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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 17TH, 1918.

*ST. GEORGE MANSIONS LIMITED v. HETHERINGTON.

Landlord and Tenant—Lease of Suite in Apartment-house—Finding of Trial Judge that Suite Let Partly Furnished—Appeal—Reversal of Finding—No Implication of Condition or Warranty of Fitness for Human Habitation—Tenant Leaving Premises because Uninhabitable—Liability for Rent.

Appeal by the plaintiff company from the judgment of the Senior Judge of the County Court of the County of York, dismissing the action, which was brought in that Court and tried without a jury.

The appeal was heard by MULOCK, C.J. EX., CLUTE, SUTHERLAND, and KELLY, JJ.

J. A. Macintosh, for the appellant company.

George Wilkie and S. A. A. Campbell, for the defendant, respondent.

CLUTE, J., reading the judgment of the Court, said that the action was brought to recover the sum of $219.34 for rental of apartment number 3 in the St. George Mansions, under a lease dated the 16th September, 1915, between the plaintiff and the defendant, for the period extending from the 1st June, 1916, to the 23rd August, 1916. The lease was dated the 16th September, 1915, and was for twelve months from the 1st October, 1915. The premises were described as "the suite of rooms or apartments

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

designated on plans on file at the offices of the lessor as suite number 3, consisting of eight rooms besides the private hall and bathroom, located on the ground storey, situated at the south-west corner of St. George and Harbord streets in the city of Toronto, and commonly known and described as the St. George Mansions, at a rental of $80 per month." This covered the description, and no chattels were referred to in the lease. The evidence shewed that there was upon the premises, and forming a part thereof, a refrigerator with a waste-pipe leading therefrom—the evidence did not shew whether securely or permanently attached or not. There were also certain window-blinds or curtains, but the premises did not purport to be furnished premises, nor were they in fact.

The defendant occupied the premises from the date of the lease until the 31st May, 1916, and paid the rent therefor. In the affidavit filed with his appearance, the defendant stated that the "apartment was uninhabitable, and for that reason he moved out of said apartment."

The plaintiff company entered and endeavoured to rent the premises, and did so rent them for the period subsequent to the 23rd August, and the rent claimed was for the intervening period between the abandonment by the defendant and the entry of the plaintiff company.

The evidence established that the apartment was infested with cockroaches. There was no doubt that the vermin became almost, if not quite, an intolerable nuisance to the premises, and were so at the time the defendant left. The defendant also complained of noises from different causes, but principally from the occupants of the apartment above. There was some evidence, rather strong, to shew that the final cause of the defendant's leaving the premises was the disturbance suffered from the occupants of the apartment above, but the trial Judge had found, and there was evidence to support his finding, that the defendant left both on account of the nuisance of the cockroaches and of the noises complained of.

The trial Judge found that the premises were partly furnished; but CLUTE, J., was unable to find evidence to support the finding in that regard. It was true that the lessor covenanted to supply the premises with necessary heat and hot and cold water at all reasonable times by means of the pipes, radiators, and appliances now placed therein, and also such janitor service as might be necessary for the proper care of the building, but not so as to include any care of the premises therein demised.

This did not bring the case within the rule applied in Davey v. Christoff (1916), 36 O.L.R. 123, following Smith v. Marrable

(1843), 11 M. & W. 5, and Wilson v. Finch Hatton (1879), 2 Ex. D. 336, 344, applied to the case of a furnished theatre.

In Davey v. Christoff, the Court specially guarded itself against unsettling the well-established rule of law that in the case of a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied.

This case fell within the rule. The facts were not such as to raise an implied warranty that the premises were habitable.

The judgment for the defendant should be set aside, and judgment entered for the plaintiff for $219.34.

The circumstances were exceptional. The defendant had suffered considerable loss from no fault upon his part, except the refusal to occupy the premises longer. The plaintiff company was not entirely free from fault. The condition of the premises must have been known, and more effective means might have been used to make them habitable.

The plaintiff company was entitled to the costs of the appeal, bu no costs of the Court below.

HIGH COURT DIVISION.

CLUTE, J. JANUARY 14TH, 1918.

*OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

Constitutional Law—Act respecting the Roman Catholic Separate Schools of the City of Ottawa, 7 Geo. V. ch. 60 (O.)—Ultra Vires—Decisions on Previous Act, 5 Geo. V. ch. 45—Moneys Received by Commissioners Appointed under that Act—Moneys Paid by Bank to Commissioners—Recovery by Board of Trustees—Exception as to Moneys Properly Paid for Salaries and Control and Management—Deductions—Reference—Counterclaim—Costs.

The three actions consolidated by order of MIDDLETON, J., on the 19th March, 1917 (see Ottawa Separate School Trustees v. Quebec Bank, 39 O.L.R. 118), were tried as one action, by CLUTE, J., at Ottawa.

The defendants were: the Quebec Bank; the Bank of Ottawa; and Thomas D'Arcy McGee, Arthur Charbonneau, and the executors of Dennis Murphy, these three individuals composing

the Commission appointed by the Lieutenant-Governor of Ontario under the Act 5 Geo. V. ch. 45, assented to on the 8th April, 1915.

The actions were brought to recover moneys paid by the banks to the Commission, and separate school moneys paid by the Corporation of the City of Ottawa to the Commission.

N. A. Belcourt, K.C., and E. R. E. Chevrier, for the plaintiffs.
G. F. Henderson, K.C., for the defendants the Quebec Bank.
W. N. Tilley, K.C., and A. W. Greene, for the other defendants.
McGregor Young, K.C., for the Attorney-General for Ontario.

CLUTE, J., in a written judgment, after making a statement of the facts, referred to the Act 5 Geo. V. ch. 45, and to the decisions of the Judicial Committee of the Privy Council in Ottawa Separate School Trustees v. Mackell, [1917] A.C. 62, and Ottawa Separate School Trustees v. Ottawa Corporation, [1917] A.C. 76. He was of opinion, having regard to those decisions, that, aside from the Act passed in 1917, 7 Geo. V. ch. 60, no valid defence had been offered to the plaintiffs' claim.

The learned Judge then considered the effect of the Act of 1917 (ch. 60). In his opinion, that Act was also ultra vires.

He then referred to the other Act of 1917—ch. 59, which had been declared valid by the judgment of the First Divisional Court of the Appellate Division: Re Ottawa Separate Schools (1917), ante 261. He was of opinion that that Act had no application to the question before him.

Referring again to ch. 60, the learned Judge said that he could regard it only as an ineffectual means to get rid of the effect of the declaration of the Privy Council that 5 Geo. V. ch. 45 was ultra vires.

However, assuming that the expenditures made by the Commission were ultra vires, and that chs. 59 and 60 had not the effect of making the plaintiffs liable for the acts of the Commission, in the way indicated in ch. 60, yet, inasmuch as a large portion of the expenditure made in the conduct of the schools found its proper place and application in carrying on the schools, the defendants were entitled to have it declared that some part of the money expended, being so "at home," need not be paid to the plaintiffs. It was only natural justice that the money expended in the payment of the teachers formerly employed and continued by the plaintiffs and of the expenses of management and control, having been actually paid out of the fund properly applicable to that use, ought not to be recovered back.

Judgment for the plaintiffs against the defendants McGee and

Charbonneau and the executors of Murphy, who died after these actions were commenced, for the two sums of $97,331.34 and $84,955.50, subject to a credit of $37,627.02 to be given when the fund is transferred to the plaintiffs and to deductions for salaries and other expenses above mentioned.

Judgment also for the plaintiffs against the defendants the Quebec Bank for $97,333,34, less the sum of $37,627.02, when paid and transferred to the plaintiffs, subject to the same deductions for salaries etc.

If the parties cannot agree upon the amount to be deducted, there should be a reference to the Local Master at Ottawa, and further directions and costs of the reference should be reserved.

Counterclaim dismissed with costs.

The plaintiffs should have the costs of the actions consolidated and of the consolidated action against the defendants other than the Bank of Ottawa.

No order as to costs between the plaintiffs and the Bank of Ottawa.

MIDDLETON, J. JANUARY 14TH, 1918.

*CLARKSON v. McLEAN.

Executors and Administrators—Assets of Estate of Intestate—Bank Shares Subject to Double Liability Claim—Distribution of Shares among Next of Kin—Personal Liability of Administrators—Liability of Assets—Bank Act, secs. 53, 130—Devastavit—Limitations Act—Bar to Claim upon Devastavit, but not to Claim upon Contract—Time when Calls Made—Persons to whom Shares Transferred—Transfers not Recorded—Sec. 43 of Bank Act—Equitable Obligation to Pay—Liability not only upon Shares Transferred but to Extent of Assets Received—Costs.

Action by the liquidator of the Farmers Bank of Canada against the administrators of estate of one Mountain, deceased, to recover the amount of the double liability upon 14 shares of the stock of the bank held by the intestate during his lifetime, and which passed to the administrators; and also against the persons beneficially interested in the estate, the claim against them being based upon the fact that upon the winding-up of the estate the shares were distributed among the next of kin in specie, and also upon the fact that other assets, exceeding the amount of the liability upon the shares, were handed over to the next of kin.

The action was tried without a jury at Toronto.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiff.

G. M. Clark, for the defendants the administrators.

J. T. Richardson, for the other defendants.

MIDDLETON, J., in a written judgment, said that the estate of the deceased was worth some $10,000 over and above all liabilities, and there was no reason why the double liability should not be realised upon for the benefit of the creditors of the bank.

The administrators were not personally liable upon the shares, but the assets of the estate in their hands were liable: Bank Act, 3 & 4 Geo. V. ch. 9, sec. 53 (D.)

When the administrators parted with the assets without providing for this liability, they were guilty of a devastavit, and so rendered themselves personally liable.

They had a simple course open to them, for they might have made proper transfers to those beneficially entitled, and then have retained the assets for 60 days, when, if the bank had not suspended, they would have been safe: sec. 130.

But the Limitations Act afforded a defence to the claim of devastavit. It constituted a new cause of action; and, as this action was not brought until 1917, more than 6 years had elapsed.

The cause of action, so far as it was based upon a claim for the double liability upon the shares, was not barred, for it was based upon contract, and the time did not begin to run until there was a call; and so the liability of the administrators as administrators was not barred, for that was the liability of the deceased and of his estate.

This distinction is recognised in Thorne v. Kerr (1855), 2 K. & J. 54; In re Baker (1881), 20 Ch.D. 230, 235; In re Gale (1883), 22 Ch.D. 820, 826; In re Marsden (1884), 26 Ch.D. 783, 789; In re Hyatt (1888), 38 Ch.D. 609, 616; Lacons v. Warmoll, [1907] 2 K.B. 350.

As against the persons beneficially entitled, the liquidator can recover upon either of the grounds alleged, and the Limitations Act affords no defence. As against them, the cause of action is upon the contract, and the liability upon the shares first accrued when the call was made in 1912. They were, at the time of the liquidation, the beneficial owners of the shares, and had accepted the transfer to them, although it was not recorded upon the books of the bank. Section 63 of the Bank Act requires registration to make a transfer valid; but the transferees are in Equity those who should pay. The reasoning in Hardoon v. Belilios, [1901] A.C. 118, applies.

This would impose upon each beneficiary a liability only for the shares transferred to him. There was, however, a wider liability. Each of the next of kin was liable to refund and pay to the creditor the amount due, to the extent of the assets received by him; but this remedy should not be invoked until it is ascertained whether those who ought to pay can be made to pay as transferees of the shares. Probably this could be worked out among those liable without further aid from the Court; if not, leave to apply should be reserved.

Judgment for the plaintiff with appropriate declarations, and with costs, but not against the administrators personally nor against the defendant McLean.

MEREDITH, C.J.C.P. JANUARY 16TH, 1918.

RE ROSS.

Will—Direction to Sell Land—Power of Executors to Effect Sale—Trustee Act, sec. 44—Sale to one of three Executors—Consent of Adults Interested—Payment into Court of Share of Infant.

Motion by the executors of the will of Lucas Ross, deceased, for an order determining questions arising on the terms of the will.

The motion was heard in the Weekly Court, Toronto.

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

The motion was not opposed.

MEREDITH, C.J.C.P., in a written judgment, said that counsel for the executors stated, in making this motion, that all that the parties to it now desired was the opinion of the Court upon the question, raised by a proposed purchaser of the trust property, whether the executors of the will had power to effect the sale of that property, which the testator in his will directed.

That question, as was then stated, was answered, in a manner which must be convincing to all concerned, by sec. 44 of the Trustee Act, R.S.O. 1914 ch. 121, in the affirmative.

But the learned Chief Justice retained the papers with a view to a fuller understanding of the facts of the case, as well as the reasons for making the application, which at the beginning was not confined to that single question.

A perusal of the papers disclosed the fact that the proposed

sale was to one of the three executors to whom probate was granted: a thing which, it need hardly be said, ordinarily could not be done; but if, as it was said, all persons beneficially entitled were sui juris, with the exception of one who, upon attaining age, would be entitled to $300, and as that sum could be paid into Court, with the concurrence of all concerned, they having a full knowledge of the facts, there should be no great difficulty in carrying out the sale: a sale which, it was said, they all desired: a sale to the testator's widow, the mother of all who were beneficially concerned, if the testator's father was not now living.

MEREDITH, C.J.C.P. JANUARY 16TH, 1918.

*RE POULIN AND VILLAGE OF L'ORIGNAL.

Municipal Corporations—Money By-law—Municipal Act, secs. 2 (o), 263 (5)—Necessary Publication of By-law—Non-compliance with Direction of Statute—Result not Affected—Saving Enactment, sec. 150—Object of By-law—Improvement of Highways and Erection of Bridge—Submission to Electors—Two Sums to be Raised upon one By-law.

Application by B. R. Poulin for an order quashing a money by-law of the village of L'Orignal, on the grounds: (1) of want of publication; and (2) of want of power in the council of the village to enact such a by-law.

The motion was heard in the Weekly Court, Toronto.
J. A. McEvoy, for the applicant.
The village corporation was not represented.

MEREDITH, C.J.C.P., in a written judgment, said that the Municipal Act, R.S.O. 1914 ch. 192, secs. 263 (5) and 2 (o), required publication of the by-law in a newspaper of the municipality: but that was not done: the publication was in a newspaper of a neighbouring town: and the first question was, whether that non-compliance with this provision of the Act made the by-law invalid.

Section 150 of the Act provides that it shall not, if "the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance . . . affected the result of the election."

The principles applicable are: that such a by-law shall not be finally enacted without the assent of the qualified voters of the municipality first given at a poll taken for the purpose of obtaining such assent. It was not any principle of the Act that was disregarded: it was a disregard only of one of the requirements of the Act regarding the mode in which such principle should be carried into effect: and there was no evidence that the non-compliance, strictly, with the prescribed manner of publication, affected the poll. All that was deposed to, on this branch of the case, was that the applicant, from information received by his solicitor from the village clerk, had reason to believe, and believed, that the number of qualified voters was 226, while only 132 voted. But the applicant also deposed to his belief that ratepayers abstained from voting, for another reason stated by him: in a village, such as L'Orignal, it is hardly possible that such a poll could have been taken without knowledge of it by all the voters who would have had notice of it through a publication in the local weekly newspaper: and there was no evidence of any want of such knowledge by any one concerned. Effect could not be given to the attack upon the by-law on this ground.

As to the other ground: the by-law was one for raising money for the improvement of highways, including the erection of a bridge, part of a highway, all in the village: $4,000 for the roads and $2,000 for the bridge; and the applicant's contention was, that the two sums could not lawfully be raised upon the one by-law; that some of the voters might desire to vote for raising one sum and against raising the other, and that there was no power to deprive them of the right to do so. That contention, however, could not succeed, for the by-law was not, nor was the scheme, that of the applicant, or of the voters; it was the scheme and the by-law of the council, which none but the council could alter, though a scheme and a by-law which the voters might defeat. The council might, in their discretion, thus improve the roads and re-erect the bridge—which was part of a highway—or else do neither. There was no power in any one to compel them to divide their scheme. If the electors wished that done against the will of the council, the one way to bring it about was to elect a council that would comply with their wishes—when they had an opportunity. There was, however, no evidence, of any kind, that a majority of the electors had any such desire; and it might well be that the scheme should be carried out in its entirety or not at all: but that was now a question for the council only.

Taprell v. City of Calgary (1913), 10 D.L.R. 656, commented on and distinguished.

The fact that the legislation there in question, as well as that

in question here, required that the by-law should recite, among other things, "the object for which" the debt was to be created, did not aid the applicant: the one object might be the building of several bridges, as well as one bridge; and, if that were not so, the singular number includes the plural in the legislation of this Province: Interpretation Act, R.S.O. 1914 ch. 1, sec. 28 (*i*).

The application should be refused; but, as no cause was shewn, and, if it had been, non-compliance with the requirements of legislative provisions should be discouraged, it should be refused without costs.

GENTLES v. FAWCETT—MEREDITH, C.J.C.P., IN CHAMBERS—JAN. 18.

Pleading—Statement of Defence—Motion to Strike out Portions of—Settlement of Action—Apology—Adjournment of Motion until Trial of Action.]—Motion by the plaintiff to strike out certain paragraphs of the statement of defence. MEREDITH, C.J.C.P., in a written judgment, said that, upon the hearing of this motion, it appeared to him that the defendant had no defence to this action; that the letter written by him was but a stupid, meddlesome interference by him, under an assumed name, with the investigation which was being held when the letter was written. The learned Chief Justice at the hearing suggested that the defendant make a complete retractation of it and ample apology for having written it; and that, upon that being done, and the plaintiff's costs as between solicitor and client paid by the defendant, the defendant be released from all further claims upon him in the matter; and that suggestion was at once accepted by the defendant, and this application was retained until the plaintiff could be communicated with and his assent or dissent had. The learned Chief Justice had not been informed whether a settlement had yet been effected by the parties upon that basis or otherwise; but it appeared that the defendant had made a public retractation and apology; and, as the case was said to be set down for trial at a sittings of the Court beginning on the 21st January instant, the motion should be postponed until that sittings of the Court, to be heard by the presiding Judge thereat, if in the meantime a settlement between the parties of all matters in question in the action had not been effected. Such a settlement seemed very probable and imminent; and the postponement would enable the parties to effect it with no undue haste; whilst, if they failed to agree, they were free from doubt regarding the position of this motion. Motion adjourned accordingly. T. R. Ferguson, K.C., for the plaintiff. G. S. Hodgson, for the defendant.