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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 19TH, 1916.

*ALTMAN v. MAJURY.

New Trial—Action against Police Constable for Forcible Entry and Arrest—Refusal of Trial Judge to Permit Amendment Setting up Defence—Arrest without Warrant—Justification for—Reasonable Grounds—Criminal Code, sec. 30—Discovery of New Evidence.

Appeal by the defendant from the judgment of CLUTE, J., upon the findings of a jury, in favour of the plaintiff, in an action against a police constable for forcibly entering the plaintiff's premises and arresting and assaulting her.

The jury found that the defendant did forcibly enter the plaintiff's premises and arrest her; that she was not keeping a common bawdy-house when the defendant entered; and they assessed her damages at $1,500; for which amount CLUTE, J., gave judgment with costs.

The appeal and a motion by the defendant for a new trial were heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

H. H. Dewart, K.C., for the appellant.

E. G. Morris and G. R. Roach, for the plaintiff, respondent.

MEREDITH, C.J.C.P., delivering the judgment of the Court, said that the trial was conducted in a manner which was not quite satisfactory. The acts complained of by the plaintiff were the acts of the defendant, a police constable; and he desired

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

to set up the defence that all he did was done in the belief, on reasonable and probable grounds, that the plaintiff had committed an offence against the Criminal Code for which she might be arrested by him without a warrant; and, if that were so, he may have been justified in making the arrest, whether the offence had been committed or not. But such a defence was not permitted to be relied on.

There may have been some misunderstanding, or counsel for the defence may not have stated their point clearly; but that was not a sufficient reason for depriving the defendant of any defence he desired to make based upon sec. 30 of the Code.

In all cases, the real matters in question between the parties should be determined, and that was not done.

The defendant should have been allowed to rely upon the provisions of the Code; and leave to amend should, if necessary, have been given.

The application for a new trial was based in part on the discovery of new evidence; and, while it might not have been granted for that alone, yet it would be satisfactory to have a fuller and better trial in that respect.

The judgment and verdict should be set aside, and there should be a new trial, with leave to both parties to amend the pleadings.

All costs to be costs in the action.

SECOND DIVISIONAL COURT. SEPTEMBER 22ND, 1916.

COX COAL CO. v. ROSE COAL CO.

Judgment—Summary Judgment—Stay of Execution—Trial of Cross-Claims Made by Defendants—Set-off—Terms.

Appeal by the defendants from an order of MASTEN, J., in Chambers, allowing an appeal from an order of one of the Registrars, sitting for the Master in Chambers, whereby the plaintiffs' motion for summary judgment was dismissed. The order appealed from awarded the plaintiffs summary judgment for $18,893.34.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, JJ.A., and LENNOX, J.

W. N. Tilley, K.C., for the appellants.

J. Jennings, for the plaintiffs, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.C.P., who said that the facts of the case were simple, and there was no substantial contention as to them: he should have thought the rights of the parties plain.

The order in question should be varied to this extent: execution of the judgment for any amount in excess of $13,000 should be stayed pending disposition of the defendants' claims against the plaintiffs or other order of this or the High Court Division. The parties to proceed to a trial of the defendants' claims, including all claims respecting State taxes, forthwith, with liberty to apply to this or the High Court Division to remove the stay, for any cause which may arise. If the defendants are successful in any of their claims, the amount awarded them to be set off *pro tanto* against the plaintiffs' judgment. Costs of this appeal to the plaintiffs unless the defendants reduce the plaintiffs' judgment substantially below the amount of it, otherwise to the defendants. If the defendants choose to pay the money into Court, they may do so, and the execution will be stayed.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P. SEPTEMBER 22ND, 1916.

RE MURRAY.

Will—Construction—Specific Gifts of Company-shares—Absorption of Company by New Company after Date of Will but before Death of Testator—Testator Holding at Death no Shares in Company Named in Will—Substitution of Shares in New Company—Validity of Gifts.

Motion by the executor of Charles Stuart Murray, who died in 1913, for an order determining certain questions arising in the administration of the estate of the deceased as to the interpretation of his will.

See the note of a former judgment in regard to the same will: Re Murray (1915), 8 O.W.N. 463.

The motion was heard in the Weekly Court at Toronto.

A. E. Knox, for the executor.

C. F. Ritchie, for Bertha Forlong and others.

H. M. East, for Adelaide Gouinlock.

J. E. Corcoran, for Mona S. Murray and others.
E. G. McMillan, for Jeannette Hunt.

MEREDITH, C.J.C.P., in a written judgment, said that the testator's property consisted mainly of his shares in a company called "W. A. Murray & Company Limited," and in another company called "The Toronto Carpet Manufacturing Company Limited," both carrying on business in Toronto. Subject to a life interest in these shares, given to his wife, he gave them to several of his own nieces and to a niece of his wife. After the making of the will, and before the testator's death, the Murray company became amalgamated with another company, the amalgamation taking the form of a new company called "Murray-Kay Limited"—the testator merely taking shares of this company in lieu of those he had in the Murray company.

Under the terms of the amalgamation, the new company acquired the exclusive right to use the name "W. A. Murray & Company Limited," and represent that they were continuing the business of W. A. Murray & Company Limited, among other like rights; and the transaction, so far as the testator was concerned, was, in substance and effect, simply a substitution of shares of Murray-Kay Limited for those of the Murray company.

It might be contended that the will spoke as of the time of the testator's death, and that at that time he had no shares in the Murray company, and so the several gifts of such shares were gifts of nothing.

But it was not necessary to consider that question—not necessary to say whether or not, had the will been made after the amalgamation, the shares in the new company might pass under a gift of them as shares in the old company—because, as to the specific gifts, the will must be taken, in the circumstances of the case, to have reference to them as existing when the will was made.

It might be said that, even if that were so, the gifts were revoked or adeemed by the change; but the shares were substantially the same property, the same which by his will the testator gave as shares in specified numbers to three of his nieces and to a niece of his wife.

The gifts were valid gifts of the shares owned by the testator at the time of his death.

Costs to all parties represented on this motion, those of the executor as between solicitor and client, out of the shares of the two companies; so that each legatee may pay a portion of these costs in proportion to the amount she takes in them.

COUNTY COURT OF THE COUNTY OF ESSEX.

DROMGOLE, Co. C.J. AUGUST 4TH, 1916.

RE WALKERVILLE ASSESSMENT APPEALS.

Assessment and Taxes—Appeal to Court of Revision—Status of Assessor as Appellant—Jurisdiction of Court of Revision—Appeal to County Court Judge—Remedy by Prohibition—Assessment Act, R.S.O. 1914 ch. 195, sec. 69 (1), (3), (5), (19), (21)—Further Appeal—Assessment Amendment Act, 6 Geo. V. ch. 41, sec. 6—Stated Case.

APPEALS by the Essex Terminal Railway Company and others to the Judge of the County Court from decisions of the Court of Revision of the Town of Walkerville, whereby the appellants' assessments, as originally set down in the roll returned by the assessor to the clerk, were increased. These decisions were given at the complaint of the assessor himself, upon the ground that the appellants' properties were assessed too low.

A. R. Bartlet, for the appellants the Sandwich Windsor and Amherstburg Railway.

J. H. Coburn, for the other appellants.

John Sale, for the town corporation.

DROMGOLE, Co. C.J., in a written judgment, said that the objection was taken before him and before the Court of Revision that the assessor had no status as appellant or respondent upon an appeal to the Court of Revision; and, therefore, the Court of Revision was without jurisdiction: sec. 69 (1), (3), (5) of the Assessment Act, R.S.O. 1914 ch. 195; Re British Mortgage Loan Co. (1898), 29 O.R. 641. Counsel for the municipality contended that the case cited was no longer an authority because of the amendment of sec. 75 of the Assessment Act, R.S.O. 1897 ch. 224 —sec. 72 (1) of the present Act expressly gives to the assessor a right of appeal from the decision of the Court of Revision to the County Court Judge. But (the learned Judge said) the Legislature, while amending sec. 75, had not seen fit materially to amend sec. 71 (substantially contained in sec. 69 of the present Act); and he considered that he was bound by the case cited to hold that the assessor had no locus standi in the Court of Revision.

Counsel for the municipality further contended that under

sec. 69 (21) of the present Act, where a complaint has been made to the Court of Revision by any person entitled to complain under sec. 69 (1) or (3) (in this case complaints were made to the Court of Revision by other persons assessed), the Court of Revision, or the County Court Judge on appeal, has jurisdiction to reopen and adjust the assessments of other persons assessed who may not be before the Court or Judge, so that the accurate amount of the assessment of such other persons may be ascertained and placed in the assessment roll.

As to this contention, the learned Judge said, clauses (19) and (21) must be held to apply only to palpable errors, unless an error involves an alteration of assessed values, and in that case provision is made for adjourning the Court and giving notice to the parties affected. That course was not taken in this case by the Court of Revision. If effect were given to this contention, it must be held that clause (21) permits of an increase of assessment, though it may involve the decision of a question of fact as to value or perhaps a question as to the principle of assessment or the construction of the statute by the Court of Revision or the Judge, without notice to or hearing the parties to be affected thereby—an arbitrary power which the Legislature could not have intended to confer.

On all grounds, there was no complaint before the Court of Revision, under any of the clauses, (1), (3), or (19), of sec. 69, upon which any increase in the assessments in question could be made.

The appeals should be allowed, the decisions of the Court of Revision set aside, and the assessments restored to the amounts originally set down in the assessment roll.

Quære, as to the jurisdiction of the Judge—whether the appellants' remedy was not by prohibition to the Court of Revision.

In view of the wide right of appeal provided in the Assessment Amendment Act, 1916, 6 Geo. V. ch. 41, sec. 6, the learned Judge professed his willingness to state a case for an appeal to a Divisional Court.