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SUPREME COURT OF CANADA.

THE REGISTRAR IN CHAMBERS. MARCH 7TH, 1917.

KING EDWARD HOTEL CO. v. CITY OF TORONTO.

Appeal—Supreme Court of Canada—Jurisdiction—Appeal from Order of Ontario Railway and Municipal Board—Court of Last Resort—Refusal of Leave to Appeal by Supreme Court of Ontario—Assessment Act, R.S.O. 1914 ch. 195, sec. 80 (6)—Supreme Court Act, sec. 41

Application by the King Edward Hotel Company, under Rule 1 of the Rules of the Supreme Court of Canada, for an order affirming the jurisdiction of that Court to hear an appeal from an order of the Ontario Railway and Municipal Board upon an assessment appeal, notwithstanding that the applicants had applied for and been refused leave to appeal from the order of the Board to a Divisional Court of the Appellate Division of the Supreme Court of Ontario (7th February, 1917).

The application was heard by E. R. Cameron, Registrar, in Chambers.

Harold Fisher, for the applicants.

Irving S. Fairty, for the respondents.

THE REGISTRAR, in a written judgment, said that jurisdiction was asserted under sec. 41 of the Supreme Court Act. It was admitted that the appeal involved the assessment of property at a value of not less than $10,000. The usual procedure on appeals in assessment cases was followed in this instance.

The applicants were assessed for the sum of $296,692 in respect of business assessment, and appealed therefrom to the Court of Revision for the City of Toronto. This appeal was heard in October, 1916, when the Court of Revision decided that

the applicants were not liable for business assessment, and directed that such assessment should be struck off. The city corporation then appealed to the County Court Judge, who on the 11th December, 1916, restored the business assessment. The applicants then appealed to the Ontario Railway and Municipal Board, pursuant to the provisions of the Assessment Act, R.S.O. 1914, ch. 195, sec. 80; the Board upheld the decision of the County Court Judge. Sub-section 6 of sec. 80 provides: "An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said Court upon application of any party and upon hearing the parties and the Board."

The Divisional Court dismissed an application for leave for a further appeal, following Re Clark and Town of Leamington (1917), 11 O.W.N. 303, in which it was decided that hotels such as that of the applicants were liable for business assessments.

The learned Registrar referred to Grierson v. City of Edmonton, in which he had held that the decision of the District Court Judge of Edmonton was a judgment in that case of a Court of last resort within the meaning of sec. 41 of the Supreme Court Act. In the argument before the Supreme Court no objection was taken to its jurisdiction.

The fact that a further appeal would lie in these cases if leave were obtained from some outside authority, in the Alberta case the municipal council, in Ontario the Supreme Court of the Province, did not prevent the decision of the District Court Judge in the one case and the Ontario Railway and Municipal Board in the other being nevertheless the Court of last resort, within sec. 41 of the Supreme Court Act. To hold otherwise would be to say that the Provinces may, by suitable legislation, prevent an appeal to the Supreme Court of Canada, in the face of Dominion legislation expressly enacted for the purpose of conferring jurisdiction, something that the Judicial Committee has held cannot be done. Vide Crown Grain Co. v. Day, [1908] A.C. 504.

Motion granted; costs in the cause.

HIGH COURT DIVISION.

CLUTE, J. MARCH 12TH, 1917.

ABBOTT v. ST. CATHARINES SILK CO.

Company—Agreement between Promoters—Goods Supplied to be Paid for in Shares of Company's Stock—Recognition by Company—Representations—Issue of Shares—Claim against Company for Price of Goods—Assignment of Chose in Action—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49—Assignment Subject to Equities.

Action by the trustee in bankruptcy of an incorporated company, the Kromer & Griffin Silk Company, of New York State, to recover from the defendant company the amount of a money demand for merchandise alleged to have been purchased from Kromer & Griffin, a mercantile firm, who had assigned their claim to the New York company on the 8th June, 1915, and also a sum claimed by that company for merchandise supplied by it to the defendant company. The price of the whole was $19,994.12, and a balance of $9,272.35 was alleged to be due.

The action was tried without a jury at St. Catharines.
W. M. German, K.C., for the plaintiff.
J. R. Ferguson, for the defendant company.

CLUTE, J., in a written judgment, set out the facts in detail. He said that the defence was that the amount in question did not represent an indebtedness of the defendant company, but was in fact part of its capital, paid for by fully paid-up shares of the capital stock, under an agreement made, before the defendant company's incorporation, between Kromer & Griffin and the other promoters and incorporators of the defendant company, and carried out by the defendant company pursuant to that agreement.

The learned Judge said that, in the view he took of the case, there having been a preliminary agreement by which the New York company was to put in machinery and material, to be paid for in stock, and representations having been made to the bank upon the faith of which the defendant company received large advances, that company was bound, if it could, to make these representations true. The machinery and advances of the New York company were represented as capital to the extent of over

$9,000; and, the bank having insisted upon the representations being made good, and the defendant company, through its officers, having issued stock for the amount of these advances, and the stock having been duly delivered and received by Frank Cromer, A. A. Kromer, and the New York company, the transaction was complete; and so the defence was made out.

The assignment of the 8th June, 1915, to the New York company had not the effect of depriving the defendant company of the right to have it declared that the advances made were capital to be paid for in stock. There was in truth no debt existing between Kromer & Griffin and the defendant company at the time of the assignment. The stock did not issue until after the assignment had been made; but that made no difference. Whatever equities attached, before the assignment, to the so-called indebtedness of the defendant company, attached to it equally in the hands of the New York company, and the company was in no better position than Kromer & Griffin, its assignors. The stock, being an asset of Kromer & Griffin, passed to the New York company, and so to the plaintiff.

The plaintiff was entitled to receive that stock, which was in the hands of the defendant company's solicitor ready to be delivered.

Reference to sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109; McMillan v. Orillia Export Lumber Co. (1903), 6 O.L.R. 126.

Action dismissed with costs; judgment to be entered upon the stock being delivered to the plaintiff's solicitor.

RIDDELL, J. MARCH 15TH, 1917.

RE PEARCY AND FINOTTI.

Executors and Administrators—Administrator with Will Annexed—Sale of Lands of Testator to Pay Legacies—Absence of Debts—Conveyance—"Persons Beneficially Interested"—Legatees—Dispensing with Concurrence of Persons Entitled to Land Subject to Payment of Legacies—Devolution of Estates Act, R.S.O. 1914 ch. 119, sec. 21 (1), (2).

Application by the vendor in a contract for the sale of land for an order under the Vendors and Purchasers Act declaring that the vendor can by conveyance pass the title to the land notwithstanding an objection by the purchaser.

The motion was heard in the Weekly Court at Toronto.

Clara Brett Martin, for the vendor.

A. S. Lown, for the purchaser.

RIDDELL, J., in a written judgment, said that the late Alexander Pearcy, who resided in the State of Indiana, died in March, 1916, having, in the preceding month, made his last will and testament, whereby he disposed of all his property, real and personal. His executor duly proved this will in Indiana; but, as the deceased had real estate in Ontario, letters of administration with the will annexed were granted by the Surrogate Court of the County of York to Walter T. Pearcy, the attorney and nominee of the Indiana executors.

The administrator sold part of the land in Ontario to Julia Finotti, who insisted that "all the legatees mentioned in the will" should join in and execute the deed. The vendor contended that this was not necessary, and the application was made to determine the dispute.

After directing the payment of debts and funeral expenses, the testator made bequests in this form: "I give to my nieces, Mary Jane, Elizabeth, and Susan, daughters of my deceased brother Gilbert, $1,000 each." There were eighteen bequests of this character. Then there were: a legacy to a specified church in Indiana, of the income on $4,000; a legacy to a specified church in Ontario of the income on $4,000; and a direction to expend $1,000 on a suitable monument. Then followed: "All the rest and residue of my property . . . I devise and bequeath to my brothers and sisters . . . I nominate and appoint James Burling to be the executor . . . and hereby authorise and direct him with the approval of the Benton Circuit Court to sell and convey and to convert into money all lands I have in Indiana when the same can be sold at their full value and to distribute the proceeds in accordance with this will." Then followed a conditional bequest of $3,000 to another specified church in Indiana.

The administrator swore that it was necessary to sell the Ontario lands in order to pay the legacies—there were no debts.

None of the legacies was specifically charged upon the testator's land or upon any part of it. While there was an express power given for sale in respect of the Indiana land, there was none in respect of the Ontario land. All parties were *sui juris* and *compotes mentis*.

The legatees had the right to be paid (if necessary) out of the real estate: Greville v. Browne (1859), 7 H.L.C. 689; but that did

not give them such an estate in it as to make their consent or their execution of a conveyance necessary.

The purchaser appeared to think that these legatees were "the persons beneficially entitled" under sec. 21 (1) and (2) of the Devolution of Estates Act, R.S.O. 1914 ch. 119; but the persons there referred to are those beneficially entitled to the land which it is proposed to sell, not the legatees who are to be paid their legacies out of the proceeds of the sale.

Effect could not be given to the objection of the purchaser.

But it would seem that the whole difficulty of the case would not be met by so declaring, as the concurrence of those entitled to the land subject to the payment of the legacies had not been obtained. It was not necessary to decide whether the administrator could make a good title without this concurrence, as, in any case, it was proper to exercise the powers given by sec. 21 (2) (*ad fin.*) of the Act, and dispense with the concurrence of all beneficially interested, thereby enabling the administrator to make title.

No costs.

LATCHFORD, J. MARCH 16TH, 1917.

*FOSTER v. TOWNSHIP OF ST. JOSEPH.

Assessment and Taxes—Exemptions—Buildings on "Mineral Land"—Assessment Act, R.S.O. 1914 ch. 195, sec. 40(4)—"Mineral"—Trap-rock—Quarry Workings—Question of Exemption Raised in Action—Remedy by Appeal from Assessment under sec. 83 of Act.

Motion by the plaintiff to continue an interim injunction restraining the defendants from proceeding with the sale of certain chattels of the plaintiff, seized for non-payment of taxes levied under an assessment of buildings of the plaintiff, used in connection with their working of a deposit of trap-rock in the township of St. Joseph.

The motion was heard in the Weekly Court at Toronto, and was, by consent of counsel, turned into a motion for judgment.

R. C. H. Cassels, for the plaintiff.

W. E. Raney, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that the plaintiff's contention was, that his buildings were exempt from assessment by virtue of sub-sec. (4) of sec. 40 of the Assessment Act, R.S.O. 1914 ch. 195: "The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant . . . shall not be assessable."

The material filed established that the buildings were used mainly for obtaining the trap, crushing it, and storing it, pending shipments to a place where it was to be used to form concrete.

If the land of the plaintiff was "mineral land" and trap-rock was a "mineral," the buildings were exempt.

In the Assessment Act, there is no definition of "mineral land" or "mineral." In the Mining Tax Act, R.S.O. 1914 ch. 26, "mineral substance" is, by sec. 2 (*a*), declared not to include, where used in that Act, "limestone . . . building stone, or stone for ornamental or decorative purposes." In the Mining Act, R.S.O. 1914 ch. 32, sec. 2 (*j*), the noun "mine" includes any opening or excavation or working of the ground for the purpose of winning "any mineral or mineral-bearing substance, and any ore body, mineral deposit, stratum, soil, rock, bed of earth, clay, gravel or cement . . ." By clause (*l*), "mineral" includes "coal, gas, oil and salt."

Reference to Ontario Natural Gas Co. v. Smart (1890), 19 O.R. 591, Ontario Natural Gas Co. v. Gosfield (1891), 18 A R. 626, 631; North British R.W. Co. v. Budhill Coal and Sandstone Co., [1910] A.C. 116; Great Western R.W. Co. v. Carpalla United China Clay Co. Limited, [1909] 1 Ch. 218, [1910] A.C. 83; Caledonian R.W. Co. v. Glenboig Union Fireclay Co., [1911] A.C. 290, 299; Symington v Caledonian R W. Co., [1912] A.C. 87, 92.

In the present case the evidence was sufficient to warrant a finding that the plaintiff's property was not "mineral land," within the meaning of sec. 40 of the Assessment Act. The workings constitute what is ordinarily called a "quarry." Nothing but what, in the usual acceptation of the word, is regarded as a mine can give to land the character of "mineral land" within the meaning of sub-sec. (4).

On another ground also, the plaintiff's case failed. His remedy was by appeal from the assessment under sec. 83 of the Assessment Act, and he should be confined to that remedy: Ottawa Young Men's Christian Association v. City of Ottawa (1913), 29 O.L.R. 574, 581; St. Pancras Vestry v. Batterbury (1857), 2 C.B N.S. 477.

Action dismissed with costs.

BAKER v. ORDER OF CANADIAN HOME CIRCLES—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—MARCH 19.

Appeal—Motion for Leave to Appeal from Order of Judge in Chambers—Parties—Revivor—Status of Plaintiff—Preservation of Rights of Defendants—Refusal of Leave.]—Motion by the defendants for leave to appeal to a Divisional Court from an order made by MIDDLETON, J., in Chambers, on the 8th December, 1916, allowing an appeal from an order of the Master in Chambers, and directing that the action be continued with Daniel Baker, the executor of the plaintiff, as party plaintiff against the society as defendants, by order to proceed; that Daniel Baker, who had filed his consent in writing, should be added as a party plaintiff in his personal capacity, and the proceedings in the action be amended accordingly, but the action should be deemed to have been brought by Daniel Baker on the 8th December only, without prejudice to his right to contend that the original action was duly brought by him under the authority conferred by a certain assignment; and allowing both parties to amend the proceedings. The appeal was against so much of the order as directed that the action should continue with Daniel Baker, the executor of the plaintiff, as party plaintiff by order to proceed. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the order of MIDDLETON, J., seemed to be eminently just and equitable It gave the plaintiff a chance to have his rights adjudicated upon at the trial, and at the same time carefully preserved any right which the defendants might have acquired. Leave to appeal refused; costs of the application to be costs to the plaintiff in any event. V. H. Hattin, for the defendants. W. A. Skeans, for the plaintiff.