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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBURARY 17TH, 1919.

SCOTT v. PARADE.

Landlord and Tenant—Action for Rent—Tenant Abandoning Premises—Want of Repair—Right to Rent—Counterclaim—Damages—Absence of Covenant to Repair.

Appeal by the defendant from the judgment of MCLENNAN, Dist. Ct. J., in an action in the First Division Court of the District of Rainy River.

The action was for rent of a store. The tenancy being for 3 years, the tenant (the defendant) gave notice that, on account of the want of repair of the store, he would abandon the premises. He sent the key to the plaintiff, who declined to take possession at the time. Some months later, he took possession, and leased the premises to another tenant, without notice to the defendant. He then brought this action for the rent accrued due after the notice by the defendant and before the landlord took possession.

The defendant counterclaimed for damages by reason of the nonrepair.

The Judge in the Division Court gave judgment for the plaintiff for $100 and costs, and dismissed the counterclaim.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

A. A. Macdonald, for the appellant.

W. C. H. Swinburne, for the plaintiff, respondent.

THE COURT held that the landlord was entitled to the rent sued for. Crozier v. Trevarton (1914), 32 O.L.R. 79, approved. The Court held, also, that the counterclaim could not succeed in the absence of a covenant by the landlord.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1919.

HARRISON v. WRIGHTS LIMITED.

Vendor and Purchaser—Agreement for Sale of Land—Purchaser to Choose Particular Lot—Price not Mentioned in Writing—Oral and Unenforceable Contract—Statute of Frauds—Vendor Willing to Convey Lot Chosen—Sale-deposit—Action to Recover—Finding of Fact of Trial Judge—Appeal.

An appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., at the trial, dismissing an action brought in the County Court of the County of York to recover $171.22 and interest. The $171.22 was claimed as the "amount received by the defendants . . . part purchase-price" of a certain lot.

The learned County Court Judge, in his reasons for judgment, said that the plaintiff contended that, when a certain statement prepared by the defendants was read to him, he understood it to mean that he was to be credited in the defendants' books with the sum of $178.78, and that if he did not choose a lot he could have this balance at the end of the year. The plaintiff, the learned Judge found, knew that the money was to be credited to him on the purchase-money of the lot that he might choose within 12 months, and that he did not understand that he was to be entitled to the money if he did not choose a lot.

But the plaintiff contended that he was entitled to judgment because the money in question was credited in the defendants' books as a deposit on a contract unenforceable at law—if the plaintiff had chosen a lot within a year and had notified the defendants, they probably could not have been compelled to carry it out, because the price at which the lot was to be taken was not given, and the Statute of Frauds would be a complete defence.

The plaintiff relied upon the general proposition of law that, where a deposit is paid upon an oral or unenforceable contract for the purchase of land, and the purchaser declines to carry out the purchase, he is entitled to the return of his deposit.

Carson v. Roberts (1862), 31 Beav. 613, has not been followed in this Province. See Kinzie v. Harper (1908), 15 O.L.R. 582.

The defendants in this case were ready and willing, and always had been, to convey to the plaintiff a lot that he might select. While the price was not mentioned in writing, the parties were agreed as to the price.

If the plaintiff should choose a lot, and the defendants should refuse to convey on the ground that the contract was not binding on them, then, and not till then, the plaintiff would be entitled to his money.

The learned Judge, therefore, dismissed the action with costs.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

A. Cohen, for the appellant.

A. J. Anderson, for the defendants, respondents.

THE COURT did not see its way to disagree with the trial Judge on the question of fact; and upon the question of law preferred to follow Kinzie v. Harper, which should be approved, rather than Carson v. Roberts.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 19TH, 1919.

WHITE v. BELLEPERCHE.

Fraud and Misrepresentation—Agreements to Purchase Land—Action by Purchasers for Rescission—Fraud of Agents—Authority of Agents—Recovery of Moneys Paid and Interest—Costs.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., ante 28.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

T. Mercer Morton, for the appellants.

A. W. Langmuir, for the defendants, respondents.

THE COURT held that fraud on the part of the agents of the defendants was proved. The evidence also shewed that the agent Wanless was acting within the scope of his authority. But, even if he was not, the defendants could not take advantage of their own wrong.

The appeal should be allowed and the contracts rescinded; the plaintiffs should recover the moneys paid by them respectively, with interest; and the plaintiffs' costs (one set of costs on the Supreme Court seale) both of the action and appeal should be paid by the defendants.

Appeal allowed.

HIGH COURT DIVISION.

ROSE, J. FEBRUARY 17TH, 1919.

RE CLEGHORN.

Will—Construction—Trust for Maintenance of Dwelling-house as Home for Widow and Daughters—Payment to Widow of Lump-sum in Lieu of Dower—Election—Sale of House—Residuary Devise—Rights as to Occupancy of House.

Motion by the executors of the will of T. H. Cleghorn, deceased, for an order declaring the construction of the will.

The motion was heard in the Weekly Court, Toronto.

John Jennings, for the executors.

H. J. Scott, K.C., and E. F. Coatsworth, for the widow of the testator.

J. J. Maclennan, for the daughters.

ROSE, J., in a written judgment, said that the testator by his will (made in 1913) left all his property to his executors in trust, and directed them to realise his estate and apply the proceeds in first paying off any mortgage upon his dwelling-house, and then dividing the surplus in equal shares amongst his wife and his three daughters. He expressed a wish that his three daughters, if unmarried or widows, should make their home with the widow in the house, which the executors were to hold in trust and maintain and permit the "wife and daughters to occupy the same so long as they shall all desire to do so." At the time when the will was made, one of the three daughters was married; another married afterwards in the testator's lifetime; the third was still unmarried. By the will, the testator further provided that his wife should have the right to occupy the house with the unmarried or widowed daughters in any event for two years after his death; and if, at the expiry of the two years, the wife and daughters did not desire to live together in the house, then, upon payment by the daughters to the wife of $2,500, the house should be held by the executors for the daughters free from any right of dower of the wife. Directions were then given for occupancy by the daughters in the event of the payment to the wife. Then followed certain specific bequests, and then a direction to divide all the residue of the estate among the daughters, share and share alike.

The testator died on the 1st March, 1917. Since his death, the widow had occupied the house alone, the unmarried daughter

not desiring to live there. The daughters desired the sale of the house, and were unwilling to pay to the widow the $2,500.

The true reading of the will was as follows:—

The house was to be held by the executors and maintained by them, at the cost of the general estate, as a residence for the widow and the unmarried or widowed daughters, for two years, and for so long thereafter as they all desired to live in it together. If, at the end of the two years, they did not desire to live in it together, the trust to maintain it came to an end, and the widow was entitled to have her dower realised out of it, unless the daughters paid her $2,500 in satisfaction of her right of dower; but, if the daughters paid the $2,500, the executors were to hold the house and maintain it, at the expense of the general estate, as a residence for such of the daughters as were unmarried or widows, until the last right of occupancy by a daughter should terminate, and then convey it to the three daughters as tenants in common. At the end of the two years, if the widow and the unmarried or widowed daughters did not desire to live in the house together, so that the trust came to an end, and if the daughters did not pay the $2,500, so that the duty of the executors to maintain the house for the daughters did not arise, the house, or the proceeds after payment of the dower, would go to the daughters, share and share alike, under the residuary clause.

Upon this reading of the will, there was no room for the suggestion that the house was devised to the daughters subject to a charge of $2,500 in favour of the widow: there was no direction to the daughters to pay anything; they were merely given the privilege of paying and so preventing the sale of the house and ensuring the maintenance of it, at the expense of the general estate, as a residence for such of them as were unmarried or widows.

The widow had formally elected to take, in lieu of dower, the benefits conferred upon her by the will; but, if all parties thought it desirable, it should be declared that, the $2,500 not being paid, the widow should be entitled to dower notwithstanding her election.

Costs of all parties out of the estate.

ROSE, J., IN CHAMBERS. FEBRUARY 19TH, 1919.

DOMINION PERMANENT LOAN CO. v. HOLLAND.

Pleading—Statement of Claim—Particulars for Purpose of Pleading—Striking out Parts of Pleading as Improper—Amendment—Leave Reserved to Move for Further Particulars for Purpose of Trial—Further Examination for Discovery.

Appeal by the defendants from an order of the Master in Chambers dismissing motions made by the defendants for particulars of the statement of claim or to strike out certain paragraphs, but granting the defendants leave to plead a simple denial without setting out the facts upon which they rely, and reserving to them leave to move for particulars after they have examined for discovery and to examine a second time for discovery after they have been furnished with any particulars which may be ordered upon the new motions.

R. R. Hall, W. W. Vickers, J. F. Boland, and Christopher C. Robinson, for the several defendants.

J. W. Bain, K.C., for the liquidator of the plaintiff company.

ROSE, J., in a written judgment, said that the action was brought by the liquidator against the personal representatives of four deceased directors, one of whom was also general manager of the company, for repayment of moneys of the company said to have been wrongfully expended by the directors in respect of dividends improperly paid and in respect of expenses of operating at a time when the company was insolvent; and also "damages for misfeasance, fraud, breach of trust, negligence, and misrepresentation," an accounting, and further and other relief.

The learned Judge went over paras. 8, 9, 11, 13, 14, 16, and 17 of the statement of claim, and said that particulars should be given of some of them and that parts of some of them ought to be struck out as improper. He ordered that paras. 9, 11, and 17 should be struck out, with leave to the plaintiff to substitute for them paragraphs omitting the objectionable parts and containing the particulars specified. This amendment rendered unnecessary the leave given by the Master to plead without setting out the facts upon which the defendants rely, which leave, it was argued, was unauthorised by the Rules; and that clause should be struck out of the Master's order. No objection was taken to the clauses of the Master's order by which leave was reserved to the defendants to make a motion for further particulars for the purpose of the trial and to examine for discovery after any particulars ordered

upon such a motion are delivered, and those clauses would not be interfered with by the order now to be made.

Costs of the appeal to be costs to the defendants in any event in the cause.

Mexican Northern Power Co. v. S. Pearson & Son Limited (1914), 5 O.W.N. 648, distinguished. In the present case, it is the liquidator, the plaintiff, who has the information, and not the defendants, the personal representatives of the four deceased directors; and it is only fair that, before they are called upon to plead or to examine for discovery, the defendants should have before them a reasonably precise statement of the case which they will have to meet. The rules of pleading, therefore, ought not to be unduly relaxed for the benefit of the plaintiff.

LENNOX, J. FEBRUARY 21ST, 1919.

RE FARRELL.

Will — Construction — Disposition of Trust Fund — Income — Principal—Death of one Beneficiary—Share Divided between Surviving Beneficiaries—Vested Interests—Immediate Payment.

Application by the National Trust Company Limited, trustees of the estate of Dominick Farrell, deceased, for the advice of the Court in the determination of certain questions arising upon the terms of the will of the deceased.

The 6th paragraph of the will was as follows:—

"(a) In further trust to pay to the trustee of the wife and children of my son Vincent F. Farrell annually during his lifetime by semi-annual payments the sum of $800 towards the support and maintenance of his wife and children; (b) and (c) after the death of the said Vincent F. Farrell to pay the said sum of $800 to his children Eva Farrell Cyril Farrell and Dorothy Farrell in equal shares until they arrive at the age of 21 years; when (d) I direct my trustees to pay over to him or her the principal sum from which the said share of said sum of $800 theretofore paid to him or her was derived: provided that in the event of the death of either of the said children of the said Vincent F. Farrell before the age of 21 years leaving issue him or her surviving the said principal sum or money that would have been paid to the parent had he or she reached the age of 21 years and become entitled to receive the same shall be paid and distributed to and among the said issue of the said deceased parent in equal shares and in the event of the

death of either of the said children of the said Vincent F. Farrell before having received his or her share of the said principal sum or money and without issue him or her surviving the said share shall not go back to my estate but shall be paid in equal shares to his brothers and sisters the children of any deceased brother or sister to take their parent's share: provided that in the event of all of said children of said Vincent F. Farrell dying without issue the principal sum or money from which said annual payment of $800 was derived shall revert to my estate and become part of the residue thereof."

The 23rd paragraph of the will was:—

"It is my will also that the said Vincent F. Farrell shall have no interest in my estate nor shall he in the event of the death of any of his children prior to his decease claim any share or interest of theirs in my estate."

The motion was heard in the Weekly Court, Toronto.

Glyn Osler, for the trustees.

LENNOX, J., in a written judgment, after setting out the facts and discussing the terms of the will, said that he was of opinion:—

(1) That a third part of the trust fund from which the income was derived vested in Eva Farrell when she attained the age of 21, subject, by reason of the express provisions of the will, to being divested in case she subsequently died before payment and without issue, as she did: Gartshore v. Chalie (1804), 10 Ves. 1, 13; Lucas v. Carline (1840), 2 Beav. 367; Sidney v. Vaughan (1721), 2 Bro. P.C. 254; Jackson v. Jackson (1749), 1 Ves. Sr. 217.

(2) That upon the death of Eva Farrell her surviving brother and sister became entitled to this share in equal proportions and that they were now each entitled to payment of half of the total trust fund from which the income was derived, according to the express terms of para. 6.

(3) That payment over of the trust fund was not, by the terms of para. 6, postponed until after the death of Vincent F. Farrell; but, even if this was not the proper interpretation of the testator's intention, the surviving children were entitled to immediate payment: Magrath v. Morehead (1871), L.R. 12 Eq. 491; Rocke v. Rocke (1845), 9 Beav. 66; Curtis v. Lukin (1842), 5 Beav. 147; Josselyn v. Josselyn (1837), 9 Sim. 63; and Saunders v. Vautier (1841), 4 Beav. 115.

Order declaring accordingly.

RE MCCARTY—LENNOX, J.—FEB. 17.

Executor — Passing Accounts in Surrogate Court — Order of Surrogate Court Judge—Appeal—Payments—Taxes—Commission —Costs.]—An appeal by the executors of Sarah McCarty, the widow and beneficiary under the will of Thomas H. McCarty. from an order of the Judge of the Surrogate Court of the County of Oxford, on the passing by the surviving executor of Thomas H. McCarty of his accounts respecting his dealings with the estate. Thomas McCarty died on the 18th June, 1914, and his widow at a later date. The appeal was heard in the Weekly Court, Toronto. LENNOX, J., in a written judgment, after setting out the facts, referring to the contentions made, and considering the authorities, said that the executor whose accounts were in question appeared to have acted zealously, in good faith, and upon the whole prudently and with good results. He was not short in his accounts. The question was, whether he should be personally out of pocket until certain lands in the Western Provinces should be sold, or whether the estate of the testator should bear its own burdens. The postponed payment of the executor's commission was a sufficient set-off against the payment of a sum of $371.83 for taxes which may have been in arrear for a year subsequent to 1916. The appeal should be dismissed; and, as the executors of Sarah McCarty had not been altogether fair in their contentions, although acting in good faith, her estate must pay the costs of the appeal. There should be reserved to all parties affected the right to require the executor to prove the expenditures set out in statement X., upon a subsequent or final passing of accounts taking place. For the present the executor had given sufficient evidence to justify the Surrogate Court in refusing to order him (the executor) to pay over the sum of $1,506.62 on this accounting. Other questions raised may also be dealt with on a subsequent passing of accounts. F. J. Hughes, for the appellants. J. W. Bain, K.C., for the accounting executor, respondent.

COUNTY COURT OF THE COUNTY OF HASTINGS.

DEROCHE, Co. C.J. FEBRUARY 17TH, 1919.

DAWSON v. CALEDONIAN INSURANCE CO. OF EDINBURGH.

Insurance (Fire)—Action on Policy—Answers in Application of Assured as to Ownership and Incumbrances—"Owner"—Person having Interest in Property Insured—Mortgage on Property not Known to Assured—Absence of Prejudice from Non-disclosure—Subsequent Insurance not Disclosed—Absence of Assent or Knowledge on Part of Insurers—Necessity for Notice—Statutory Condition 5—Fraudulent Purpose—Finding of Fact of Trial Judge—Previous Acquittal of Assured on Criminal Charge.

Action upon a policy of fire insurance.

The action was tried without a jury at Belleville.

A. A. Abbott, for the plaintiff.

W. N. Ponton, K.C., and R. D. Ponton, for the defendants.

DEROCHE, Co. C.J., in a written judgment, said that the plaintiff insured against fire in the defendant company, the policy bearing date the 30th August, 1917, for $800; and he also insured in the Northern Assurance Company by policy dated the 7th September, 1917, for $800.

The house insured was burned on the night of the 7th September, 1917.

The defendants denied liability on several grounds, one being that in the application for insurance the plaintiff said he was the sole owner of the property to be insured, and that answer was not true.

Reference to Keefer v. Phœnix Insurance Co. (1901), 31 Can. S.C.R. 144, per Sedgewick, J., at p. 147.

Clearly the plaintiff had an interest at the time of the insurance and loss. He had purchased the land on an agreement of sale and purchase, the price being payable by instalments, and had paid several instalments. The building insured he erected entirely with his own money, and the amount of the insurance was fully covered by his cash interest in the building.

Then, too, the word "owner" as used in the statutory conditions is not synonymous with "holder of an exclusive title." See Drombolus v. Home Insurance Co. (1916), 37 O.L.R. 465, at p. 469; Hopkins v. Provincial Insurance Co. (1868), 18 U.C.C.P. 74.

This defence failed.

Another ground was that the property was mortgaged and that the plaintiff denied this in his application. In the application the question was left unanswered. There was no evidence that the plaintiff knew of any mortgage upon the property. There was a mortgage, but not made by him, covering a large tract of land in which this small piece was included. The defendants were not prejudiced by the non-disclosure: Patterson v. Oxford Farmers Mutual Fire Insurance Co. (1912), 4 O.W.N. 140, 7 D.L.R. 369.

Therefore, the plaintiff was not debarred from recovery by reason of his answers in his application to the questions as to ownership and incumbrances.

A more serious objection was that no notice was given to the defendants of the insurance in the Northern Assurance Company, and that there was no assent by the defendants, or even knowledge on their part, of the insurance subsequently effected. There was such an insurance as required notice to the defendants.

Reference to Gauthier v. Waterloo Mutual Fire Insurance Co. (1881), 6 A.R. 231, at p. 236; Manitoba Assurance Co. v. Whitla (1903), 34 Can. S.C.R. 191, at p. 206; Bruce v. Gore District Mutual Assurance Co. (1869), 20 U.C.C.P. 207, at p. 210.

The plaintiff effected other insurance without the written assent of the defendants, and so at the best the plaintiff would not be entitled to recover in excess of 60 per cent. of the loss, under statutory condition 5, which was endorsed on the defendants' policy.

The last clause of statutory condition 5 reads: "But if for any fraudulent purpose the assured does not disclose such other insurance to the company this policy shall be void."

The learned Judge said that he had in December, 1917, tried the plaintiff for fraud and perjury in connection with this same transaction, and found him "not guilty."

There is a distinction between the evidence of fraud necessary to convict in a criminal prosecution and that necessary to avoid a policy of insurance: Adams v. Glen Falls Insurance Co. (1916), 37 O.L.R. 1, at p. 16.

The learned Judge found that the non-disclosure by the plaintiff to the defendants of the insurance in the Northern was for a fraudulent purpose—that the plaintiff had it in his mind to obtain the amounts of the two insurances on a building worth about $800.

The policy was, therefore, void under statutory condition 5.

Action dismissed with costs.