307 Mo. 206
Supreme Court of Missouri, Division No. 1.

GERHART
v.
CITY OF ST. LOUIS et al.

No. 24609.
|
March 16, 1925.

Synopsis
Appeal from St. Louis Circuit Court; Robert W. Hall, Judge.

Suit for injunction by George J. Gerhart against the City of St. Louis and others. From a decree of dismissal, plaintiff appeals. Affirmed.

West Headnotes (3)

[1] Animals
Dogs

Dogs are "property."

4 Cases that cite this headnote

[2] Injunction
Domestic animals, livestock, and pets

Owner of impounded dog held to have adequate remedy at law, so that equity jurisdiction by injunction against enforcing ordinance could not be invoked.

2 Cases that cite this headnote

[3] Municipal Corporations
Implied repeal

Ordinance relating to disposition of impounded dogs *held* not to repeal other ordinances.

Cases that cite this headnote

Attorneys and Law Firms

****680** ***207** Raymond S. Davis, of St. Louis, for appellant.

***208** Oliver Senti, Arthur H. Bader, and Michael J. Hart, all of St. Louis (Frederick W. Lehmann and Irvin V. Barth, both of St. Louis, of counsel), for respondents.

Opinion

***209** GRAVES, J.

This is a dog case. The city of St. Louis has three ordinances which deal with the general welfare of the dogs of the city. Perhaps it would be better to say which deal with the general welfare of the public. The record bears some evidence of the fact that it is a made case, and the real question is whether or not it has sufficient evidence of good faith, and if so, has it sufficient of facts to pass muster. The appellant sought to enjoin the city and its officials from enforcing ordinance No. 31698 of the city of St. Louis. This ordinance is short, and the only two sections thereof read:
"Section 1. Whenever any school of medicine, in the city of St. Louis, which is recognized and approved ***210** by the board of health of the state of Missouri, shall apply to the health commissioner for an order to the city marshal directing him to deliver to such school of medicine a certain number of dogs held and impounded by him and which are reasonably needed by it to teach and maintain the different courses of and for the study of medicine, the health commissioner, upon being satisfied as to the standing of said school of medicine, and that the number of dogs requested are reasonably needed by it to teach and maintain its courses of and for the study of medicine, shall make an order to the city marshal directing him to deliver the said dogs to the said school of medicine.

"Sec. 2. It shall be the duty of the city marshal to deliver the said dogs to the said school of medicine as directed by the health ****681** commissioner, and he shall collect a fee of seventy–five cents per

head for the dogs delivered, to cover the expense of taking up and caring for said dogs."

The ordinance became effective on May 19, 1922. It was violently opposed by the humane society of the city. The Revised Code of the city of St. Louis contains two sections (583 and 585) which deal with the subject of dogs. Section 583 reads:

> "It shall be the duty of the city marshal and his deputies and assistants to take up and impound in a suitable place—of the location of which he shall give notice by posting a card of notice in some conspicuous place in his office, and by posting a similar card or notice in the office of the license collector—any dog found in the city of St. Louis without a collar around its neck, marked as herein provided, or which may be found running or being at large unmuzzled, contrary to the provisions of any order issued by the health commissioner as provided by ordinance, shall be impounded."

Section 585 provides the method of the redemption of impounded dogs. It gives the owner three days time to redeem his impounded dog, and if not redeemed in such time authority is given the officers to kill the same. This ***211** section provides the details for the redemption. These sections are found in the Revision of 1914 of the general ordinances of the city of St. Louis. Geo. F. Dieckman was made poundmaster by the appointment of Anton Schuler, the city marshal of St. Louis. Dieckman was also an officer of the Humane Society, as is Douglas W. Robert, the latter being the president thereof. On the morning of June 14, 1922, a dog of the appellant was taken up by men working under Dieckman. Appellant immediately telephoned Robert the predicament of his dog, and requested him to take such action as would release the prisoner. Mr. Robert sent a man posthaste for the necessary documents and tags to procure the release, and before noon of that day he tendered the same, with the necessary cash to Dieckman for the release of the canine —a black and tan of no proven value, but one close to the heart (as is alleged) of appellant. Dieckman refused, as is said, because he had an order for 10 dogs under the ordinance first set out, from the Washington University. Thereupon Mr. Robert, with the necessary papers in his pocket, had Gerhart, the plaintiff (now appellant) sign up, and he immediately filed this suit in equity, by which it is sought to enjoin the respondents from enforcing said ordinance No. 31698, supra. On the same day the circuit court granted an order upon defendants to show cause on June 22, 1922, why a temporary injunction should not be granted. Dieckman was not a party to the action, but the city marshal, Schuler, was, as will be seen by the title of this cause. The University did not get the dog, and as the poundmaster has a killing of dogs each Tuesday and Saturday, the record would indicate that plaintiff's dog took his departure to the great beyond on Saturday, the 17th of June. After the injunction suit was filed, the plaintiff seems to have lost all interest in his dog, but retained his interest in the lawsuit. Dieckman says he gave directions to his men on the 14th not to kill the dog, but very singularly he cannot account for his later absence. As said, the dog probably met the usual fate at the killing upon the ***212** 17th. The evidence discloses that Dieckman usually kept the well–bred dogs overtime in the hopes of some person taking them out. Neither plaintiff nor Dieckman seem to have had any interest in this dog after they got the injunction suit filed.

The petition for injunction charged the unconstitutionality of this ordinance (No. 31698) from all imaginable angles, and it is averred that the suit was brought by plaintiff, as a taxpayer, in behalf of himself, and all others similarly situated. No others seem to have been interested. After the evident demise of the dog, the trial court heard evidence on the matter of granting a temporary injunction, but, after this hearing, the issues were fully made up, and, by agreement, the case submitted for final determination on the evidence adduced on this hearing. There was no hurry, as the dog was dead. Later the court denied the permanent

injunction and dismissed plaintiff's bill. From such judgment, this appeal was taken. There was full answer to the bill made by respondents, which can be noticed in the course of the opinion, if necessary. The city is a party, and this suffices for our jurisdiction of the case, without considering the sundry alleged constitutional questions. There are enough of these to suffice for the appeal of a dozen cases, if they are of substance.

I. Perhaps it would be better to give a slight outline of respondent's answer and contentions. They admit the official position of Dieckman at the time of the disappearance of plaintiff's "black and tan" dog, alleged to have been close to the heart and affections of the plaintiff. "Black and Tan" seems to have taken his departure about June 17th, and respondents say that Dieckman was deposed (officially) on the 19th, the Monday following. They charge that Dieckman violated the ordinances of the city in refusing to return the dog to his distressed (?) master; that they were no parties to the performance, and that the bill in equity was a cooked–up case to trouble them and the learned chancellor nisi. They intimate that plaintiff had ***213** no real affection for "Black and Tan," but that the case was one "cooked" by Dieckman and his Humane Society, in order, willy–nilly, to draw into equity ordinance No. 31698, supra. In fact Dieckman testified that he had to have a test case, so ****682** plaintiff's canine was selected for the purpose. Respondents also say that the demise of "Black and Tan" makes the case a moot one, as appellant may never have another such to be threatened with laboratory work at Washington University. They say that plaintiff has ample remedy at law, and there was no reason to "fudge" upon a court of equity. To say the least, there are suspicious circumstances, and the trial court (judging from the questions asked by the court) doubted the bona fides of the equitable action. He seemed to be impressed with the idea that all affection for "Black and Tan" had disappeared, when once the attack in equity had been safely launched. Brother Dieckman (the Humane Society secretary and pound-+ master) did nothing for "Black and Tan" except to tell his men not to kill him, yet he was never heard of after the dog executions at the city pound on the 17th. Dieckman succeeded, however, in getting his personal attorney, who was also the president and general counsel for the Humane Society, to hurry up an equitable attack upon the ordinance that he (Dieckman) had vigorously opposed before its final passage. The learned chancellor no doubt recalled the story of "Old Drum" the veteran hound dog of Johnson County. He no doubt thought of how Burden, the owner of "Old Drum" searched the country wide, until he found the corpse, and after satisfying himself of the author of his wrong, proceeded to sue Hornsby for the value of his dog. He finally recovered after two trials in the justice's court, two in the common pleas court, and one in this court. Charles Burden v. Leonidas Hornsby, 58 Mo. 238. It was in this case that Senator George G. Vest delivered his famous eulogy upon the dog. See "The True Story of 'Old Drum' "' by Walter L. Chaney, republished in Missouri Historical Review, in January number, 1925, being volume XIX, ***214** No. 2, of that publication, at page 313, in which story appears the tribute of Senator Vest to man's most steadfast friend, the dog. The learned chancellor no doubt thought of plaintiff's great lack of interest in his beloved (?) "Black and Tan" after the equity proceeding was safely launched. If he had the knack of reading between lines (and we think that he did) he no doubt concluded that "Black and Tan" was not a dog troubled with undue affections from his master, but was a mere "critter" to be made the "goat" for launching this bill in equity. If the learned chancellor so concluded, his view meets with just what is in our mind after reading this record. There were no tears for "Black and Tan" as for "Old Drum." Thought of him ceased when he had served his part in the institution of this suit in equity. Whither he went no man seems to know, nor did they seem to care. And this includes the distressed (?) master, who never inquired for his dog after he lodged this suit. "Black and Tan," although saved by injunction from the laboratories of Washington University, was left friendless and alone to suffer the cruelties of the several dog catchers under Dieckman, and under the ordinances of the city, after the lapse of three days, took his final departure, unwept, unhonored, unmourned, and unsung. Peace to his ashes.

III. With a heavy heart we proceed to the law of "Black and Tan's" case. He is left with us in equity, his spirit wandering, where we know not. It is true

that equity does hover over and around the widow, the orphan, the minor, and the non compos, but neither "Black and Tan" nor his owner falls within either of these classes, under the evidence adduced. Neither are of the special charges of a court of equity.

[1] We shall not elaborate upon the law of this case. It is clear that the new ordinance with reference to the delivery of dogs does not repeal the two sections of the Code which we have mentioned. All can stand under a ***215** proper construction. We mean all can stand on the theory that all are valid. The first two sections are not questioned and could not be questioned. The late ordinance (the one questioned here) thoroughly fits into the system. After the lapse of three days the evidence shows a great number of dogs whose lives have been forfeited to the city. The new ordinance means that of these the poundmaster should select those for medical schools. It does not mean that the newcomer into the pound shall be turned over to meet the requirements of this new ordinance. The dog has three days for redemption before he can either be killed by the executioner of the poundmaster, or be delivered to a medical school. Such is the clear meaning of these ordinances when read together.

We shall not discuss the alleged invalidity of the new ordinance, for reasons made apparent by the succeeding paragraph. That ordinance has been dragged into this case by the ears. We might say almost by force and arms.

[2] [3] IV. The plaintiff in this case had an adequate and complete remedy at law. When we began the practice of law, our first case was a dog case, and we were as proud as the small boy with his first pair of red–topped boots when we recovered for our client the sum of $50 for a dog (pure–bred Collie) which had been shot by a neighbor. We have kept in touch with dog law ever since. Dogs are property in Missouri. "It has long been the settled law that dogs are property in Missouri, and that no one has the right to kill them except for just cause." Reed v. Goldneck, 112 Mo. App. loc. cit. 312, 6 S. W. 1105. To like effect are Fenton v. Bisel, 80 Mo. App. loc. cit. 138; Woolsey v. Haas, 65 Mo. App. loc. cit. 199, bottom of page; State v. Mease, 69 Mo. App. loc. cit. 582; Gillum v. ****683** Sisson, 53 Mo. App. loc. cit. 516. This court in the early case of Burden v. Hornsby, 50 Mo. 238, sustained a judgment of damages for the killing of "Old Drum," mentioned, supra. Not only so, but we have made the dog a subject of grand larceny, ***216** just the same as other property worth more than $30. R. S. 1919, s 3312; R. S. 1909, s 4535; R. S. 1899, s 1898; R. S. 1889, s 3535. So at least as early as R. S. 1889, dogs have been classed as property, with a value.

In the instant case the plaintiff had complied with all the ordinance provisions for the redemption of "Black and Tan." Instead of having prepared in advance this bill in equity, and after Dieckman refused delivery of the dog, filing the same, he could have brought an action in replevin against Dieckman for the dog and gotten him. The dog was alive then from all accounts, but plaintiff preferred to try out a bill in equity with a dead dog as the moving cause, rather than take a simple legal remedy to recover the same. Of course the court of a justice of the peace is not quite so dignified as the equity side of a circuit court, but a writ of replevin in the hands of a constable, who might have deputized a corpse of adept Boy Scouts, would have made the recovery of "Black and Tan" swift and certain. If the constable had been unable to catch "Black and Tan," the Scouts would hvve been delighted with such a task.

Even after the unlawful demise of "Black and Tan," the master had his action of damages. If the master of "Old Drum" could recover in this court, why not the master of "Black and Tan?" Of course if there was collusion between the master of the dog and the poundmaster to sacrifice "Black and Tan" for a test case (and there is a lurking suspicion of such), then the case might be different. But this to the side. Plaintiff had adequate and ample remedies at law and the delicate machinery of a high court of equity should not be clogged with a simple dog case. That there are ample legal remedies for a case such as we have is not only apparent from the decision of this state, but elsewhere. Even in Oklahoma, where domestic animals of the dog and cat line are not as favorably considered as in Missouri and other states, it is recognized that the owners of such have full legal remedies to redress all wrongs against

***217** such animals. In Helsel v. Fletcher, 98 Okl. loc. cit. 286, 225 P. 515, 33 A. L. R. 792, it is said:

> "The first question to be determined is that of whether or not a cat under the laws of this state constitutes property. The general rule of law seems to be that all domestic animals are regarded as property, and that wild animals are not so regarded, except when captured and under the immediate dominion of some individual. Some writers distinguish between animals of real and intrinsic value for food, or beasts of burden, and animals that have no such value, but are kept to satisfy the mere whim or pleasure of the owner, among such animals we find cats; and many courts have held that animals of this nature are not subjects of larceny, except where specifically made so by statutory provisions, and we have no such statutes on cats, but notwithstanding this fact the owner thereof may enforce his rights therein by civil proceedings."

The same case is reported also in 33 A. L. R. 792, and this case is thoroughly annotated as to "Law as to Cats" at page 796 et seq., being an elaborate note to the principle case. In the note it is pointed out that Blackstone (2 Blackstone, Com. 397) says that the killing of a cat was a grievous crime. The annotator stops not with the question of a cat being property, but he sets out an old statute which fixed the measure of damages in civil action thus:

"The foregoing statute is translated as follows in Ingham on Animals, p. 33, note: 'If any one shall steal or kill a cat being the guardian of the king's granary, let the cat be hung up by the tip of its tail with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat' The amount of wheat thus required to cover the tail apparently was the maximum recovery. See, also, Thurston v. Carter (Me.) supra, for a mention of this law."

In this note will be found the "Cat Law" which is equally applicable to dogs. Physically, cats and dogs ***218** should not be linked together, but the law classifies them in that way. The "Dog Law" of the country has been collated in a note to Graham v. Smith, from Georgia Supreme Court, 40 L. R. A. 503. On page 507 of 40 L. R. A., supra, will be found the case law of the country as to the legal actions maintainable where the subject of the action is a dog. The cases cover trover, replevin, and trespass. They all show that this plaintiff had adequate legal remedies, and was thereby precluded from equity. This precludes a consideration of the ordinance in question. Had replevin been brought, and had the poundmaster invoked this ordinance in asserting his right to hold the dog, its validity might possibly have been determined in the legal action, but upon this question we do not now speak.

The judgment nisi is right, and it is affirmed.

All concur, except ATWOOD, J., not sitting.

All Citations

307 Mo. 206, 270 S.W. 680