The
Ontario Weekly Notes

VOL. XIX. TORONTO, MARCH 4, 1921. No. 25

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

*RE RACE-TRACKS AND BETTING.

Constitutional Law—Powers of Provincial Legislature—Prohibition of Race-track Gambling—Licensing of Corporations and of Race-tracks—Conditions—Criminal Code, sec. 235 (2), (3) (10 & 11 Geo. V. ch. 43, sec. 6)—British North America Act, secs. 91, 92.

Questions referred to the Court by the Lieutenant-Governor in Council, pursuant to the Constitutional Questions Act, R.S.O. 1914 ch. 85.

The questions were in respect to the power of the Ontario Legislature to enact certain legislation respecting racing, betting, etc.

The questions were as follows:—

1. Has the Lieutenant-Governor in Council power, under the provisions of the Corporations Tax Act, sec. 4, sub-sec. 15, to impose as a condition in the license therein referred to, that race-track gambling, that is to say, book-making, pari-mutuels, or pool-selling, shall not be carried on by the incorporated company, association, or club to which, or upon the race-track in respect of which, the said license is issued?

2. In the event of the answer to question 1 being in the negative, is it within the legislative competence of the Legislative Assembly for Ontario (a) to empower the Lieutenant-Governor in Council to insert in racing licenses issued by the Provincial Treasurer conditions prohibiting racing on race-tracks on which race-track gambling . . . is carried on, and thus to prohibit racing upon race-tracks to which the Criminal Code, sec. 235, sub-secs. 2 and 3, as enacted by 10 & 11 Geo. V. ch. 43, sec. 6 (Dom.), applies?

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

Or (b) to empower the Lieutenant-Govenor in Council to refuse to issue racing licenses for race-tracks on which race-track gambling . . . is carried on, and thus prohibit, etc., as in (a)?

The questions were argued before MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and LENNOX, JJ.

Edward Bayly, K.C., and J.M. Godfrey, for the Attorney-General for Ontario.

H. J. Scott, K.C., for the Kenilworth Jockey Club and the Metropolitan Racing Association.

D. L. McCarthy, K.C., for the Ontario Jockey Club.

J. W. Curry, K.C., for the Western Racing Association.

W. S. Montgomery, for the Thorncliffe Racing Association.

MEREDITH, C.J.C.P., read a judgment, in which he discussed the questions, and concluded:—

"The Province does not ask whether it can deal with horse-racing or gambling as a crime; it knows that it cannot; it asks only whether, in so far as Parliament has not made it a crime, it can deal with it otherwise than as a crime; as, obviously, I should have thought, it might if horse-racing were within any of the subjects assigned to the Provinces in sec. 92 of the British North America Act. Thomas v. Sutters, [1900] 1 Ch. 10, is much in point.

"The onus, as it were, of establishing provincial legislative power over the matter in question is upon those who ask these questions with the purpose of exercising such legislative power; and that onus they have not only failed to satisfy; but, on the contrary, it has been, in my opinion, made plain that there is no such power. And, I may add, the more carefully each legislative body keeps, and is kept, within its defined boundaries, the better must the purposes of Confederation be attained and maintained."

Both questions should be answered in the negative.

MIDDLETON, J., read a judgment in which he said, among other things, that in the case in hand the proposed legislation was not in any way within the ambit of the provincial jurisdiction; it was an attempt by the Province to deal with the question of public morals. Parliament has undertaken, in the exercise of its powers, to lay down rules, in the interest of public morals, to regulate gambling. It has considered the question of gambling in connection with horse-races, and has declared that on certain race-tracks betting by means of pari-mutuel machines shall not be unlawful. The Province, thinking that this does not sufficiently guard public morals, seeks, in an indirect way, to accomplish that which it thinks the Dominion should have done, and so proposes to prohibit racing on all tracks upon which it is lawful under the Dominion Act to operate pari-mutuel machines.

This is in no sense a conflict between the two jurisdictions by reason of the overlapping of the fields—it is a deliberate attempt to trespass upon a forbidden field.

The case is governed by the Lord's Day case, Attorney-General for Ontario v. Hamilton Street R.W. Co., [1903] A.C. 524.

This view of the case is in no way in conflict with the decisions upon the various liquor laws.

Both questions should be answered in the negative.

LENNOX, J., agreed with MIDDLETON, J.

RIDDELL, J., dissented, for reasons to be given hereafter.

Questions answered in the negative (RIDDELL, J., *dissenting*).

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

*CARR-HARRIS v. CANADIAN GENERAL ELECTRIC CO.

Contract—Employment of Person to Obtain Orders for Goods from Government—Use of Influence—Payment for, by Commission on Value of Orders—Public Policy—Illegality—Money Paid on Account of Commission—Action for Balance—Evidence—Failure to Shew Performance of Contract—Appeal—Costs.

Appeal by the plaintiff from the judgment of KELLY, J., 48 O.L.R. 231, ante 63.

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

W. N. Tilley, K.C., and G. W. Mason, for the appellant.

Wallace Nesbitt, K.C., and H. W. Shapley, for the defendants, respondents.

MEREDITH, C.J.C.P., in a written judgment, said that the judgment of Kelly, J., was right, and should be confirmed on the ground upon which it was based—that the Court will not enforce or give any effect to such a contract as that upon which this action was brought.

Upon the other branch of the case, the learned Chief Justice was of opinion that the plaintiff could not recover upon the contract if it were within the law, because it had never been performed

on his part. The plaintiff was to be paid only upon direct orders from the British buyers to the defendants; and no such direct orders, nor anything like them, were obtained.

Though the plaintiff could not recover upon the contract, he might, but for the illegality, recover upon a quantum meruit.

The appeal should be dismissed.

RIDDELL, J., in a written judgment, said that the main objections to the plaintiff's case were two: (1) that the contract sued upon was against public policy; and (2) that the contract was not performed on the plaintiff's part.

In the view which the learned Judge took, there was no need to pass upon the first objection; and he merely expressed his total and emphatic dissent from much that was said as to the illegality of payment according to success, payment by results, conditional fee, etc.

But the learned Judge could not find that what the defendants agreed to pay for was actually performed. They wanted to get away from the Munitions Board in Canada and to deal directly with the authorities in England. Even if the agreement could be interpreted as covering contracts obtained from the Board in Canada, which the Board were enabled to let through the results of the efforts of the plaintiff, it was not proved that there were any such results.

While the action could not be successfully defended on the ground that the contract was against public policy, and while the plaintiff was not entitled to any payment, it could not be said that what took place upon which he was paid $17,000 could render him entitled to $17,000 more.

The appeal should be dismissed.

LATCHFORD, J., in a written judgment, said that the evidence fully warranted the conclusions of fact and law of the trial Judge; and the appeal should be dismissed.

MIDDLETON, J., in a written judgment, after stating the facts and referring to some authorities, said that he could find nothing in the acts contemplated or in the tendency of such acts to offend against public policy. No one in authority was to be improperly influenced, no public servant was to be called upon to depart from his primary obligation to the public.

If the matter were at large, public policy would seem to demand an accounting for the public benefit by the defendants, before allowing them "in the public interest" to assert the common misconduct as a defence.

This, however, would not avail the plaintiff, as, in the opinion of the majority of the Court, the contracts by the defendants were not, and none of them was, within the terms of the agreement so as to entitle the plaintiff to commission.

The learned Judge would have been content to accept the opinion of the defendants' president that the contract in respect of which the $17,000 commission was paid was within the agreement, and to have awarded a further sum of $17,000 upon the ground that the agreement to reduce the commission to one-half of one per cent. was obtained by an untrue statement—the contract having been actually arranged before the request to reduce the commission was made.

The appeal should be allowed.

LENNOX, J., in a written judgment, after reviewing the evidence and the authorities, said that he found nothing to suggest that there was either an effort or a purpose to deceive, mislead, or entrap any servant of the Crown, or to induce him to swerve from the path of public duty. This ground of defence had not been made out.

Upon the second branch of the case, the learned Judge discussed the evidence, and found in favour of the plaintiff.

The judgment below should be set aside, and judgment should be entered for the plaintiff for $17,639.66, with interest thereon from the 5th September, 1917, with costs to the plaintiff in the Court below and without costs of the appeal to either party.

Appeal dismissed (MIDDLETON *and* LENNOX, JJ., *dissenting*).

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 19 .

OSBORNE v. LEATHER.

Fraud and Misrepresentation—Sale of Motor-truck—Representations as to Earning Power—Warranty that "Contract" for Work to Go to Purchaser of Truck—Breach—Evidence—Damages—Return of Money Paid—Cancellation of Sale-agreement—Pleading.

Appeal by the defendants from the judgment of the County Court of the County of Wentworth in favour of the plaintiff in an action (tried by a jury) for the recovery of $300 paid on account of the purchase of a motor-truck, for the cancellation of the agreement of purchase, and the return of a promissory note.

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

S. F. Washington, K.C., for the appellants.

W. Morrison, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the amount involved was small; the case was tried by a jury; there was no objection to the charge; and the verdict could not be said to be unreasonable or unfair. Therefore, it ought to stand unless the defendants had shewn that they were entitled to judgment notwithstanding the verdict—that the trial Judge should have withdrawn the case from the jury and dismissed the action. He was not obliged to do so. He could not have rightly done so.

The plaintiff was a labouring man, who had to depend upon the earnings of the truck, not only for the support of himself and family, but also for the means of paying the price of it; and so all representations as to the earning capacity were things of the utmost importance to him in determining whether to buy it or not; and the defendants, being dealers in such cars, were well aware of that fact, and the representations as to it shewed how fully they made use of it to effect the sale. Their representations in this respect induced the contract.

The plaintiff insisted upon having from the defendants something in writing binding them in regard to a contract which one Axford had with certain persons for work to be done with this truck, and which it was promised should be given over to the plaintiff; and so the words, "Mr. Osborne has steady contract with this truck," were inserted in the sale-agreement. It turned out that there was no customer's contract of any kind; and so there was a complete breach of this essential part of the contract of sale; and it was not surprising that the jury found the defendants guilty of fraud in connection with it.

And, quite apart from any question of fraud, there was a breach of the written warranty of the defendants, for which they were answerable in damages to the plaintiff; but, instead of paying damages, they retook and retained the truck.

The plaintiff was not bound to rescind the contract because of the fraud; he would have been quite within his right in retaining it and meeting the defendants' claim for the balance of the price with his claim for damages for the deceit; and the verdict of the jury had the commendable effect of meeting this aspect of the case as well as that of fraud.

The Court should not usurp the rights of jurors and try to determine cases as the Judges might happen to think they should have been determined by the jurors. If the Chief Justice were

at liberty to determine this case, his judgment would be, as the jurors' was, altogether for the plaintiff.

The appeal should be dismissed.

LATCHFORD and LENNOX, JJ., agreed with the Chief Justice.

RIDDELL, J., read a dissenting judgment. He said that no fraud was alleged, and, in his view, none had been proved, and the trial Judge should have so held. The alleged damages were occasioned by the plaintiff's own default.

The appeal should be allowed and the action dismissed.

MIDDLETON, J., agreed with RIDDELL, J.

Appeal dismissed (RIDDELL *and* MIDDLETON, JJ., *dissenting*).

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

*REX v. BARNES.

Evidence—Witness Subpœnaed to Give Testimony at Inquest Refusing to Testify—Issue of Coroner's Warrant for Apprehension—Motion to Quash Warrant or for Prohibition—Witness Charged with Manslaughter of Person on whose Body Inquest Held—Charge Laid before Issue of Subpœna—Committal for Trial—Canada Evidence Act, sec. 5—Protection of Witness.

Appeal by the defendant from the order of ORDE, J., ante 543.

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

A. Courtney Kingstone, for the appellant.

Edward Bayly, K.C., for the coroner, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the real and single question involved was whether the appellant could be compelled to give evidence of his guilt of a crime of manslaughter—with which he was charged—if he were in fact guilty. The charge against the man had passed its first stage; he had, after the usual preliminary investigation before a magistrate, been duly sent for trial. But, running concurrently with that charge, a coroner's inquest was being held upon the body of the man whose death was the subject of the criminal charge.

The Crown sought an examination of the appellant at the inquest; the appellant resisted because charged by the Crown with having caused the death of the man by a criminal act amounting to manslaughter. Which was right?

The learned Chief Justice referred to and discussed sec. 5 of the Canada Evidence Act, and also sec. 4, and distinguished Re Ginsberg (1917), 40 O.L.R. 136.

On principle, it was not lawful or proper to examine the appellant in the coroner's court in any way regarding the charge which was pending against him, as long as he was in jeopardy in respect of it. But he might be examined as a witness in regard to the guilt of any other person, so long as the examination did not touch in any way the charge against him.

The authorities seemed to be in accord with this conclusion. Reference to Wakley v. Cooke (1849), 4 Ex. 511; The People v. Taylor (1881), 59 Cal. 640; Hendrickson v. The People (1854), 10 N.Y. 1; Corpus Juris, vol. 13, pp. 1257 et seq.

The appellant was wrong in disobeying his subpœna; he might be examined as to the guilt of others so long as the examination did not encroach upon his rights as a person charged with crime.

The appeal should be dismissed.

RIDDELL, J., read a judgment in which he examined the law and stated his agreement with the conclusions of Orde, J.

In his opinion, the appeal should be dismissed.

MIDDLETON, J., also read a judgment. In his opinion, the order of Orde, J., was clearly right, and the appeal must be dismissed.

LATCHFORD, J., agreed with MIDDLETON, J.

LENNOX, J., was also of opinion, for reasons stated in writing, that the appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

DOMINION BANK v. REINHARDT.

Fraudulent Conveyance—Voluntary Conveyance of Land by Father to Son for Benefit of Son and other Children—Gift—Action by Creditors to Set aside—Financial Circumstances of Father at Time of Conveyance—Evidence—Brewing Business—Fear of Prohibitory Legislation—Gift not Actuated by—Parties—Trustees and Beneficiaries—Some Beneficiaries not Defending Action—Defence by Trustees—Form of Judgment.

An appeal by the plaintiffs from the judgment of ROSE, J., ante 414.

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

W. B. Milliken, for the appellants.

A. W. Ballantyne and F. H. Snyder, for the defendants, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that there was really no evidence of an actual intent to defeat, hinder, or delay creditors; nor that at the time when the gift in question was made the giver was in anything like insolvent or financially embarrassed circumstances. On the contrary, it was proved that he had been, and yet was, in a very profitable business from which he had amassed a very considerable fortune.

It is true that certain legislation was being sought at the time, which, if passed, might be ruinous to that business and to those who had their fortunes in it; but that had been sought for years, and, probably, not very many thought that, if ever it should be passed, it would be passed without making some reasonable compensation to those who might otherwise be ruined. Eventually it was passed without any provision being made for any such compensation—the result being the ruin of the fortunes of many, including apparently that of the giver of the gift in question.

But there was no evidence going any way towards proving that this gift of only a portion of a then large and valuable estate was made in contemplation of such a ruin.

This branch of the case created no difficulty.

As to the proper form of the judgment, all the beneficiaries, as well as the trustees, of the gift, were made parties; and one only of the beneficiaries defended; so that now the plaintiffs' claim stood as if confessed by all the beneficiaries but that one. The trustees, however, who had the legal estate in the whole of the property in question, also defended.

In these circumstances, the judgment merely dismissing the action might stand: in the face of the defence of the trustees no part of the property in question could be reached by the plaintiffs—however it might have been if the beneficiaries alone were defendants.

If the beneficiaries who had not defended desired that the property in question should go towards the payment of their father's debts, they could easily give effect to that desire, out of Court, to the extent of their interests in it.

Not having defended, they got no costs; and as to any claim the plaintiffs might make against them for costs the discretion of the Court might well be exercised in making no order as to such costs.

The order upon this appeal should be one dismissing the appeal with costs to be paid by the appellants to those parties who opposed the appeal.

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

MIDDLETON and LENNOX, JJ., also agreed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

*LINDSEY v. HERON & CO.

Contract—Formation of—Conversations by Telephone—Offer and Acceptance—Sale of Company-shares—Alleged Mistake as to Company Referred to by Purchasers—Parties Found to be ad Idem.

An appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff in an action to recover $787.50 on a cheque given in payment for shares of the capital stock of a company. The defence was that the cheque was given by mistake, the defendants' intention being to purchase shares of another company.

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

I. F. Hellmuth, K.C., for the appellants.

T. N. Phelan, for the plaintiff, respondent.

MIDDLETON, J., read a judgment in which he said that the vital parts of the transaction were the question put by the plaintiff to the defendants, "What will you give me for 75 shares of Eastern Cafeteria of Canada?" and the answer, in effect, "We shall look into it and let you know." The defendants made such inquiry as they saw fit and then telephoned the plaintiff, "I will give you $10.50 a share for your Eastern Cafeterias." The plaintiff answered, "I accept your offer." He then delivered his shares of Eastern Cafeteria of Canada Limited and received the cheque now sued upon. The defendants now said that they meant to buy "Eastern Cafeteria Limited," another stock; and so, the parties not being ad idem, there was no contract.

Reference to Corpus Juris, vol. 13, p. 265; Smith v. Hughes (1871), L.R. 6 Q.B. 597, 607; Watson v. Manitoba Free Press Co. (1908), 18 Man. R. 309; North-West Transportation Co. v. McKenzie (1895), 25 Can. S.C.R. 38.

Applying the principle of these authorities, the words used by the defendants, judged by any reasonable standard, manifested an intention to offer the named price for the thing which the plaintiff proposed to sell—stock in the Eastern Cafeteria of Canada. Had the plaintiff spoken of "Eastern Cafeterias," the words would have been ambiguous, and no contract could have been found, for each party might have used the ambiguous term in a different sense; but the defendants, by the use of the ambiguous term, in response to the plaintiff's request couched in unambiguous language, must be taken to have used it in the same sense.

Reference to Stewart v. Kennedy (1890), 15 App. Cas. 75, 108, 121; Hobbs v. Esquimalt and Nanaimo R.W. Co. (1899), 29 Can. S.C.R. 450.

The appeal should be dismissed.

MEREDITH, C.J.C.P., was also of opinion, for reasons stated in writing, that the appeal should be dismissed.

LATCHFORD, J., was of the same opinion. In a short written judgment, he referred to Freeman v. Cooke (1848), 2 Ex. 654, as applicable.

LENNOX, J., read a dissenting judgment. After a thorough examination of the facts and circumstances and a review of the authorities, he concluded that there was no contract, and that the appeal should be allowed and the action dismissed.

Appeal dismissed (LENNOX, J., *dissenting*).

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

WOOLRICH v. STONE.

Costs—Scale of—Action Brought in District Court—Recovery of Amount within Jurisdiction of Division Court—Division Courts Act, sec. 62 (c) (10 & 11 Geo. V. ch. 34, sec. 1)—Amount of "Claim."

Appeal by the plaintiff from an order of the Judge of the District Court of the District of Algoma made upon appeal from the taxation of the costs of the action.

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

H. A. Harrison, for the appellant.

Grayson Smith, for the defendant, respondent.

MIDDLETON, J., reading the judgment of the Court, said that the plaintiff sued for more than $200, but recovered only a little more than $100. There was no "order to the contrary," so the taxation was governed by the general Rules. The officer who taxed the costs and the Judge took the view that the action might have been brought in a Division Court, and so allowed the plaintiff Division Court costs only and taxed to the defendont his excess of County Court costs over Division Court costs.

Section 62 of the Division Courts Act, as enacted by the amending Act, 10 & 11 Geo. V. ch. 34, sec. 1, provides that a Division Court shall have jurisdiction in (*c*) an action on a claim or demand of debt, etc., where the amount or balance claimed does not exceed $200; provided that in the case of an unsettled account the whole account does not exceed $1,000.

Assuming in favour of the appellant that the claim here could be regarded as an unsettled account, by no possible manipulation of figures could it be shewn that "the whole account" exceeded $1,000. It has frequently been determined that the amount of the "claim" is the amount awarded and not the amount improperly claimed.

The appeal should be dismissed, with costs fixed at $30.

Appeal dismissed.

SECOND DIVISIONAL COURT. FEBRUARY 25TH, 1921.

*CROSS v. WOOD.

Principal and Agent—Agent's Commission on Sale of Land—Commission-agreement—Commission to Become Due and Payable when Purchase-price or any Part thereof Paid—Acceptance by Vendors (Principals) of Promissory Notes in Lieu of Cash Stipulated for in Sale-agreement—Notes as Regards Agent to be Treated as Cash—Right of Agent to Commission.

An appeal by the plaintiff from the judgment of the County Court of the Counties of Leeds and Grenville dismissing an action for an agent's commission on the sale of the defendants' farm and farm stock and equipment.

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

H. H. Davis, for the appellant.

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

LENNOX, J., reading the judgment of the Court, said that the plaintiff's claim was made upon a written agreement providing, amongst other things, that the commission is "to become due and payable when the purchase-money or any part thereof has been paid," and "the owners hereby agree that the said property shall not be offered for sale at a less price or on more liberal terms without first giving the said agent an opportunity of doing likewise, and that all inquiries which the owners receive from prospective purchasers . . . will be referred immediately to the said agent, who is hereby appointed solely and exclusively for the purpose of making a sale. The owners agree not to sell the property or to receive any money to apply on the purchase-price without first communicating with the said agent and obtaining his approval in writing," etc. The sale-price was fixed alternatively: for the farm alone $8,500, of which $2,000 was to be paid in cash and the balance secured by mortgage; and, if the farm and farm stock and equipment should be sold together, the sale-price for the whole was fixed at a bulk-sum of $12,500, on the basis of a cash payment of $6,000 and the balance to be secured by mortgage. The land and chattels were sold *en bloc* at the price of $12,500, and on the terms above set out, by the plaintiff, to one Stinson, with the concurrence and approval of the defendants, early in August, 1919.

The County Court Judge dismissed the action because, as he said, the giving of promissory notes for the purchase-money and

their acceptance by the defendants from the purchaser could not be considered as a payment on account of the purchase-money; and, the notes not being paid, the purchaser could not succeed; no purchase-money having been paid, there was nothing due to the plaintiff.

In fact the defendants here discovered the purchaser, and, in spite of remonstrances by the plaintiff, would not let that purchaser go. The defendants accepted the notes instead of the cash upon their own responsibility and against the advice of the plaintiff.

The promissory notes must be treated as a payment on account of the purchase, as cash, so far as the plaintiff was concerned: Beatty v. O'Connor (1884), 5 O.R. 731.

Fletcher v. Campbell (1913), 29 O.L.R. 501, distinguished.

The plaintiff brought about a sale of the defendants' property satisfactory to them, and in all respects in accordance with his commission-agreement. By the sale-agreement the defendants were entitled to a cash-payment of $6,000. They could do as they pleased about the manner of payment, but not to the plaintiff's disadvantage: Smith v. Upper Canada College (1920), 47 O.L.R. 37, 48 O.L.R. 120.

The appeal should be allowed with costs, and there should be judgment for the plaintiff for the amount claimed with costs.

HIGH COURT DIVISION.

LOGIE, J. FEBRUARY 24TH, 1921.

RE ANDERSON.

Will—Construction—Devise to Wife during Widowhood with Devise over in the Event of Remarriage—Gift over Taking Effect on Death without Remarriage—Vested Remainder under Gift over—Personal Property—Executory Bequests in Remainder.

Motion by the Toronto General Trusts Corporation, administrators de bonis non of the estate of Walter Anderson, deceased, and by the administratrix of the estate of David Anderson, deceased, for an order determining question arising upon the terms of the will of Walter Anderson.

The motion was heard in the Weekly Court, Toronto.

F. P. Dawson, for the applicants.

J. M. Godfrey, for all the next of kin of David Anderson except John Cameron Anderson.

G. R. Munnoch, for John Cameron Anderson and for the foreign committee of his estate.

L. Ramsay, for the Official Guardian.

J. M. Bullen, for the widow of David Anderson and for the Lambton Loan and Investment Company, mortgagees under a mortgage made by David Anderson.

LOGIE, J., in a written judgment, said that Walter Anderson died in 1872, leaving surviving him his widow, Mary Ann, and his only child, David. Mary Ann died in 1900, without having re-married. The letters of administration de bonis non, with the will annexed, of the estate of Walter, were granted in 1900, after the death of Mary Ann. David died on the 26th August, 1920, leaving him surviving his widow and three sons and four daughters all alive and of age at the date of this application. After the death of Mary Ann, David entered into possession of the real and personal property owned by his father, and conveyed the real estate to his wife, after mortgaging it to the Lambton Loan and Investment Company.

Walter's will was dated the 7th October, 1861. By it, he gave and devised to Mary Ann "all my household furniture and the interest of my estate, real and personal, during her lifetime, provided she does not marry. Should she marry, my executors to take charge of my estate, real and personal, the interest on the same to go to my son David during his life, and then to go to his children on their each attaining the age of 21 years. . . . Should my son David die before his children are 21 years of age they are then to receive the interest of my estate, real and personal, for their maintenance and education, and, on their attaining the age of 21 years, the principal of my estate, real and personal, to be divided among them."

The learned Judge said that, after a careful perusal of the whole will, he was of opinion that on its true construction David had a life-interest in Walter's realty after the death of Mary Ann, and after David's death his children took under Walter's will, share and share alike.

There was no intestacy. The devise over was not dependent on the contingency of the widow marrying again, but took effect upon her death, whereupon David's life-interest arose, and upon his death his children took: Re Branton (1910), 20 O.L.R. 642.

There should be a declaration that David's children took under the will a vested remainder in the land, to take effect in possession upon the death of David and upon their each attaining the age of 21 years.

Reference to In re Tredwell, [1891] 2 Ch. 640, 653; Browne v. Hammond (1858), Johns. 210; Theobald, 7th ed., p. 480.

There was no reason why the personal property which was the subject of the executory bequests should not vest in David's children: see 24 L.Q.R. 531.

Order declaring accordingly; costs of all parties, those of the applicants as between solicitor and client, out of the estate.

LOGIE, J. FEBRUARY 24TH, 1921.

RE DE BOER AND TOWNSHIP OF ROMNEY.

Arbitration and Award—Compensation for Land Taken by Municipal Corporation—Amount Awarded by Arbitrators—Appeal—Weight of Evidence—Testimony of Witnesses Taken down in Longhand by Township Clerk—Notes Taken by Arbitrators—Sufficiency as Compliance with sec. 17 (2) of Arbitration Act, R.S.O. 1914 ch. 65—View of Locus by Arbitrators—Neglect to File Statement Required by sec. 17 (3)—Reference back to Arbitrators for Statement—Costs of Arbitration—Discretion—Appeal—Arbitration Act, sched. A., cl. (l)—Municipal Act, secs. 332, 344—Costs of Appeal.

An appeal by De Boer, a land-owner, from an award of $1,400 as compensation for land taken by the township corporation.

The appeal was heard in the Weekly Court, Toronto.

H. S. White, for the appellant.

Shirley Denison, K.C., for the township corporation.

LOGIE, J., in a written judgment, said that the first ground of appeal was that the amount of the award was insufficient. There was no suggestion that the arbitrators proceeded on a wrong basis in fixing the amount or that they omitted to consider any proper element of damage or made any mistake, but only that they had not given full weight to the evidence of an expert witness for the land-owner. The weight of evidence was entirely for the arbitrators. The Court should not interfere. Even if there had been misconception of the evidence, that would not be any ground for interference in this Court: In re Great Western R.W. Co. and Postmaster-General (1903), 19 Times L.R. 636; In re Bradshaw's Aribtration (1848), 12 Q.B. 562.

The second ground was that the testimony of witnesses examined was not taken down in writing, pursuant to sub-sec. 2 of sec. 17 of the Arbitration Act, R.S.O. 1914 ch. 65. Notes of this evidence, however, were taken by all three arbitrators, as appeared by their uncontradicted affidavits. These notes were not pro-

duced. Notes of the evidence taken by one Kennedy, the township clerk, were produced. These notes were fairly full, and, as one of the aribtrators said, "Kennedy, as the proceedings went on, sat at the table, took down notes of the evidence in longhand, and took charge of the exhibits. Apparently this was done with the full consent of, or at least without objection by, the experienced counsel who appeared on the arbitration. In the absence of misconduct on Kennedy's part, which was not alleged, the learned Judge would, if it were necessary, hold that Kennedy's notes sufficiently satisfied the statutory direction.

Smith v. Boothman (1913), 4 O.W.N. 801, distinguished.

There is in sec. 17 (2) no direction to the arbitrators themselves to take down the evidence; and, in any event, they did in fact comply with the statute and did take in writing such notes of the evidence as enabled them to do justice between the parties.

Third, it was objected that, although the arbitrators had a view of the locus, they failed to put in writing a statement that they proceeded wholly or partly on a view sufficiently full to enable a judgment to be formed of the weight which should be attached thereto: sec. 17 (3). They had a view, but it was not known whether they "proceeded wholly or partly" on it.

Following Re Myerscough and Lake Erie and Northern R.W. Co. (1913), 4 O.W.N. 1249, 1252, the learned Judge directed that the land-owner might, if he desired it, have the award referred back to the arbitrators so that they might certify in accordance with sec. 17 (3).

Fourth, the disposition of the costs was objected to. By the award it was directed that the arbitrators' fees, $174, and the witness-fees of a civil engineer, one Baird, $20, should be paid by the township corporation; but otherwise each party should pay his and its own costs.

The learned Judge was pressed with the case of In re Pattullo and Town of Orangeville (1899), 31 O.R. 192; but he thought that he was bound by the later case of Re Hislop and Stratford Park Board (1915), 34 O.L.R. 97, and Gray v. Lord Ashburton, [1917] A.C. 26.

Reference to clause (*l*) of schedule A. to the Arbitration Act, and secs. 333 and 344 of the Municipal Act.

The learned Judge said that he could not, after reading and considering the evidence and the affidavits filed on the motion, find any tenable and satisfactory ground for disturbing the conclusions of the arbitrators in respect of costs; but, as the appellant had some cause of complaint, in that sec. 17 (3) of the Arbitration Act had not been complied with, the appeal should be dismissed without costs.

ORDE, J. FEBRUARY 25TH, 1921.

RE ROBERTSON TRUSTS.

Will—Construction—Absolute Gift to Son upon Attaining 25—Gift over in Certain Events—Vested Gift Subject to be Divested upon Happening of Events—Powers of Trustees—Sale of Company-shares—Income—Accumulations.

Motion by the National Trust Company and William A. Denton, executors and trustees under the will of Thomas Edward Robertson, deceased, for an order determining certain questions arising in the administration of the estate as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

J. G. Hossack, for the applicants.

E. A. Harris, for Douglas Robertson.

L. M. Keachie, for Caroline W. Robertson, committee of the estate of Doris Robertson.

ORDE, J., in a written judgment, said that the testator died on the 6th July, 1919, leaving a will by which he devised and bequeathed the whole estate to the executors and trustees upon trust: "To retain, if said trustees think advisable, my shares in the Massey-Harris Company until my son Douglas attains the age of 25, when he is to receive absolutely two-fifths of my estate, the remaining three-fifths to be held absolutely for the care and maintenance of my daughter Doris during her lifetime. My daughter's portion is to be transferred to my son should she predecease him. If he should predecease her before attaining the age of 25 years without making disposition of his portion by will, his portion is to be added to my daughter's portion for the same purpose as mentioned regarding her, and at her decease the whole remaining estate is to be divided as follows." (Then followed a division thereof among the testator's sisters and other collateral relatives.)

The gift of two-fifths of the estate to Douglas was comprised in the words "until my son Douglas attains the age of 25, when he is to receive absolutely two-fifths of my estate." If those words were all, the gift would be clearly contingent upon his attaining 25. But there were other provisions in the clause which must be considered. The testator divided his estate into two distinct portions, one, comprising two-fifths of the estate, was set apart for the benefit of the son, and the remaining three-fifths for the care

and maintenance of the daughter during her lifetime. The share set apart for the benefit of Douglas is spoken of as "his portion." There was no disposition of the income upon Douglas's portion prior to his attaining the age of 25, and the gift over in the event of his not attaining the age of 25 was only in case he should predecease his sister before that time and "without making disposition of his portion by will." All the provisions indicated an intention on the part of the testator that Douglas's interest was to be something greater than a merely contingent one.

It was argued on his behalf that his interest became an absolute vested interest upon the testator's death.

Many of the authorities cited in support of this contention were not applicable. Reference to the leading case of Saunders v. Vautier (1841), Cr. & Ph. 240.

The gift in this case fell within the principle laid down in Phipps v. Ackers (1842), 9 Cl. & Fin. 583. See also Whitter v. Bremridge (1866), L.R. 2 Eq. 736; Finch v. Lane (1870), L.R. 10 Eq. 501; In re Turney, [1899] 2 Ch. 739.

It was argued that the right to dispose of his portion by will before attaining 25, to be implied from the words "without making disposition of his portion by will," had the effect of giving to Douglas an immediate and absolute vested interest, and that the gift over in the event of his dying before 25 was inconsistent with that absolute gift, and consequently ineffective. There are, of course, cases where an absolute gift will not be cut down by a gift over: Halsbury's Laws of England, vol. 28, pp. 771, 772. But this was not such a case. There was not here any such prior absolute and immediate vested gift, followed by a gift over, as to bring the case within any such principle. On the contrary, the gift here, if taken alone, was merely contingent, and it was only the further provisions as to Douglas's portion of the estate, including the provision for the gift over, and the absence of any disposition of the intermediate income, which enlarged the contingent gift into a vested one. As the extent of the gift to Douglas was to be gathered by reading the clause as a whole, it was impossible to ignore the gift over in the event of his predeceasing his sister before attaining 25 and without making any disposition of his portion by will. Upon the principle laid down in Phipps v. Ackers, the gift to Douglas vested immediately upon the testator's death, but subject to be divested if he should predecease his sister before attaining 25 and without making disposition thereof by will.

Certain questions were asked as to the sale of the Massey-Harris Company shares. The trustees clearly had a discretion as to whether or not they should realise upon the shares before Douglas attained 25; but, in view of the ruling that the gift to

Douglas was subject to be divested, it would not be proper for the trustees to transfer the capital of his portion of the estate to him until he reaches 25. In the meantime he is entitled to the income of any accumulations thereof.

Order declaring accordingly; the costs of all parties to be paid out of the estate, those of the trustees as between solicitor and client.

ORDE, J. FEBRUARY 26TH, 1921.

RE GRAHAM.

Will—Construction—Provision for Widow—Whether in Lieu of Dower—Failure of Widow and Son Living on Farm to Agree—Payment of Lump-sum by Son (Devisee of Farm) to Widow—Right of Widow to Maintenance on Farm—Interest of Widow in Livestock upon Separation from Son—Maintenance and Education of Infant Son of Testator—Extent of Obligation of Elder Son—Removal of Infant from Farm.

Motion by Sarah Graham, Pearl Graham, and Venecia Graham, for an order determining certain questions as to the meaning and effect of the will of James Graham, deceased.

The motion was heard in the Weekly Court, Ottawa.

J. R. Osborne, for the applicants.

A. C. Craig, for Percy Graham and George Graham.

I. Hilliard, K.C., for the Official Guardian, representing the infants Dorothy, Ruby, and Clayton Graham.

ORDE, J., in a written judgment, said that the estate consisted of a farm of 110 acres, valued at $6,000, the farm-stock, implements, and furniture, valued at $2,185, and $640.68 in the bank.

By his will, the testator gave, devised, and bequeathed all his real and personal estate in the manner set out, viz.: to his wife he gave $3,100 and all the household furniture; to his son Percy (now 22 years of age) he gave his farm, 10 head of milch cattle, half of the young cattle, 3 horses, and all the implements; he directed that his son Clayton (now 8 years old) "is to be maintained at school by my son Percy until he passess the High School entrance examination and . . . that my son Percy shall pay to my son Clayton $1,000 with bank interest when he reaches the age of 21;" that "my son Percy shall not dispose of my farm until after my son Clayton becomes of age;" that "the above mentioned

bequest to my wife becomes due from my son Percy—should they fail to agree and should my wife get married I direct that the amount I leave to her shall be divided among my daughters equally;" that "the balance of the stock shall be used by my son Percy and my wife and when separating said stock is to be sold and the proceeds divided between them;" and finally, "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my wife."

Since the testator's death in May, 1917, the widow and the three infant children had continued to reside on the farm with Percy; it was said that it was impossible for her to continue to live with him.

The first question was whether the provisions for the widow were intended to be in lieu of dower. Upon a consideration of all the circumstances, and having regard to the authorities, the learned Judge was of opinion that the will did not put the widow to an election, and that she was entitled to dower out of the testator's lands in addition to the benefits conferred on her by the will.

The second question was, whether, in the events that had happened, the widow was entitled to be paid the $3,100. The learned Judge was of opinion that there had clearly been a failure of the mother and son to agree, and that she was entitled to be paid $3,100 forthwith. If the date of the disagreement was of any importance, it could be fixed as that on which the notice of this motion was given.

The third question was, whether the widow was entitled to be maintained on the farm by Percy in addition to the other benefits conferred by the will. The learned Judge ruled that, apart from her claim to dower, she had no such right, and the will gave her no such right.

The widow's interest in the livestock was also questioned. The learned Judge said that it was clear that, "when separating," that is, when the widow ceased to live with Percy on the farm, the "said stock," that is, what was left of the stock after taking out the specific gift to Percy, was to be sold and the proceeds divided equally between the widow and Percy.

The fifth and last question was, whether Clayton was bound to reside on the farm to entitle him to the maintenance provided for him in the will, and what was the nature and extent of the maintenance he might claim. The learned Judge said that, in the circumstances, he did not think that the widow could take Clayton away from the farm and at the same time require Percy to bear the whole burden of Clayton's maintenance and education. While Clayton remains on the farm, his board and lodging are a necessary incident of his residence there, which Percy must undertake; but,

if the mother insists upon exercising her right, as Clayton's natural guardian, to take him with her, then she cannot require Percy to pay for Clayton's board and lodging. But Percy cannot escape from the obligation of providing for Clayton's education; and, if the mother takes Clayton from the farm, Percy is nevertheless bound to pay for Clayton's education at a public school by providing the school-fees (if any) and the necessary books and also such clothes as may be reasonably necessary to enable the boy to go to school, but nothing more. This expense he would have been put to in any event.

There should be an order determining the 5 questions accordingly; costs of all parties out of the estate, those of the executors, Percy and George Graham, as between solicitor and client.

BENSTEIN v. JACQUES—JACQUES v. BENSTEIN—MASTEN, J.—FEB. 23.

Building Contract—Action by Owner against Architect and Contractor for Breach—Fraud—Finding against—Action by Contractor to Enforce Mechanic's Lien—Controversy as to Amount Due—Reference—Reports of Official Referee and Special Referee—Appeals—Items—Judgment on Further Directions—Costs.]—

Appeals from the reports of Referees and motion for judgment on further directions in the two actions. The appeals and motion were heard in the Weekly Court, Toronto. LOGIE, J., in a written judgment, said that the first action was brought by a building owner against his architect and contractor for damages for breach of the building contract. The second action was brought by the contractor against the owner to enforce a mechanic's lien for the balance of the contract-price. The actions were consolidated and referred to an Official Referee for trial, by an order made in September, 1917. The Official Referee made his report on the 4th June, 1918, finding the contractor entitled to recover $4,554.65 for the balance due on the contract and for extras, and the owner entitled to recover in his action, against the two defendants, $570; and he set the two amounts off pro tanto and so awarded the contractor $3,984.65. He also by his report found against the allegation of fraud made by the owner. The owner appealed from the report, successfully as to two items; and the report was referred back to the Official Referee as to the other items. The Official Referee died before making a further report; and the parties agreed to an order referring certain specific items in

dispute to a Special Referee for inquiry and report. The Special Referee made a report, which was to some extent in favour of the owner's contentions, and the contractor appealed from that report. The learned Judge, therefore, considered the appeals from both reports and also the motion for further directions. In the result, the amount found due to the contractor was reduced to $4,453.65; the amount allowed to the owner was increased to $1,734.29. The learned Judge directed that the two amounts should be set off pro tanto, and that the contractor should recover $2,719.36, with interest at the legal rate from the date of the architect's final certificate. The Official Referee having found that the architect was liable equally with the contractor, and that finding not having been appealed against, the architect was liable for the $1,734.29. Judgment should be entered for the contractor in the second action for the sum of $2,719.36 and declaring him entitled to a lien under the Mechanics and Wage-Earners Lien Act for $2,719.36, with costs of that action to be taxed down to and including the report of the Official Referee, together with costs of a motion for further directions; but this does not include costs of the reference in so far as it relates to the claims of the owner for work omitted or defectively done. In the first action, owing to the disallowance of the charge of fraud and the divided success as to the numerous claims put forward, there should be no costs to either party, at any stage of the proceedings or on this appeal, save as heretofore ordered, and the proper charges of the Special Referee should be borne by the parties, share and share alike. D. L. McCarthy, K.C., and A. H. Foster, for the owner. E. S. Wigle, K.C., for the architect and contractor.

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4 Geo. V. ch. 25 (O.) (Workmen's Compensation Act)—See NEGLIGENCE, 9—WORKMEN'S COMPENSATION ACT.

4 Geo. V. ch. 25, sec. 9 (O.)—See NEGLIGENCE, 12.

5 Geo. V. ch. 18, sec. 13 (3) (O.) (Toronto and Hamilton Highway Commission)—See HIGHWAY, 11.

5 Geo. V. ch. 22 (O.) (Mortgagors and Purchasers Relief Act)—See MORTGAGE, 1.

6 Geo. V. ch. 18, secs. 3, 8 (O.) (Power Companies)—See SOLICITOR, 2.

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6 Geo. V. ch. 50, sec. 2 (*f*) (Ontario Temperance Act)—See ONTARIO TEMPERANCE ACT, 23.

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6 Geo. V. ch. 50, sec. 40—See CRIMINAL LAW, 8—ONTARIO TEMPERANCE ACT, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 28.

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9 & 10 Geo. V. ch. 36, secs. 2 (*dd*), 10 (D.) (Bankruptcy Act)—See BANKRUPTCY AND INSOLVENCY, 2.

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9 & 10 Geo. V. ch. 68, secs. 362-366 (D.) (Railway Act)—See CARRIERS.

10 & 11 Geo. V. ch. 34, sec. 1 (O.) (Amending Division Courts Act)—See COSTS, 2.

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3. Agreement for Sale of Land—Declaration of Court that Agreement Valid and Subsisting—Subdivision of Land by Purchaser and Sales of Lots—Moneys Received by Vendor-company—Winding-up of Company—Receiver—Account—Reference—Findings of Referee—Appeal—Jurisdiction—Interest—Taxes—Local Improvement Rates—Discount—Credit—Scope of Reference—Bill of Costs—Commission on Collections—Damages—Inducing Servant to Leave Employment. *Diamond* v. *Western Realty Co.*, 19 O.W.N. 217.—MIDDLETON, J.

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8. Construction—Devise—Life-estates—Remainder Devised to Children of Life-tenants—Gift to Class—Time at which Class to be Ascertained. *Re Anderson*, 19 O.W.N. 192.—MEREDITH, C.J.C.P.

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