The
Ontario Weekly Notes

Vol. I. TORONTO, AUGUST 10, 1910. No. 46.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JULY 29TH, 1910.

RE WRIGHT AND COLEMAN DEVELOPMENT CO.

Mines and Minerals—Claim of Discovery not Recorded in Due Time—Refusal of Mining Recorder to Receive—Claim already Recorded—Re-staking—Abandonment—Claim Resting on Original Discovery—Benefit of Discovery made by Employee—Supplies of Employer Used in Work—Assistance from Employees after Hours.

Appeal by the Coleman Development Company from the judgment of the Mining Commissioner, dated the 14th July, 1909, made in pursuance of an order of the Court of Appeal, dated the 5th April, 1909, 13 O. W. R. 900, reversing a previous judgment of the Mining Commissioner and the order of a Divisional Court, 12 O. W. R. 248, and remitting the matter for trial by the Mining Commissioner, who was directed to add the respondent Sharpe as a party and "to determine all claims, questions, and disputes of the mining claim in question and the rights, title, and interest therein of the parties, or any of them."

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

W. M. Douglas, K.C., for the appellants.

J. Shilton, for the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.:—Practically the only question to be determined is, whether or not the appellants are entitled to the benefit of the discovery under which the respondents claim.

The Mining Commissioner has found, and we see no reason for differing from his conclusion, that the only real discovery was that made by the respondent Wright on the 16th July, 1906.

A claim in respect of this discovery the respondent Wright was unable to record in due time, owing to the refusal of the Mining Recorder to receive it, because of a claim already recorded on behalf of the respondent Agnes Columbus, which, in his view, prevented the recording of any other claim in respect of the same property: a view which in Munro v. Smith, 8 O. W. R. 452, 10 O. W. R. 97, was held to be erroneous.

Being met with this difficulty, the respondent Wright adopted the plan of periodically re-staking his claim, and succeeded finally in having it recorded on the 15th September, 1906, after his last re-staking, which took place on the 3rd of that month.

It has been decided by the Divisional Court and by the Court of Appeal that such a re-staking does not work an abandonment of the discovery in respect of which it is made, and it follows from this that the claim of the respondent Wright may properly be rested on the original discovery and the staking of the 3rd September, 1906, as, I should be prepared to hold on principle and apart from authority, it well may.

What I have just said is subject to the observation that the failure to record his claim in due time after staking of it out may leave the original discoverer open to have his right to a claim cut out by a person who subsequently makes a bona fide discovery and stakes out and records a claim in respect of it.

Upon what I have said is practically the only question to be determined, the facts are not in dispute, and in his reasons for his judgment these are stated by the Mining Commissioner, as well as the grounds upon which he came to the conclusion that the appellants are not entitled to claim the benefit of the discovery of the respondent Wright.

The finding of the Commissioner is that, before the partnership between the respondent Wright and the respondent Sharpe was entered into, and before the employment of Hebner to assist in prospecting on its behalf, the appellants had ceased to prospect on the lot on which the discovery of Wright was made, and had withdrawn their workmen from it.

That being the case, the fact that the respondent Sharpe was still in the employment of the appellants when discovery was made, does not, we think, entitle the appellants to claim the benefit of that discovery, nor did the mere fact of Sharpe being an employee of the appellants disentitle him, either alone or in partnership with Wright, to engage in the work of prospecting on his own account or that of the partnership, especially if, as the Commissioner finds, his employers' time was not made use of in that work.

Nor does the fact that some of the supplies of the appellants were used in connection with the work after the discovery had been made, necessarily render what was done work to the benefit of which the appellants are entitled. It was, no doubt, improper of Sharpe to make use of these supplies of his employers without their consent, but that is the most that can be said of it.

Nor is the fact that some of the appellants' men assisted in the work material, as the work was done after hours, and the men were paid for what they did, not by the appellants, but by Sharpe.

Upon the whole, we see no reason for differing from the view taken by the Commissioner, that the principle of equity which the Divisional Court thought was applicable, and entitled the appellants to the benefit of the discovery made by Wright, is not applicable, on the facts and circumstances as they appeared upon the evidence taken at the last hearing, and which were materially different from the hypothesis upon which the Divisional Court proceeded in reaching its conclusion.

The appeal fails and should be dismissed with costs.

DIVISIONAL COURT. JULY 29TH, 1910.

*GOODALL v. CLARKE.

Damages—Breach of Contract—Conversion and Sale of Shares of no Market Value—Bona Fides in Selling at Best Price Obtainable—Higher Price Realised at Subsequent Sale—Exceptional Circumstances—Measure of Damages—Estimate as if by Jury.

Appeal by the plaintiff from an order of MEREDITH, C.J.C.P., upon appeal from the report of George Kappele, an Official Referee, varying the report by reducing the amount of damages assessed by the Referee.

The reference was to assess the damages which the plaintiff sustained from breach of contract in the sale of 20,000 shares of the capital stock of the Lawson Mine Limited.

The Referee found 40 cents a share to be the value of the shares at the time of their conversion, and assessed the damages by reason of the breach of contract at $8,000. The Referee further found that the defendant had paid the plaintiff $5,100, leaving a balance due of $2,900 to be paid, with interest at 5 per

* This case will be reported in the Ontario Law Reports.

cent. from the 17th March, 1909, on which date the defendant made a sale of 100,000 shares, including the plaintiff's 20,000, at 26 cents per share. On the 11th March there was a sale by McLeod at 19 cents a share; and on the 11th April there was a sale by Millar at 40 cents a share.

On appeal from the Referee's report, the Chief Justice thought the damages assessed were too liberal; that it would be unfair to charge the defendant with more than 26 cents a share, which was the price he got. He therefore reduced the damages from 40 cents to 26 cents per share.

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

R. S. Cassels, for the plaintiff.

F. E. Hodgins, K.C., for the defendant.

CLUTE, J.:— . . . There is no doubt that the Millar sale was exceptional. All the stock had been got in, except his, which was necessary to complete the consolidation that had been arranged, and probably induced the higher rate for his shares in order to close the transaction. There was no market value for the shares. The plaintiff had advanced certain sums to the defendant, and held for a short time these shares as security, and afterwards purchased them. From the nature of the transaction, and the conduct of the parties throughout, I think it probable that Goodall would not have sold the shares when Clarke sold them. At all events he was not bound to do so. Clarke should have known, and he did know, that he was selling what did not belong to him, in breach of trust and in breach of contract. As the matter now stands, he has simply paid what money Goodall advanced to him, with possibly the interest. His wrongdoing has not cost him a cent. Goodall knew all the conditions: he had the right to be allowed to exercise his judgment and to fix his own time for the sale of shares which belonged to him. . . .

[Reference to Michael v. Hart, [1901] 2 K. B. 867, [1902] 1 K. B. 482; Mayne on Damages, 7th ed., p. 195, 8th ed., p. 221; McArthur v. Lord Seaforth, 2 Taunt. 257; Simons v. London Joint Stock Bank, [1891] 1 Ch. 284; Williams v. Peel River Land Co., 55 L. T. N. S. 689; Frost v. Knight, L. R. 7 Ex. 111; Johnstone v. Milling, 16 Q. B. D. 460.]

The writ of summons was issued in this case on the 27th March, 1909. The plaintiff claims a declaration that he is entitled to receive from the defendant the 20,000 shares. The shares having been disposed of, specific performance for the

delivery of the shares could not be ordered, and a reference was made as to the damages. It seems, therefore, to me clear that Goodall has never recognised the act of the defendant, but has pursued his remedy to have a return of the shares. It is not a case of his consenting now to take damages—he can obtain no other remedy. The shares on the day the action was brought had no market value. In such case the damages to be allowed would seem to fall within the case of In re Bahia and San Francisco R. W. Co., L. R. 3 Q. B. 584, where Lord Chief Justice Cockburn says: "The measure of damages would be the market price of the shares at that time. If no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares."

While I agree with the Chief Justice that the Millar sale was exceptional, and that the Referee was wrong in fixing 40 cents a share as the value of the shares to which the plaintiff was entitled, yet I think a jury, assessing damages, ought to take into consideration the fact of the subsequent sale at that price, not as the measure of damages, but as one of the elements to be considered. And, dealing with the question as a jury probably would, a fair assessment of damages, over and above the $5,200 realised upon the sale, would be $1,500.

The appeal will be allowed and the order below varied accordingly, with costs throughout.

MIDDLETON, J., reached the same conclusion, for reasons stated in writing.

SUTHERLAND, J., also concurred.

TEETZEL, J. JULY 30TH, 1910.

CAIN v. PEARCE CO.

Water and Watercourses—Mill Privileges—Dam—Raising Height of—Flooding Neighbouring Lands—Easement — Prescription —Statute of Limitations—Damages—Log-driving—R. S. O. 1897 ch. 142, sec. 1—Laches—Injunction—Reference—Costs.

The above action and three others by different plaintiffs against the same defendants were tried together by TEETZEL, J., without a jury, at Belleville.

The actions were brought to recover damages for the alleged flooding of the plaintiffs' lands by the defendants, who were mill-owners owning and occupying mill privileges on Crow river, and for injunctions.

Crow river flows out of Crow lake, which is a body of water embracing about 2,000 acres. Into Crow river flow the waters of Beaver creek, and into Crow lake, a short distance from the head of Crow river, flows Cain's creek; and the lands of the several plaintiffs abut either on Crow lake, Crow river, Beaver creek, or Cain's creek; and the plaintiffs alleged that the defendants, by the maintenance of their dam in Crow river, caused damage to the plaintiffs' land by unlawfully penning back the waters of Crow river, thereby flooding the plaintiffs' lands.

At the point in the river where the defendants' dam is constructed, there are four islands lying between the east and west banks of the river, and the defendants maintained dams in the several channels into which the waters of the river were divided by these islands, the main dam extending from the west bank to island No. 1.

The defendants and their predecessors in title had maintained dams in these channels for more than 60 years.

In 1893 the defendants' predecessor in title constructed a new dam over the main channel about 56 feet down stream from the old dam, and the defendants had, since that date, with the exception possibly of the dam between islands 1 and 2, improved the dams in the smaller channels, and built additional mills on the site, and while, prior to 1893, they utilised only about 100 h.p., they had since been utilising about 200 h.p.

At present, and for several years prior to the commencement of these actions, it was undisputed that the waters above the dam were and had been considerably higher than they were prior to 1893, and the plaintiffs alleged that this was owing to the new dam, constructed in that year by the defendants, being four feet higher than the old dam. The defendants disputed this, and alleged that the increased height of water in Crow lake and Crow river was due to the fact that, while before 1893 there were maintained in the rivers and creeks flowing into Crow lake numerous dams for the purpose of penning back or conserving the waters of these rivers and creeks for the use of persons engaged in driving logs down them into Crow lake, the timber cutting having largely ceased of late years, the lumbermen had taken out these dams or allowed them to decay, in consequence of which all the waters during the spring freshets came down at once into Crow lake, instead of at different stages during the spring and summer, and that, the defendants having improved their dams by tightening them, these flood waters were retained for a longer period, and consequently the lands adjoining Crow lake and Crow river above the dam were flooded further and for a greater length of

time than they were during the period of the old dam, and the defendants claimed the right, by virtue of the easement which they alleged to have accrued to them during the existence of the old dam, to maintain their new dams in an efficient state so as to retain the waters above the dam, although the same would have flowed away more quickly formerly owing to the imperfect condition of the old dam.

H. E. Rose, K.C., for the plaintiffs.

E. G. Porter, K.C., for the defendants.

TEETZEL, J.:— . . . There was a great conflict of evidence upon the question whether the new dam was in fact higher than the old dam. . . .

I find, upon the weight of evidence, supported by the probabilities, that the top of the old dam as constructed in 1893 was higher than the top of the old dam. It is clear from the evidence that the old dam, which was built largely of logs, was very leaky and defective, and had been so for a considerable time; and I think it is also clear that during the period of the old dam the means of escape for the water through the other channels to the east of the main channel were greater than subsequently; for I find that, in addition to the new dam being well built and tight, the defendants, for the purposes of their milling operations, improved the dams across the other channels, except the dam between islands 1 and 2, which, as I understand, has always been comparatively tight, so that, as a result, as I find, the defendants have, for several years prior to these actions, penned back the waters in question to a greater height and for longer periods each year than it was possible to do under the old conditions; and that, therefore, the lands of all the plaintiffs have been flooded to a greater extent and for longer times each year than the defendants had a right to flood the same before the construction of the new dam and the other improvements referred to.

I also find, upon the evidence, that the defendants, even before the new dam was built, had acquired an easement by prescription entitling them to continue flooding the lands of the plaintiffs to the extent enjoyed by them for more than 20 years; but I am unable from the evidence to define either the points upon the plaintiffs' lands to which this right to flood had accrued or the length of time each year that such flooding could be continued. . . .

The defendants contend that, while they have not exercised the right of flooding the plaintiffs' lands to the extent complained of, except since the new dam was built, being less than 20 years, yet

that, having acquired a prescriptive right to do the flooding under the old dam, and having built the new dam no higher than the old, they are entitled to continue the flooding constantly and to the same height, notwithstanding the inefficiency of the old dam to do so on account of its leaky condition; and for that position they cite the rule laid down by the Supreme Court of Massachusetts in Cowell v. Thayer, 5 Met. 253, 258. . . .

This rule has been disregarded by the Supreme Courts of several other States, notably Wisconsin, Michigan, and New Hampshire, and is not, I think, consistent with the principles laid down in cases in our own Courts. . . .

[Reference to Sabine v. Johnstone, 35 Wis. 185, 202; Smith v. Rose, 17 Wis. 227; Carlisle v. Cooper, 21 N. J. Eq. 576, 594; Turner v. Hart, 71 Mich. 128, 138; Gould on Waters, 3rd ed., notes to sec. 344; Angell on Watercourses, 7th ed., notes to secs. 224-227, 380; Buell v. Reid, 5 U. C. R. 546, 553; McNab v. Adamson, 6 U. C. R. 100; McKechnie v. McKeyes, 10 U. C. R. 37, 52, 53; Bechtel v. Street, 20 U. C. R. 15, 17.]

Now, as already stated, I find that as far back as the date of the construction of the new dam the defendants had acquired the right by prescription to back upon the plaintiffs' lands the waters in question; and, in my opinion, the only right they now have is, not to maintain the water as high as they are able to do with the present dam, although it is not higher than the old one, but only to back up the water as high as and for such time as was usual for their predecessors to do during the 20 years prior to 1893, and for any excess of flooding beyond that the defendants are liable in damages, if any have been sustained. . . .

As to the defendants' contention that the increased height of water is owing to the removal of the dams in the streams north and west of Crow lake, I think it is obvious that, although there is a greater flood of water at one time early in the year than formerly, it is obvious that, if the old conditions of the dams and outlets at the defendants' premises existed, this water would more readily pass away than it is possible for it to do under the improved conditions now maintained by the defendants.

As to that part of the claim of the plaintiff McGrath in respect of lots 9 and 10, I am of opinion that, upon a proper construction of the conveyances filed at the trial, the defendants are entitled to flood the said lots by virtue of the grant contained in the conveyance from . . Peter McGill to the Marmora Foundry Co. (a predecessor in title of the defendants), which expressly grants the right "to dam up the waters in Crow river and flow back the same in, over, and upon . . . lots 9 and

10 . . . to such heights and extents as the said company may . . . deem necessary to flood back the same," etc. This right was given to the successors and assigns of the company, and by a series of conveyances is now vested in the defendants, and, although not expressly mentioned in the subsequent conveyances, I think that, on the proper interpretation of the Act respecting the Law and Transfer of Property, R. S. O. 1897 ch. 119, sec. 12, this right passed under the various conveyances.

Then in the conveyance to the plaintiffs' predecessor in title, some seven years after the above conveyance, is an express reservation of the above right to the foundry company and its successors. . .

To the extent, therefore, of his claim in reference to lots 9 and 10, the claim of the plaintiff McGrath must be dismissed.

As to lot 8 . . . evidence might be given of the damages caused by the waters being backed up, beyond the injury to the soil itself, such as washing it entirely away.

There will, therefore, be a reference to ascertain the damages of the first three plaintiffs in respect of all their lands . . and the damages of the plaintiff McGrath in respect of lot 8.

Upon the reference no claim or allowance for damages must be made for any flooding upon the plaintiffs' lands occasioned by the defendants or others exercising the right of driving logs down Crow river, under sec. 1 of ch. 142, R. S. O. 1897 . . . See Neely v. Peter, 4 O. L. R. 293.

In respect of the claim for damages, the defendants pleaded the Statute of Limitations, but erroneously cited R. S. O. 1897 ch. 72, sec. 1, sub-sec. 1 (8), instead of ch. 324, sec. 38 (3); and the defendants, if they desire, may . . amend their defence accordingly.

Subject to the above, the damages to be ascertained upon the reference will be confined to the damages occasioned by flooding in excess of the extent to which the defendants were entitled by prescription when their new dam was constructed.

If the parties cannot agree upon the limitations of that easement, the same will be ascertained by the Referee. . . .

Having once ascertained the limitation of the defendants' prescriptive rights, the Referee may be able to fix with some certainty the damages which the plaintiffs have suffered through the excessive use latterly assumed by the defendants. . . .

Having regard to the great delay of which all the plaintiffs have been guilty, and to their failure to establish their main contention, that the defendants raised the height of their dam, and to the fact that, in my opinion, the injuries sustained by the plain-

tiffs may be well compensated in damages, and are not irreparable, I do not think the plaintiffs should have an injunction.

I shall not name a Referee until notified by the parties that they have failed to agree upon one.

Costs of the action and reference will be reserved until after report.

DIVISIONAL COURT. AUGUST 2ND, 1910.

*WILSON v. HICKS.

Life Insurance—Assignment of Policy to Stranger—Delivery—Gift—Intention—Revocation—Insurance Act, R. S. O. 1897 ch. 203, sec. 151, sub-secs. 3, 4, 5—Absolute Assignment not to be Construed as Designation of Beneficiary.

Appeal by the defendant from the judgment of BRITTON, J., ante 429, in favour of the plaintiff.

On the 28th December, 1888, the plaintiff effected an endowment insurance for $5,000, the annual premium upon which was $250.50. On the 22nd December, 1896, the plaintiff executed an assignment of the policy to the defendant, describing her as his "fiancée." The consideration stated was $1 and "other valuable considerations." The policy was properly described in the assignment by number and the name of the company. Neither the policy nor the assignment was under seal. There was in fact no consideration for the assignment—it was a gift or attempted gift inter vivos. The plaintiff did not inform the defendant of the fact that he had made the assignment until February, 1897. On the 5th April, 1897, the plaintiff wrote the defendant a letter in which he stated that the assignment was enclosed, but he did not in fact send her the assignment. He sent the assignment to the insurance company, who made a memorandum of it and notified the defendant of it.

In January, 1909, the plaintiff asked the defendant to reassign the policy, which she refused to do; and on the 23rd January, 1909, the plaintiff, by an instrument under seal, assumed to revoke the assignment and to direct that all moneys due under the policy should be paid to himself or his estate. The plaintiff paid the premiums and kept the policy alive.

* This case will be reported in the Ontario Law Reports.

This action was brought for a declaration that the plaintiff was entitled to the policy and the moneys payable thereunder, and that the assignment to the defendant had been effectually revoked.

The appeal was heard by FALCONBRIDGE, C.J.K.B., CLUTE and SUTHERLAND, JJ.

W. Proudfoot, K.C., for the defendant.

J. M. Best, for the plaintiff.

CLUTE, J. (after setting out the facts):—There was some evidence and much discussion as to what the intention of the plaintiff was in executing this assignment. Certainly his intention—if otherwise than implied in the instrument itself—was not communicated to the defendant; nor do I think that evidence of such intention upon his part was admissible. But, even if it were admissible, I am unable, from the evidence, to reach the conclusion arrived at by the trial Judge. The assignment is absolute upon its face. The fact that the plaintiff paid the premiums from time to time evidences, to my mind, his intention to make the gift a valuable one by keeping the policy alive, and each payment was a re-affirmation of the gift already made. I can find nothing in the evidence to warrant the finding of the trial Judge that there was no intention on the part of the plaintiff to give absolutely and irrevocably to the defendant the policy in question; nor that it was his intention to make the policy payable to her at his death, should that occur before maturity of the policy, and subject to any change he might desire to make before such death or maturity. The assignment was transmitted to the agent of the insurance company, and by him forwarded to the home office, and the defendant duly notified of the transfer of the policy to her. She was then, in my opinion, to all intents and purposes, owner of the policy. Delivery was not necessary, but, even if it were, I think there was a constructive delivery of the policy by the formal acts of registration in the home office and the notification to her. . . .

[Reference to Standing v. Bowring, 31 Ch. D. 282, 288; London and County Banking Co. v. London River Plate Bank, 21 Q. B. D. 535, 541; Re Blake and Bowers, 60 L. T. N. S. 663; In re Orbit, [1891] 1 Ch. at p. 613; In re Richardson, 47 L. T. N. S. 514; Sherratt v. Merchants Bank of Canada, 21 A. R. 473.]

I think the gift was complete. The assignment and the registration thereof with the company and notice by the company to the defendant that the assignment was so registered were

sufficient, without more, to entitle the defendant to receive the money. Nor do I think effect can be given to the alleged intention of the donor to reserve the right of revocation. If such a contention can be admitted here, there is no case in which it might not avail where a gift has been made. It utterly contradicts the form of the gift, and oral evidence of such intention is not, in my opinion, admissible.

It is urged, however, that the effect of the statute R. S. O. 1897 ch. 203, sec. 151, sub-sec. 3 (as amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 5) and sub-sec. 4, is to give the donor the right to change the beneficiary, and that the legal effect of the assignment was merely to designate the defendant as the beneficiary. . . .

The policy is in form a promise to pay the assured, Robert Wilson, or his assigns, the sum of $5,000, due on the 26th December, 1908, or, if the assured should die before that time, then to make payment to his executors, administrators, or assigns.

It does not appear to me that under sub-sec. 3 an absolute assignment of the policy is contemplated. Under that section the policy remains the property of the assured with the right to designate a beneficiary and to alter or revoke the benefits thus conferred upon the beneficiary. The word "assignment" is nowhere used in that sub-section; nor was it, in my opinion, intended to apply to an assignment. Sub-section 5 of sec. 151 in the original Act makes this clear. Nothing contained in the Act is to restrict or interfere with the right of any person to assign a policy in any other mode allowed by law. By the assignment the plaintiff assigned and transferred all his right, title, and interest in the policy. He did not merely designate the beneficiary, but transferred to her the absolute legal title.

With great respect, the judgment below should be set aside, and judgment entered for the defendant, with a declaration that the defendant is entitled to be paid the money due and payable under the policy in question. The defendant is entitled to the costs below and of this appeal. In case there is no appeal, the plaintiff may be paid the amount of the premiums paid by him subsequent to the assignment, in pursuance of the offer made by the defendant's counsel, less the costs of the action and appeal.

SUTHERLAND, J.:—I agree.

FALCONBRIDGE, C.J., agreed in the result, for reasons stated in writing.