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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 19TH, 1919.

REX v. GIOVANZZI.

Criminal Law—Murder—Evidence—Dying Declaration.

Crown case reserved by MULOCK, C.J. Ex., as follows:—

The prisoner was tried before me at the Guelph assizes commencing on Monday the 19th May, 1919, for the murder of Alexander Dutki on Sunday the 30th March, 1919, was found guilty of murder, and sentenced to be hanged on Friday the 22nd August, 1919.

At the trial I admitted as evidence on behalf of the Crown a dying declaration of the deceased, reserving the question whether I was right in so admitting it.

The evidence in the case shewed that at about a quarter to 9 o'clock on the evening of the said 30th March, one John Nassadick and another man, thought to have been the prisoner, met Dutki and a companion, Zizza, in Alice street, in the city of Guelph, and that the man with Nassadick fired three shots out of a revolver at Dutki, all three shots hitting him, two in the abdomen and one in the thigh. The assailant then ran away, and Dutki ran a short distance after him. Morrison, a policeman on duty, in uniform, heard the firing and promptly appeared on the scene, and then hurried to the house of one Checkley, which was near by, and telephoned for an ambulance and a doctor. In the meantime some other men assisted in bringing Dutki to the Checkley house, where he was placed upon a couch. As Dutki lay on the couch, Morrison, looking at him, thought he was dying and asked him how he felt and if he (Morrison) could do anything for him (Dutki), whereupon Dutki answered, "I am killed." A number of men, including John Nassadick, had followed the wounded man into Checkley's house; and, upon his saying "I am killed," Morrison made these men, one after another, appear before Dutki, to see if

he identified any one amongst them as his assailant. Then Morrison asked him who did it, and Dutki answered "Short man with the fellow named John." When John Nassadick was brought before Dutki, Dutki said, "That man said 'Hold up your hands or I shoot,' but his friend shot me." Dutki said, "Go get his friend." Dutki added, "I don't know who he was, he was with John." Asked as to the appearance of Dutki when he said "I am killed," Morrison answered, "The appearance of a dying man."

This conversation between Morrison and Dutki took place at about 8.50 o'clock in the evening, or about 5 minutes after Morrison had heard the shooting.

At about 9 o'clock, Dr. Harcourt arrived at Checkley's, and, on ascertaining the nature of Dutki's wounds, reached the conclusion that they would prove fatal and that Dutki would die within a day. Dr. Harcourt was also of opinion that Dutki realised the serious nature of his wounds. Dr. Stewart, who was also present at the Checkley house, considered the wounds fatal and that death was a matter of hours only.

The wounded man was removed to the hospital to be operated upon, and his spiritual adviser was sent for. At 11 o'clock he was placed under an anæsthetic, and an operation was commenced, but he died at about 1 o'clock, before the completion of the operation, the medical testimony being to the effect that death was caused by the wounds.

I was of opinion that, when the deceased made the dying declaration objected to, he was in actual danger of death from his wounds and fully realised their serious nature and regarded them as fatal, and had abandoned all hope of recovery, and that his words "I am killed" were used in their literal meaning.

I therefore admitted his dying declaration—and the question is, "Was I right in so doing?"

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. C. Robinette, K.C., for the prisoner.

Edward Bayly, K.C., for the Crown, was not called upon.

MEREDITH, C.J.O., delivering the judgment of the Court, cited with approval the statement of the law on the subject of dying declarations from Phipson's Law of Evidence, 5th ed., p. 300: "The deceased must be proved to the satisfaction of the Judge to have been, at the time of making the declaration, in actual danger of death, and to have abandoned all hope of recovery." The Chief Justice said that there was no question that the deceased was in actual danger of death, and, having regard to the circumstances of the case and to the statement "I am killed," it was shewn that the deceased had abandoned all hope of recovery.

The question, therefore, must be answered in the affirmative.

HIGH COURT DIVISION.

LOGIE, J. JUNE 16TH, 1919.

SUNDERLAND ATHLETIC ASSOCIATION v. TORONTO GENERAL TRUSTS CORPORATION.

Landlord and Tenant—Lease—Covenant for Quiet Enjoyment—Breach—Eviction—Damages—Measure of—Recovery of Rents Received by Landlord from New Tenants after Eviction—Value of Improvements—Value of Renewal Term—"Treaty Terminating the War"—Armistice—Counterclaim for Rent and Taxes—Costs.

Action for damages for breach of a covenant for quiet enjoyment, and for the eviction of the plaintiffs from lands demised to them, and for a declaration that the plaintiffs were entitled to certain rents and profits. Counterclaim by the defendants for rent and taxes paid.

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

J. P. MacGregor, for the plaintiffs.

W. A. McMaster and A. J. Anderson, for the defendants.

LOGIE, J., in a written judgment, said that on the 1st April, 1914, the predecessors of the defendants, as executors of one Townley, deceased, by a lease under the Short Forms of Leases Act, demised lands to the plaintiffs to hold for 5 years, at the yearly rental of $500. It was stipulated in the lease that, although the term was 5 years, the lease should become null and void on the death of the widow of Townley, during the period of whose life the executors were permitted to hold and lease the lands, and that at the end of the same term of 5 years, if the widow should still be living, the executors should give a renewal of the lease for a further period of 5 years, subject to terms similar to those contained in the original lease, at the same rental.

It was admitted by the defendants that the lease was valid and binding upon them and in full force and effect at the time of the acts complained of.

The plaintiffs entered into possession of the lands demised and fitted them up as athletic grounds. There were about 2,000 members of the association, and at the outbreak of the war some 1,500 or more of them went overseas. The result was disorganisation, and the rent fell in arrear.

The rent had been guaranteed by certain members of the association, and negotiations took place looking towards a surrender of the lease. The learned Judge finds that a surrender was not in fact effected; but, in December, 1916, an arrangement was entered into that $150 should be paid on account of the then arrears of rent, and that the defendants should accept $100 per annum during "the term of the war," without prejudice to the rights of any of the parties or to the validity of the guaranty, commencing from the 1st April, 1917.

Up to the 1st April, 1919, there was due for rent, under the lease and the subsequent agreement, $1,116.68, and $250 had been paid on account, leaving a balance due of $866.68.

By the terms of the lease, the plaintiffs were to pay taxes, exclusive of local improvements; the taxes were in fact paid by the defendants, and up to the 1st April, 1919, amounted to $1,077.36, which, added to the $866.68, made a total of $1,944.04.

In addition, the plaintiffs had to pay the rent and taxes for the duration of the renewal term of 5 years dependent upon the life of Mrs. Townley, who was 80 years old, with an expectation of life of 5 years. The rent would thus be $2,500 and the estimated taxes $1,070.55. Adding these sums to the $1,944.04, the whole amounted to $5,514.59.

On the 11th March, 1918, the defendants leased the lands to the Imperial Munitions Board for the duration of the war and for 6 months after the signing of peace or treaty terminating the war, to be computed from the 11th March, 1918, at $1,600 per annum.

This lease was a breach of the covenant for quiet enjoyment in the plaintiffs' lease; and the defendants protected themselves by taking a covenant for indemnity from the Board.

The plaintiffs might claim restoration of the premises, which had been wholly altered and their character changed, but by consent damages only were sought.

The measure of damages upon a breach of the covenant, where the cause of such breach is eviction of the lessee, is, in addition to the expense to which he has necessarily been put, the full value of what he has lost by being evicted, or the value of the term.

Reference to Williams v. Burrell (1845), 1 C.B. 402; Rolph v. Crouch (1867), 37 L.J. Ex. 8, 17 L.T.R. 249.

The learned Judge assessed the damages in respect of the plaintiffs' improvements at $2,500.

The defendants should not profit by their wrongdoing; and the rental paid or to be paid to the defendants by the Board should be allowed to the plaintiffs. Peace had not been declared—the recent armistice was not a treaty terminating the war. On the basis agreed to of peace being declared on the 1st July, 1919,

the rent paid or payable by the Board should be fixed at $2,888.94.

The value of the renewal term of 5 years should be allowed at $3,200.

These three sums amounted to $8,588.94, and for that sum the plaintiffs should have judgment; the defendants should have judgment on their counterclaim for $5,514.59; these two sums to be set off pro tanto. The plaintiffs should have their costs of the action and the defendants their costs of the counterclaim, with set-off.

LENNOX, J. JUNE 17TH, 1919.

RE DOMINION PERMANENT LOAN CO.

Company—Winding-up—Shareholders Receiving Dividends improperly Paid out of Assets of Company—Liability to Repay—Jurisdiction of Referee under Winding-up Order to Determine—Contributories—Holders of "Prepaid Stock"—Assets and Undertaking of another Loan Company Sold and Transferred to Insolvent Company—Contract—Approval of Lieutenant-Governor in Council—Ontario Loan Corporations Act, R.S.O. 1897 ch. 205—Position of Shareholders in Selling Company who Received Paid-up Shares in Insolvent Company.

A reference having been directed to an Official Referee under an order for the winding-up of the company, appeals from his rulings and orders were taken by shareholders as follows:—

(1) An appeal, on behalf of Edward Acheson and all other shareholders of the company whose names appeared upon the list of contributories, from the ruling of the Referee that he had power to hear and determine the claim of the liquidator to make these appellants liable for the amounts of the dividends received by them in respect of shares held by them in the company.

(2) An appeal, on behalf of Edward Acheson and all other members of the company holding shares of the company's stock designated "prepaid stock," from an order of the Referee settling these appellants upon the list of contributories and holding them liable to the liquidator for the balances by him claimed as unpaid upon their shares.

(3) An appeal, on behalf of Florence Adams and all other persons named in the summons to contributories whose names appeared upon the records of the company as members or shareholders thereof in respect of shares of that company theretofore issued to them in substitution for shares of the capital stock of the Provincial Building and Loan Association, from an order of

the Referee settling these appellants on the list of contributories and holding them liable to the liquidator for the balances by him claimed as unpaid upon their shares.

The appeals were heard in the Weekly Court, Toronto.
I. F. Hellmuth, K.C., and J. J. Maclennan, for the appellants.
J. W. Bain, K.C., and M. L. Gordon, for the liquidator.

LENNOX, J., in a written judgment, said, as to the first appeal, that the Referee was right in holding that he had jurisdiction. He is an officer of the Court delegated to exercise the jurisdiction of the Court, inherent and statutory, so far as this is within the terms or intent of the order of reference. The Winding-up Act, R.S.C. 1906 ch. 144, specifically confers upon the Court the most ample powers in winding up the affairs of an insolvent company: sec. 107 et seq. The order in this case is in the usual comprehensive terms. It would be a mistake to conclude that, if there is a right to recover in these cases, it must necesarily be against the parties qua shareholders or contributories, or that they are to be "settled upon the list of contributories" within the meaning of the statute. The ultimate question for decision is: "Are these shareholders liable to pay to the liquidator the moneys claimed?" This question the Referee has a right to determine, according to the recognised method of procedure, subject to appeal. This appeal should be dismissed with costs.

As to the second appeal the learned Judge said that the law was clear and the decisions definite that the shareholders of an insolvent company must pay the balances due on their shares. It was not necessary to consider whether the by-laws of the company and the terms upon which the prepaid shares purported to be issued were valid during the solvency and operation of the company. The clear implication and necessary inference is, that it was not contemplated that the statutory rights of the creditors of an insolvent concern would be impaired in any way by a device of the character indicated in the evidence. The conclusion of the Referee was right, and the appeal should be dismissed with costs.

Dealing with the third appeal, the learned Judge said that, in pursuance of the terms of the Ontario Loan Corporations Act, R.S.O. 1897 ch. 205, the Provincial Building and Loan Association sold and transferred the assets and undertaking of that company to the company now in liquidation, on terms set out in an agreement dated the 2nd April, 1902. The Act authorised a sale, but prescribed the conditions as well, and, amongst other things, provided for the protection of shareholders of both companies by enacting that, in addition to ratification by the shareholders, the agreement should not go into effect until assented to by the

Lieutenant-Governor in Council. All the requirements were complied with. In truth and in fact the shareholders of this class, neither at the date of the winding-up order nor at any time, held shares for more than the amount in fact paid-up. They got exactly what the order in council said they were to get, and in the form provided, neither more nor less; and they occupied exactly the position they were compelled to occupy by reason of the statute and the action of the Lieutenant-Governor in Council, intended to protect them. They were sellers, not buyers; and the Administration determined and defined the form of their security. Subject to the power of the Legislature to enact what it will, and to the voluntary exercise of the "privilege" referred to, which creates no obligation, the agreement is specific and final to all intents and purposes. Nobody was deceived or misled, nobody can be wronged except by the opposite conclusion. The creditors get exactly what the companies bargained for, within the provisions of the statute, and with the sanction and approval of the Administration. This appeal should be allowed with costs.

RE PORT ARTHUR WAGGON CO. LIMITED—TUDHOPE'S CASE—SHELDEN'S CASE—LENNOX, J., IN CHAMBERS—JUNE 16.

Company — Winding-up — Contributories — Order of Master Reversed by Judge in Court—Motion for Leave to Appeal to Divisional Court—Importance of Question—Conflicting Decisions—Doubt as to Correctness of Order.]—Motion by the liquidator of the company for leave to appeal from the order of MIDDLETON, J., ante 65, allowing the appeals of Tudhope and Shelden from an order of the Master in Ordinary, in the course of the winding-up of the company, placing their names on the list of contributories. LENNOX, J., in a written judgment, said that he was very far from being definitely of opinion that MIDDLETON, J., erred in reversing the decision of the Master in Ordinary in Tudhope's case. The question of Tudhope's liability was, however, clearly debatable. The learned Judge had serious doubt as to the correctness of the order; and the matter was, in his opinion, of sufficient importance, both as affecting the litigants and as a question of company law to justify an appeal. He had not carefully considered the much-argued additional question of conflicting decisions. The liquidator should have leave to appeal in Tudhope's case: if he should succeed upon the appeal, he should have the costs of this motion; if not, there should be no costs to either party.—In Shelden's case, the learned Judge was of opinion that leave to appeal should not

be granted. He knew of no conflicting decisions touching the question which would arise upon the proposed appeal, and there was, in his belief, no good ground to doubt the correctness of the decision. The liquidator's motion in Shelden's case should be dismissed with costs. J. W. Bain, K.C., for the liquidator. W. N. Tilley, K.C., for Tudhope. D. C. Ross, for Shelden.

NASMITH v. NASMITH—LENNOX, J.—JUNE 16.

Husband and Wife—Land Conveyed to Wife—Contributions to Purchase-money Made by Husband—Declaration of Husband's Rights—Half Interest in Property—Wife Declared Trustee for both in Equal Shares—Costs.]—Action by a man against his wife for a declaration of his rights in respect of a certain house and lot, No. 5 Woodrow avenue, in the city of Toronto, the title to which stood in the name of the defendant. The action was tried without a jury at a Toronto sittings. LENNOX, J., in a written judgment, after stating the facts and reviewing the evidence, found the facts in dispute as to the intentions of the parties and their respective contributions to the purchase-price of the house and lot, in favour of the plaintiff, and directed that judgment should be entered declaring that the plaintiff and defendant were owners of the house and lot in equal shares, and that the defendant held the property in trust for the plaintiff and herself in equal shares as tenants in common. There should be no costs of a motion made to dismiss the action. The defendant should pay the plaintiff's costs of the action, and these costs should be fixed at $200, unless the defendant should prefer to pay the plaintiff's taxed costs; in that event the plaintiff's costs should be taxed and paid by the defendant. J. W. McFadden, for the plaintiff. T. N. Phelan, for the defendant.