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HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. JULY 17TH, 1916.

EASTERN TRUST CO. v. MACKENZIE MANN & CO.

Foreign Judgment—Action on Judgment of Supreme Court of Nova Scotia—Finality of Judgment—Pending Appeal to Privy Council—Motion for Summary Judgment—Order—Terms—Security.

Appeal by the defendants from an order of the Master in Chambers, upon summary application, allowing the plaintiffs to enter judgment against the defendants for $81,719.98 and costs in an action on a judgment recovered in the Supreme Court of Nova Scotia. The order contained these provisions: that the defendants should transfer to the plaintiffs certain shares of stock; and that execution for the $81,719.98 and costs should not issue until the plaintiffs should have deposited security in the sum of $100,000 to perform such order as His Majesty in Council should see fit to make on an appeal pending before the Judicial Committee from the Nova Scotia judgment upon which this action was brought.

R. B. Henderson, for the defendants.
O. H. King, for the plaintiffs.

KELLY, J., read a judgment in which he said that it was contended by the defendants that the judgment of the Supreme Court of Nova Scotia was not a final judgment, an appeal therefrom having been taken.

As to what is "a final judgment," the learned Judge referred to Nouvion v. Freeman (1889), 15 App. Cas. 1, 9, 13; and said that it was not contended that the Nova Scotia Court had any power to set aside or vary its judgment—so far as that Court was concerned, the judgment was final; and that was the finality necessary to make the judgment a proper subject of an action in this Court.

The order appealed from, so far as it went, directed judgment to be entered in the terms of the judgment sued upon; and there was no reason for disturbing that order.

The term prohibiting the issue of execution until the plaintiffs should give security was for the protection of the defendants.

Motion dismissed with costs.

SUTHERLAND, J. JULY 19TH, 1916.

ROOS v. SWARTS.

Practice—Death of Party while Reference Pending—Report Made after Death, but Dated back to Day when Case Closed—Necessity for Direction of Court—Rules 304, 512—Appeal from Report—Refusal to Hear until Representative of Deceased Appointed and Order of Revivor Made.

In the above-named action, William Roos sued upon three mortgages assigned to him, the defendants being Edward R. Swarts and Charlotte E. Swarts. Another action was begun in which Edward R. Swarts was plaintiff and William Roos defendant. On the 14th July, 1914, an order was made directing that all necessary inquiries should be made and accounts taken in respect of the matters in question in the two actions, and for that purpose directing a reference to the Local Master at Goderich.

Edward R. Swarts died on the 24th April, 1915, and on the 5th August following an order was made in the above-named action directing that it should be continued at the suit of William Roos as plaintiff against Charlotte E. Swarts, administratrix of the estate of Edward R. Swarts, deceased, and the said Charlotte E. Swarts, as defendants.

The reference was proceeded with, and by January, 1916, all the evidence had been taken. On the 16th January, a written argument was put in by counsel for Roos; and, on the 1st February, a written answer by counsel for Charlotte E. Swarts.

On the 4th February, 1916, Charlotte E. Swarts died. No intimation of this having been given to counsel for Roos, he, in ignorance of her death, on the 5th February, put in a written reply.

The Master prepared his report, and gave an appointment to settle it, which was served on the solicitor who had acted for Charlotte E. Swarts.

On the 26th May, 1916, this solicitor wrote to the Master saying that he (the solicitor) could not act, his authority being at an end, and no further administration having been granted.

The Master, notwithstanding, settled the report; and, assuming to proceed under Rule 304, dated it as of the 1st February, 1916, and signed it; it was filed on the 26th May, 1916.

On the 8th June, 1916, the same solicitor served a notice of motion by way of appeal from the report and for an order setting it aside, and directing a reference to another officer, and appointing Clarence L. Swarts administrator ad litem and adding him as a party defendant to represent the estate of Edward R. Swarts.

The Local Master had then resigned his office.

On the 23rd June, 1916, the solicitors for Roos served a notice of motion for judgment for the amount found due to Roos by the report, and dismissing the action brought by Edward R. Swarts.

The two motions were heard in the Weekly Court at Toronto.

L. E. Dancey, for the applicant in the first application.

C. Garrow, for Roos.

SUTHERLAND, J., referred to Holmested's Judicature Act, p. 770, where the effect of Rule 304 is dealt with; and said that it appeared that the Master must have ignored the argument in reply delivered by counsel for Roos, and treated the argument as closed when counsel for Mrs. Swarts delivered his written answer on the 1st February, as that was the date of his report. It might be that a special direction should have been obtained from the Court to date and enter the report as of the 1st February before it was formally signed and filed. See Rules 304, 512, and notes thereunder in Holmested's Judicature Act, pp. 770, 1131; Turner v. London and South-Western R.W. Co. (1874), L.R. 17 Eq. 561, 565; Ecroyd v. Coulthard, [1897] 2 Ch. 554, 573; Couture v. Bouchard (1892), 21 S.C.R. 281.

But, assuming that, in the circumstances, the Master treated the argument as closed on the 1st February for the purpose of enabling him to date his report on that day and before the death of Mrs. Swarts, once he had done that, the learned Judge thought, no further step could be taken before representation of the estates had been obtained and an order to continue proceedings made.

The parties desired to argue the matter on the merits; but the learned Judge found himself unable to make any effective disposition thereof in the absence of proper representatives of the estates concerned. If the parties preferred, the motions might stand until after vacation, and meantime representatives of the

estate might be appointed and an order to continue the proceedings obtained. Thereupon, the learned Judge said, he would deal with and dispose of the motions, either with or without further argument, if requested so to do. Unless the parties agreed to some such course, there was no alternative but to dismiss the two motions, and, in the circumstances, without costs. In this latter event, the dismissal would be without prejudice to a renewal of either motion in the future, after representation and revivor.

BRITTON, J. JULY 20TH, 1916.

ROYAL BANK OF CANADA v. JACKSON.

Contract—Sale of Standing Timber—Bona Fides—Part Performance—Rights of Creditors of Vendor—Abandonment—Waiver—Injunction—Dissolution of Interim Injunction—Undertaking as to Damages—Assessment of Damages.

Action by creditors of Jacob Hallowell, on behalf of themselves and all other creditors, to restrain the defendant from cutting and removing any trees or timber from a parcel of land in the township of Clarke.

The action was tried without a jury at Cobourg.

D. H. Chisholm and E. H. McLean, for the plaintiffs.

D. B. Simpson, K.C., for the defendant.

BRITTON, J., in a written judgment, set out the facts. On the 17th December, 1910, Jacob Hallowell mortgaged the land to one Clemesha to secure payment of $2,200 and interest. On the 27th November, 1911, Hallowell, with the knowledge and consent of Clemesha, entered into an agreement with the defendant to sell him all the timber and trees, fit for milling purposes, then upon the land, for $650. The agreement provided for the removal of the trees when cut and for the right of the defendant to enter upon the land; and it was stated in the agreement that the timber was to be removed by the 1st April, 1914. The defendant paid the $650, and, during the winter of 1911-12, cut and removed about one-half of the timber. The defendant had no intention of abandoning the remainder, and there was no rescission of the contract of sale. Clemesha received the $650 and applied it in reduction of the principal and interest of his mortgage. The

price, so far as appeared, was a fair price. On the 6th July, 1912, the defendant purchased from the executors of Clemesha, who had died, the mortgage made by Hallowell, and it was assigned to the defendant. On the 12th July, 1912, Hallowell borrowed $1,500 from the defendant, and made a mortgage upon the land to the defendant for that sum. Later on, one Walker agreed to lend Hallowell $2,500 upon the land. The defendant was to be paid out of the new loan, and the defendant was to execute a discharge of the $1,500 and to assign the Clemesha mortgage to Walker. It was also agreed between Walker and the defendant that the defendant could have until the 9th January, 1917, to remove the remainder of the timber and trees. About the 12th January, 1916, the defendant began to cut and remove timber; but was stopped by an interim injunction obtained by the plaintiff in this action and continued until the trial.

The plaintiffs' judgment was recovered against Hallowell on the 23rd November, 1915, for $880.55 and costs, upon a claim or debt which originated after all the transactions in respect of timber and trees and after the mortgage and loan transactions referred to.

The learned Judge said that the plaintiffs could not succeed. There was a bona fide sale of the timber, evidenced by writing; the price was a fair one; and the whole purchase-money was paid and applied in reduction of the mortgage upon Hallowell's land.

There was part performance of the contract, as the defendant proceeded to take possession, and cut and removed one-half of the timber.

To attempt to retain the defendant's property for those who were not creditors at the time of his purchase was unjust, and the plaintiffs ought not to be assisted by injunction.

By the agreement between Walker and the defendant, by which the defendant agreed to make no claim to the remainder of the timber after the 9th January, 1917, the defendant waived no right to the trees.

In Brown v. Sage (1865), 11 Gr. 239, the sale of timber was not made until after the writ of execution was placed in the sheriff's hands.

Judgment for the defendant dissolving the injunction, dismissing the action, and declaring that the defendant is entitled, as against the plaintiffs, to remove the remainder of the timber, with costs, including the costs of the interim injunction and motion to continue, to be paid by the plaintiffs.

The defendant should also recover $10 for damage sustained by reason of the interim injunction, upon the plaintiffs' undertaking.

SUTHERLAND, J. JULY 21ST, 1916.

BILLINGS v. CITY OF OTTAWA AND COUNTY OF CARLETON.

Municipal Corporations—Erection of Bridge—Absence of By-law —Trespass upon Land of Private Owner—Patent from Crown—Reservation of Road—Extrinsic Evidence to Determine Width—Replacing of old Bridge by Wider New Bridge —Work of Repair—Deprivation of Access to Highway—Absence of Expropriation Proceedings—Right of Action—Remedy under sec. 325 of Municipal Act, R.S.O. 1914 ch. 192—Damages.

Action for damages for trespass to the plaintiff's land in the erection of a bridge by the two defendant corporations crossing the Rideau river.

The patent from the Crown, issued to the grandfather of the plaintiff in 1857, described the land now owned by the plaintiff, in respect of which he complains of trespass, as "being composed of an island lying in the river Rideau opposite to lot number 18 in the Gore concession between the rivers Rideau and Ottawa, in the township of Nepean; reserving nevertheless the line of road across the said island and free access to the shore for all vessels, boats, and persons."

An order in council of the 8th February, 1856, approved the suggestion that "Mr. Billings be allowed to purchase so much of the island . . . as may not be taken up by a line of road of the ordinary breadth of one chain in connection with the bridge;" and a memorandum of sale in the Crown Lands office described the land as "containing half an acre more or less, reserving the line of road across the said island and free access to the shore."

The allegation of the plaintiff was, that no roadway across the island wider than 20 feet or thereabouts was ever laid out or used, and that the defendants, in the construction of the new bridge, had not taken the line of the old bridge, but had placed their piers upon the plaintiff's land outside the 20-foot roadway, thus trespassing and blocking the plaintiff's access to the bridge from the island.

The action was tried without a jury at Ottawa.

D. J. McDougal, for the plaintiff.

F. B. Proctor, for the defendants the Corporation of the City of Ottawa.

J. E. Caldwell, for the defendants the Corporation of the County of Carleton.

SUTHERLAND, J., set out the facts and referred to the pleadings in a written judgment. He was of opinion that extrinsic evidence was admissible for the purpose of determining the meaning or sense in which the words of the patent, "reserving nevertheless the line of road across the said island," were used, having regard to the circumstances at the time the patent was issued. According the evidence, there was, at the date of the patent, an existing road across the island of about 23 feet in width; and, construing the patent in the light of the memorandum of sale above quoted, what was intended to be reserved was the existing road of 23 feet in width.

The plaintiff proved his title to the island, apart from the excepted public highway of 23 feet in width. The new bridge was at least 60 feet in width; and it was plain that it overlapped on each side a portion of the plaintiff's land, and that at the points where the piers were placed, definite portions of the plaintiff's land had been taken by the defendants.

The new bridge could not be considered a work of repair which could be undertaken by the corporations without a preliminary by-law.

The plaintiff's access to the highway was completely cut off.

In the absence of a by-law and expropriation proceedings initiated by the defendants, who had entered upon and taken the plaintiff's land, the plaintiff was entitled to maintain this action, and was not confined to the remedy under sec. 325 of the Municipal Act, as the defendants urged.

Both defendants joined in the construction of the bridge; and both were liable to the plaintiff.

Reference to Norton on Deeds, ed. of 1906, pp. 56, 117, 118, 119, 242, 246; Pratt v. City of Stratford (1887-8), 14 O.R. 260, 16 A.R. 5; Taylor v. Gage (1913), 30 O.L.R. 75, 84, 85; Twin City Ice Co. v. City of Ottawa (1915), 34 O.L.R. 358; Eastwood v. Ashton, [1915] A.C. 900, 906; Tweedie v. The King (1915), 52 S.C.R. 197, 212; and other cases.

Judgment for the plaintiff with costs. Reference to the Master at Ottawa to determine the damages, unless the parties agree upon some other course.

RIDDELL, J., IN CHAMBERS. JULY 21ST, 1916.

*REX v. MERKER AND DANIELS.

Criminal Law—Keeping Common Gaming-house—Police Magistrate's Conviction under sec. 773 (f) of Criminal Code—Sentence of Imprisonment—Appeal to General Sessions under sec. 749—Order for Bail—Bond Signed by Sureties—Failure of Defendants to Enter into Recognizance — Sec. 750 (c) — Habeas Corpus—Application for Discharge from Custody—Right of Appeal Taken away by Amending Act, 3 & 4 Geo. V. ch. 13, sec. 28—Secs. 771 (a) vii. and 797 of Code—Motion to Quash Conviction—Keepers of House—Officers of Club—Secs. 226, 228, 228(2).

Motion by the defendants, upon the return of a writ of habeas corpus, for their discharge from custody under a warrant of commitment issued pursuant to a conviction of the defendants by one of the Police Magistrates for the City of Toronto, under sec. 773 (*f*) of the Criminal Code, for keeping a disorderly house. The defendants were sentenced to 30 days' imprisonment.

The defendants also moved to quash the conviction.

T. N. Phelan, for the defendants.

J. R. Cartwright, K.C., for the Crown.

RIDDELL, J., read a judgment in which he said that the defendants had lodged an appeal from the conviction to the Court of General Sessions, under sec. 749 of the Code; and a Judge of Sessions had ordered that, upon the defendants entering into recognizances (of which he approved) before a Justice of the Peace for the County of York, they should be released. A Justice of the Peace went with the bondsmen to the gaol to have the recognizance properly entered into; but, being informed by the gaoler that the defendants were not to be released, the Justice did not proceed. Consequently, although the bondsmen had signed the bail-bonds, and the defendants were ready and willing to enter into the recognizance, they did not in fact do so; and, assuming that sec. 750 (*c*) of the Criminal Code applied, the defendants had not entered into a recognizance. Accordingly, the gaoler must obey the warrant and hold the defendants; and the application for the defendants' discharge must be refused with costs.

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

The conviction being under Part XVI. of the Code, and not Part XV., it was sought to make the provisions relating to appeals of Part XV. applicable by the exception (sec. 797). That section provides that, where a case of this kind is tried before two Justices of the Peace sitting together, an appeal shall lie in the same manner as from a summary conviction under Part XV. This, however, applies only to trials at which two Justices of the Peace sit together, not to cases in which the Police Magistrate sits by himself. The definition of "magistrate" in sec. 771 (a) (vii.) does not assist.

The amendment of the Code in 1913, 3 & 4 Geo. V. ch. 13, sec. 28, takes away the right of appeal which was given by sec. 797, and limits it to the special case of two Justices of the Peace.

Rex v. Dubuc (1914), 22 Can. Crim. Cas. 426, was rightly decided. No appeal to the Sessions lay.

The place in question was undoubtedly a gaming-house; and the whole question upon the motion to quash the conviction was, whether it was "kept" by these defendants. It was plain that the "City Social Club," of which the defendants were respectively secretary and treasurer, kept the gaming-house for gain—it was a place covered by sec. 226 of the Code; and it followed, under sec. 228, that it was a disorderly house, and that the keeper was guilty of an indictable offence. While the defendants were not the real owners, and might not be the real keepers, they assisted in the care and management, and were in law considered the real keepers: sec. 228 (2).

Rex v. Jung Lee (1913), 22 Can. Crim Cas. 63, and Rex v. Hung Gee (1913), 21 Can. Crim. Cas. 404, distinguished.

Motion to quash the conviction refused with costs as of a motion separate from the motion to discharge upon habeas corpus.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE—KELLY, J. —JULY 17.

Costs—Disposal of on Further Directions—Both Parties Partly Successful—Counterclaim—Reference—Set-off — Solicitor's Lien.] —Motion by the plaintiffs for judgment on further directions and as to costs. The motion was heard in the Weekly Court at Toronto. KELLY, J., in a written judgment, said that, with the exception of a $2,000 reduction by the Appellate Division in one of the several matters of claim, the plaintiffs had succeeded on all their claims remaining after the abandonment of some of those set forth in the pleadings. On the two items of the defendant's counterclaim referred to the Master, an allowance was

made, the Master certifying that in each case counsel had agreed upon the amount. The defendant urged that he was entitled to costs in respect of the part of the action as to which he had been successful; but the learned Judge thought that a fair disposition of the costs would be to award the plaintiffs costs of the action, including the reference and of and incidental to this motion, less a reduction of $100 by reason of whatever success the defendant had had in the action and on the reference. Judgment for the plaintiffs for the amount found in their favour and interest thereon and costs arrived at as above indicated; and judgment for the defendant for the two items allowed on the counterclaim and interest thereon; the amount to be set off against the amount of the judgment in the plaintiffs' favour. It was urged that the defendant's solicitor was entitled to a lien upon the amount found in favour of the defendant, and that a set-off should not be allowed to the prejudice of such lien. The lien, the learned Judge said, was not one which must be declared as of right, and, in the circumstances, it was not entitled to prevail. A. B. Cunningham, for the plaintiffs. A. J. Russell Snow, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B. JULY 20TH, 1916.

PRESTOLITE CO. v. LONDON ENGINE SUPPLIES CO.

Contract—Purchase of Gas-tanks—Out and out Purchase—Filling with Gas other than that Manufactured by Vendors—Action for Injunction—Evidence—Findings of Fact by Trial Judge.] —Action for an injunction restraining the defendants from filling, refilling, charging, or recharging, with acetylene gas, or any other lighting material, any cylinders or tanks with the plaintiffs' label thereon, and for damages and other relief. The action was tried without a jury at London. The learned Chief Justice, in a written judgment, said that the purchasers of these tanks or packages bought them out and out and could do what they liked with them, so long as they did not represent or hold out to the public that they were filled with the gas manufactured by the plaintiffs. For a year before the trial, i.e., many months before the commencement of the action, the defendants had been taking all reasonable precautions to notify the public that the tanks were charged with gas by the Headlight Gas Company, London; and on the 22nd May, 1914, notified the plaintiffs. The statement of claim was not proven, and the action should be dismissed with costs. S. F. Washington, K.C., and J. G. Gauld, K.C., for the plaintiffs. G. S. Gibbons, for the defendants.

HOWE v. IRISH—KELLY, J.—JULY 20.

Contract—Advances to Owner of Mining Claims—Agreement to Allot Shares in Mining Property when Company Incorporated—Failure to Incorporate—Interest in Property—Declaration of—Parties—Reference—Account.]—Action for specific performance of an agreement, and for a declaration of the plaintiffs' rights in certain mining claims standing in the name of the defendant, and for an accounting and other relief. The plaintiffs and others, on whose behalf they sued, advanced moneys to the defendant to assist him in developing the claims, upon his agreement to allot them shares in a mining company to be incorporated, but which has not been incorporated. The action was tried without a jury at Sandwich. KELLY, J., read a judgment in which he stated the facts, and said that the action was properly brought on behalf of the plaintiffs and those who signed the written authorisation of the action; and these persons were entitled to transfers from the defendant of undivided interests, to the extent in the aggregate of one-half, proportionate to their aggregate contributions. Other contributors may also come in and take the benefit of the transfer. Reference to the Local Master to take the accounts. Costs of the action down to the reference to be paid by the defendant; further directions and subsequent costs reserved until after the Master's report. The plaintiffs are to have, as security to the persons on whose behalf the action is brought, a lien upon the mining claims. O. E. Fleming, K.C., for the plaintiffs. F. D. Davis, for the defendant.

STACEY v. SMITH—BRITTON, J.—JULY 21.

Fraud and Misrepresentation—Exchange of Properties—Evidence—Finding of Fact of Trial Judge—Failure to Prove Fraud.]—Action to recover possession of a farm in the township of Darlington. The plaintiff claimed as mortgagee upon default in payment of a mortgage made by the defendants. The defence was that the mortgage was obtained by the fraud of the plaintiff; and the defendants counterclaimed for rescission of the contract of exchange and the conveyances following upon it, one of them being the mortgage upon which the plaintiff claimed. The contract was for the exchange of the plaintiff's farm for property of the defendants situate in the city of Toronto. In order to adjust the values, the defendants made the mortgage, for $2,100. The defendants' allegation was that the plaintiff, by false and fraudulent representations, induced them to believe that the farm was worth $7,700, whereas in fact it would not sell for more than $2,000. The action was tried without a jury at Cobourg. After reviewing

the evidence in a written judgment, BRITTON, J., said that he was of opinion that the defendants had not, beyond reasonable doubt, made out a case of fraud against the plaintiff. The learned Judge said that he was not aware of any case where relief had been given for alleged fraud where there was so much inquiry, so much of actual examination and inspection, and so much delay and apparent satisfaction, as in this case. The defendants failed in their defence and failed to establish their counterclaim. Judgment for the plaintiff for possession of the farm with costs and dismissing the counterclaim with costs. F. S. Mearns, for the plaintiff. D. B. Simpson, K.C., for the defendants.

RE CANADIAN MINERAL RUBBER CO. LIMITED—SUTHERLAND, J. —JULY 21.

Contract—Winding-up of Contracting Company—Moneys Payable to Company in respect of Contract—Assignment to Bank—Claims of Wage-Earners and Material-men—Priority—Construction of Contract.]—An appeal by the Canadian Bank of Commerce from a decision of the Master in Ordinary, in the course of a reference for the winding-up of the company, allowing a claim made by wage-earners and material-men in respect of work and material supplied to the company, under a contract between the company and a municipal corporation in British Columbia. The contract was assigned by the company to the Canadian Bank of Commerce, the appellants. The Master's finding was, that the several claimants were entitled to be paid in full out of the fund held by or available to the municipal corporation for settlement of the claim of the company under the contract. If the municipal corporation paid over the whole price of the work and materials to the company, the Master found, the claimants would be entitled as creditors of the company to preferential payment out of the fund. The appeal was heard in the Weekly Court at Toronto. SUTHERLAND, J., in a written judgment, said that the question for him was merely as to the construction of the contract; and he was of opinion, agreeing with the Master, that it was competent for the municipal corporation to insist as against the contractor, the company, and consequently as against the company's assignees, the appellants, on the claims being paid, or adequate proof of payment furnished, before the company or the appellants could claim the balance of the moneys payable under the contract. If there was any discrepancy between two clauses of the contract, the earlier one would probably govern: Norton on Deeds, 2nd ed. (1906), p. 80. Appeal dismissed with costs. Glyn Osler, for the appellants. W. B. Raymond, for the claimants, respondents.