The
Ontario Weekly Notes

VOL. XII. TORONTO, MAY 25, 1917. No. 10

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 17TH, 1917.

*CAMPBELL v. HEDLEY.

Animals—Escape of Valuable Fox from Premises of Breeder—Animal Born and Reared in Captivity—Destruction by Defendants on Premises of Stranger—Right of Action—Animal Feræ Naturæ—Qualified Property of Breeder—Ontario Game and Fisheries Act, R.S.O. 1914 ch. 262—Criminal Code, sec. 345 (3), (4).

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Middlesex, upon the findings of a jury, dismissing the action, but without costs.

The action was brought to recover the value of a "patch" fox shot and killed by the defendant Hedley assisted by the defendant McIntosh. The plaintiff was a breeder of foxes for profit. This fox was born on the plaintiff's ranch, one of a third generation of captive foxes, reared in captivity. It escaped and was at large for several days before the plaintiff was aware of it, and was shot upon the premises of a stranger. The jury found that the fox had escaped from the plaintiff's ranch or kennels, and that the defendants when they killed it had no reason to believe that it was a fox which had escaped from the kennel or ranch of any fox-breeder.

The appeal was heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

J. M. McEvoy, for the appellant.

W. R. Meredith, for the defendants, respondents.

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

LENNOX, J., read a judgment containing an elaborate discussion of the law. He said that the question to be decided was, whether the plaintiff enjoyed an absolute or only a qualified or possessory title in the fox; and this question was to be answered by determining whether the fox should be regarded as of the domestic or tamed class of animals or of the class known as animals feræ naturæ. The former are the subject of absolute property, and the owner retains his right of property if they stray away, and may retake them if he can find them, living or dead: Halsbury's Laws of England, vol. 1, p. 365, para. 797. In the latter class the owner has no absolute property; he has a recognised qualified property, and may, by obtaining complete physical control, become the absolute owner—by killing the animals for instance: op. cit., paras. 798, 802. The plaintiff's qualified property in the fox, by expenditure of time and money and housing on his own land, and the incipient power of enlarging this into absolute ownership, both came to an end when the fox escaped and was reduced into actual possession by the defendants, without the plaintiff's intervention or knowledge. It was not pretended that there was an animus revertendi, that the fox regarded its pen as other than a prison, or that it would voluntarily return to captivity or human control—it was struggling for freedom, pursuing the instincts of its class, and had reverted to the common stock at the time it was destroyed. There was no room for doubt as to the class to which the fox should be assigned.

There is nothing in the Ontario Game and Fisheries Act, R.S.O. 1914 ch. 262, which indicates that foxes are to be regarded as game or are entitled to protection.

Reference to sec. 345 (3) and (4) of the Criminal Code.

ROSE, J., agreed with LENNOX, J.

MEREDITH, C.J.C.P. (written reasons to be given later), and FERGUSON, J.A., agreed in the result.

Appeal dismissed with costs.

WHALEY v. WHALEY—FERGUSON, J.A., IN CHAMBERS—MAY 18.

Appeal—Extension of Time for Appealing to Appellate Division—Terms—Costs.]—Application by the plaintiff to extend the time for appealing from an order of MASTEN, J. In a short memorandum, FERGUSON, J.A., said that, upon the plaintiff abandoning all claim to interim alimony and disbursements, and, within five days after the 19th May, paying to the defendant, through his solicitors, as costs thrown away by the plaintiff's default, the sum of $125, the plaintiff's time for appealing from the order of Mr. Justice Masten would be extended: the notice of appeal to be served within two days after payment, and the appeal to be set down within two days thereafter. On default application refused. Counsel did not raise any question as to the plaintiff's right to appeal without leave. J. F. Boland, for the plaintiff. A. W. Langmuir, for the defendant.

HIGH COURT DIVISION.

MIDDLETON, J. MAY 15TH, 1917.

TOWN OF BURLINGTON v. COLEMAN (No. 1).

Highway—Dedication—Registered Plan—Sale of Lots according to Plan—User of Road by Public—Municipal Act, R.S.O. 1914 ch. 192, sec. 433—Surveys Act, R.S.O. 1914 ch. 166, *sec. 44—Amendment to Original Statute—Retroactive Effect—Application to Townships.*

Action by the Corporation of the Town of Burlington to establish its title to a small piece of land situate in the town between the Grand Trunk Railway and the lake, asserted to be part of Maple avenue, to compel the defendant to remove a building therefrom, and to restrain the defendant from trespassing.

The defendant denied that the land in question now or ever formed part of Maple avenue—which, he alleged, did not go to the water's edge. He claimed title in himself by virtue of certain conveyances.

The action was tried without a jury at Toronto.

C. W. Bell and W. Morrison, for the plaintiff corporation.

B. N. Davis, for the defendant.

MIDDLETON, J., in a written judgment, set out the facts and referred to surveys, plans, and conveyances. Plan 47, registered on the 28th October, 1869, shewed the street now known as Maple avenue as running to the water's edge. Statute labour was done, not only upon the Lake Shore road and Maple avenue, but upon the road where it ran down the bank and to the water's edge. This road had, long before the plan was made, been used by the public as a means of access to the beach and to the water. The land was laid out by the owner as part of Maple avenue, upon registered plan 47; and, as the evidence disclosed sales according to this plan, the land in question became a public highway.

The original enactment, which is now sec. 44 of the Surveys Act, R.S.O. 1914 ch. 166, did not apply to townships at the date of the plan; but, when the statute was amended so as to apply to townships, the amendment was retroactive in its effect—all roads which had been laid out in the way described were declared to be public highways; and, under sec. 433 of the Municipal Act, R.S.O. 1914 ch. 192, had become vested in the municipality.

Judgment for the plaintiff corporation, with costs, declaring that the land in question is a highway and directing the defendant to remove his building therefrom.

MIDDLETON, J. MAY 15TH, 1917.

TOWN OF BURLINGTON v. COLEMAN (No. 2).

Vendor and Purchaser—Agreement for Sale of Land to Municipal Corporation—Action by Corporation for Specific Performance—Defence—Representation as to Formation of Public Park—Resolution of Municipal Council—Costs.

Action for specific performance of an agreement under seal, dated the 14th June, 1912, whereby the defendant covenanted and agreed to convey to the Municipal Corporation of the Town of Burlington, the plaintiff, land in the town fronting upon the lake and lying between Water street and the lake, to enable the plaintiff corporation to complete arrangements with the Dominion Government for the construction of a sea-wall.

The action was tried without a jury at Toronto.

C. W. Bell and W. Morrison, for the plaintiff corporation.

B. N. Davis, for the defendant.

MIDDLETON, J., in a written judgment, said that the defence was, that the agreement was entered into by the defendant upon "the express representation and undertaking that the plaintiff corporation would fill in and convert into a public park the lands lying between the water-front and the breakwater," which the corporation had refused to do, and that the main consideration for the defendant's agreement was the formation of this park.

No such representation was ever made, and it never was contemplated that the harbour should be filled in for a park.

When the original retaining wall was under contemplation, on the 25th October, 1912 (after the date of the defendant's agreement), a resolution was passed by the town council, regarding the use to be made of the lands to be given by the owners to the council, that, in consideration of the owners agreeing to convey to the town, the council agreed "that all of the properties lying south of Water street shall always be kept as a park, and that no obstructions in the way of buildings or otherwise shall be placed upon it."

This resolution, which was a violation of the corporation's understanding with the Government, was the whole foundation of the defence now put forward—but it was after the agreement. The land was vacant and open for public resort. No improvements had been made to warrant the shore being regarded as a park, but as a natural park it was probably all that the council or any one else ever intended.

What was done by the construction of the sea-wall was not what was originally contemplated, but the defendant assented to the change, which was greatly to his advantage.

There seemed to have been some error in the land covered by the agreement. Specific performance of the agreement as it stood must be awarded, reserving to the defendant the right to give in lieu of it certain parcels which the plaintiff corporation was willing to accept.

There had been much laxity on the part of the plaintiff corporation, which almost induced the learned Judge to refuse it costs; but the defence set up was so contrary to good faith that he had concluded to let the costs follow the event.

SUTHERLAND, J. MAY 16TH, 917.

RE ORR.

Will—Validity of Bequests—Charitable Bequests—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2 (2)—Advancement of Religion—Christian Science Church—Public Policy—Perpetuities—Benefit to Community—Distribution of Fund among Churches of Town—"Uplift of Needy"—Next of Kin—Ascertainment—Uncertain Bequests—Invalidity—"Deserving People"—Residuary Estate—"For God only"—Evidence—Capability of Corporate Bodies to Receive Gifts—Leave to Adduce—Costs.

Motion by the executors of Mary Helen Orr, deceased, upon originating notice, for an order determining certain questions arising upon the language of the will. The estate was of about the value of $200,000.

The testatrix gave the whole of her property to her executors in trust for the following purposes:—

First, to pay debts, etc.

"Second, I give devise and bequeath unto The Mother Church, Boston, $10,000 to be used in spreading the truth; $10,000 towards encouraging those building C.S. churches to be distributed in smaller or larger sums as may be wise from $100 to $300 to each church; $10,000 to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually; $10,000 for the benefit of those who are endeavouring to uplift the needy in Chicago, such as Miss Jane Addams, United Charities, and whatever may seem to require assistance; $5,000 to be used for any necessary or uplifting purpose among father's kin; $5,000 to be used for any necessary or uplifting purpose among mother's kin; $50,000 will be used as a fund towards helping such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near, and universal for all who will receive. These institutions may take the place of what at present are called hospitals, poor-houses, gaols, and penitentiaries, or any place that is maintained for the uplifting of humanity. Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised as said before in such work as is helpful to men and women who are willing to know and

experience the truth as revealed in the Bible and which has been unlocked through the Revelation as given in 'Science and Health with Key to the Scriptures' by Mary Baker Eddy. The whole of my estate must be used for God only."

The motion was heard in the Weekly Court at Toronto.

T. Stewart, for the executors.

E. D. Armour, K.C., for the Official Guardian.

R. J. McLaughlin, K.C., and T. H. Stinson, for Mary Cameron.

A. M. Fulton, for the Corporation of the Town of Bobcaygeon and three cousins of the testatrix.

I. F. Hellmuth, K.C., and E. C. Cattanach, for various charities and religious bodies.

J. A. Paterson, K.C., for father's kin.

Daniel O'Connell, for mother's kin.

SUTHERLAND, J., in a written judgment, said that the material filed disclosed that the testatrix was a Christian Scientist, and the will itself shewed an intention to benefit the Christian Science sect or religious body. The testatrix was never married, and was predeceased by her father, mother, brothers and sisters, and nephews and nieces. Her nearest of kin was Mary Cameron, an aunt; and other relatives living were the descendants of brothers and sisters of her father and mother.

Evidence was properly admissible and was received to shew what the relationship of the testatrix was to the First Scientist Church of Boston and that it was known to her and to Christian Scientists generally as "The Mother Church."

According to the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, sec. 2 (2), the relief of poverty, education, the advancement of religion, and any purpose beneficial to the community not falling under those heads, are to be deemed charitable uses.

The bequest to the Mother Church at Boston should be considered a bequest for the advancement of religion; it could not be said to be contrary to public policy; it could not be said that there was something of a definitely irreligious or immoral tendency in the teaching of the Christian Science body: Halsbury's Laws of England, vol. 4, para. 182; Thornton v. Howe (1862), 31 Beav. 14. The 4th question submitted should be answered thus: By "The Mother Church, Boston," is meant "The First Church of Christ, Scientist, Boston," and it is entitled to the bequest of $10,000.

(5) "Is the Mother Church, Boston, or any other church, corporation, or persons, entitled to receive the sum of $10,000, or any part thereof, towards encouraging those building C.S. churches, to be distributed as mentioned in the will, and, if so, to what person or persons or corporation shall the said money be paid?" The purpose of this bequest is charitable in the legal sense, and the language definite enough to make it a valid bequest. It is left to the discretion of the executors to select the recipients and distribute the fund. The purpose of the gift being charitable, the rule against perpetuities is excluded: Marsden's Law of Perpetuities (1883), pp. 295, 298.

(6) "What is meant by . . . '$10,000 to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually?' This is a charitable bequest: Halsbury's Laws of England, vol. 4, para. 179. It is for religious purposes, and is a valid one; there should be a reference to the Master to ascertain the religious sects, churches, or associations in Bobcaygeon entitled to share therein.

(7) "Are any person or persons, corporation or corporations, entitled to receive the sum of $10,000 for the benefit of those who are endeavouring to uplift the needy in Chicago . . . and in what proportions and to whom or to what corporations shall the said money be paid?" This gift should be upheld as a charitable one, and the money should be divided between and allotted to Miss Jane Addams and the United Charities so as to carry out as far as possible the intention of the testatrix.

(8) and (9). The bequests to father's kin and mother's kin were valid, and there should be a reference to ascertain the persons entitled to share.

(10) "What is meant by '$50,000 will be held as a fund towards helping to supply such institutions . . . ?' What shall the executors do with this $50,000?" The language is so vague and visionary, chimerical and impracticable, and the objects intended to be benefited and the time when the benefit is to accrue so uncertain, that no reasonable or intelligible construction or effect can be given to the clause, and the legacy must be considered to be void.

(11) "What is the meaning of . . . '$10,000 as a fund to be used in lending to deserving people . . . ?' The term "deserving people" does not necessarily imply "poor people," nor does a bequest to them indicate a purpose beneficial to the community under sec. 2 (2) of the Mortmain and Charitable Uses Act: Kendall v. Granger (1842), 5 Beav. 300, 303. This cannot be regarded as a charitable gift, and is void.

(12) "Who are entitled beneficially to receive the balance or remainder of the estate . . . ?" There is no residuary clause; and apparently there will be a residue of the estate undisposed of by the will. The expression, "The whole of my estate must be used for God only," is too broad, indefinite, and open to controversy, to be intelligible or capable of being carried out.

There was, strictly speaking, no proper proof that "The Mother Church" was capable of taking the bequests: see Rex v. Maguib, [1916] W.N. 427. "The Mother Church" should have leave to supplement the material filed by such expert testimony as might be necessary. The like leave should also be granted to the United Charities.

Order declaring accordingly; costs of all parties out of the residuary estate—those of the executors as between solicitor and client.

MASTEN, J., IN CHAMBERS. MAY 16TH, 1917.

*REX v. GULEX.

Ontario Temperance Act—Magistrate's Conviction for Having Intoxicating Liquor in Railway Car—Use of Car by Railway Servants as Place to Eat and Sleep—"Private Dwelling-house"—6 Geo. V. ch. 50, secs. 2 (i), 41—Motion to Quash—Costs.

Motion to quash the conviction of the defendant by a magistrate, for that, on the 20th March, 1917, the defendant had "intoxicating liquor in a car in the Canadian Pacific Railway yard in the town of Smith's Falls . . . the said car not being his private dwelling-house, without having first obtained a license authorising him to do so."

The magistrate found that the car was not a dwelling-house.

Four men, of whom the defendant was one, employed by the Canadian Pacific Railway Company, were accustomed to live in an ordinary box-car, in the switching-yard at Smith's Falls. The car was supplied for their use by the railway company; it was furnished with a stove, bunks and mattresses, and a table.

The car was in a sense their permanent dwelling; they had no other dwelling-house; they were at liberty to live elsewhere if they chose.

On search it was found that the defendant had a bottle of gin under his mattress.

Section 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50, is: "Except as provided by this Act, no person . . . shall have or keep or give liquor in any place wheresoever, other than in the private dwelling-house in which he resides, without having first obtained a license under this Act authorising him so to do. . . ."

J. Haverson, K.C., for the defendant.
J. R. Cartwright, K.C., for the Attorney-General.

MASTEN, J., said that the motion turned on the meaning of "private dwelling-house." Defined by sec. 2 (*i*) of the Act, it is: "a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence."

The car was not used as a private residence only; it was also used as a means of transport, and was therefore not used "exclusively" as a private residence.

Nor was it "private," because others besides the four might use it to eat and sleep in, if the company so ordered.

Nor was it a "house"—it did not become a house when it ceased to move.

Again, the magistrate had found as a fact that the car was not a private dwelling-house; and that finding could not be reviewed upon a motion to quash the conviction.

Motion refused, but, in view of the importance and general interest of the case, without costs.

MORRIS v. MORRIS—LATCHFORD, J.—MAY 16.

Company—Agreement between Shareholders and Officers—Salary of Officer—Liability for Proportionate Part—Money Lent—Repayment—Reference—Report—Evidence—Appeal—Costs.]—An appeal by the defendant D. Z. Morris from the report of the Local Master at Welland finding that the appellant was indebted to the plaintiff in the sum of $2,848.55, together with interest at 4 per cent. per annum from the 21st October, 1912, and that the plaintiff was not indebted to the appellant in respect of the matters set forth in his defence and counterclaim. The appellant alleged that the plaintiff was indebted to him in the sum of $2,250 as the plaintiff's proportion of his arrears of salary as secretary-treasurer and manager of Brown Brothers Company Nurserymen Limited, for two years, ending the 30th June, 1915; and that she (the plaintiff) owed him $4,415.19 additional for moneys advanced by him to her from time to time and agreed to be repaid. The grounds of the appeal were: (1) That the evidence proved that the nursery company owed the appellant certain sums of money for salary, and that the plaintiff was liable to pay him one-quarter of the amount due by the company—"being her proportionate share thereof." (2) That the evidence established that, upon the happening of a certain event, the plaintiff was to pay back to the appellant certain moneys advanced by him to her, and that the event had happened. The appeal was heard in the Weekly Court at Toronto. LATCHFORD, J., reviewed the evidence in a written judgment, and stated his conclusion that the appeal failed on both grounds. Appeal dismissed with costs; report confirmed; and costs of the action and reference directed to be paid by the appellant. W. N. Tilley, K.C., and L. B. Spencer, for the appellant. G. H. Pettit, for the plaintiff and the other defendants.

DIAMOND v. WESTERN REALTY CO. LIMITED—BRITTON, J.—MAY 18.

Vendor and Purchaser—Agreement for Sale of Land—Cancellation by Vendor—Rights of Subpurchasers—Damages—Enticing away Servant—Counterclaim—Money Lent—Costs.]—Action for an injunction restraining the defendants from receiving or collecting any moneys payable under contracts entered into by the plaintiff's subpurchasers for lots in a part of Lundy Park, Niagara Falls, which the plaintiff had agreed to buy from the defendant company, and from interfering in any way with the subpurchasers; for $6,000 damages from the defendant company for a breach of the covenants contained in the agreement for sale and purchase, and damages for interfering with the subpurchasers; for an account; and for damages from the defendants Davidson and Bettel for enticing away a man from the plaintiff's employment. The defendant company counterclaimed certain sums of money lent, money paid for taxes, etc. The action was tried without a jury at Toronto. BRITTON, J., in a written judgment, found that the defendant company had the right to cancel the agreement and did cancel it, and the plaintiff consented thereto; that the alleged sale by the plaintiff to one Saltzman was not a bona fide sale and was not within the scope of the agreement between the plaintiff and the company; that the plaintiff was not entitled to any damages by reason of interference with his subpurchasers; that, if there was any enticing, no damages resulted therefrom; that the defendant company was entitled to recover upon its counterclaim $400, but none of the other sums claimed. Action dismissed with costs. Judgment for the defendant company against the plaintiff for $400 with costs of the counterclaim. McGregor Young, K.C., and A. Cohen, for the plaintiff. D. C. Ross, for the defendants.