SECOND DIVISIONAL COURT. FEBRUARY 14TH, 1917.

*BIRDSALL v. MERRITT.

Negligence—Allowing Dog with Propensity for Barking at Horses to be upon Highway—Scienter—Liability for Injury Caused by Horses Running away—Findings of Trial Judge—Appeal.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Haldimand in favour of the plaintiff in an action for damages for injury to the plaintiff's person and property, by reason of the defendant's negligence in allowing his dog, which, to the knowledge of the defendant, had a mischievous propensity for barking at horses, to be upon the highway.

The plaintiff was driving in a buggy upon the highway, when the dog ran out, barking, and frightened the horses, who ran away. The plaintiff was thrown out and injured, one of the horses was injured, and the buggy and harness were damaged.

The action was tried by the County Court Judge without a jury, and the plaintiff was awarded judgment for $350 and costs.

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

G. Lynch-Staunton, K.C., and J. M. Telford, for the appellant, referred to Zumstein v. Shrumm (1895), 22 A.R. 263, and Heath's Garage Limited v. Hodges, [1916] 2 K.B. 370.

Harrison Arrell, for the plaintiff, respondent, was not called upon.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that it was not necessary to decide whether the dog was or was not rightly upon the highway. Assume that it was rightly there. The County Court Judge having found that the dog had a mischievous propensity for running out after horses and barking at them, to the knowledge of the defendant, and that the injury to the plaintiff was caused by the dog running out and barking, the Court could not interfere. The case was a clear one upon the evidence, and the appeal should be dismissed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

LATCHFORD, J. FEBRUARY 13TH, 1917.

THOMPSON v. CANADA PEBBLE CO.

Contract—Carrier by Ship—Capacity of Ship—Knowledge of Shipper—"Cargo"—Correspondence — Deficiency in Tonnage—Breach of Contract—Damages.

Action by a ship-owner for damages for breach of contract in not furnishing a full cargo of 800 tons instead of a part cargo of but 383 tons of pebbles.

The action was tried without a jury at Sandwich.

A. R. Bartlet, for the plaintiff.

E. G. McMillan, for the defendants.

LATCHFORD, J., in a written judgment, said that the right of the plaintiff to recover depended on the meaning of the word "cargo" as used in the correspondence between the parties.

The defendants were aware, when they sent to the plaintiff the telegrams of the 8th and 9th June, 1915, that the plaintiff had purchased a new boat (the "Shrigley"), and that her carrying capacity was about 800 tons of pebbles.

After a letter inquiring as to the probability of obtaining freight at $2 per net ton to certain ports, including Buffalo, in the event of the purchase of a steamer of about 600 tons' capacity, the plaintiff had interviews with the managers of the defendants' business, and on the 22nd April, 1915, wrote to one of them regarding the "Shrigley," informing him that she would take about 800 tons of pebbles per trip. The defendants' telegrams of the 8th and 9th June, addressed to the plaintiff as captain of the "Shrigley," and the plaintiff's telegram of the 8th June and his letters of the 9th and 10th June, constituted the contract between the parties; and, with the knowledge which the defendants had of the capacity of the new boat, established quite clearly that the defendants undertook to provide a cargo of approximately 800 tons of pebbles, to be carried by the plaintiff from Jackfish to Buffalo at $2 per ton.

The word "cargo," referring to a ship, means the whole loading: Sargent v. Reed (1745), 2 Strange 1228.

Reference also to Borrowman v. Drayton (1876), 2 Ex.D. 15, 19; Miller v. Borner & Co., [1900] 1 K.B. 691.

In this case, the cargo agreed to be provided approximated 800 tons. The nine cargoes carried by the plaintiff for the defendants in 1914, in his old vessel of 400 tons' capacity, averaged 388 tons each, and both parties recognised such an average tonnage as constituting a cargo for the old boat. Upon the same scale, a cargo of 776 tons would have been a compliance with the contract made in 1915. The defendants were able to load only 383 tons. They should have loaded 393 tons additional, for which the plaintiff would be entitled to claim $786 in addition to what he had received.

Judgment for the plaintiff for $786 damages with costs.

SUTHERLAND, J. FEBRUARY 13TH, 1917.

MORTIMER CO. LIMITED v. DOMINION SUSPENDER CO. LIMITED.

Contract—Furnishing Work and Material—Breach—Delay—Right to Repudiate—Measure of Damages—Deduction from Contract Price of Sum to be Expended in Completion—Anticipated Loss on Contract to be Compensated by Advertising Benefit—Element in Assessment.

Action for damages for breach of an agreement embodied in correspondence between the plaintiffs and defendants in March, 1915. The plaintiffs agreed to print for the defendants 3,500 catalogues from copy and material supplied by the defendants, in accordance with specifications, at a price of $1,200, subject to an addition to the price in the event of changes. The defendants furnished some of the copy and material, and the plaintiffs had it set up and did work upon it. The alleged breach was the failure of the defendants to supply the rest of the material so as to enable the plaintiffs to complete their work. The action was begun on the 26th October, 1916.

The action was tried without a jury at Ottawa.

R. G. Code, K.C., for the plaintiffs.

R. S. Robertson, for the defendants.

SUTHERLAND, J., set out the facts and the correspondence in a written judgment, and said that it was clear that the defendants had made up their minds not to have the catalogue completed

and published until trade became more settled. While no time had been agreed upon at the outset for the completion of the catalogue, it was clear from the correspondence that both parties contemplated its being completed by the autumn of 1915; and that the plaintiffs from time to time, and for much more than a reasonable length of time, pressed upon the attention of the defendants the necessity for completing the catalogue.

The delay which occurred was attributable to the defendants. The plaintiffs would have been justified long before in treating the contract as at an end and notifying the defendants accordingly.

It would be unreasonable to hold that the contract was still an existing one at the time that the action was begun. The plaintiffs had then a right to treat the contract as at an end and sue for damages.

As to the measure and quantum of damages, the plaintiffs, when they entered into the contract, had in mind and expectation that as a result of the expected distribution by the defendants of 3,500 catalogues, which the plaintiffs intended to be excellent in workmanship and appearance, they themselves would secure a good advertisement. In consequence of this, they offered, for $1,200, to do work and supply materials which they knew would cost much more than that sum, and so from the outset expected to make a loss on the contract—although this was not at the time communicated to the defendants.

It was argued on behalf of the plaintiffs that, when the defendants persistently declined to furnish the additional material by which alone their contract could be completed and carried out, until the plaintiffs notified them that their conduct would be treated as a repudiation of the contract, it was then open to the plaintiffs to claim $1,400 for work done and materials provided up to that time; and the right to assert some such claim was suggested or hinted at by Bramwell, B., in Gee v. Lancashire and Yorkshire R.W. Co. (1860), 6 H. & N. 211.

But it is not enough that the party whom it is subsequently sought to make liable should be informed that a breach will result in particular loss; he must be informed of the special circumstances in which the loss will be incurred, and must enter into the contract subject to them. Information given at a later date will not suffice: Halsbury's Laws of England, vol. 10, p. 313.

While in this case it may not appear to give the plaintiffs adequate damages, the proper measure is to be found by deducting from the $1,200 which the plaintiffs would have received had

the contract been carried out, such further sum as they would have been obliged to expend in its completion.

The plaintiffs' damages, therefore, should be fixed at $675, to include interest down to the commencement of the action. If the plaintiffs or defendants are dissatisfied with this amount, they may have a reference to the Master at their risk.

Subject to a possible reference, judgment for the plaintiffs for $675, with interest from the date of the writ of summons and costs on the Supreme Court scale.

Reference to Mayne on Damages, 8th ed. (1909), p. 126; Tredegar Iron and Coal Co. v. Hawthorn Brothers and Co. (1902), 18 Times L.R. 716, 717; Frost v. Knight (1872), L.R. 7 Ex. 111; Planché v. Colburn (1831), 8 Bing. 14; Braithwaite v. Foreign Hardwood Co., [1905] 2 K.B. 543.

MIDDLETON, J. FEBRUARY 14TH, 1917.

RE KOHLER.

Will—Construction—Moneys Received from Investment Made by Testator—Income or Capital—Executory Gift—Substitutional Gift—Period of Distribution.

Motion for an order determining a question as to the construction of the will of Christian Kohler, deceased.

The motion was heard in the Weekly Court at Toronto.

A. J. Thomson, for the children of the testator.

F. W. Harcourt, K.C., for the issue of children born and yet to be born.

MIDDLETON, J., in a written judgment, said that the testator, who died on the 10th March, 1915, by his last will, dated the 13th March, 1911, duly admitted to probate, dealt with his residuary estate by clause 10. His trustees were to convert the same into money as soon as conveniently might be, and to invest, and, after certain provisions, not now material, to pay to his widow an annuity out of the income, and, if need be, the corpus; and, upon the death or remarriage of the widow, to divide the residuary estate equally among the children. Then followed a provision that if any child died before the period of division, leaving issue,

the issue were to take, but if the child dying left no issue the surviving children were to take.

This will had already been construed. The income from the residue was greater than the widow's annuity, and the holding was that the shares of the children were vested, subject to being divested in event of death before the period of distribution, and that the income above that required to meet the annuity was payable to the children.

A further question now arose, whether certain money was to be regarded as income now distributable, or as corpus to be retained and invested till the period of distribution.

During his lifetime the testator had invested $3,661.36 in the purchase of an interest in "gas-leases." This venture turned out well. He received $4,500 dividends. His executors received $4,932.59, and then sold out for $9,500. The question was as to the $4,932.59.

If the rule in Howe v. Earl of Dartmouth (1802), 7 Ves. 137, applied, the $4,932.59 would have to be apportioned between income and capital. But the rule did not apply to the case in hand. Reference to Re Hammersley (1899), 81 L.T.R. 150; In re Bland, [1899] 2 Ch. 336.

Here the gift was for the benefit of a class, but the beneficial enjoyment was postponed for the purposes of the estate—to allow the income to be used for the raising of the widow's annuity, and, as had already been held, the surplus income was not to accumulate, but was at once divisible.

There was no reason to suppose that the testator intended that the income which was derived from this property should not be at once divided as income among his children, but should be retained for the benefit of the same children upon the death of the widow. The executory gift was substitutional, and there could be no valid reason to impute to the testator any intention of benefiting those who would take in the event of the children or any of them dying before the period of distribution, at the expense of the children themselves.

For these reasons, the $4,932.59 was to be regarded as income; it formed no part of the capital fund to be retained intact during the life of the widow; but was presently divisible.

Costs out of the $4,932.59, the fund in question.

MULOCK, C.J.Ex. FEBRUARY 15TH, 1917.

RE BROWN AND KELLAR.

Title to Land—Tenant in Tail—Enlargement of Estate—Mortgage —Registration—Bar of Entail—Act respecting Assurances of Estates Tail, R.S.O. 1887 ch. 103, sec. 9.

Motion by Margaret Lucia Brown, vendor, for an order, under the Vendors and Purchasers Act, declaring that objections to the vendor's title made by Stanley Kellar, the purchaser of lands under an agreement for sale and purchase, had been fully answered, and that the vendor had a good title in fee simple.

The motion was heard at Kitchener as in Weekly Court.
M. A. Secord, K.C., and A. B. McBride, for the vendor.
W. H. Gregory, for the purchaser.

MULOCK, C.J.Ex., in a written judgment, said that for the purposes of this motion it was to be assumed that Margaret Lucia Brown by indenture made the 8th September, 1863, between her father Thomas Halifax Lamphier, the grantor, and Jane Lamphier, his wife, to bar dower, and the said Margaret Lucia Brown, acquired an estate tail in the lands referred to; and the only question to determine here was, whether the estate tail had been barred.

It appeared that by indenture of mortgage bearing date the 17th April, 1888, Margaret Lucia Brown granted by way of mortgage the lands in question to David B. Eby in fee, as security for payment of the mortgage-moneys and interest therein mentioned, and covenanted that she had a good title in fee simple to the said lands—Fanny Brown and Annie Brown, described as daughters of the mortgagor, also joining in the mortgage for the purpose of thereby releasing any interest they might have in the lands in question.

According to the affidavit of Margaret Lucia Brown, this mortgage had been paid off, but it did not appear that it had been discharged or that there had been any reconveyance of the mortgaged lands to her.

By the Act respecting Assurances of Estates Tail, R.S.O. 1887 ch. 103, sec. 9, the execution of a mortgage in fee by a tenant in tail and its registration within six months bars the entail: Lawlor v. Lawlor (1881), 10 S.C.R. 194; Culbertson v. McCullough (1900), 27 A.R. 459.

By virtue of the mortgage, the mortgagee acquired the fee in the lands, subject to the mortgagor's equity of redemption, no interest in the land remaining either in the mortgagor, the issue in tail, or the remaindermen, in case of failure of issue in tail.

At this stage the only parties having any interest in the lands were the mortgagor and the mortgagee. Under the statute, the mortgagor, upon payment, became entitled to have conveyed to her the estate in fee which had been conveyed to the mortgagee.

Therefore, the mortgage effectually barred the entail, leaving Margaret Lucia Brown the owner in fee subject to the mortgage.

McTAVISH v. LANNIN AND AITCHISON—CAMERON, MASTER IN CHAMBERS—FEB. 13.

Costs—Security for—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 16—Action against Police Officers—Entry of Dwelling-house without Search-warrant—Trespass.]—Motion by the defendants for an order for security for costs under the provisions of sec. 16 of the Public Authorities Protection Act, R.S.O. 1914 ch. 89. The defendants were police officers of the City of Stratford; and the action was brought for trespass by entering the plaintiff's house and assaulting and arresting her. It appeared that no information was laid charging the plaintiff with any offence, but that a person complained to the defendants of the theft of a sum of money and said that she (the complainant) suspected the plaintiff, whereupon the defendants, without a search-warrant, entered the plaintiff's house. The learned Master said that the defendants were mere trespassers, and were not entitled to security for costs. He referred to Polley v. Fordham (1904), 20 Times L.R. 639; Moriarity v. Harris (1905), 10 O.L.R. 610, 614. Application dismissed with costs to the plaintiff in the cause. R. S. Robertson, for the defendants. R. T. Harding, for the plaintiff.