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HIGH COURT DIVISION.

MASTEN, J. JULY 16TH, 1917.

*GETTY AND SCOTT LIMITED v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Goods—Demand of Goods after Earlier Refusal to Take Delivery—Undertaking to Pay Charges—Acceptance—Waiver of Tender—Sale of Goods to Pay Charges—Negligence—Damages—Carriers or Warehousemen—Bill of Lading—Special Provision—Value of Goods at Date of Shipment.

Action for damages for the defendants' failure to deliver goods shipped upon their railway.

The action was tried without a jury at Kitchener.

M. A. Secord, K.C., for the plaintiffs.

W. N. Tilley, K.C., and J. D. Spence, for the defendants.

MASTEN, J., in a written judgment, made findings of fact as follows: (1) that the defendants did not agree to retain the goods in their possession until the settlement of certain litigation between the plaintiffs and their vendor; (2) that the goods were duly carried to Galt, and that on the 20th May, 1915, delivery was tendered to and refused by the plaintiffs, and that thereafter the defendants were warehousemen of the goods, and as such retained possession until the 21st January, 1916, when they sold them for unpaid charges for transportation and storage; (3) that on the 17th June, 1915, the defendants made a demand in writing on the plaintiffs and their vendor for payment of charges against the goods, with a notification that, in default of payment, the goods were liable to be sold, and a similar demand on the 30th

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

December, 1915; (4) that at that time the defendants had the right to sell the goods, and no agreement waiving that right was made by the defendants down to the 18th January, 1916; (5) that on the last-named day the plaintiffs requested the chief agent of the defendants at Galt to deliver the goods to them (the plaintiffs), and undertook to pay the charges thereon, and that undertaking was accepted by the agent on behalf of the defendants, and prepayment or tender of the charges was thereby effectually waived, and the agent, on that day, wired the defendants' officer at Toronto to return the goods to Galt, but at that date the goods had been forwarded to Montreal to be sold there; (6) that there was delay in communicating the request to the proper authority at Montreal, which delay arose from the negligence of the defendants' clerks, and, in consequence of this delay, the notification to return the goods did not reach the proper hands in Montreal until after the goods had been sold on the 21st January, 1916.

Upon these findings, the defendants were liable.

The shipping order contained the following provision: "The amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges, if paid, and the duty, if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern such computation, whether or not such loss or damage occurs from negligence."

While the defendants held the goods on the 21st January as warehousemen, they were still carriers within the above provision. When the stipulation is one which, by its terms, is to apply to a state of things which might arise after the goods had arrived at their destination, it remains in force notwithstanding that the transit is ended. The defendants were entitled to the benefit of this provision.

Swale v. Canadian Pacific R.W. Co. (1913), 29 O.L.R. 634, distinguished.

Mayer v. Grand Trunk R.W. Co. (1880), 31 U.C.C.P. 248, referred to.

The only evidence as to the value of the goods at the date of their receipt by the defendants in 1915 was that the plaintiffs paid for them 16½ cents a square foot. Upon this basis, there should be judgment for the plaintiffs for $1,487.56, with costs.

BRITTON, J. JULY 19TH, 1917.

RE CLEAVER.

Will—Construction—Distribution of Residue of Estate—Period for Distribution—Will Speaking from Date—Wills Act, R.S.O. 1914 ch. 120, sec. 27—Persons Entitled to Share—Children and Grandchildren—Vested Gifts.

Motion by the executors of the will of James Cleaver, deceased, for an order declaring who are the persons entitled to receive the undistributed residue of the estate of the deceased—a sum of about $5,000 and accumulated interest—under clause 11 of the will.

The motion was heard in the Weekly Court at Toronto.

E. H. Cleaver, for the executors.

F. W. Harcourt, K.C., for the infants.

D. C. Ross, for the children alive at the time of the first construction of the will.

Hughes Cleaver, for others interested.

BRITTON, J., in a written judgment, said that clause 11 provided for the trustees dealing with the estate as fully set out, and provided that, if the wife of the testator should be living 18 years from the date of the will, a sufficient sum should then be invested in such a way that the interest arising therefrom should provide for the payment of an annuity to her of $200, during her natural life, and then to "divide all equally amongst all my children, the children of any of my said children who may then be dead to be entitled to and receive their parent's share;" and, "as soon after the decease of my said wife as the money hereinbefore directed to be invested for the purpose of paying said annuity can be collected in or realised from the securities in which it may then be invested, to divide the same equally amongst my said children, in the same manner as hereinbefore directed respecting the other moneys arising from the sale of my estate and personal property."

The will was dated the 30th January, 1877, and the testator died on the 30th March, 1890. At the date of this will the testator had 15 children, all living. Three of these children predeceased the testator; these children were: John, who died on the 27th June, 1880; George, who died on the 15th February, 1885; and Charlotte, who died on the 17th February, 1888; each of these three left children. Mary Colling and Nancy Plewes died before 1895.

In dealing with the estate, the testator seemed to have provided two periods for distribution: the first 18 years from the date of the will, i.e., on the 30th January, 1895; the second, at the death of the widow, the annuitant, 13th June, 1916. It will be seen that Mary and Nancy died after the death of their father and before the first distribution.

Angelina Shaw died on the 10th December, 1905, leaving no children; and James W. Cleaver died after 1905, that being prior to the second distribution, leaving children.

The question now arising is: Who are entitled to share in the undistributed residue of the estate of the testator?

The learned Judge says that all the living children of the testator are entitled to share—so also are all the living grandchildren, who are children of the children of the testator. The gifts by the testator to the executors, for which the property of the testator was devised and bequeathed to his executors, vested at the time of the death of testator for the classes and persons named in the will. Realisation of the testator's assets was postponed.

As to all the estate, the distribution was postponed for 18 years from the date of the will. If the testator's widow was then alive, there was a further postponement as to part of the estate until her death.

If the view expressed as to the time of vesting is correct, that disposes of the argument for the exclusion of children who died after the death of the testator, and before the expiration of the 18 years, and also the argument against the children of the testator whose parents died after the 18 years and before the death of the annuitant.

Then as to grandchildren, children of children who predeceased the testator, the rule is that the will of the testator must be construed as if speaking at the death of testator: sec. 27 of the Wills Act, R.S.O. 1914 ch. 120. In this case, however, "a contrary intention appeared by the will." The will spoke from its date—not from the death. The testator then knew and desired to provide for all his large family of children, and also to provide that upon the death of his children, whenever that death might take place, the children should take the parent's share.

In re Hannam, [1897] 2 Ch. 39, distinguished.

In re Kirk (1916), 85 L.J. N.S. Ch. 182, followed.

Order declaring accordingly. Costs of all parties out of this residuary estate.

COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R.W. Co. —SUTHERLAND, J.—JULY 18.

Street Railway—Agreement with City Corporation—Privileges—Annual Payments—Res Adjudicata.]—Action for $1,165.30, the balance alleged to be due to the plaintiffs of a sum of $1,380, or $460 a year for each of the years 1915, 1916, and 1917, payments under the covenant contained in an agreement dated the 19th June, 1905, as the consideration for certain privileges granted. In County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton (1916), 54 S.C.R. 178, it was held that the agreement was still in force. The action was tried without a jury at Hamilton. SUTHERLAND, J., in a written judgment, after stating the facts, said that, in his opinion, all the defences raised in this action were open to and were raised by the defendants in the former action, and the matters raised were res adjudicatæ. Judgment for the plaintiffs as prayed with costs. G. Lynch-Staunton, K.C., for the plaintiffs. D. L. McCarthy, K.C., for the defendants.

HAMER & CO. v. O'BRIEN & CO.—SUTHERLAND, J.—JULY 18.

Contract—Railway Construction Work—Claim of Subcontractors — Counterclaim—Evidence—Payment into Court—Costs.] — The defendants were contractors under the Commissioners of the Transcontinental Railway for the construction of a portion of that road in the Province of Ontario, and by a contract between them and the contracting firm of O'Brien Martin & Co. it was agreed that the latter firm should do a portion of the work; that firm sublet to the plaintiffs the construction of all concrete work for a certain section of 44 miles. The plaintiffs began their work in November, 1910, and completed it in about a year. The plaintiffs claimed several sums as due to them for work done, and there was also a counterclaim by the defendants. The action and counterclaim were tried without a jury at Toronto. SUTHERLAND, J., in a written judgment, said that the trial had developed into what was really a long-drawn-out reference. The first claim was for the balance of an account rendered for overcharge for train-work, amounting to $3,309.80. This claim should be dismissed as unwarranted. The plaintiffs also claimed $13,792.18 for work in connection with the erection of a round-house. The defendants admitted that they were indebted in the sum of $8,095.62, which they brought into Court. Upon the evidence, the learned Judge

was of opinion that this claim should be disallowed with the exception of the amount paid into Court. The counterclaim of the defendants should also be disallowed, without costs. The plaintiffs to have costs against the defendants down to the time of the payment into Court, and the defendants costs against the plaintiffs thereafter; the costs may, after taxation, be set off and the defendants allowed to take out of Court sufficient to pay the difference due them on account of costs, and the remainder of the moneys in Court will then belong to the plaintiffs. R. McKay, K.C., for the plaintiffs. W. N. Tilley, K.C., for the defendants.

CONNELL v. BUNKER—SUTHERLAND, J.—JULY 18.

Injunction—Motion for Interim Injunction—Contract—Mining Company—Improvement of Mining Property—Notice—Prejudice.] —Motion by the plaintiffs for an interim injunction restraining the defendants from proceeding with any operations upon the property of the defendants the Prince Davis Silver Cobalt Mining Company Limited, and restraining the defendant Haines from entering into possession of the property or removing ore or mineral therefrom or proceeding in any way under an agreement between the defendant company and the defendant Haines, dated the 1st February, 1917. The motion was heard in the Weekly Court at Toronto. SUTHERLAND, J., in a written judgment, said that the plaintiffs had notice, on or about the 5th February, of the agreement between the defendant company and the defendant Haines. The writ was issued on the 6th March. The contract contemplated the expenditure of moneys in the development of the mining property of the defendant company by Haines—which would enure to the advantage of all persons interested in the company, inclusive of the plaintiffs, if they had still such an interest. The defendant Haines and his associates had expended approximately the sum of $10,000 in opening up and developing the property, and were intending to expend further moneys on the work, as appeared by an affidavit of the defendant Haines read upon the motion. It was argued that it had been shewn that the defendant Haines had, before entering into the contract, such notice of the alleged rights of the plaintiffs as to preclude him from properly becoming a party to the contract. It was also argued that the contract was an illegal one on its face, contemplating improper dealings with the property and stock of the company. It would

not be proper, on an application of this kind, to attempt to determine such questions. Notice of any agreement or agreements between the plaintiffs or any of them and the defendant Bunker was expressly denied by the defendant Haines. The plaintiffs' attack appeared to be one in the main directed against Bunker, and an alleged improper control and manipulation of the company and its affairs by him, to the detriment of the plaintiffs. The notice of this motion was served on the 25th June; and, while it was stated upon the argument that some negotiations for settlement had been carried on between the parties for a considerable portion of the time intervening between the commencement of the action and the launching of the motion, it did not appear that the plaintiffs had themselves thought the matter of obtaining an injunction an urgent one. On the material it was impossible to make the order asked. It might well be apprehended that an injunction order would work to the predjudice of all parties concerned. Motion refused: costs to the defendants, unless otherwise ordered by the trial Judge. R. McKay, K.C., for the plaintiffs. A. W. Anglin, K.C., for the defendant Haines. Frank Denton, K.C., for the other defendants.

AULT v. GREEN—SUTHERLAND, J.—JULY 18.

Deed—Conveyance of Land—Security to Surety for Grantor's Indebtedness to Bank—Absence of Fraud—Declaratory Judgment—Costs.]—Action by the assignee of a judgment recovered against the defendant Green to set aside, as voluntary, fraudulent, and void, a conveyance of land made by the defendant Green to the defendant McCormick. The defendant McCormick pleaded that the deed was made to secure him for moneys advanced to the defendant Green and against his liability on certain notes endorsed for the accommodation of Green, and that, upon payment of the notes so endorsed and held by a bank, he was prepared to reconvey the lands to his co-defendant. The action was tried without a jury at Ottawa. At the opening of the trial, the plaintiff moved for judgment on the admissions contained in the depositions of the defendant McCormick on examination for discovery; and the plaintiff also intimated his willingness to withdraw any allegation as to fraud. SUTHERLAND, J., in a written judgment, set out the facts, and pronounced judgment amending the statement of claim and declaring that the deed, though in form absolute, was a security in the hands of the defendant McCormick to the extent of the

indebtedness of the defendant Green endorsed or guaranteed by McCormick to the bank. The defendant McCormick should have his costs against the plaintiff; and the plaintiff's costs of the action and the costs paid by him to the defendant McCormick are to be added to the plaintiff's claim against the defendant Green. No order as to the costs of the motion for judgment. A. Ellis, for the plaintiff. T. McVeity, for the defendant Green. H. Fisher, for the defendant McCormick.

MILLER v. YOUNG—BRITTON, J.—JULY 19.

Vendor and Purchaser—Agreement for Sale of Land—Vendor's Ability to Shew Title—Specific Performance—Rescission—Return of Moneys Paid—Reference—Costs.]—Action for a return of moneys paid by the plaintiff to the defendant upon a contract for the sale by the defendant to the plaintiff of land in the city of Toronto. The defence was, that the plaintiff was not entitled to insist upon repayment until the defendant failed in his negotiations to procure title. The defendant counterclaimed for specific performance. The action and counterclaim were tried without a jury at Toronto. BRITTON, J., in a written judgment, after setting out the facts, said that, as he viewed the facts, there should be a judgment declaring that the agreement between the plaintiff and the defendant for the sale or exchange of lands was a valid and subsisting one. In case the defendant could on the 15th or 19th August, 1916, have made and can now make a good title, the plaintiff has broken the contract, and the defendant is entitled to specific performance. In case the defendant could not on the 15th or 19th August, 1916, or cannot now make a good title, the contract is to be rescinded and the defendant to refund to the plaintiff what she has paid to him. There should be the usual judgment against the plaintiff for specific performance, with a reference to the Master in Ordinary as to title and as to the amount of money the plaintiff has paid to the defendant on the contract. In default of the plaintiff performing the contract on her part, in case a good title can be made, the land is to be sold with the approbation of the Master, and the purchase-money is to be applied, first, in payment of the costs of sale, and, secondly, in payment of the amount due to the defendant for principal, interest, and costs; the balance, if any, to be paid to the plaintiff. Shirley Denison, K.C., for the plaintiff. W. N. Tilley, K.C., and J. D. Bissett, for the defendant.

ELLIOTT v. BYERS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JULY 21.

Mortgage—Foreclosure—Subsequent Incumbrancer Added as Party in Master's Office—Attack upon Judgment and Report—Locus Standi—Regularity of Proceedings.]—Motion by S. Cleland, an execution creditor, made a party in the Master's office, to set aside the judgment and report in a mortgage action. FALCONBRIDGE, C.J.K.B., in a written judgment, said that he listened to Cleland's solicitor discourse for an hour or more before he learned the following facts, stated by counsel for the plaintiff, and not denied at the time, although an affidavit (apparently not filed) appeared to have slipped in among the papers in which there was some slight attempted modification of the plaintiff's counsel's statement. The action was for foreclosure. The plaintiff, no appearance having been entered by the defendant, was proceeding in the Master's office, when Cleland was made a party. It was evident that the solicitors for the plaintiff and Cleland considered the latter's claim as negligible, for Cleland's solicitor agreed to procure a release from him for $10. On procuring this, he demanded $15. The plaintiff's solicitor refused to be "held up," as he called it, for the extra $5. Hence this motion, which was therefore all about $5. In the circumstances, Cleland had no locus standi to attack these proceedings. If he had, some of the objections were not in accordance with the facts, and the others were not tenable. Motion dismissed with costs. T. Hislop, for the applicant. A. M. Dewar, for the plaintiff.