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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 9TH, 1918.

NESBITT v. OTTAWA ELECTRIC R.W. CO.

Negligence—Injury to Automobile by Collision with Street-car—Findings of Jury—Contributory Negligence—Ultimate Negligence.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex., upon the findings of a jury, in favour of the plaintiff, for the recovery of $500 in an action for damages for injury to the plaintiff's motor car in a collision with the defendants' electric street railway car at a highway crossing in the village of Britannia, on the 6th June, 1917.

The questions submitted to the jury and their answers were as follows:—

1. Were the defendants guilty of any negligence which caused the accident? A. Yes.

2. If yes, in what did such negligence consist? A. That street-car was travelling at excessive rate of speed, namely, around 25 miles per hour.

3. Could the motorman, after he had passed the station and after the danger of collision had become apparent to him, or by the exercise of reasonable care should have become apparent to him, have avoided the accident? A. If he had been attentive to his duty, the accident could have been avoided.

4. If yes, what could he have done? A. Reversed engine and applied both brakes.

5. Was the plaintiff guilty of any negligence which caused or contributed to the accident? A. Yes.

6. If yes, in what did such negligence consist? A. Consisted of misjudgment of distance by Nesbitt of street-car from crossing.

The trial Judge questioned the jurors as to the meaning of the answer to question 6; and they said that they meant that, had the plaintiff gone more slowly, he might not have met with the accident.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and LATCHFORD, J.

Taylor McVeity, for the appellants.

J. E. Caldwell, for the plaintiff, respondent.

MAGEE, J.A., in a written judgment, set forth the facts and referred to the evidence and the findings of the jury. He said that the view of the learned trial Judge as to the findings was thus expressed:—

"There were three acts of negligence: (1) that the defendants' car was going at an excessive speed; (2) that the plaintiff was going at an excessive speed; and (3) that the morotman, after the danger of a collision became apparent to him, or ought to have become apparent to him, could, by the exercise of reasonable care, have avoided the accident. . . . They say this plaintiff came down at too high a speed, but that the motorman, if he had been on the look-out, would have realised the danger, and in that event he could have avoided the accident. . . . My view of it is that the negligence of the defendants was the last negligence, and that their ultimate negligence was the cause of the accident."

The position could not be more pithily expressed. There was no reason to disturb either the findings of the jury or the judgment thereon.

The appeal should be dismissed.

MACLAREN, J.A., agreed with MAGEE, J.A.

HODGINS, J.A., and LATCHFORD, J., agreed in the result.

Appeal dismissed with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JULY 8TH, 1918.

TOWN OF WIARTON v. CANADA CASKET CO. LIMITED.

Mortgage—Action for Foreclosure—Form of Judgment—Foreclosure with Six Months for Redemption, or Sale after Three Months—Costs.

Action upon a mortgage; the plaintiffs claimed foreclosure, immediate possession, and payment of $21,802.07.

The action was tried without a jury at Owen Sound.

J. C. Moore, for the plaintiffs.

D. Robertson, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiffs at the trial insisted on a decree for *immediate* foreclosure. This, the learned Chief Justice thought, he could not grant, but gave their counsel time to submit authorities. By a memorandum since sent in by counsel for the plaintiffs, he apparently abandoned his former position and asked for immediate sale.

The action was begun on the 27th September, 1917; an appearance was entered on the 9th October; and the plaintiffs took no further proceedings until June of this year, when they gave notice of motion for immediate foreclosure, which motion was dismissed with costs to be paid by the plaintiffs to the defendants in any event of the action.

The plaintiffs would have been much further ahead if they had adopted the suggestions contained in the defendants' solicitors' letters of the 1st February and the 14th June, 1918.

The plaintiffs must take the usual decree for foreclosure (6 months to redeem), or, if they prefer, a decree for sale in 3 months.

As they may elect, the Master at Walkerton will take the account and tax costs and fix a day for redemption.

In view of all the circumstances, the Master will not tax the plaintiffs any costs of the trial.

FALCONBRIDGE, C.J.K.B. JULY 9TH, 1918.

WILKINSON v. STRAUS LAND CORPORATION LIMITED.

Nuisance—Water Conveyed to Plaintiff's Premises from Defendants' by Reason of Defective Conduit-pipes—Injury to Stock of Goods —Damages—Measure of—Indemnity—Lessor—Third Party.

Action for damages for injury to the plaintiff's stock of goods by water alleged to come from the near-by premises of the defendants.

The action was tried without a jury at Sandwich.

E. S. Wigle, K.C., for the plaintiff.

O. E. Fleming, K.C., and A. H. Foster, for the defendants.

T. G. McHugh, for a third party brought in by the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, found that the damage to the plaintiff's stock was caused by water coming from the buildings erected on the defendants' property. By reason of defective conduit-pipes, this water was not conveyed to the sewers, as it should have been, but was diverted so as to flow in upon the plaintiff's premises.

Neither under the terms of the lease nor otherwise was the third party liable to indemnify the defendants in respect of such damage.

The plaintiff had undoubtedly sustained substantial injury, but he had assumed to fix his own measure of damage in a manner unknown in the learned Chief Justice's experience, and, he considered, unwarranted by the authorities. Instead of using every effort to remove, dry, and make saleable as possible the damp and soiled stock, he went on selling it at a depreciated price, and only bringing up the damaged goods from the basement as fast as his clerks could sell it.

And so he now sought to have his damage assessed as on a percentage basis of his stock, which could not be done.

The expenses incurred by him in endeavouring to make the stock as presentable as possible would have of course been an element of damage if he had adopted the obvious and usual way of dealing with the goods.

Selling (vice-president of the defendant company) and the plaintiff arrived, at one time, at a basis of settlement—$500 for this item and $1,000 for half a party-wall. That went off because the plaintiff's mortgagee wanted too large a share of the money. The sum of $500 seemed, therefore, a fair amount to award.

There should be judgment for the plaintiff for $500, with costs on the Supreme Court scale; the defendants must pay the costs of the third party.

BRITTON, J. JULY 13TH, 1918.

RE WOODSTOCK CONCRETE MACHINERY CO. LIMITED.

Company—Winding-up—Sale of Lands of Company—Satisfaction of Mortgage—Claim of Guarantors to Balance of Proceeds of Sale—Agreement—Acquiescence—Costs of Liquidation Proceedings—Rights of Liquidator.

An appeal by Brownlee and others, called "the guarantors," from a ruling of J. A. C. Cameron, Official Rerefee, in a winding-up matter under the Dominion Winding-up Act, R.S.C. 1906 ch. 144.

The appeal was heard in the Weekly Court, Toronto.
Frank Arnoldi, K.C., for the appellants.
W. N. Tilley, K.C., and B. H. L. Symmes, for the liquidator.

BRITTON, J., in a written judgment, said that the guarantors asked to have the ruling of the Referee set aside, and to have it declared that the money received by the liquidator for the sale of the lands of the company, over and above the amount paid to the Imperial Bank of Canada, the mortgagees, and over and above the amount paid for taxes, was the property of the guarantors, who were entitled to be subrogated to the rights of the bank in respect of the mortgage, and further that the liquidator be ordered to pay the money to the guarantors.

Before and on the 7th May, 1915, the company was indebted to the bank in a large sum of money, and on that day a mortgage was given to the bank, reciting that the company was indebted to the bank for various advances and credits. This mortgage contained the following clause: "It is hereby declared that no surety, endorser, or other person entitled to indemnity or contribution from the mortgagor, its successors or assigns, in respect of any sum secured hereby, shall be entitled to the benefit of this security."

On the 30th November, 1916, the bank filed a petition and applied for a winding-up of the company; but the order, although issued, was not at once acted upon in any way that would prevent

negotiations for settlement between the parties. The company, the guarantors, and the bank entered into an agreement, bearing date the 22nd December, 1916, the intention of which was that the guarantors should pay to the bank $10,000, and that the bank was to continue collecting the company's notes and collateral notes. The bank was also to stay proceedings on the petition for winding-up, and such proceedings were delayed from time to time.

This agreement was intended, for the time, to enable the company to be continued as a going concern, and for the benefit of at least the mortgagee and the guarantors; further, that, upon payment to the bank of the claims of the bank, the bank would assign and transfer all the securities held by the bank.

Using the proceedings in liquidation as a means of continuing the business of the company, and enabling the company to make an agreement with the guarantors, and so in result benefiting both the mortgagors and the mortgagees, as well as the guarantors, was not illegal or improper.

Such a proceeding as was carried on by the parties must carry with it a consent to the liquidator receiving the money and distributing it.

The question submitted was only, whether the liquidator was entitled to or was not entitled to receive the proceeds of the property sold. The guarantors contended that the money should be paid to them. The amount of costs the liquidator would be entitled to was not in question.

When the offer to purchase the assets was accepted, the guarantors were represented by counsel, and gave their consent to the sale. It must have been manifest that the purchase price of the assets was the only fund on which the costs could be charged, and yet no objection was taken.

This acquiescence must carry with it a consent to the liquidator receiving the money, and paying all costs which had been properly incurred.

The conclusion arrived at by the Referee could not be said to be wrong; and, therefore, the appeal must be dismissed, with costs to be paid by the guarantors, the appellants.

Reference to In re Silver Valley Mines (1882), 21 Ch. D. 381; In re London Metallurgical Co., [1895] 1 Ch. 758; Re Martin International Trap Rock Co. Limited (1915), 8 O.W.N. 599; Kitching v. Hicks (1884), 6 O.R. 739, at p. 749.

FALCONBRIDGE, C.J.K.B. JULY 13TH, 1918.

TOMPKINS v. TOWNSHIP OF HARWICH.

Highway — Encroachment — Action for Mandamus to Township Corporation to Restore Road to Original Width—Fences—Non-feasance—Remedy.

An action for a mandamus to the Corporation of the Township of Harwich to restore a road.

The action was tried without a jury at Chatham.

R. L. Brackin, for the plaintiffs.

J. M. Pike, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the three plaintiffs were adjoining proprietors, Tompkins and Brown owning parts of lot 19 in the 2nd concession and McAllum owning lot 19 in the 3rd.

There was an original road allowance between 18 and 19 in the 2nd concession, and between 18 and 19 in the 3rd. The plaintiffs complained that the defendants had laid out and were using for public travel a highway not of the required statutory width. In their statement of claim they asserted that the highway was partly on their lands, without any expropriation. They abandoned at the trial their claim for damages on this latter head, and proceeded only to ask for a mandamus as set out in the proposed amendment of the statement of claim, which should be allowed (as it most clearly set out the plaintiffs' claim). It was, shortly, to direct the defendants to restore the road to its original width, as it was formerly fenced off, and to restore highway fences to the lines originally occupied by them.

Mosey and Huffman, proprietors on the opposite side of the road, moved their fences in on the road some 13 feet; and the plaintiffs thought the council ought not to stand aside and allow this to be done.

Mosey's encroachment was only temporary, while he was building a new fence, and he had now removed the objectionable fence and gone back to his original boundary. Huffman's fence still encroached, and it was about 200 rods in length.

There was no deprivation of ingress or egress. The road was in about the same condition as the ordinary country side-road, and the travelled part thereof was of about the same width.

The plaintiffs were not entitled to a remedy by mandamus. The council's neglect or refusal to interfere was a mere act of nonfeasance.

No case exactly in point was cited, but the principles laid down in Hislop v. Township of McGillivray (1890), 17 S.C.R. 479, and in Dick v. Township of Vaughan (1917), 39 O.L.R. 187, were directly opposed to the granting of this form of relief.

Perhaps Huffman was indictable for obstructing the highway.

Action dismissed with costs.

NEW TORONTO BOARD OF TRADE v. VILLAGE OF NEW TORONTO—FALCONBRIDGE, C.J.K.B.—JULY 11.

Street Railway—Agreement with Municipal Corporation—Removal of Tracks—Injunction.]—Action to restrain the defendants from removing the tracks of the defendants the Toronto and York Radial Railway Company, lying within the limits of New Toronto, from their present position towards the Toronto and Hamilton Highway, and to restrain the defendants from constructing switches etc. The action was tried without a jury at Toronto. FALCONBRIDGE, C.J.K.B., in a brief memorandum, said that he was told that immediate judgment was desired, and so, without stating reasons, he referred to the extended notes of the argument, and said that he agreed on all points with the contentions of the defendants' counsel. The action should be dismissed with costs. V. H. Hattin, for the plaintiffs. A. J. Anderson, for the defendants the Corporation of the Village of New Toronto. R. S. Robertson, for the defendants the Toronto and Hamilton Highway Commission. J. H. Moss, K.C., for the defendants the Toronto and York Radial Railway Company.

HETTING v. SNEETH—BRITTON, J.—JULY 11.

Vendor and Purchaser—Agreement for Sale of Land—Authority of Agent of Vendor—Statute of Frauds—Specific Performance—Discretion.]—Action for specific performance of a contract alleged by the plaintiff to have been made with him by the defendant for the sale by the defendant of the north half of lot 10 in the 2nd concession of the township of Miscampbell. The action was tried without a jury at Fort Frances.

BRITTON, J., in a written judgment, said that the plaintiff alleged that one Warner was the defendant's agent for the sale of the land, and made the agreement with the plaintiff, at the price of $700, of which amount the plaintiff paid Warner $150. A number of letters passed between the defendant and Warner, but nothing definite was agreed upon. Warner's duty involved the solicitation of offers. He had no authority to sign any deed or accept any money on account of the purchase-price. The plaintiff made an offer, but the acceptance of it rested entirely with the defendant, and no definite acceptance of it was given. Then the prospective buyer disappeared, and, after a delay of nearly 4 months, returned and deposited another $50 with Warner. Warner had no authority to receive the money so as to bind the defendant. There was no writing signed by the defendant to take the case out of the Statute of Frauds. The plaintiff's delay was fatal; he was not entitled to the relief asked. Apart from the question of contract, there was a discretion which should be exercised in favour of the defendant in refusing the plaintiff specific performance. The action should be dismissed with costs, fixed at $100. C. R. Fitch, for the plaintiff. A. G. Murray, for the defendant.

ONTARIO DRAINAGE COURT.

HENDERSON, DRAINAGE REFEREE. JUNE 12TH, 1918.

RE EDWARDS AND WYNNE.

Appeal—Leave to Appeal from Judgment of County Court Judge in Matter Arising under Ditches and Watercourses Act, R.S.O. 1914 ch. 260—Drainage Referee—When Leave should be Granted—Question of Law—Amending Act, 7 Geo. V. ch. 56, sec. 5.

An application by an owner of land for leave to appeal from the judgment of a County Court Judge upon appeal from an award made under the provisions of the Ditches and Watercourses Act, R.S.O. 1914 ch. 260, the application being made under the provisions of an Act to amend the Ditches and Watercourses Act, 7 Geo. V. ch. 56, sec. 5.

F. D. Hogg, for the applicant.
F. B. Proctor, for the respondent.

THE REFEREE, in a written judgment, said that, under the provisions of the statute, an appeal from the judgment of a Judge shall not lie unless and until leave has been given by the Referee. No limitation is contained as to the granting of leave; but (the Referee said), after very careful consideration, and having in view the reasons advanced for the creation by the Legislature of this new right of appeal, he had come to the conclusion that leave to appeal should be given only where some question of law is involved, and that he should not assume to sit in appeal from a Judge where there was no question involved other than one of fact. It was represented to those in authority that drainage engineers, particularly in certain localities of the Province, were embarrassed by reason of the fact that different County Court Judges, sometimes in adjacent counties, held different opinions as to the legal effect of certain of the provisions of the Ditches and Watercourses Act, and the creation of the new right of appeal was with the object of bringing about a harmony of opinion, where, up to the then present, differences existed. It would be obviously injudicious to attempt to pass in appeal upon the physical questions arising out of the many schemes under the Act throughout the Province; and, since in this particular case no question of law was involved, leave to appeal should not be given.

There should be no costs, as the principle upon which he (the Referee) proposed to proceed had not until now been made public.