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HIGH COURT DIVISION.

ORDE, J. MARCH 29TH, 1920.

RE McKAY.

Mortgage—Application by Mortgagor for Order Vesting Legal Estate in him—Payment of Mortgage-moneys—Trustee Act, sec. 9—Death of Mortgagee (Trustee) and Cestui que Trust—Status of Foreign Executors of Deceased Executor of Cestui que Trust—Absence of Consent from Legal Personal Representative of Mortgagee—Refusal of Application.

An application by Robert J. Goodfellow, as mortgagor of land, for an order vesting the land in him for all the estate of Allen P. McDonnell, the mortgagee, deceased, and of the heirs and executors of Susan McKay, also deceased, for whom it was alleged McDonnell held the mortgage as trustee.

The application was heard in the Weekly Court, Ottawa.
L. A. Kelley, for the applicant.

ORDE, J., in a written judgment, said that the application was based on meagre material, and was made without notice to and without the consent of any person interested. It was urged that the circumstances brought the matter within the provisions of sec. 9 of the Trustee Act, R.S.O. 1914 ch. 121, which give the Court power in certain cases to vest the mortgaged land in the mortgagor. The power must be very carefully exercised, and only in cases where it is clear that the interests of those entitled to the mortgage-moneys are fully safeguarded.

The mortgage was made to McDonnell, who was described therein as a trustee, but without any disclosure of the name of the cestui que trust. In an affidavit of the applicant's solicitor it was stated that McDonnell was a trustee for Susan McKay.

He died in November, 1911; and she in September, 1915. Probate of her will was granted to Alexander T. MacDonell, of Lima, Ohio; he died in November, 1919, leaving a will whereby he appointed three executors, all residents of Ohio, who had obtained probate thereof in Ohio, but not in Ontario. These three executors had executed what, the solicitor said in his affidavit, "purports to be a good and sufficient discharge of the mortgage." It was also said that the money due on the mortgage had been paid; and counsel stated that it had in fact been paid by the mortgagor to the same solicitor, who had been also solicitor for Susan McKay, and who received the money as solicitor for her or her estate.

The discharge referred to was presented as affording sufficient evidence of the consent of the executors of Alexander to the order asked for. It might be sufficient to justify proceeding in their absence; but there were several difficulties in the way of making an order under sec. 9.

Reference to Re Worthington and Armand (1915), 33 O.L.R. 191.

The legal personal representative of Allen should have notice of the application. The fact that he is described as a trustee in the mortgage is no reason for excluding him from all consideration. The legal estate, vested in him as mortgagee, passed on his death to his legal personal representative, whether he was a mere trustee or not. There was no evidence that the legal estate ever passed to Susan McKay or to her estate.

Even assuming that Alexander, as the Ontario executor of Susan McKay, was entitled to give a valid discharge of the mortgage without joining in it the legal personal representative of Allen, the Ohio executors had no status in this Province until they proved the will here. The instrument signed by these executors "purports," the solicitor said, "to be a good and valid discharge;" but that is open to serious question.

It was likewise open to serious question whether "the money due in respect of the mortgage has been paid to a person entitled to receive the same," within the meaning of sec. 9. It was not clear when the money was paid to the solicitor. The Ohio executors were not entitled to be paid until they obtained probate in Ontario; and the position was not altered by shewing that some one in Ontario was holding the money on their behalf.

The application should be dismissed, but without prejudice to the right of the applicant to renew it on additional material, if so advised.

ROSE, J. MARCH 30TH, 1920.

CYCLONE WOVEN WIRE FENCE CO. LIMITED v. CANADA WIRE AND CABLE CO. LIMITED.

Landlord and Tenant—Lease—Special Proviso as to Rent in Case of Destruction of "Building" on Premises—Construction—Group of Buildings—Premises Becoming Unfit for Occupancy—Purposes of Lease—Uses to which Premises Put—Determination of Lease—Conditions Precedent—Liability for Rent up to Day of Surrender—Apportionment Act, R.S.O. 1914 ch. 156, sec. 4—Action to Recover Rent for Longer Period or for Damages for Breaches of Covenants—Costs.

Action, by lessors against lessees of premises upon which the lessees carried on their business of manufacturing various kinds of wire, to recover rent or damages for the breach of the defendants' covenants contained in the lease.

The action was tried without a jury at a Toronto sittings.

J. T. Loftus, for the plaintiffs.

I. F. Hellmuth, K.C., and H. E. McKittrick, for the defendants.

ROSE, J., in a written judgment, said that the lease was for two years from the 1st November, 1918, expressed to be made pursuant to the Short Forms of Leases Act; but, instead of the usual short form proviso for the cessation of rent in case of damage to or destruction of the premises, it contained a special proviso "that if during the said term the said building is destroyed by fire or by the elements so as to render the premises demised wholly unfit for occupancy, and if they shall be so badly injured that they cannot be repaired with reasonable diligence within 60 days of the happening of such injury, then this lease shall, at the option of the lessee, cease and determine from the date of such damage or destruction, and in such event the lessee shall immediately surrender the premises to the lessor and the lessee shall pay rent only until the time of such surrender; should the lessee not elect to terminate this lease, the lessor shall with all reasonable speed rebuild the said building on said premises, and if the premises shall be repairable as aforesaid within 60 days from the happening of such injury, then the rent shall not run or accrue after the said injury or while the process of repair is going on, and the lessor shall repair the same with all reasonable speed, and the rent shall recommence immediately after the premises are restored so as to be fit for occupation; but if the premises

shall be so slightly injured by fire or the elements as not to be rendered unfit for occupation, then the lessor shall repair the same with reasonable promptitude and in that case the rent accrued or accruing shall not cease determine or be suspended."

A fire occurred on the 27th April, 1919; and the defendants, exercising what they asserted to be their right under the lease, notified the plaintiffs that they elected to determine the lease, and afterwards vacated the premises. The plaintiffs maintained that there had been no such destruction of the buildings on the demised premises as justified the defendants in acting as they did; and this action was brought to recover the rent which accrued up to October, 1919, when the plaintiffs sold the property, or, in the alternative, for damages.

Upon the land were three connected buildings, all used by the defendants: in each of them were performed operations essential to the turning out of the finished product in which the defendants dealt: so that the destruction of any one of them would necessarily cause a cessation of the defendants' work. One of these buildings had been erected by the plaintiffs—the others by the defendants during the term of an earlier lease, of which the lease existing at the time of the fire was a renewal; but these two buildings had become the property of the plaintiffs, and were included in the demise now in question.

The fire entirely destroyed the two new buildings and damaged the old one so as to make it temporarily unfit for occupancy by a manufacturing company, although it remained standing, and required only some minor repairs to make it weather-proof.

In the proviso quoted, the words "the said building" are used at the beginning. No building is identified or described in any part of the lease preceding the proviso. The word "said" is meaningless. The proviso must be regarded as relating to the connected group of buildings.

Two things must concur in order that the tenants shall have the right to determine the lease—such "destruction" of the *building* as renders the *premises* unfit for occupancy, and such *injury* to the building (or to the premises) as cannot be made good, with reasonable diligence, within the time mentioned. Notwithstanding the inaccuracy involved in speaking of *injury* to a building which has been destroyed, it must be held that the tenants' right to determine the lease arises only if the building is so "destroyed" as that the premises are rendered wholly unfit for occupancy and if the building cannot be repaired with reasonable diligence within 60 days.

Adopting the view of the Supreme Court of Wisconsin in Acme Ground Rent Co. v. Werner (1912), 139 N.W. Repr. 314, the learned Judge holds that the premises became wholly unfit

for occupancy, within the meaning of the proviso, when they became wholly unfit for occupancy taking into consideration the purposes of the lease and the uses to which the premises were put by the defendants.

Upon the question whether the requisite repairs—i. e., repairs to the old or main building and the rebuilding of the others—could have been made, with reasonable diligence, within 60 days, the evidence was conflicting. The learned Judge found that the work would have occupied more than 60 days.

The two conditions precedent to the defendants' right to determine the lease existed, and they were justified in notifying the plaintiffs on the 29th April that they terminated the lease, and in their surrender of the premises by letter of the 28th May.

The defendants ought to pay rent up to the time of the receipt by the plaintiffs of the letter of the 28th May—$953.42: see the Apportionment Act, R.S.O. 1914 ch. 156, sec. 4.

The plaintiffs had no claim if the case was one to which the part of the proviso relative to the case of such a fire as did not give to the tenant the right to determine the lease, applied; and the plaintiffs were in worse plight than if the case was governed (as the learned Judge had held) by the part of the proviso relative to the case of such a fire as would give the defendants the option which they purported to exercise; for, if the last mentioned part of the proviso applied, the defendants must pay rent until the surrender of the premises; while, under the other, the plaintiffs had no right to rent until the premises were restored so as to be fit for occupation, and they were never so restored; and the plaintiffs had not proved that they suffered any loss.

There should be judgment in favour of the plaintiffs for $953.42; but, as there did not seem to have been any demand or refusal of this sum, and as the claim actually put forward by the plaintiffs failed, there should be no order as to costs.

ROSE, J. APRIL 3RD, 1920.

RICHARDSON v. TOWNSHIP OF WARWICK.

Highway—Nonrepair—Break in Surface of Road—Injury to Person Driving on Road—Wheel of Vehicle Going into Hole on Dark Night—Liability of Township Corporation—Absence of Direct Notice of Condition of Road—Breach of Statutory Duty—Municipal Act, sec. 460—Evidence—Failure to Shew Adoption of all Reasonable Means to Prevent Continued Existence of Dangerous State of Nonrepair—Damages—Injury to Married Woman—Expense Incurred by Husband.

Action by a man and his wife for damages for injuries sustained by reason, as alleged, of the nonrepair of a highway in the township.

The action was tried without a jury at Sarnia.

A. Weir, for the plaintiffs.

John Cowan, K.C., for the defendant.

ROSE, J., in a written judgment, said that on the 14th September, 1919, the two plaintiffs drove in a buggy from their farm, over the road in question, to Watford, some 5 miles distant, in a westerly direction. In the evening they returned, reaching the place of the accident some time after 10 o'clock. The night was dark and rain was falling; so that Richardson, who was driving, had not a very definite idea as to where he was, and thought that he had passed the very narrow part of the road where the accident occurred. At this point, the road is raised by a "fill" a few feet above the general level; the fill is traversed by a culvert, consisting of a pipe some 12 inches in diameter, by which water flows from the ditch on one side of the road to the ditch on the other, the top of the pipe being about 2½ or 3 feet below the level of the centre of the road, and the top of the fill being about 14 feet wide. Of this 14 feet, a width of about 12 feet is occupied by the gravelled road, the remaining 2 feet, at the north side, being grass. The northern end of the pipe—a section about 2 feet 8 inches long—had collapsed, from causes unknown, and the part of the fill immediately above it had caved in, making a break, triangular in form, on the surface, the apex of the triangle touching or extending a short distance into the gravelled surface of the road, and the base taking in a foot or two, measured from east to west, of the grass north of the gravelled surface. The break had existed since about the 19th August.

The plaintiffs had passed the place, going to Watford, a few hours before the accident; but Richardson said that he did not then observe the break and had not known of it before. The plaintiffs on their homeward journey overtook a buggy which was proceeding quite slowly; they were anxious to pass, and Richardson turned a little to the north, in order to enable him to get his horse alongside of the buggy in front, that he might speak to the driver. He then asked to be allowed to pass, and was told that passing would be easier a little farther on, where the road was wider. At that minute the wheels on the left hand side of his buggy went into the hole, and his wife was thrown out and injured.

The only question seemed to be, whether the defendants were answerable for not having repaired the break.

The defendants should be assumed to have been without actual notice of the want of repair.

The plaintiffs' right of recovery did not depend upon any finding that, if the defendants had adopted such a system of inspection as they ought to have adopted, they would have learned of the want of repair at some time before the accident. The result of City of Vancouver v. Cummings (1912), 46 Can. S.C.R. 457, and Jamieson v. City of Edmonton (1916), 54 Can. S.C.R. 443, is that, upon proof of such facts as had been established in this case, the municipality must be held liable, as for a breach of a statutory duty, unless they are able to shew that they took all reasonable means of preventing the continued existence of such a dangerous state of nonrepair as had been described.

So far as appeared, the only provision made for the making of minor repairs to the roads in the neighbourhood of the place of the accident was the delegation, express or implied, to one Williamson, who represented that part of the township, of authority to order them as the necessity for them came to his knowledge. He said that this jurisdiction of his extended to some 35 miles of road; but it did not appear that he felt that he was charged with the duty of inspecting those 35 miles at stated intervals. Upon this evidence alone, there seemed to be no possibility of the making of any such exculpatory finding as seemed to be necessary if the defendants were to escape liability.

The plaintiffs must be held entitled to succeed.

The damages should be assessed at $2,350: $2,000 for the wife, who was injured, though no bones were broken, and was suffering from nervous shock; and $350 for Richardson, who was not injured, but was put to expense by reason of his wife's injury.

Judgment for the plaintiffs for $2,350 and costs.

HASLIP v. HUGHES—LATCHFORD, J.—APRIL 3.

Fraud and Misrepresentation—Sale of House—False Representations as to Renewal of Ground-lease—Rescission—Damages.]—Action by purchasers for rescission of a contract for the sale and purchase of a house, or for damages. The action was tried without a jury at a Toronto sittings. LATCHFORD, J., in a written judgment, said that, when the defendant instructed her agent to sell the house, she knew that her ground-lease, which was to expire in a little more than 3 months, would not be renewed. Her knowledge that in that event she would meet with a severe loss was the motive actuating her in endeavouring to make a sale, and not the suggestion by her that her husband was unable to attend to the heating of a second house. The plaintiffs were misled by the representation that the owner of the land was not in the city of Toronto, where the property was situated. The defendant was aware that, while the owner was at times away from the city, her daughter, who acted for her, was in the city all the time. When the plaintiffs inquired of the defendant's agent whether the lease, which they knew was about to expire, would be renewed, they were told by the agent, after he had consulted with the defendant, that there was absolutely no doubt the lease would be renewed. This statement was false. The defendant had no ground for believing it to be true. She made it to her agent with a knowledge that it was false, and the plaintiffs were induced to purchase the house—a lodging-house—by this false representation. The plaintiffs' remedy, however, was not rescission. They entered into possession of the property and accepted a lease of it from the defendant. They continued to occupy the property after they knew of the fraud and until the expiry of the term on the 31st January. They were entitled to damages. They paid $1,200 to the defendant and her agent. They had the furniture, which was probably of far less value. They had also a profit of about $180, being the difference between the rent paid and the amounts received from lodgers. Against this, however, should be set a reasonable sum for management. If the parties could agree upon such a sum and upon the value of the furniture, there might be no necessity for a reference. Otherwise there must be a reference. The plaintiffs' costs of the action and reference should be paid by the defendant. S. W. McKeown, for the plaintiffs. Peter White, K.C., and J. S. Duggan, for the defendant.