The

Ontario Weekly Notes

Vol. II. TORONTO, AUGUST 2, 1911. No. 45.

HIGH COURT OF JUSTICE.

TEETZEL, J. JULY 21ST, 1911.

PARSONS v. CITY OF LONDON.

*Municipal Corporations—Sale of Municipal Property—*1 *Geo. V. ch.* 95, *sec.* 10*—Trustee for Ratepayers—Action by Ratepayer to Restrain Sale—Undervalue—Primâ Facie Case—Injunction.*

Motion by the plaintiff to continue an injunction restraining the defendants from completing a transaction for the sale and purchase of municipal property in the city of London.

N. W. Rowell, K.C., and C. G. Jarvis, for the plaintiff.

T. G. Meredith, K.C., for the defendants the Corporation of the City of London.

J. B. McKillop, for the defendants the Royal Bank of Canada.

TEETZEL, J.:—By Geo. V. ch. 95, sec. 10, the Corporation of the City of London may sell, at such price and on such terms as the council of the corporation may deem expedient, the city hall and the police station in the said city of London, or either of them, and the lands upon which the same are situate, etc.

In carrying out any such sale under the Act, the corporation being a trustee for all the ratepayers and being amenable to the like jurisdiction of the Courts as is exercised over trustees generally (Phillips v. Corporation of Belleville, 9 O.L.R. 732, and MacIlreith v. Hart, 39 S.C.R. 657), and the plaintiff being a ratepayer and therefore a cestui que trust, the plaintiff is entitled to maintain an action, in his own name, on behalf of himself and the other ratepayers, to restrain the corporation from carrying out a sale which may have been effected under circumstances amounting to a breach of trust.

Whether, upon a proper construction of the above statute, the corporation is entitled to sell the whole block, 110 feet square,

or only so much thereof as upon which the city hall is literally situate, there being no specific reference to that portion occupied by the market-place, or whether the corporation is authorised to sell the land free from any right of the public to a passageway over the said land from Richmond street to the market, and whether, if the corporation is not entitled to do either, the plaintiff has any status to maintain this action, are questions upon which I do not need to express an opinion, because I think, upon the second ground of this motion, the plaintiff has made out a case entitling him to have the injunction continued to the trial.

As to the duty of a municipal corporation in selling land belonging to the corporation, I adopt the language of the learned Chancellor in Phillips v. Corporation of Belleville, at p. 746: "It is not advisable in dealing with a corporate (trust) property to dispose of it in a private way, but some steps should as a rule be taken to insure competition, whether by inviting tenders or exposing to auction (with, it may be, a reserve bid). This method is recognised by legislation in recognising the municipal power to dispose of 'wet lands.' When it is deemed expedient to sell, part with, or dispose of the same, it is to be by public auction in like manner as they may by law sell or dispose of other property." See sec. 556 of the Consolidated Municipal Act, 1903.

In Downes v. Grazebrook, 3 Mer. 200, at p. 208, in speaking of the duties of trustees for the sale of land, Lord Eldon says: "A trustee for sale is bound to bring the estate to the hammer under every possible advantage to a cestui que trust." And in Mathie v. Edwards, 2 Coll. 465, the Vice-Chancellor, in speaking of the duties of a mortgagee selling under power, says: "I apprehend that a mortgagee having a power of sale cannot, as between him and the mortgagor, exercise it in a manner merely arbitrary, but is, as between them, bound to exercise some discretion, not to throw away property, but to act in a prudent and businesslike manner, with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be, under the circumstances, obtainable."

In Lewin on Trusts, 11th ed., p. 494, it is stated that "trustees, if they or those who act by their authority fail in reasonable diligence in inviting competition or in the management of the sale, as if they contract under circumstances of haste and improvidence . . . will be personally responsible for the loss to the suffering party; and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel specific performance of the agreement."

To my mind, there is every reason why the strictness with which the conduct of private trustees is watched by the Courts should apply in all its force to the action of municipal corporations in their dealings as trustees.

I do not think that Robertson v. City of Toronto, 1 O.W.N. 259 cited by the defendants, is conclusive upon this application, because in that case the learned Chief Justice was of opinion that the sale was not at an undervalue, but that it was a fair sale "just such a sale as a private owner would have made in the circumstances of the case."

Now, upon the material filed in this case, it does not appear that anything whatever was done by the corporation in the direction of inviting competition either by calling for tenders or by putting up at public auction or otherwise. They seem to have accepted the first offer made for the property.

If the material filed by the plaintiff is to be believed, the property is worth much more than the sum of $100,000, for which the corporation agreed to sell it to the Royal Bank of Canada.

It is difficult for me to understand why a property having a frontage of 110 feet on the principal thoroughfare of the city, and a depth of 110 feet adjoining at the rear the market-place, and being in the heart of a large and prosperous city, should not attract active bidding, if due diligence and business-like methods were applied in inviting competition.

It may be that at the trial the defendants will be able to establish by overwhelming evidence that the price agreed to be accepted is the full value of the property, and all that could, under any reasonable circumstances, be obtained for it.

In the meantime, I am of opinion that the plaintiff has established a primâ facie case of an improvident and unbusinesslike sale, and therefore a primâ facie case of breach of trust by the corporation, from which the plaintiff and other ratepayers would suffer substantial loss.

The injunction will, therefore, be continued until the trial, with costs in the cause unless otherwise disposed of by the trial Judge.

TEETZEL, J. JULY 25TH, 1911.

RE CUMMER MARRIAGE SETTLEMENT.

Marriage Settlement—Construction—Remainder—"Heirs of the Body"—Failure of—"Right Heirs"—Attempted Revocation of Executed Trusts—Invalidity.

Motion by the trustees under the marriage settlement of Lockruan A. Cummer and Flora Ann Creen, and by the executors of the will of Lockruan A. Cummer, under Con. Rule 938, for an order determining questions arising upon the construction of the settlement, and for an order, under the Vendors and Purchasers Act, declaring that the executors could make a good title to certain lands.

G. S. Kerr, K.C., for the applicants.
S. F. Washington, K.C., for the Creen heirs.
C. W. Bell, for the Cummer heirs.
E. C. Cattanach, for infants.
J. G. Farmer, K.C., for the purchaser.

TEETZEL, J.:—The deed of settlement is dated the 28th November, 1864, by Lockruan A. Cummer, of the first part, Flora Ann Creen, of the second part, and trustees of the third part, and recites that a marriage is shortly to be had between the parties of the first and second parts, and that it has been agreed that the lands thereinafter described shall be granted to the trustees on the trusts thereinafter declared, and, in consideration of the marriage, and for making provision for the maintenance and support of the party of the second part during her life, if the marriage should take place, and she should happen to survive the party of the first part, and also for the issue, if any, of the intended marriage, and five shillings, the party of the second part granted to the trustees the lands therein described, "in trust for the said party of the second part, her heirs, executors, administrators, and assigns, until the said intended marriage shall be had and solemnised, and from and immediately after the solemnisation thereof upon trust to the use of the said party of the second part and her assigns during the term of her natural life, and from and immediately after her decease to the use and benefit of the heirs of the body of the party of the first part on the body of the party of the second part to be begotten, and in case of the death of the said party of the second part without

issue, as aforesaid, to the use of the said party of the first part during the term of his natural life, and upon his decease to the use of the right heirs of each of the parties of the first and second parts as tenants in common forever." Then follows a provision "that it shall and may be lawful to and for the said parties of the first and second parts, by any writing or writings attested by one or more credible witness or witnesses, to direct the parties of the third part, their heirs and assigns, to sell and absolutely dispose of the said lands and premises and to charge the same with and for the payment of any sum and sums of money to be paid and payable at any time or times to any person or persons and upon and for any trusts, intents, or purposes whatsoever, and for securing the payment of the said sum or sums with interest, to make any demise or demises, grant or grants, by way of mortgage of the said lands and premises so to be charged for any number of years, to take effect upon the making of such demise or demises, grant or grants, and that it shall and may be lawful to and for the said parties of the third part, their heirs and assigns, and they are hereby authorised to make such absolute sale or sales, demise or demises, grant or grants, by way of mortgage of the said land and premises, as the said parties of the first and second parts shall direct in writing attested as aforesaid."

Pursuant to this proviso, Cummer and his wife signed a request to the trustees on the 17th October, 1871, to convey the lands described in the deed to one Rymal and to take in exchange therefor a conveyance to them of the property now in question, "as trustees to hold upon the trusts of the said marriage settlement."

The conveyance from Rymal to the trustees was "upon the same trusts and to and for the several uses, ends, and purposes as are expressed and declared in the marriage settlement."

There were two children, issue of the marriage, both of whom died in infancy, prior to the year 1875.

A deed dated the 25th June, 1890, between the trustees, of the first part, and John R. Forstner, of the second part, and Cummer and wife, of the third part, after reciting, inter alia, the marriage settlement, the exchange made with Rymal, the appointment of new trustees, the birth of two children, issue of the marriage, and their death, proceeds: "And whereas there is no child issue of the said parties of the third part hereto surviving, and the possibility of issue has been for some time and is now extinct, and the said parties of the third part under the circumstances have agreed to revoke and make void the uses,

trusts, powers, provisoes, and declarations by and in the said hereinbefore in part recited indenture by way of marriage settlement declared and contained, of and concerning the hereditaments intended to be hereby conveyed;'' and then follows a recital that the parties of the first part, at such request, have agreed to sell and absolutely dispose of the said lands to the party of the second part freed and discharged of and from the uses, etc., expressed in the marriage settlement; and the trustees then proceed, in exercise of their supposed power, to revoke and make void the uses, trusts, powers, provisoes, etc., in the marriage settlement declared and contained, and to convey the lands in fee simple to Forstner.

On the same day Forstner, in consideration of one dollar, conveyed the lands in question to Cummer and his wife as joint tenants in fee simple.

Mrs. Cummer died on the 30th December, 1895, without leaving children, and by her will constituted her husband sole devisee.

Mr. Cummer died on the 20th June, 1907, leaving a will disposing of the farm in question, and his executors entered into an agreement to sell the same to Mr. Farmer's client.

The questions for determination are: (1) whether, upon a proper interpretation of the marriage settlement, the infant children of Mr. and Mrs. Cummer took a vested estate upon birth which upon their death passed to the father and mother and to their half-brothers, sons of Mr. Cummer by a former marriage; or (2) whether, upon the death of Mrs. Cummer, no children surviving her, the estate went to Mr. Cummer for life with remainder to the right heirs respectively of Mr. and Mrs. Cummer; and (3) whether, in the events that have happened, the conveyance to Forstner abrogated the trusts of the marriage settlement, so far as they extend to such right heirs.

Counsel for the trustees and the Cummer estate raised the contentions covered by the first and third questions, and argued that Lazier v. Robertson, 30 O.R. 517, 27 A.R. 117, was conclusive in their favour upon the first question.

I think the language of the settlement in that case is so strikingly different from that used in this case as entirely to distinguish it from this case. In that case it is to be observed that the provision is that ''after the several deceases of William and Jane to well and sufficiently convey and assure to the children issue of the said marriage the said lands,'' etc.; and the Court was of opinion that, although there was no time fixed by expression in the settlement declaring when the vesting should take

place, the vesting happened at the birth of each child, subject to a partial divesting as each child was afterwards born, although they were not to enjoy it until after the death of the surviving parent, which does not interfere with the time of vesting, in the absence of words to the contrary.

Now in this case, instead of the estate being limited to the children of the marriage upon the death of Mrs. Cummer, the gift is to the use and benefit of "the heirs of the body of the party of the first part," etc. Taking this literally, of course there could be no heir until after the death of the ancestor, and I can find no case which, taking the whole of the language of this settlement, would warrant holding that the word "heirs" is equivalent to the word "children," or that the settlement should be construed as if the word "children" instead of "heirs" was used by the draftsman. Of course, if any children or grandchildren survived, they would be the "heirs" contemplated.

In my opinion, the word "heirs" must be given its natural meaning; and, therefore, there could be no vesting in any children born of the marriage unless they survived and become "heirs;" and herein the case is differentiated from Lazier v. Robertson.

I think the proper construction of the trust provision is, that, after the marriage, the trustees are to hold the trust property to the use of Mrs. Cummer, party of the second part, during her life, and upon her death, if there are heirs of the body of the first part on the body of the party of the second part begotten, then to the use of such heirs; but, if she dies without any such heirs, that is, in the language of the trust, "without issue as aforesaid," then to the use of the party of the first part during his life, and upon his death to the use of the right heirs of each of said parties as tenants in common forever.

It occurred to me during the consideration of the case that the effect of the language of the trust provisions was to vest in Mrs. Cummer an equitable estate tail in the trust property; but, upon further reflection, I think such reading is impossible, not only because, reading the language of the trust in the light of the context, such construction would be contrary to the apparent intention of the parties, and it would be in violation of the purpose of the settlement to confer an estate tail on the settlor, who would at once be able to bar the entail under the Statute respecting Estates Tail, and thus defeat the trusts created by her and appropriate the trust estate to herself—but because, I think, both the words "heirs of the body of the party of the first part," etc., and "right heirs," must be construed in the light of the con-

text as words of purchase creating contingent remainders, and not words of limitation.

Upon this construction, therefore, there never having been any heirs of the body, etc., to take the remainder of the trust estate, it must be held to the use of the right heirs of the respective parties.

If this view is correct, the deed to Forstner was a breach of trust and was ineffectual either as a disentailing deed or as a revocation of the trust in favour of those right heirs.

The deed of settlement having completely provided for the creation of the trusts, so that they are executed and not executory trusts, the rule in such a case is that there can be no revocation unless the power to do so has been expressly reserved. The case is in this respect well within the principle adopted in Edmison v. Couch, 26 A.R. 537, and Dawson v. Dawson, 23 O.L.R. 1; but, I think, the rights of the right heirs are even more appropriately covered by the case of Paul v. Paul, 20 Ch. D. 742, where by a marriage settlement the wife's property was settled for life estates in the husband and wife, and, in default of children, in the event of the wife surviving, on her, and, in the event of the husband surviving, as the wife should by will appoint, and, in default of appointment, on her next of kin; and it was held that the trusts in favour of the next of kin could not be revoked, and that, although there was no possibility of issue, the husband and wife together were not entitled to the corpus of the settled fund. At p. 744 Jessel, M.R., says: "In this case a trust was declared by the settlement for the next of kin of the lady, and the fund has been transferred to the trustees. The fact of their being volunteers does not enable the trustees to part with it without the consent of their cestuis que trust. That has been the rule ever since the Court of Chancery existed." And Cotton, L.J., says: "The next of kin of the lady are cestuis que trust under the settlement, although they are not yet ascertained. I assume that the trust would not have been enforced if it were still executory, but this trust is executed, and the next of kin have an interest as cestuis que trust. It is immaterial that they are volunteers; the trust cannot be broken on that account; and, if the trustees were to part with the fund, they would be guilty of a breach of trust."

The order will, therefore, declare the opinion of the Court to be: (1) that the right heirs of Mr. and Mrs. Cummer respectively are entitled to have the trust estate divided between them as tenants in common; (2) that representatives of the Cummer estate, as vendors, cannot make a good title to the property.

Costs of all parties out of the estate.

TEETZEL, J., IN CHAMBERS. JULY 26TH, 1911.

REX v. WHITNEY.

Liquor License Act—Conviction for Selling without License—Evidence to Support—Information—Form of—Informant or Witness not Examined on Oath—Information and Belief—Costs of Conveying to Gaol not Provided for—Secs. 72 and 89 of Act—Imprisonment at Hard Labour—Power to Impose.

Motion to quash a conviction under sec. 72 of the Liquor License Act, whereby the defendant was convicted of selling liquor without a license and adjudged to pay a fine of $100 and $4.75 costs.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Crown.

TEETZEL, J.:—The conviction ends with these words: "And if the said several sums be not paid forthwith, we adjudge the said Harry Whitney to be imprisoned in the common gaol of the united counties at Cobourg," etc., "and there to be kept at hard labour for the space of three months, unless the said sums shall be sooner paid."

There was abundant evidence, if believed, to warrant conviction.

The objections relied on and not disposed of on the argument are:—

(1) That neither the informant nor any other witness who might support the charge was examined on oath by the convicting magistrate, before the summons to the defendant was issued.

(2) That the costs of "conveying to prison" are not mentioned or provided for in the conviction.

(3) That imprisonment at hard labour forthwith in default of payment is unwarranted.

Since the argument, a similar objection to the first has been disposed of in Rex v. Mitchell, ante 1408, which was also a case under the Liquor License Act, and in which it was held that, notwithstanding the Dominion Act 9 Edw. VII. ch. 9, amending sec. 655 of the Criminal Code, a Justice of the Peace is quite justified, when the allegations of the complainant are such as to convince him of the propriety of issuing a summons on information on the oath of the complainant, in issuing the summons; and

it is only when the allegations of the complainant do not convince the Justice that a summons should issue, that there is any need of witnesses.

I would follow that decision, the facts being, as I understand, much the same, except that Mr. Mackenzie, for the defendant, says that the information in that case was not, as in this case, upon "information and belief." I do not think that fact should affect the principle of the decision, because the information in this case follows substantially the form of the information authorised by secs. 95 and 103 of the Liquor License Act, and which, under sec. 95, "may be made without any oath or affirmation to the truth thereof." A similar provision is contained in sec. 710, sub-sec. 2, of the Criminal Code.

The suggestion that a conviction is bad because, in ease of the accused, it omits something which the Justices might in their discretion have imposed upon him, while novel in the extreme, is, I think, ineffective.

In the first place, it is to be observed that the conviction follows substantially the language of sec. 72, which, after providing for the penalty and costs of conviction, says: "And in default of payment thereof he shall be imprisoned in the county gaol of the county in which the offences was committed, for a period of not less than three months, and be kept at hard labour, in the discretion of the convicting magistrate."

If this section stood alone, there would, of course, be no power in the Justice to impose costs of conveying to prison; but sec. 89 provides that in a case like this the Justice or Justices "may by the conviction adjudge that the defendant be imprisoned, unless the sum or sums adjudged to be paid, and also the costs and charges of the commitment and conveyance of the defendant to prison are sooner paid." Further similar enabling provisions with reference to imposing payment of costs for conveying a defendant to prison are found in sec. 739 of the Code, as amended by 8 & 9 Edw. VII. ch. 9, and also in sec. 7 of the Ontario Summary Convictions Act, 10 Edw. VII. ch. 37.

In my opinion—so far as respects the power of the Justices under sec. 72—sec. 89 of the Liquor License Act and the other sections above mentioned simply enlarge their discretionary powers in the matter of costs, but do not make it necessary to a valid conviction that they should exercise a discretion by requiring the defendant to pay the costs of conveying him to prison.

I think it is too plain to admit of serious argument that both under the Ontario Summary Convictions Act, which incorpor-

ates the summary conviction provisions of the Code, and under the Liquor License Act, all costs, whether of conviction, commitment, or conveying the defendant to prison, are in the discretion of the convicting Justices; and, therefore, an omission to exercise that discretion as against the defendant, as to either or all of those items of costs, is no objection to a conviction otherwise valid.

The objection as to imprisonment at hard labour in default of payment is answered by what I have already said, and by the express language of sec. 72 of the Liquor License Act, and by 8 Edw. VII. ch. 33, sec. 1, sub-sec. 2, which amends sec. 7 of the Interpretation Act, by adding: "Where power to impose imprisonment is conferred by any Act it shall authorise the imposing of imprisonment with hard labour."

The motion is, therefore, dismissed with costs.

MILLER v. KAUFMAN—DIVISIONAL COURT—JULY 25.

Master and Servant—Injury to and Death of Servant—Dangerous Machine—Guard—Negligence—Carelessness of Deceased—Findings of Jury—Inconsistency—New Trial.]—Appeal by the plaintiff from the judgment of LATCHFORD, J., ante 925, after a trial by jury, dismissing the action. The Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.) directed a new trial. The Chief Justice said that he agreed with the remark of the trial Judge that "the result (of the jury's findings) is a miscarriage, or at least a postponement of justice." The answers of the jury were inconsistent and insensible, and were not made clearer by the attempted explanation. There had been a mistrial, and there must be a new trial. What had taken place was not the fault of the trial Judge, nor of the parties. Therefore, all costs to date should be costs in the cause to the successful party. J. G. Gauld, K.C., for the plaintiffs. E. E. A. DuVernet, K.C., for the defendant.

HORTON v. MACLEAN—SUTHERLAND, J., IN CHAMBERS—JULY 26.

Discovery—Examination of Defendant—Relevant Questions—Duty of Defendant to Inform himself—Further Examination.]—Appeal by the defendant from an order of the Master in Chambers of the 7th April, 1911, requiring the defendant to

attend for further examination for discovery and to answer questions which he had previously refused to answer. See also the order of the Master of the 23rd February, 1911: ante 804. SUTHERLAND, J., said that, in view of the nature of the plaintiff's claim in this action, and the position of the defendant with respect to the World Printing Company, it was incumbent on him to inform himself about the matters as to which discovery was sought and arising out of the questions mentioned in the notice of motion. These matters were relevant to the issue, and the plaintiff was entitled to discovery with respect to them: McKergow v. Comstock, 11 O.L.R. 642. The defendant had had the opportunity and ample time to inquire and inform himself so as to answer the questions. Appeal dismissed with costs. K. F. Mackenzie, for the defendant. G. W. Mason, for the plaintiff.