

“advance” contained in the contract there in question, a word which no one suggested had any part in the contract here in question, and one which might convey quite a different meaning under different circumstances.

If the defendant were really overpaid, there was no reason why the plaintiffs should not recover the amount overpaid as money payable by the defendant to the plaintiffs for money received by the defendant for the use of the plaintiffs, a count which at common law was said to cover all money had by a defendant to which a plaintiff might in any way be entitled in justice and equity. If the plaintiffs’ contention on this appeal was right, then the defendant received the money in question for services to be rendered by him, which afterward he would not perform.

But it was for the plaintiffs to prove that contention, else they should have failed in the action; and the learned Chief Justice was unable to find that that was done.

Taking into consideration only the testimony of the witnesses whose testimony was given credence by the trial Judge, witnesses for the plaintiffs, it did not seem to establish the plaintiffs’ claim; in places it did, but in other places it seemed to go the whole way in establishing the defendant’s contention that the money in question was paid to him as wages which he was to have in any event.

Upon such testimony a judgment in the plaintiffs’ favour could not properly be awarded; they had failed to satisfy the onus of proof which was upon them.

For this reason, the judgment dismissing the action should be affirmed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS.

FEBRUARY 7TH, 1921.

*REX v. MOONEY.

Ontario Temperance Act—Magistrate’s Conviction for Offence against sec. 40—Selling Intoxicating Liquor without License—Absence of Evidence upon which Reasonable Man could Find Defendant Guilty—Theft of Liquor from Dwelling House—Allegation of Collusion—Failure to Prove—Onus of Proof—Sec. 88 of Act—Affidavit of Magistrate—Explanation of Findings—Conviction Quashed—Costs—Protection of Magistrate.

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