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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. OCTOBER 19TH, 1920.

FULLER v. STORMS.

Contract—Sale of Farm with Implements and Stock—Allegation of Purchaser that all Chattels not Delivered—Items of Claim—Success as to one only—Counterclaim—Mortgage—Waste—Injunction—Removal of Timber—Damages—Account—Reference—Costs—Appeal.

Appeal by the plaintiff from the judgment of KELLY, J., 18 O.W.N. 235.

The appeal was heard by MULOCK, C.J. Ex., MAGEE, J.A., RIDDELL and MASTEN, JJ.

E. G. Porter, K.C., for the appellant.

Gideon Grant and M. R. Allison, for the defendant, respondent.

THE COURT allowed the appeal of the plaintiff in respect of the injunction against waste, and dismissed the appeal in respect of all other matters; the respondent to be paid his costs of the appeal by the appellant.

SECOND DIVISIONAL COURT. OCTOBER 20TH, 1920.

TORONTO HOCKEY CLUB LIMITED v. ARENA GARDENS LIMITED.

(TWO ACTIONS.)

Contract—Agreements between Associations for Commercialised Games—Enforcement—Reformation—Evidence—Corroboration—Damages—Services of Players—Loss of—Delivery up of Contracts—Injunction—Reference—Costs—Findings of Trial Judge—Appeal.

Appeals by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., 17 O.W.N. 370.

The appeals were heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

A. C. McMaster, for the Arena Gardens Limited, appellants.

R. T. Harding, for the individual defendants, appellants.

W. R. Smyth, K.C., for the plaintiffs, respondents.

The judgment of the Court was read by RIDDELL, J., who said that it was obvious that there was in reality no question of law involved, when the facts were understood; and with the findings of fact at the trial the Court could not interfere unless convinced that they were wrong.

With the estimate of the credibility of the witnesses formed by the Chief Justice, who saw them, and with the assistance of the correspondence, there did not seem to be any ground for interfering with the findings at the trial.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 22ND, 1920.

*TOURANGEAU v. TOWNSHIP OF SANDWICH WEST.

Arbitration and Award—Liability of Township Corporation for Injury to Sheep by Dogs—Dog Tax and Sheep Protection Act, 1918, 8 Geo. V. ch. 46, sec. 14 (1), (2)—Investigation by Sheep-valuers—Finding as to Amount of Damages—Appeal by Owner to Minister of Agriculture—Appointment of Investigator—Finding of Investigator—Increase in Amount of Damages—"Arbitrator"—"Award"—Misconduct of Arbitrator—Hearing only one Party to Dispute—Effect as to Award—Ground for Setting aside—Award Good on its Face—Action on Award.

Appeal by the plaintiff from the judgment of the County Court of the County of Essex.

The plaintiff claimed damages from the defendant township corporation because of the killing and injuring of certain of his sheep by dogs the ownership of which was unknown. The town-

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

ship council, as required by sec. 14 (1) of the Dog Tax and Sheep Protection Act, 1918, appointed sheep-valuers, who made the investigation called for by the statute, and found damages amounting to $225. The plaintiff, considering that sum inadequate, appealed to the Minister of Agriculture, who, under sec. 14 (2), appointed one Brien as arbitrator to make a further investigation. Brien, in the absence of and without notice to the defendant corporation, made an investigation, in the course of which he examined the plaintiff as to the value of the sheep, and fixed the plaintiff's damages at $331. The council of the defendant corporation not having paid the amount awarded by Brien, the plaintiff brought this action in the County Court to recover the same. The defendant corporation admitted liability to the extent of $225, and paid that amount into Court. The County Court Judge tried the action and found that the award was bad and that the plaintiff was entitled to recover only the $225. The plaintiff refusing to accept judgment for that sum without costs, the action was dismissed with costs, "without prejudice to the right of the plaintiff to have a new investigation in respect of damages."

The appeal was from that judgment.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, AND MASTEN, JJ.

F. D. Davis, for the appellant.

J. H. Rodd, for the defendant corporation, respondent.

MULOCK, C.J.Ex., read a judgment in which, after setting out the facts as above, he said that, in his opinion, the County Court Judge was right in his view that the award of Brien was bad. Sub-section 2 of sec. 14 of the Act requires the arbitrator to conduct an investigation. It is a principle of general application in the administration of justice that both parties to a judicial inquiry shall have an opportunity of being heard; and, though the words of the sub-section do not so provide, it must be assumed that the Legislature intended that that principle should apply to the conduct of the investigation.

Brien was not acting as an expert to determine the matters in difference according to his own judgment, unaided by evidence, but was to investigate, that is, ascertain the extent of the damage sustained by the plaintiff. This involved his ascertaining the facts, not from one of the parties to the difference only, but from both parties, and then determining the extent of the damage in accordance with the facts thus learned. This duty constituted him an arbitrator.

When not expressly absolved from so doing, an arbitrator is bound to observe in his proceedings the ordinary rules which are

laid down for the administration of justice. No opportunity having been afforded to the defendant corporation to be heard, the investigation was not conducted in harmony with the general principle that both sides should be heard; and, on a proper application, the award might be set aside: Cooper v. Wandsworth Board of Works (1863), 14 C.B.N.S. 180, and other cases.

But, although the arbitrator thus erred in the conduct of the investigation, his misconduct could not be pleaded in bar to the plaintiff's action upon the award: Bache v. Billingham, [1894] 1 Q.B. 107, 112, and other cases.

Though liable to be set aside, the award was not void, but good on its face.

The County Court Judge erred in treating the misconduct of the arbitrator as a bar to the plaintiff's claim.

The appeal should be allowed, and judgment should be entered for the plaintiff for $331 with costs of the action and of the appeal.

SUTHERLAND, J., agreed with MULOCK, C.J.Ex.

RIDDELL and MASTEN, JJ., agreed in the result, for reasons stated by each in writing.

Appeal allowed.

HIGH COURT DIVISION.

MEREDITH, C.J.C.P., IN CHAMBERS. OCTOBER 1ST, 1920.

*REX v. LANGLOIS.

*REX v. JOSEPHSON.

Ontario Temperance Act—Seizure of Intoxicating Liquors—Sec. 70—Forfeiture—Evidence—Orders of Magistrate—Motions to Quash.

Motions by the defendants to quash orders made by the Police Magistrate for the City of Windsor declaring the forfeiture of certain cases of bottles of intoxicating liquors, the property of the defendants, pursuant to sec. 70 of the Ontario Temperance Act.

J. M. Bullen, for the defendants.
Edward Bayly, K.C., for the magistrate.

MEREDITH, C.J.C.P., at the conclusion of the argument, said that a magistrate has no power to determine how much or how little intoxicating liquor any one may have. Every one may have as much or as little as he or she sees fit if it has been lawfully obtained and is had in a lawful place for a lawful purpose.

Intoxicating liquor in transit, and under some other circumstances, may be seized by an officer if he believes that it is to be sold or kept for sale in contravention of the provisions of the Ontario Temperance Act; and, if a magistrate finds, upon a proper investigation, that it was intended that the liquor seized should be so sold or kept for sale, he may order that it be forfeited to His Majesty.

The quantity of the liquor may be circumstantial evidence of the purpose for which it is obtained; evidence of more or less weight according to all the other circumstances and evidence in the case.

If there is evidence, circumstantial or direct or both, upon which reasonable men could find that there is no reasonable doubt that the liquor was to be sold or kept for sale in contravention of the provisions of the Act, the order of the magistrate cannot be quashed in this Court.

In these cases there was such evidence, and therefore the applications to quash the forfeiture orders should be refused.

ORDE, J. OCTOBER 21ST, 1920.

RE COOPER AND KNOWLER.

Dower—Conveyance of Land in Fee Simple—Habendum to Grantee for such Uses as he may Appoint and in Default of Appointment to Grantee his Heirs and Assigns—Rule in Shelley's Case—Legal Estate in Grantee—Wife's Right to Dower—Vendor and Purchaser—Right of Purchaser to Require Bar of Dower in Conveyance from Grantee—Attempt to Correct Conveyance—Absence of Wife—Authority of Previous Decision.

ORDE, J., in a written memorandum, said that his attention has been drawn to the fact that his judgment in this matter, noted ante 27, was in conflict with that of Middleton, J., in Re Osborne and Campbell (1918), 15 O.W.N. 48. The latter case was not cited on the argument before the learned Judge; and, upon examining it, he could see no distinction between it and this case. The limitations were the same, and the only difference in

the position of the parties was that in the Osborne case the grantee to uses had died leaving a will which was held to be a due exercise of the power of appointment, while in the present case the grantee to uses was still living; this difference in no way affected the principle involved.

The learned Judge's judgment in this case was not intended to be a decision upon the question as to the wife's right to dower; but, having in view the doubts expressed in Armour on Real Property, 2nd ed., p. 114, the learned Judge did not think it proper, upon a vendor and purchaser application, to force an unwilling purchaser to accept the title with the wife unrepresented on the motion.

Had the Osborne case been referred to on the argument, the learned Judge would have considered himself bound by it. His decision ought not to be considered as in conflict with that in the Osborne case.

ORDE, J. OCTOBER 22ND, 1920

*RE TORONTO R.W. CO. AND CITY OF TORONTO.

Contract — Construction—Originating Motion — Rule 604 — Agreement between City Corporation and Purchasers of Street Railway —Payments for Mileage and Percentage upon Gross Receipts— Priority as between City Corporation and Bondholders—Application by Street Railway Company for Determination—No "Right" of Applicant Involved.

Motion by the Toronto Railway Company, upon originating notice under Rule 604, for an order determining the true interpretation of a certain contract.

E. D. Armour, K.C., and William Laidlaw, K.C., for the Toronto Railway Company.

G. R. Geary, K.C., for the Corporation of the City of Toronto.

R. S. Cassels, K.C., for the trustees for the bondholders.

R. B. Henderson, for a bondholder.

ORDE, J., in a written judgment, said that the company asked for an interpretation of those provisions of the contract between the city corporation and the original purchasers of the railway (whose rights and obligations were now vested in and borne by the Toronto Railway Company) which related to the payments

for mileage and for percentage upon gross receipts, in so far as they affected the priority of the city corporation as against the bondholders. There was no present issue between the city corporation and the bondholders, and there was no question as to the railway company's obligation to discharge its liabilities to both the city corporation and the bondholders. Notwithstanding that the question of priority had not been raised either by the city corporation or by the bondholders, the railway company claimed to be entitled to submit the question of priority to the Court.

Rule 604 provides that, "when the rights of any person depend upon the construction of any deed, will, or other instrument, he may apply by originating motion, upon notice to all persons concerned, to have his rights declared and determined."

The notice of motion set out several questions which the Court was asked to decide, but each involved the question of priority as between the city corporation and the bondholders. Counsel for the city corporation and for the bondholders disclaimed any desire at the present moment to have the question decided; and, so far as the learned Judge could see, they were the only persons interested in its determination. The railway company, as the debtor, had to some extent an interest in that question; but Rule 604 was not intended to apply to such a case. What the Rule provides for is the submission of a question of construction in order that the rights of the person making the application, not those of some other person, may be declared and determined. The learned Judge was at a loss to see what "rights" of the railway company were in any way affected by the question of priority. If there were any such, they could arise only in some remote and incidental way. The questions submitted to the Court involved, in the most direct and vital manner, the rights of the city corporation and of the bondholders as between themselves, which they expressed no desire to have determined. If any rights of the railway company were involved, they must be merely incidental to the larger question. Rule 604 was not intended for any such purpose as that proposed here.

There was a good deal of argument as to the Court's power to make a declaratory order upon a motion of this sort; but the decision must be rested upon the simple ground that no right of the railway company was invaded or threatened or required some immediate remedy or relief which justified any such motion as this. The result would have been the same if the matter had been the subject of an action.

Motion dismissed with costs.

ORDE, J. OCTOBER 22ND, 1920.

*RE TREMBLAY.

Will—Construction—Gift of whole Estate to Parents of Testator—Guardianship of Testator's Infant Children also Given to Parents—Aggregate Gift—Election—Acceptance cum Onere or Rejection—Maintenance and Education of Infants.

Motion by the Capital Trust Corporation, administrators with the will annexed of the estate of Albert Temblay, deceased, for an order determining questions as to the meaning and effect of the will of the deceased.

The motion was heard in the Weekly Court, Ottawa.

J. P. Labelle, for the applicants.

A. C. T. Lewis, for the Official Guardian.

No one appeared for Vanance Tremblay and Emma Tremblay.

ORDE, J., in a written judgment, said that the will was written in French and correctly translated in the letters of administration as follows:—

"I the undersigned being about to die desire and order that all will made previous to this day be annulled by the present will and I bequeath all the property I am possessed of or all interests that may come be bequeathed to my father Vanance Tremblay and my mother Emma Tremblay my children and all that I possess or is due to me and I make this will being sound of mind and before the witnesses who have signed their names."

The testator died on the 23rd May, 1920, leaving three infant children (one of whom had since died) and his father and mother.

Upon the true construction of the will, the children were not the objects of the gift but the subjects of it—the testator gave his whole estate together with his children to his parents. There was no reason for inserting the word "for" or the word "and" before the words "my children."

The gift is in favour of Vanance Tremblay and Emma Tremblay alone, and the infant children are not direct objects of the testator's bounty.

As a general rule, a guardian is under no obligation to expend his own money upon the maintenance of his ward: Halsbury's Laws of England, vol. 1, p. 130. But, in ordinary circumstances, the acceptance of the office of guardian would, either by arrangement or otherwise, involve some obligation to maintain and educate the infants. It was not conceivable that the testator could have intended that his parents should accept the gift of

his whole estate and at the same time cut his children adrift. The gift of his children to their grandparents was in effect an appointment of the grandparents as guardians, carrying with it the custody and control of the children. Under the equitable doctrine of election, when a legatee takes, under the same will, a beneficial legacy and an onerous legacy, and the two are intended to form an aggregate gift, he must accept or reject both: Halsbury, vol. 13, p. 117, note (*m*); Talbot v. Radnor (1834), 3 My. & K. 252; In re Hotchkys (1886), 32 Ch.D. 408. It was equitable and just that that principle should be applied to this case.

It should be declared, therefore, that the beneficiaries cannot accept the gift of the estate without at the same time accepting the guardianship and custody of the children with the accompanying obligation of maintaining and educating them; that Vanance and Emma are entitled to the whole estate of the testator, but subject to the obligation of maintaining and educating the two surviving infant children of the testator during infancy.

Order accordingly; costs of the application, including those of the Official Guardian, to be paid out of the estate, those of the administrators as between solicitor and client.

ATLEY v. ATLEY—KELLY, J.—OCT. 19.

Judgment—Motion for Judgment in Default of Defence—Statement of Defence Delivered out of Time—Regularisation on Terms—Alimony—Costs.]—Motion by the plaintiff for judgment on the statement of claim in default of defence, in an action for alimony. The motion was heard in the Weekly Court, Toronto. KELLY, J., in a written judgment, said that the defendant failed to deliver a statement of defence, and on a motion for judgment an order was made on the 23rd September, 1920, by Rose, J., extending the time for delivery of defence until the 28th September, and ordering the defendant to pay the costs of the motion forthwith after taxation. That order not having been complied with, and the defendant being thus again in default, the plaintiff, on the 29th September, launched this present motion for judgment. An affidavit filed on behalf of the defendant set forth that a statement of defence was filed and served on the 29th September—after the extended time for delivery of defence had expired. On the return of the motion the plaintiff's counsel asked that the defence be struck out. The defendant had not satisfactorily accounted for this second default; but, to enable the action to be disposed of on the merits, this belated statement of defence should be allowed to stand, provided that the defendant, not later than the day after

the taxation of the costs of this motion (which he should be ordered to pay), pay to the plaintiff the said costs and the costs of the motion before Rose, J. In default of such payment, the defence should be struck out, and there should be judgment in the plaintiff's favour as asked in the statement of claim, with costs, and with a reference to the Master in Ordinary to fix the amount of alimony. G. Cooper, for the plaintiff. F. G. McKenzie, for the defendant.

RE FORESTELL AND ROBISON—HODGINS, J.A.—OCT. 22.

Vendor and Purchaser—Agreement for Sale of Land—Title—Deeds—Registration—Priority—Registry Act, sec. 52—Possession—Evidence.]—Motion by William James Forestell, under the Vendors and Purchasers Act, for an order declaring that an objection taken by Herod Robison, the purchaser, to the vendor's title to land in the town of Campbellford, was not a valid objection. The motion was heard in the Weekly Court, Toronto. HODGINS, J.A., said that he did not think any order should be made on the material filed. Herbert Shore, who made an affidavit on behalf of the vendor, was the devisee of his father, Henry Shore, whose interest arose under a later deed said to have gained priority by earlier registration. Herbert was also executor of his mother, through whom the vendor claimed. He did not state how possession had gone, whether in his mother and himself as executor, or in the devisee Topper, who appeared to have conveyed the lot in question to Ashton in 1914. The father died in 1909 and the mother in 1903, and possession may have cleared up any question arising under the two deeds in question, which were both registered on the same day and at the same hour. Priority must depend wholly on the registration number attached by the Registrar, which, under sec. 52 of the Registry Act, R.S.O. 1914 ch. 124, is to be affixed after registration. A deed from Herbert would clear up any difficulty; and there was no reason why he should not give one. There should be no order at present, and no costs. Daniel O'Connell, for the vendor. J. A. Humphries, for the purchaser.