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HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 11TH, 1919.

*BANK OF TORONTO v. PICKERING.

Trial—Place for Trial of Action—Rule 245 (b)—"Residence" of Parties—Bank—Branch Office—County Court Action—Order of Registrar (Sitting for Master in Chambers) Refusing to Change Place of Trial—Appeal—Right of—Rule 767.

Appeal by the defendant from an order of a Registrar (holding Chambers for the Master in Chambers) dismissing the defendant's application to change the place of trial of a County Court action from Toronto to Barrie.

H. S. White, for the defendant.
R. S. Robertson, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the action was brought upon a promissory note, made at Stayner, in the county of Simcoe, where the defendant resided, and payable at the office of the branch of the plaintiff bank at that town, and the plaintiff bank acquired its title to the note by a transaction taking place in that town between one Donor, its local manager, and the defendant, the maker. It was alleged that Donor procured the note from the defendant by fraud, and discounted it in his own branch upon his personal account.

A preliminary objection was taken on behalf of the plaintiff, that no appeal lay: it was argued, upon the wording of Rule 767, that, athough an appeal lay where the County Court Judge or the Master in Chambers changed the place, it did not lie

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

where the order was refused. The learned Judge said that that was not the true construction of the Rule—the effect was that the order of the Judge or Master should be subject to appeal as though the action were in the Supreme Court of Ontario instead of in the County Court.

In Cameron v. Elliott (1897), 17 P.R. 415, it was decided that there was no right of appeal; but that decision was based upon the then Rule 1260. In the revision of 1897 the words "subject to appeal" etc. were introduced, and from that time on it had been uniformly held that there was a right of appeal whether the order was made or refused.

The preliminary objection was, therefore, overruled.

Upon the merits, the defendant contended that the case fell within Rule 245 (*b*). The plaintiff bank had laid the venue in Toronto, although the cause of action arose and the parties resided in the county of Simcoe, and the place named for trial should have been Barrie, the county-town of that county. The cause of action undoubtedly arose in Simcoe, and the defendant resided there, and the branch of the bank where everything connected with the transaction took place was also in that county. The bank must be taken to "reside" in that county for the purposes of Rule 245 (*b*), and the fact that the head office of the bank was in Toronto did not take the case out of the operation of the Rule.

For many purposes, a branch bank is regarded as an independent organisation: see Rex v. Lovitt, [1912] A.C. 212, at p. 219; Ex p. Breull, In re Bowie (1880), 16 Ch. D. 484.

The appeal should be allowed and the place of trial should be changed to Barrie; costs to the defendant in the cause.

HODGINS, J.A., IN CHAMBERS. NOVEMBER 14TH, 1919.

REX v. ZURA.

REX v. OLLIKKILA.

Criminal Law—Magistrate's Convictions—Motion to Quash—Procedure—Rules (of 1908) 1279 et seq.—Notice under Rule 1281—Returns of Papers—Affidavits—Amended Conviction—Adjournment of Motion.

Motion to quash the convictions of the defendants, by the Police Magistrate for the City of Fort William, for the offence of having prohibited literature in their possession.

D. Campbell, for the defendants.
Peter White, K.C., for the Crown.

HODGINS, J.A., in a written judgment, said that a preliminary objection raised by the Crown should be overruled, as proper steps were taken to bring up the convictions under Rules 1279 et seq., including the deposit in each case of $100.

The learned Judge was not prepared to deal with these cases until the papers were properly before the Court, in obedience to the notice prescribed by Rule 1281. This appeared to be the proper course in view of the judgment of a Divisional Court in Rex v. Avon (1919), 45 O.L.R. 633.

There were filed on these motions affidavits of the solicitor for the accused, exhibiting copies of the information, conviction, and evidence, together with two convictions, the authenticity of which no one vouched for; also affidavits of the accused, disputing that they individually pleaded "guilty."

The exhibits which were before the magistrate were not returned, although they were the objectionable matter itself, for the possession of which the accused had been convicted.

Upon the magistrate making a proper return, including all that was before him, the applications to quash will be disposed of. It will be entirely proper for the magistrate to return amended convictions if he deem it necessary: Rex v. Graf (1909), 19 O.L.R. 238. In view of the decision of Boyd, C., in Rex v. Dagenais (1911), 23 O.L.R. 667, 18 Can. Crim. Cas. 287, the magistrate might certify, or, if he preferred it, make an affidavit, as to the allegation of the accused that they did not individually plead "guilty."

HODGINS, J.A., IN CHAMBERS. NOVEMBER 14TH, 1919.

GOLDBERG v. CRUIKSHANK.

Conspiracy—Action against Police Officers—Pleading—Statement of Claim—Public Authorities Protection Act, R.S.O. 1914 ch. 89, sec. 12—Search Warrant—Conviction for Breach of Ontario Temperance Act—Allegation of Damage—Trespass—Malicious Prosecution—Actionable Damage—Leave to Amend.

Appeal by the plaintiff from an order of GAULD, Local Judge at Hamilton, who decided that the action was not maintainable for anything done under the search warrant, but gave the plaintiff leave to amend. The defendants were police constables, and the action was for conspiracy.

M. J. O'Reilly, K.C., for the plaintiff.
F. F. Treleaven, for the defendants.

HODGINS, J.A., in a written judgment, said that the order of the Local Judge left the plaintiff in as good a position as she could expect, and the defendants were not asking that she should be deprived of such consolation as it might afford. There was no reason why the provisions of the Public Authorities Protection Act, R.S.O. 1914 ch. 89, could not be invoked before trial.

The plaintiff, by the statement of claim, alleged a conspiracy by the two defendants to injure the plaintiff financially and rob her of her good character.

The means adopted were to play upon her good nature and induce her to give liquor to the defendant Smith, posing as a sick man, and then to search her house, prosecute her, and secure a conviction for breach of the Ontario Temperance Act.

Damage is the gist of an action for conspiracy, and damage was alleged. It could only arise, however, under two heads—trespass due to the search and malicious prosecution. These matters were set out as overt acts, and were the only ones which could reasonably cause any actionable damage.

The plaintiff was therefore in this dilemma. Her action for conspiracy needed proof of damage to sustain it. That arising out of the search was barred by sec. 12 of the Public Authorities Protection Act, which prevents any action being brought against a police officer for anything done in obedience to a warrant issued by a Justice of the Peace until demand has been made for perusal and a copy of the warrant, and there has been refusal to exhibit it. The issue of the search warrant was sworn to and not denied.

Damages for malicious prosecution were apparently not recoverable, as it was not alleged that the conviction had been reversed.

Without these elements upon which to found proof of damage, a finding of conspiracy to injure would be in the air.

If the action could be treated as one for conspiracy to injure, joined w th claims for damage arising from the search and for malicious prosecution, the result would seem to be the same: Thomas v. Moore, [1918] 1 K.B. 555. The allegations in the statement of claim did not suggest any fraudulent procurement of the warrant, if that would make any difference. It might be, however, that the ingenuity which prompted this form of avoiding the difficulties in the customary actions for wrongdoing, such as was here set up, might find heads of damage beyond those mentioned.

As the defendants had not asked to have the action dismissed, the order appealed from should stand so as to enable the plaintiff to reframe her case, though she would perhaps find difficulties awaiting her in the prosecution of the action.

Appeal dismissed with costs to the defendants in any event.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 15TH, 1919.

RE STEVENS—JOHNSON v. HANCOCK.

Executors and Administrators—Administration Order—Conduct of Administrator.

Motion by the plaintiffs for an order for the administration of the estate of George Horace Stevens, deceased.

R. T. Harding, for the plaintiffs, the applicants.
J. R. Blake, for a beneficiary.
W. S. Brewster, K.C., for a beneficiary.
J. M. Jamieson, for the defendant.

MIDDLETON, J., in a written judgment, said that, the parties being all sui juris and all debts paid, the administrator was in effect a mere trustee or agent for them, and they had a right to take the estate out of his hands.

An order for the administration of the estate should be made. In this there was no reflection upon the defendant. His former clients had changed their minds, and he could not complain, as he must be paid for all services rendered so far.

MIDDLETON, J. NOVEMBER 15TH, 1919.

*ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Stay of Proceedings—Action Brought for same Causes as Former Action—Res Judicata—Action for Reformation of Contract upon which Former Action Brought—Time-limit for Bringing Action—Ontario Insurance Act, sec. 1914, condition 24—Estoppel—Costs—Motion—Forum—Court or Chambers.

Motion by the defendants for an order staying proceedings in this action and directing the plaintiffs to pay the costs of the action up to this time, upon the ground that the action was vexatious and an abuse of the process of the Court, in that the causes of action had all been disposed of in an earlier action between the same parties, and also upon the ground that, the action being to recover upon a fire insurance policy, and it being admitted that the fire occurred more than a year prior to the commencement of this action, the limitation prescribed prevented the action from being successfully prosecuted.

See Ross v. Scottish Union and National Insurance Co. (1917), 41 O.L.R. 108; S.C. (1918), 58 Can. S.C.R. 169.

The motion was heard in Chambers.

Shirley Denison, K.C., for the defendants.

H. J. Macdonald, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that in the present action the plaintiffs sought to have it declared that the restriction in the policy as to the insurance upon five dwelling-houses was improperly inserted in the policy, and for the rectification of the policy by deleting the restrictive provision, or, in the alternative, to recover an amount equal to the insurance as damages for fraud of the defendants in improperly inserting the restrictive words in the policies issued.

The learned Judge was of opinion that, according to the present practice, it was obligatory upon the plaintiffs to assert all their claims in the one action. He had failed to find any case since the Judicature Act which suggested that a party might in a second action seek to reform a contract upon which he had brought an action and failed. Here there was in reality but one cause of action.

The second objection must also prevail. The fire took place in 1916—this action was not brought until 1919. The statutory

limit is one year: Ontario Insurance Act, R.S.O. 1914 ch. 183, sec. 194, condition 24. It was contended that some estoppel prevented the defendants from relying upon the statutory limitation—that the defendants argued, and were successful in their contention, that upon the true construction of the policy they were not liable. This could not, in any view, constitute a misleading attitude or such misconduct as to found estoppel.

On both grounds, the action must be stayed, and an order should now be made directing the plaintiffs to pay the costs of the action so far incurred and of this motion.

The order should be issued as a Court order.

McRae v. McIntyre—Falconbridge, C.J.K.B.—Nov. 13.

Contract—Family Arrangement—Executed Agreement—Conveyance in Breach of, Set aside—Repayment of Amount of Incumbrance Discharged by Grantee—Lien for—Dismissal of Action for Recovery of Land.]—Action to recover possession of land and for mesne profits. The action was tried without a jury at London. Falconbridge, C.J.K.B., in a written judgment, said that the action concerned a wretched little dispute between a sister and a brother. The learned Chief Justice found as a fact that, after the funeral of their father in the early part of 1906, the family (except John) agreed that, if the defendant stayed and took care of the mother, he should have the property in question. This arrangement was frequently referred to by the mother down to a short time before her death. The defendant carried out his part of the agreement. The action should be dismissed without costs, the deed to the plaintiff, which was in breach of this executed agreement, declared to be invalid, and the registration thereof vacated. The plaintiff should be repaid the amount of the small mortgage paid off by her, with interest, and, if necessary, have a lien on the land for the amount. J. Macpherson, for the plaintiff. J. M. McEvoy, for the defendant.