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OCTOBER 15TH, 1907.

DIVISIONAL COURT.

FALLIS v. WILSON.

Fraudulent Conveyance—Ante-nuptial Marriage Settlement—Action by Execution Creditor to Set aside—Fraudulent Intent of Settlor—Knowledge of Intended Wife of Claim of Execution Creditor—Bona Fides—Absence of Knowledge of Fraudulent Purpose—Letter of Intended Wife Demanding Settlement.

Appeal by plaintiff from judgment of MABEE, J., ante 121.

B. N. Davis, for plaintiff.

C. J. Holman, K.C., for defendants Alice Emily Wilson and the trustees.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. OCTOBER 16TH, 1907.

CHAMBERS.

MOUNTJOY v. SAMELLS.

Pleading—Statement of Claim—Undue Extension of Indorsement of Writ of Summons—Inconsistent Cause of Action—Action to Set aside Will—Contract of Testator with Child—Property Wrongfully Obtained from Testator in his Lifetime—Amendment.

Motion by some of the defendants to strike out part of the statement of claim.

H. E. Rose, for the applicants.

W. E. Middleton, for the other adult defendants.

M. C. Cameron, for the infant defendants.

S. H. Bradford and W. H. Harris, Port Perry, for plaintiff.

THE MASTER:—The plaintiff in her writ of summons asked only to have the last will and testament of John Samells, dated 8th October, 1906, declared null and void, as well as all preceding wills of said John Samells. In the statement of claim she makes two additional claims. The first is that her father, the said John Samells, in his lifetime promised that if she would work for him so long as he desired her services, he would give her an equal share with her brothers and sisters of his property at his death. She alleges that she performed the work as requested by her father, and is therefore entitled to such equal share.

The will is not produced. It may be assumed that her allegation is correct, that it only gave her $500, while the value of the estate is probably about $25,000. The plaintiff is one of 7 children of the deceased. The plaintiff also alleges that defendant John Samells jr., who is one of the executors, after the making of the will of 8th October, which was the day before the testator's death, by undue influence procured from his father certain notes of his, given to his father, to a large amount, so depleting the estate.

Some of the defendants are moving against the statement of claim, on the grounds: (1) that these two last claims are an undue extension of the indorsement on the writ; and (2) that in any case they are causes of action which cannot be united with each other, or with the claim as indorsed on the writ. . . .

If the claim to have it declared that plaintiff's father died intestate, for want of testamentary capacity, succeeds, the Court will order administration.

Until this initial question has been decided, the other two claims cannot be prosecuted.

The first can only be usefully made against the executors if the will is established. If the wills are set aside, the plaintiff would share equally with her brothers and sisters on the intestacy, and her claim would be merged and satisfied. At any rate, it can only be made against the duly appointed personal representative of the deceased, and at pre-

sent plaintiff says there is none, as the letters probate should be revoked and all previous wills set aside.

The other claim is not one that she herself can make in any case. It must be made by the personal representative of the estate, as in him alone would the right of such an action be vested. See Fairfield v. Ross, 4 O. L. R. 534, 1 O. W. R. 631. At present it is, therefore, doubly objectionable.

If, when there is a duly qualified representative or representatives, they refuse to take action in regard to the notes alleged to have been fraudulently obtained from the deceased, the plaintiff will not be without remedy, as she could proceed against the executors or administrators for a devastavit, or perhaps they would assign the claim to her and allow her to prosecute it if she thought it worth while to do so. It is not necessary, in the view I have taken, to consider whether or not the statement of claim in the above respects is an undue extension of the indorsement, nor the effect of one of the defendants not having appeared, and therefore, not having been served with the statement of claim. I am quite clear that for the foregoing reasons the paragraphs objected to should be struck out and the prayer for relief amended accordingly.

The costs of these motions will be to the defendants in the cause. If the plaintiff so prefers, she may amend the statement of claim otherwise as she may be advised; as, e.g., by setting up her claim to an equal share of the estate under the alleged contract with the deceased, and abandon the claims to have the letters probate set aside and the deceased declared to have died intestate.

CARTWRIGHT, MASTER. OCTOBER 16TH, 1907.

CHAMBERS.

PIPER v. ULREY.

Pleading—Statement of Claim—Embarrassment—Multifariousness—Irrelevancy—Pleading Evidence.

Motion by defendants Ulrey and Marskey to strike out certain paragraphs of the statement of claim as being embarrassing; and a similar motion by defendant Barber.

A. B. Morine, for defendants Ulrey and Marskey.

G. B. Strathy, for defendant Barber.

E. Gillies, for defendants Lennox and Ryerson.

Casey Wood, for plaintiffs.

THE MASTER:—After reading through the statement of claim as now amended, and considering the arguments of counsel, I am of opinion that it should not be interfered with. The basis of the action is the allegation in the 3rd paragraph that "the plaintiffs and the defendants Ulrey and Marskey agreed to join together as a syndicate for the purchase or acquisition of options or mining claims in the Larder Lake district, the said parties to be equally interested in the said syndicate." Then follows an account of what was done by these two defendants in pursuance of that agreement, which resulted in the formation of a company, of which the defendants Lennox were two of the incorporators; how that certain localities were sold to the company for $126,000 cash and 1,100,000 of the shares in the said company, as fully paid up, and that plaintiffs are entitled to a share in these transactions. There are then allegations that these two defendants, Ulrey and Marskey, issued shares to the defendants Lennox, Ryerson, Barber, and the other defendants, without consideration, and that such shares were taken by them all with knowledge on their part of the matters hereinbefore set forth, and with notice of the plaintiffs' rights. Barber is also made a defendant, on the allegation that Ulrey and Marskey, or the directors, at their instigation, gave him, as managing director of the Canada Mines Limited, an option for 8 months (from 11th February, 1907) on 800,000 shares at 25 cents a share, and that Barber was given 194,319 shares on condition of his sharing any profit he might make on the 800,000 shares with Ulrey and Marskey, in which profits plaintiffs claim to share.

In view of the case of Evans v. Jaffray, 1 O. L. R. 614, it does not seem that this statement of claim is in any sense multifarious.

The plaintiffs claim to be entitled to relief in respect of all these shares and of the moneys realized by Ulrey and Marskey. Therefore, all the present defendants must necessarily be before the Court if the plaintiffs are found entitled to the relief asked for.

The claim is based on partnership, and the defendants Ulrey and Marskey are charged with violating the known rights of the plaintiffs, and the other defendants are alleged to be colluding with them and aiding them in what the plaintiffs say (whether truly or not cannot now be inquired into) is a fraudulent scheme to deprive plaintiffs of their rights.

The statement of claim is longer than usual, but it is not necessarily objectionable on that account. If any of the allegations are irrelevant in defendants' view, they can safely leave them alone. Blake v. Albion Life Insurance Co., 4 C. P. D. 94, compared with the previous decision in that case, to be found in 35 L. T. 269 and 45 L. J. C. P. 663, shews how dangerous it is to strike out matters as being, if relevant at all, only evidence, which are afterwards found to be allegations of some of the material facts on which a plaintiff succeeds. See too Millington v. Loring, 6 Q. B. D. 190.

Both motions against the statement of claim are dismissed—costs in cause to plaintiffs.

Defendants should plead in a week. . . .

I refer to a similar case of Lee v. Meehan, 17th March, 1905, not reported, affirmed on appeal by Meredith, C.J., 21st March; see Chambers book, No. 27, p. 134.

BRITTON, J. OCTOBER 18TH, 1907.

CHAMBERS.

CLISDELL v. LOVELL.

Jury Notice—Striking out—Separate Sittings for Jury and Non-jury Cases—Practice.

Motion by defendants Lovell, McKenzie, and the Dominion Brewery Co., for an order striking out the jury notice filed and served by plaintiffs.

W. H. Blake, K.C., for the applicants.

H. Cassels, K.C., for defendants Case and the Case Co.

H. Ferguson, for defendant Millar.

W. N. Tilley, for plaintiffs.

BRITTON, J.:—The plaintiffs claim, inter alia, that an agreement between the defendant Lovell and the Dominion Brewery Co., dated 13th February, 1907, for the sale and transfer of the brewery property therein described, should be set aside as fraudulent and void as against plaintiffs, and that plaintiffs be declared to be entitled to a one-eighth share each in said property, etc., etc.

Looking at the pleadings, and reading the judgment of Riddell, J. (ante 203), upon a motion to compel answers by some of the defendants upon examination for discovery, and considering all that was urged by counsel upon the argument, I am unhesitatingly of the opinion that the issues herein should be tried without a jury. In any view of the case, I cannot think that a Judge in dealing with any of the alternative claims of the plaintiffs would be assisted by attempting to get the findings of a jury upon the issues of fact.

It is plainly a case in which a Judge at the trial, unless for some special reason to the contrary, not now appearing, would strike out the jury notice. That being so, and as the venue is laid in Toronto, I must follow Montgomery v. Ryan, 13 O. L. R. 297, 8 O. W. R. 855. This case is expressly in point.

Order to go striking out jury notice. Costs in the cause.

RIDDELL, J. OCTOBER 18TH, 1907.

TRIAL.

HUNTON v. COLEMAN CO.

Contract—Work and Labour—Construction—Rate of Payment—"Clear" — Wages — Waiver — Counterclaim—Damages—Reference—Costs.

Action to recover a balance of the contract price for work done by plaintiff for defendants. Counterclaim for damages.

S. A. Jones, for plaintiff.

A. G. Slaght, for defendants.

RIDDELL, J.:—I find as fact that the plaintiff had agreed with the manager of the defendant company to sink two shafts straight down 5 ft. x 7 ft. clear and 50 ft. deep, for $25 per foot: that, upon being shewn the locus of the two

shafts, he refused to go on with them; that then it was agreed that he should sink the other at the same price; and that he was told that a written contract would be prepared and submitted to him by Mr. M., the solicitor and one of the directors of the company.

By mistake the contract was drawn up at $30 per foot, and upon this being shewn to the plaintiff, he attempted to bribe the manager of the company to accede to the increased price, but the manager refused. The plaintiff then took the document and signed it and handed it to the solicitor of the company. The document was never executed by the company, and never was accepted by the company or by any one authorized by the company—the manager insisted that the terms were $25 per foot, and at no time was there any agreement to pay any larger sum.

The plaintiff went on and sank one shaft to the required depth, and at all points in the shaft there was a clear opening of 5 ft. x 7 ft., that is, speaking mathematically, a right parallelogram could at any point be described within the shaft without cutting the sides. The shaft was not straight, however, but, following the vein, it curved around, forming what was called a "belly."

The plaintiff claims the balance of the sum of $1,500, being for 50 feet at $30 per foot. The defendants assert that the price should be $1,250, and that they are entitled to damages for the cost of cutting away the "belly."

The plaintiff's claim, I think, cannot succeed—he knew that the defendants were not willing to pay more than $25 per foot, and he cannot now insist upon being paid more.

In Moore v. Maxwell, 2 C. & K. 554, a supercargo had sailed to Colobar in charge of ship "A," his commission being 5 per cent. Some time after his departure, his principals despatched another ship "B" to Colobar, with instructions to the supercargo already there to find a cargo for her, and offered him in connection with ship "B" a commission of 2½ per cent. He wrote to his principals rejecting this 2½ per cent. commission, but, notwithstanding this, he proceeded to load "B," thinking that the best course for his principals. It was held that he could recover only 2½ per cent. in respect of the cargo of "B."

The present case is stronger against the plaintiff than the case in 2 C. & K. See also Cavanagh v. Glendinning, 10 O. W. R. 475, in the Court of Appeal.

The next and only remaining point is the interpretation of the word "clear." On the evidence I find, and without evidence I should have found, that a shaft is 5 ft. x. 7 ft. "clear" only when, whether vertical, oblique, or horizontal, it could be described (mathematically speaking) as a right parallelopipedon 5 ft. x 7 ft.

A third point I do not think necessary to decide, though even on that ground, as at present advised, I think the plaintiff should fail. Whether the contract was oral or written, it was a term that the last 25 per cent. of the contract price should not be paid without "production of satisfactory evidence that all wages and material has been paid for." Even after trial there remained some wages unpaid, and at no time was there or could there be "evidence that all wages had been paid for."

Nothing done by the defendants, in my view, constituted a waiver. The plaintiff then fails. In respect of the counterclaim I am not entirely satisfied with the alleged cost of removing the "belly." If both parties agree, I shall fix that at $500; but either party may have a reference at his own peril, in which case I shall reserve to myself all questions of future costs and further directions. The plaintiff will pay the costs of action and counterclaim up to and including judgment.

With this adjudication, the parties can, no doubt, agree upon the proper judgment to be drawn up; if not, I may be spoken to. The parties will have until 31st October to exercise the option to take a reference.

OCTOBER 18TH, 1907.

DIVISIONAL COURT.

RE HALLIDAY AND CITY OF OTTAWA.

Municipal Corporations—Ontario Shops Regulation Act—Early Closing By-law Affecting Class of Traders—Time for Passing—Application of Members of Class—Majority—Computation—Certificate of Clerk of Municipality—Withdrawal of Names of Applicants—Quashing By-law.

Appeal by the city corporation from order of BRITTON, J., ante 46, quashing by-law.

Taylor McVeity, Ottawa, for appellants.

J. R. Code, for Halliday.

THE COURT (MEREDITH, C.J., MACMAHON, J., TEETZEL, J.), dismissed the appeal with costs.

RIDDELL, J. OCTOBER 19TH, 1907.

TRIAL.

FRETTS v. FRETTS.

Dower — Gift of Land by Father to Son — Mother Joining in Deed to Bar Dower — Absence of Consideration — Improvidence — Action by Mother against Son for Dower after Death of Father.

Action for dower.

W. S. Herrington, K.C., for plaintiff.

E. G. Porter, Belleville, for defendant.

RIDDELL, J.:—Plaintiff is the mother of defendant and the widow of the late William Ryerson Fretts. The deceased Fretts was the owner of considerable real estate, and in 1902 he was desirous of giving to defendant the land in question, composed of some 50 acres, part of lot 19 in the 3rd concession of the township of Fredericksburg.

Husband and wife did not live on the most harmonious terms, the husband from all the evidence having been an unreasonable and overbearing man. In October, 1902, he asked—perhaps "commanded" is the better word—his wife, the present plaintiff, to join in a deed to defendant, their son, of the property already mentioned. Without independent advice, but, as I think, understanding the effect of what she did, she gave way to the urging of her husband, and joined in the deed to bar her dower. No consideration was ever given for this conveyance, but I think plaintiff was at that time willing that defendant should have this property. I come to this conclusion upon her own evidence, and add that where her evidence and that of defendent and his wife do not agree, the evidence of plaintiff should be accepted.

The husband died in 1906, and in his will appear certain provisions for the benefit of his wife. She did not and does not accept these in lieu of her dower, and this action is brought for dower in the land already mentioned. At the trial she expressed her willingness to accept even $50 a

year from her son, the defendant, but he refused to pay a dollar.

I am unable on the evidence to find that defendant had anything to do with procuring the deed, or that the deed was obtained by fraud, or such pressure as the law requires before it can be called coercion, or that plaintiff did not understand the effect of the deed, or that the deed was improvident. Therefore, I think plaintiff must fail.

The cases have all been gone into by the King's Bench Divisional Court in Jarvis v. Jarvis, in part reported in 9 O. W. R. 903, and it would serve no useful purpose to go through them again. That case has been carried to the Court of Appeal and stands for judgment, and I do not think that the appeal can turn upon any point material in the case now under consideration.

"Of the wisdom of the act it is not for me to judge. That every man"—and I add every woman—"compos mentis and not subject to improper exercise of influence, must judge of for himself:" per Van Koughnet, C., in Corrigan v. Corrigan, 15 Gr. 341.

The defendant in this case, as in many other cases, must be left to the court of public opinion. The conduct of a son who refuses to contribute a dollar to the support and comfort of his aged mother, when he has received and still enjoys the benefit of her self-abnegation, and that upon the excuse that he thinks she does not need it, is such as fortunately seldom comes before the Courts—and I regret that it is not in my power to do more than to refer to it.

There will be no costs.

RIDDELL, J. OCTOBER 19TH, 1907.

TRIAL.

WARREN v. MACDONNELL.

Master and Servant — Injury to Servant and Consequent Death — Negligence — Railway — Person in Charge — Workmen's Compensation Act — Res Ipsa Loquitur.

Action to recover damages for the death of a servant of defendant owing to the negligence of defendant, as alleged.

T. W. McGarry, Renfrew, for plaintiff.

J. E. Jones, for defendant.

RIDDELL, J.:—The deceased was an employee of defendant, who is a railway contractor engaged in the construction of part of the Temiskaming and Northern Ontario Railway. The work of deceased was simply that of repairing cars. At the place of the accident there was a switch off the main line of the railway, upon which switch cars were placed by defendant for the purpose of repair. Upon the occasion in question there was more than one car upon this switch, that nearest to the switch being but a few feet away from the junction with the main line. The deceased, according to the evidence which the jury must have believed, was in the afternoon working under one of these cars. An engine of the defendant, in charge of the foreman, proceeding slowly about two miles per hour along the main line, was not intended to go upon the switch, but, by reason of the switch standing open, the engine ran in a few feet upon the switch, and jarred the car under which the unfortunate deceased was, and he sustained injuries resulting in his death.

At the trial various grounds of negligence were relied upon for plaintiff. It was contended: (1) that defendant should have had a different and more efficient kind of switch; (2) that the foreman or the engine-driver should have blown the whistle or given some other warning of the approach of the engine; and (3) that there should have been some signal placed upon the car when the deceased was working under it to warn the engine-driver upon the engine. All these the jury (rightly as it seems to me) negatived. It was contended by defendant that the deceased had been told by the foreman and by one McLeod not to go to the place in which he was when the accident happened; this the jury disbelieved.

In answer to questions the jury found that the casualty was caused by the negligence of defendant; that such negligence was "by the party or persons who were in A. R. Macdonnell's employ and who were in charge of the yard and repair works, should have seen that the switch was kept locked. Upon the evidence we do not know the name of the party, and his name does not appear in the evidence."

It would appear by the evidence that one Stewart, the forman already referred to, was in charge of the repair work; and to that extent at least in charge of the yard. The jury have entirely disbelieved Stewart in one particular, and they may have doubted his evidence in this particular

also; and so have said that they "do not upon the evidence know the name of the party." However that may be, it is clear that some one there was who was in charge of the yard in the employ of the defendant, and it is not pretended that this was the deceased. Such person would be, within the meaning of the Workmen's Compensation for Injuries Act, sec. 2 (5), a "person in the service of the employer who has the charge or control of . . . points . . . upon a railway," and therefore one for whose negligence the employer is liable.

The sub-section has received consideration in several cases. Cox v. Great Western R. W. Co., 9 Q. B. D. 106, Gibbs v. Great Western R. W. Co., 11 Q. B. D. 22, and McCord v. Cammell, [1896] A. C. 57, may be referred to as shewing the inclination of the Courts to give the widest interpretation to the words of the sub-section.

I think, too, that the jury were well justified in finding that the fact that the switch in question was open, there being no explanation as to how the switch had become open, or as to how it was still open at the time of the accident, indicated negligence in the person in charge of the place.

It may very well be that plaintiff might also succeed upon the principle of res ipsa loquitur, as to which see Meenie v. Tilsonburg, etc., R. W. Co., 5 O. W. R. 69, 6 O. W. R. 286, 955, and cases cited.

There will be judgment for plaintiff for the amount found by the jury, viz., $1,400, and full costs of suit.