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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 13TH, 1919.

*CAMPBELL v. MAHLER.

Contract—Formation—Sale of Goods—Telegrams—Agents' Bought and Sold Notes—Statute of Frauds—Evidence—Letter Repudiating Contract—Omission of Statement of Time for Payment "Shipment Opening Navigation"—"Terms Usual"—Custom of Trade—Immediate Payment where Shipment Deferred—Breach of Contract by Vendors—Damages—Costs.

Appeal by the defendants from the judgment of FALCONBRIDGE, C. J. K.B., 43 O.L.R. 395, 14 O.W.N. 348.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

R. G. Fisher, for the appellants.

G. S. Gibbons, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 14TH, 1919.

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 Parties.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 14 O.W.N. 322.

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

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

D. L. McCarthy, K.C., for the appellants.

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

A. W. Langmuir, for the International Hotel Company Limited, third parties.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 15TH, 1919.

*RE GLASS v. GLASS.

Division Courts—Jurisdiction—Claim for $96 for Conversion of Goods—Division Courts Act, sec. 62 (1)—Prohibition.

Appeal by the plaintiff from the order of MIDDLETON, J., ante 194.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

J. H. Naughton, for the appellant.

J. Gilchrist, for the defendant, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JANUARY 15TH, 1919.

REID v. MILLER.

Damages—Action to Recover Possession or Value of Chattels—Ascertainment of Value—Counterclaim—Assessment of Damages—Set-off—Costs.

Appeal by the plaintiffs and cross-appeal by the defendant Philoméne Miller from the judgment of LENNOX, J., 14 O.W.N. 91.

The appeal and cross-appeal were heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

J. H. Fraser, for the plaintiffs.

J. H. Rodd, for the defendants.

THE COURT dismissed the appeal of the plaintiffs and allowed the cross-appeal of the defendant Philoméne Miller, and varied the judgment so as to make the amount awarded to the plaintiffs the same as the balance, if any, of the sums received or which should have been received on the sale of the goods in question. Reference directed if asked by the plaintiffs—otherwise action to be dismissed with costs. The plaintiffs should pay the costs of the appeal and cross-appeal.

SECOND DIVISIONAL COURT. JANUARY 16TH, 1919.

*REX v. HYNES.

Criminal Law—Engaging in the Business of Betting or Wagering—Criminal Code, sec. 235 (e) and (2) (9 & 10 Edw. VII. ch. 10, sec. 3)—Aiding Another to Commit Offence—Sec. 69 (b)—Evidence of Offence to Go to Jury.

Case reserved by the Senior Judge of the County Court of the County of York upon the trial of the defendant by a jury at the Sessions, and conviction made upon a verdict of "guilty."

The case was heard by RIDDELL, LATCHFORD, and MASTEN, JJ., FERGUSON, J.A., and ROSE, J.

James Haverson, K.C., for the defendant.

Edward Bayly, K.C., for the Crown.

RIDDELL, J., in a written judgment, said that Hynes was a hotel-keeper in Toronto. One Maynard, a bank manager, wanted to place money with Gagen, who carried on business as a book-maker; he did not know Gagen, but Hynes did, and Maynard knew Hynes, and Maynard got Hynes to bet on his behalf on the races with Gagen, Maynard supplying the money and selecting the horse himself. The bets ranged from $200 to $500 at a time, one or sometimes more bets per day. When Maynard lost, he paid the money to Hynes; when he won, Gagen drew a cheque to "cash" and gave it to Hynes, who cashed it (sometimes without shewing it to Maynard), and gave the proceeds to Maynard. The bets in all were about a dozen in number within the six months before prosecution.

There was no evidence that Hynes was paid anything by either Gagen or Maynard, and none to contradict his statement that he acted in this way to oblige his friend Maynard. Although there was something in the evidence of Gagen which might indicate that Hynes was acting for Gagen, it was not enough to establish this as a fact.

There was another class of transactions in which Hynes took

part. One Phillips was in the habit of betting with him from $10 to $200, about twice a week—credit bets—Phillips paying Hynes in cash or by cheque if he lost, and usually being paid in cash by Hynes if he won. The practice was for Phillips to call up Hynes at his place of business by telephone and tell him he wanted to bet, make the deal over the telephone, and settle the next day (Hynes calling for that purpose on Phillips).

Hynes was tried on a charge that he "did engage in the business of betting or wagering contrary to the Criminal Code." The jury found a verdict of "guilty."

The question reserved for the opinion of the Court was, whether there was any evidence of the offence charged to go to the jury.

The indictment was under sec. 235 (*e*) of the Code (enacted by 9 & 10 Edw. VII. ch. 10, sec. 3): "Every one is guilty of an indictable offence.....who.....engages..... in the business.....of betting or wagering....."

Engaging in business does not mean taking part in a single act; it connotes a repetition or series of acts; but where a person makes bets averaging two a week for a period of at least six months, in the manner and circumstances disclosed here, there is ample to justify a jury in finding that he engaged in betting as a business, and therefore engaged in the business of betting. That being so, the transactions are not protected by sec. 235 (2), which exempts from penalty "a private bet between individuals not engaged in any way in a business of betting," Quite irrespective of the Maynard transactions, the question should be answered in the affirmative.

In the Maynard cases it was contended by the Crown that, as Gagen was clearly engaged in the prohibited business, Hynes was also in law guilty of the same offence under the provisions of sec. 69 (*b*) of the Code, in that he did acts for the purpose of aiding Gagen to commit the offence; that his acts of carrying bets to Gagen did aid Gagen to commit the offence; and the purpose was for the jury to decide. While the mere carrying of a bet or two to a book-maker for a friend to oblige him and enable him to keep under cover might not be satisfactory evidence of the forbidden purpose, there was enough in the case to justify a jury in so finding.

The sole question before the Court should be answered in the affirmative.

LATCHFORD, J., FERGUSON, J.A., and Rose, J., agreed with RIDDELL, J.

MASTEN, J., agreed in the result, for reasons stated in writing.

Conviction affirmed.

SECOND DIVISIONAL COURT. JANUARY 17TH, 1919.

STERLING BANK OF CANADA v. THORNE.

Bills of Exchange—Acceptances—Renewal of Earlier Instruments—Agreement—Sale of Patent Rights—Bills of Exchange Act, secs. 14, 131, 145—Bills not Addressed to one of the Acceptors—Change in Address—Discount of Bills by Drawers—Adoption of Change—Bank—Holder in Due Course—Evidence—Ratification—Estoppel—Altered Bill—Title of Bank—Suspicion—Inquiry.

Appeal by the defendants Mills and Kilpatrick from the judgment of MIDDLETON, J., ante 39.

The appeal was heard by RIDDELL and LATCHFORD, JJ., FERGUSON, J.A., and ROSE, J.

Gideon Grant, for the appellants.

Casey Wood, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LATCHFORD, J. JANUARY 13TH, 1919.

SPEARMAN v. RENFREW MOLYBDENIUM MINES LIMITED.

Master and Servant—Claim by Engineer against Mining Company for Arrears of Salary—Evidence—Disputed Questions of Fact—Credibility of Witnesses—Account—Counterclaim—Patents for Inventions — Partnership in — Declaration — Half Interest — Reference—Costs.

The plaintiff, an engineer, employed as such by the defendants, a company operating a molybdenite mine, sued for $6,787.50 for arrears of salary, for $1,469.53 for moving expenses and rent, and for $10,000 damages for wrongful dismissal. (The claim for wrongful dismissal was abandoned at the trial.)

The defendants denied any indebtedness, made charges of misconduct against the plaintiff, and counterclaimed for $1,105.74, alleged to be owing by the plaintiff for board and expenses of himself, his wife and family, and other disbursements made by the

defendants on his account. The defendants also claimed an interest in inventions made by the plaintiff with the aid of the defendants, and asked for an account of the plaintiff's earnings from other sources during the period when they were entitled exclusively to his professional services.

The action and counterclaim were tried without a jury at an Ottawa sittings.

G. F. Henderson, K.C., and Fleming, for the plaintiff.

A. G. Slaght and W. E. Wilson, for the defendants.

LATCHFORD, J., in a written judgment, discredited the plaintiff's evidence, because it was in some instances directly contradicted by authentic documents; and gave credence to the plaintiff only where his testimony was uncontradicted or corroborated. The testimony on the main issues was contradictory; especially the evidence of the plaintiff was opposed to that given by Goyette, the vice-president and general manager of the defendant company.

The learned Judge examined the items in dispute and found that there was due to the plaintiff $1,254.50, but this was subject to deductions for board etc., which left the amount due to the plaintiff on account of salary and bonus $160.85.

It was not shewn that the plaintiff had earned anything from outside sources during his term of employment.

From the plaintiff's claim of $865.43 for travelling and sundry expenses, certain deductions must be made, reducing that amount to $434.03.

Adding the $434.03 to the $160.85, the utmost sum which the plaintiff could rightly claim from the defendants was $594.88, and judgment should be entered in his favour against the defendant company for that amount. Costs of the action should be reserved and proceedings upon the judgment stayed until the counterclaim had been disposed of after a report upon a reference.

Upon the question raised by the counterclaim as to inventions made by the plaintiff, the learned Judge was of opinion that Goyette was a joint inventor with the plaintiff, and that the defendant company and Goyette were together entitled to an equal interest with the plaintiff. The principle applicable is analogous to that which governs partnerships. When there is no evidence as to the amount of the separate interests of partners, they have an equal interest: Lindley on Partnership, 7th ed., p.384.

There should be judgment on the counterclaim declaring the defendant company and Goyette entitled to an undivided one half share or interest in the several applications and patents mentioned in the evidence; enjoining the plaintiff from dealing with such applications and patents otherwise than as to his undi-

vided half interest; and directing a reference to the Master at Ottawa to ascertain and report upon certain matters in connection with the applications and patents. Further directions and costs of claim and counterclaim reserved until after report.

RIDDELL, J., IN CHAMBERS. JANUARY 15TH, 1919.

*REX v. HACKAM.

Criminal Law—Police Magistrate's Conviction Quashed with Costs to be Paid by Magistrate and Prosecutor—Refusal to Protect Magistrate and Prosecutor from Actions—Reconsideration of Order before Passing and Entry—New Affidavits—No Variation of Order.

Upon a motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Bracebridge, "for that he, the said Sam Hackam, did neglect to register as an alien enemy," RIDDELL, J., on the 6th December, 1918, pronounced an order quashing the conviction, directing payment of the costs of the motion by the Magistrate and prosecutor, and refusing to protect them from actions: ante 190.

The respondents (magistrate and prosecutor) afterwards applied for leave to answer an affidavit made by the defendant; leave was given; affidavits were filed; and the motion was reconsidered.

H. H. Davis, for the defendant.

W. R. Smyth, K.C., for the magistrate and prosecutor.

RIDDELL, J., in a written judgment, said that he stayed the issue of the order to allow evidence to be adduced of the conduct of the magistrate and officer toward the defendant. Until an order is passed and entered, a Judge can always reconsider his judgment: Holmested's Judicature Act, pp. 1138, 1139; and an order made as this was made (as to costs) without the one party answering material allegations of the other, because of a misunderstanding, is an order which may well be held up to enable both parties to be heard.

On the merits, the learned Judge saw no reason to change his view that the conviction could not stand.

The affidavits filed by the respondents were mainly made up of allegations against the defendant, and were largely irrelevant.

On the admitted facts, the defendant was arrested upon a charge which did not lie, and convicted under an order in council which, as any reasonable man must see, did not cover his case. The prosecution was wholly inexcusable, unfounded, and unlawful.

The learned Judge could see nothing in the case justifying him in relieving the respondents from payment of the costs.

As to an order for protection: the defendant was arrested upon a charge of an offence of which he was admittedly not guilty; there was not one word of evidence against him. There was no possible ground for an order protecting the respondents. If the defendant desired the opinion of a jury of Canadians as to whether what the magistrate did was done maliciously and without reasonable and probable cause—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 3—he should have the right to take that opinion. His Majesty's Courts should not be closed against the stranger in the land.

It was said by counsel for the respondents that the Government had decided to prosecute, generally and rigorously, defaulters under the Military Service Act, and that the judgment originally pronounced in this case had made magistrates reluctant to act in connection with these prosecutions. But this was no legitimate argument. The Court had nothing to do with the policy of the Government; and, if magistrates declined to do their duty, the writ of supersedeas was as valid to remove them as it had been for centuries.

The order as at first pronounced should stand.

RIDDELL, J., IN CHAMBERS. JANUARY 15TH, 1919.

*RE S.

Infant—Illegitimate Child—Mother Unable to Maintain—"Neglected Child"—Statutory Meaning—Order of Commissioner of Juvenile Court Placing Child in Custody of Children's Aid Society—Motion to Quash—Adoption of Child by Stranger—Jurisdiction of Commissioner—Juvenile Delinquents Act, 7 & 8 Edw. VII. ch. 40 (Dom.)—Children's Protection Act of Ontario, R.S.O. 1914 ch. 231, secs. 2, 9, 28—Amending Act, 6 Geo. V. ch. 53, secs. 3, 4—"Anglican"—"Protestant"—Roman Catholic Institution—Irregularities in Procedure—Discretion.

Application by Ellen McD., as the person having the actual custody, at the time a certain order was made, of the person of

A. S., a boy whom she had adopted, to quash the order, which was made by the Commissioner of the Juvenile Court, Toronto, finding that the boy was a "neglected child" and a Protestant, and directing that he should be made a ward of the Children's Aid Society of Toronto.

Frank J. Hughes, for the applicant.
J. R. Cartwright, K.C., for the Attorney-General.

RIDDELL, J., in a written judgment, set out the facts at length. It appeared that the boy was the illegitimate son of Mary Helen S., and was placed by her in a Roman Catholic home for infants. The applicant and her husband, as she said, "adopted this boy in the expectation that he would be left with us." In 1917 he became disobedient and unmanageable; and in the spring of 1918 the applicant returned him to the orphanage from which she had received him. Shortly afterwards she took him out with the consent of the orphanage authorities, but returned him again. She said that she never at any time intended to give up control of the boy; and on the 19th September she took him away again.

In the meantime proceedings were being taken in the Juvenile Court. On the 3rd July, 1918, a complaint was laid that A. S., "residing at the Sacred Heart Orphanage," was "a neglected child, in that he is deserted by his parents." Evidence was taken, and the case was adjourned for further evidence. The mother of the boy was found, and brought to the orphanage in September; she identified her child, but was wholly unable to support him; she had not heard of him since 1908, and had thought him dead.

Her evidence having been taken, in which she swore that she was a Protestant and desired him to be brought up as a Protestant, the child was ordered to be produced in Court; he was brought in on the 10th December, and the Commissioner then made the order complained of.

The applicant contended that A. S. was not a neglected child, and that the proceedings were irregular.

The boy was not a neglected child in the ordinary sense. The applicant and her husband were perfectly respectable and reliable persons, both able and willing to care for the lad. But the Legislature, in determining the various classes of children concerning which special provisions should be made, selected the classes, and used the term "neglected children" to cover them all.

As in Regina v. Commissioners of the Boiler Explosions Act 1882, [1891] 1 Q.B. 703, and Bradley v. Baylis (1881), 8 Q.B.D. 210, 230, the plain words of the statute cannot be got over, although the statute may say that things are what they are not; and, when the Legislature says, in the Children's Protection Act of Ontario,

R.S.O. 1914 ch. 231, sec. 2 (1) (*h*), that "neglected child" shall mean, inter alia, "an illegitimate child whose mother is unable to maintain it," it must be held that it is a neglected child, even if it is established that the child is not neglected, but fully and faithfully cared and provided for.

Under the combined effect of Dominion and Provincial legislation, the Commissioner had jurisdiction in the premises: Juvenile Delinquents Act, 7 & 8 Edw. VII. ch. 40 (Dom.); Children's Protection Act of Ontario, as above; see especially sec. 9.

It would perhaps have been more regular to notify the applicant and her husband earlier, and allow them to hear and test all the evidence; but the statute does not void proceedings resulting in an adjudication, so long as the Judge or Commissioner is satisfied that the parents or the person having the actual custody of the child have been notified of the investigation before he proceeds to dispose of the matter: Children's Protection Amendment Act, 1916, 6 Geo. V. ch. 53, sec. 3 (4*b*); and that was done in this case.

There were some trifling irregularities, but none affecting the merits, and none made fatal by statute.

By sec. 4 (2) of the Act of 1916, "the illegitimate child of a Protestant mother shall be deemed to be a Protestant;" and, by the principal Act, sec. 28 (1), "no Protestant child shall be committed to the care of a Roman Catholic . . . institution."

The mother said she was "an Anglican;" and "Anglican," as opposed to "Roman Catholic," means "Protestant."

The Commissioner was forbidden by sec. 28 (1) to commit the boy to a Roman Catholic institution; and he did what the law required in making the boy a ward of the Children's Aid Society: sec. 9 (5).

There is in this case no discretion to be exercised by the Court as to what is best for the welfare of the child.

Motion dismissed with costs.

JASPERSON v. SELKIRK—FALCONBRIDGE, C.J.K.B.—JAN. 13.

Contract—Action for Price of Goods Alleged to have been Sold and Delivered—Evidence—Failure to Establish Sale—Counterclaim—Costs.]—Action for $945.30, the price of onions said to have been sold and delivered to the defendants. There was a counterclaim by the defendants for $136.16, and third parties were brought in by the defendants. The action was tried without a jury at Sandwich. FALCONBRIDGE, C.J.K.B., in a written judgment, said

that he had experienced much difficulty and felt much doubt as to the disposition of this case. He had no remarks to make as to comparative demeanour of parties or witnesses. But he thought that the defendants were entitled to succeed. Exhibit 4, which came from an entire book of duplicate manifests used by the Onion Growers, did not indicate a sale, and the witness Large swore that he mailed the original to the plaintiff Jasperson. Two months after the alleged sale, viz., on the 11th December, the plaintiff Jasperson wrote a letter to the defendant Selkirk which did not in its terms claim a sale, but only complained that he "should have his money for them" (the onions)—"I understand other parties up here who shipped their onions after I did got their money long ago." And the evidence of independent witnesses favoured the defendants' contention. In all the circumstances, it was not a case for costs either between the original parties or as between the defendants and the third parties. It was a case of hardship. Action and counterclaim dismissed. J. H. Rodd, for the plaintiffs. R. L. Brackin and W. T. Easton, for the defendants. W. H. Furlong, for the third parties.

TANNER v. SUTOR—BRITTON, J.—JAN. 15.

Title to Land—Lost Deed—Failure to Prove—Reference in Will to Deed—Recovery of Possession—Lien for Improvements Made in Mistake of Title—Damages for Removal of Chattels.]—Action for a declaration that the defendant has no right or interest in a certain parcel of land, part of lot 4 in the 3rd concession of the township of Seneca, on which land there is a barn, erected in 1867; and for damages for the wrongful and improper removal of certain chattels from the barn. The action was tried without a jury at Cayuga. BRITTON, J., in a written judgment, said that it was admitted that the land in question was originally owned by James Tanner the elder, the father of the plaintiffs. He had a good title, and the plaintiffs, claiming under him, had a good title, unless it was displaced by something he had done. In 1872 he made a conveyance to his son James, but this was of 50 acres of lot 3 and a half-acre piece, described by metes and bounds, in lot 4. The description of the half-acre did not include the land on which the barn was built. The allegation of the defendant that a certain deed had been executed and lost had not been proved; and the mere statement in the will of James Tanner the elder that such a deed had been executed, was not proof. The reference in the will was a mistaken reference. The learned Judge said that he could not find in the evidence anything to prove that

James Tanner the elder had at any time conveyed to his son James, under whom the defendant claimed, the land on which the barn stood. The defendant was not entitled to a lien for improvements made in mistake of title. Judgment declaring that the defendant was not entitled to the land in question and for delivery of possession to the plaintiffs and for $50 damages for the removal of the chattels, with costs on the Supreme Court scale. C. W. Bell, for plaintiffs. George Lynch-Staunton, K.C., for defendant.

McCORMACK v. CARMAN—BRITTON, J.—JAN. 17.

Injunction—Receiver—Sale of Oil-wells—Company.]—Motion by the plaintiff for an interim injunction and the appointment of a receiver, heard in the Weekly Court, Toronto. BRITTON, J., in a written judgment, said that the order for an injunction should go, restraining the defendants from selling any of the oil-wells now being operated by the defendants or any of them, and a receiver should be appointed. There should be no restraint on the working of the wells or as to paying current or running expenses in so working. As the parties were able to agree upon a working plan pending the argument, they probably would be able to agree if any variation should be desired. There should be an injunction restraining the defendants, and each of them, including John H. McLeod, until the trial or other termination of this action, from further interfering with the affairs of the defendant company, and from receiving from the defendant company, either personally or on their account, any payments of the company's moneys, and restraining the defendant company from making any payment to the other defendants, or any of them, save and except for wages and expenses of working in the ordinary course of their business. And G. T. Clarkson should be appointed receiver. Costs of this motion should be costs in the cause unless otherwise ordered by the trial Judge. Hamilton Cassels, K.C., for the plaintiffs. A. Weir and A. I. McKinley, for the defendants.

CORRECTION.

In ALLEN v. MACFARLANE, ante 336, 337, the name of the counsel for the plaintiffs should be A. E. Honeywell, not F. H. Honeywell.