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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*ERNST BROS. CO. v. CANADA PERMANENT MORTGAGE CORPORATION.

Mortgage—Two Parcels of Land Mortgaged by one Instrument Executed by two Several Owners—Subsequent Conveyance by one Owner of his Parcel to the Other, after Second Charge in Favour of Creditor—Assumption of both Debts by same Person—Absence of Direct Liability of Grantee to Creditor—Parties—Subrogation—Declaration—Costs.

Appeal by the defendant Jeremiah McAsey from the judgment of ORDE, J., 47 O.L.R. 362, 18 O.W.N. 136.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

H. H. Davis, for the appellant.

H. J. Scott, K.C., for the plaintiffs, respondents.

MULOCK, C.J.Ex., read a judgment in which, after stating the facts, he said that there was much in the evidence of the appellant to support the view that he did not take beneficially under the conveyance from his brother Frank, but yet it was impossible to say, on the evidence, that the learned trial Judge erred in his finding that the transaction was an actual sale to the appellant free from any trust; and, after some hesitation, the learned Chief Justice had reached the conclusion that the fair inference was that the consideration of $1,500 mentioned in the deed represented the obligation of the appellant to pay the mortgage of the defendant corporation and the plaintiff company's claim.

It is a settled principle of law that, where there are two funds to which, or to either of which as he may elect, a creditor may resort, and there is another creditor who is entitled to resort to only

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

one of such funds, the latter has the right to require the former creditor to exhaust first the fund on which the latter has no claim: Dolphin v. Aylward (1870), L.R. 4 H.L. 486.

Here the defendant corporation had a lien on both lots, and the plaintiff company a lien on lot 14 only. The appellant was the owner of the equity of redemption in both lots, and, as between the common debtor, Frank, and himself, he was bound to pay both claims and thus save Frank harmless.

In these circumstances, the plaintiffs were entitled to have marshalled in their favour the securities of the defendant corporation—and that right could not be defeated by the act of the defendant corporation in having first resorted to lot 13, on which the plaintiffs had no claim.

In view of these facts, the application of the principle of marshalling securities shifted to lot 14 the plaintiffs' right to resort thereto in respect of their claim; and it was rightly declared by the judgment entered that the plaintiffs were entitled to a lien or charge on lot 14. The only amendment to the formal judgment that was necessary was the addition thereto of the usual provisions for redemption and in default for sale.

The appeal should be dismissed with costs.

RIDDELL, J., in a written judgment, agreed, for reasons stated, that the appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MULOCK, C.J.Ex.

MASTEN, J., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*SELICK v. NEW YORK LIFE INSURANCE CO.

Insurance (Life)—Untrue Answers of Assured upon Application—Materiality of Answers—Fraud—Unsatisfactory Findings of Jury—Judgment of Appellate Court upon the Evidence, Disregarding the Findings—Judicature Act, sec. 27.

Appeal by the defendants from the judgment of ORDE, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $3,318.49 and costs, in an action upon a policy of insurance upon the life of the plaintiff's husband, Joseph Selick, who died on the 30th March, 1918.

The appeal was heard by MULOCK, C.J. EX., RIDDELL, SUTHERLAND, and MASTEN, JJ.

D. L. McCarthy, K.C., and D. B. Sinclair, for the appellants.

T. H. Lennox, K.C., and R. Lieberman, for the plaintiff, respondent.

MASTEN, J., reading the judgment of the Court, said that by their amended statement of defence the defendants admitted that the plaintiff would be entitled to recover $3,000 and interest, as claimed in the statement of claim, but for certain written representations in the application for the insurance, dated the 20th April, 1917, signed by Joseph Selick, which representations the defendants alleged to be false and fraudulent. These representations were made by Selick in the presence of the medical examiner of the defendants, in answer to questions 8 and 9 then propounded to him. Question 8 was, whether the applicant for insurance had ever suffered from any one of a number of specified diseases, and whether he had consulted a physician for any ailment or disease not included in those specified; and Selick answered "No" to the question as to each of specified diseases and to the question as to diseases not specified. Question 9 was, what physician or physicians the applicant had consulted or been treated by within 5 years before the application and for what illnesses or ailments; and Selick answered "None." It appeared from the evidence that on the 10th March, 1917, Selick, suffering from acute nephrosis, with a temperature as high as 103, was admitted to the Toronto General Hospital, where he received treatment until the 15th March, when he was discharged in an improved condition. Nephrosis was not one of the diseases specified.

At the trial questions were submitted to the jury, and they found: (1) that Selick answered "No" to the question, "Have you consulted a physician for any ailment or disease not included in your above answers;" (2) that that answer was untrue and was acted upon by the defendants, but was not material; (3) that Selick answered "None" to the question as to consulting or being treated by physicians; (4) that that answer was untrue and was acted upon by the defendants, but was not material; (5) that Selick was not guilty of fraud in answering the questions in the way he did.

After referring to sec. 156 of the Ontario Insurance Act, R.S.O. 1914 ch. 183, and to numerous cases, the learned Judge said that it was manifest, without any specific finding, that the answers of Selick, forming, as they did, part of the application, were made with the intention that they should be acted upon by the defendants; and it was also clear that Selick, at the time he made the

answers, knew them to be untrue. But the jury had found that these representations were not material, and they had negatived fraud.

After a close consideration of the evidence, the learned Judge said that he was of opinion that the findings of the jury that the answers were not material and that there was no fraud must be set aside as unsatisfactory.

In his opinion also, the case was one in which the Court should exercise the powers conferred by sec. 27 of the Judicature Act and pronounce final judgment instead of directing a new trial. If the case were sent down for a second trial, no fresh evidence could usefully be given on behalf of the plaintiff, and the Court had all the materials before it to enable it to deal finally with the case.

The appeal should be allowed with costs and the action be dismissed with costs.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

FORBES v. DAW.

McGREGOR v. DAW.

Fire—Setting out on Farm—Destruction of Property on Adjoining Farm and one more Remote by Spreading of Fire—Absence of Negligence—Finding of Jury—Bringing Dangerous Thing on Premises—Liability for Escape—Municipal By-law Requiring Notice to Adjoining Owner—Pleading—Exclusion of Evidence—Amendment—New Trial—Costs.

Appeals by the plaintiffs from judgments of the Judge of the County Court of the County of Grey, upon the findings of a jury, dismissing actions brought to recover damages alleged to have been suffered by the plaintiffs, respectively, from fire spreading to their lands by reason (as alleged) of the negligence of the defendant in setting fire to the bush upon his land. The actions were tried together.

The appeals were heard by MULOCK, C.J. Ex., MAGEE and HODGINS, JJ.A., and MASTEN, J.

G. H. Kilmer, K.C., for the appellants.

W. H. Wright, for the defendant, respondent.

MULOCK, C.J. Ex., reading the judgment of the Court, said that the defendant, a farmer, owned, occupied, and operated as a farm, lot 13 in the 19th concession of Keppel. The plaintiff Forbes owned the adjoining lot, 14, and the plaintiff McGregor owned lot 15, which was separated from the defendant's lot by the intervening lot 14. In the centre of the defendant's land was a lane by which he was able to reach his woodland situate at the southerly end of the lane. A brush-heap near the rear end of the land interfered with his obtaining convenient access to the woodland, and in order to remove the obstruction the defendant, on the 6th September, 1919, set fire to this brush-heap. The fire spread first through the adjoining land, owned by Forbes, and thence to the land of McGregor, destroying timber on the property of each plaintiff, and these actions were brought to recover damages because of such destruction.

At the trial questions were submitted to the jury, and in each case the answers were to the effect that the defendant was not guilty of negligence either in starting the fire or in endeavouring to prevent its extending to the plaintiffs' lands. In the case of the plaintiff Forbes the jury found $60 damages and in the case of the plaintiff McGregor $50 damages.

One ground of appeal was, that the County Court Judge erred in refusing to allow the plaintiffs to put in evidence a by-law passed by the township council, under authority of sec. 542 (16) of the Municipal Act, R.S.O. 1897 ch. 223, which provided that no stumps, wood, brush, etc., should be set on fire in the open air within the township from the 15th July to the 1st September, nor at any other time or times during the year until after two days notice to the owner or occupant of the adjoining property; and that any person contravening this provision should be liable to a fine and also for all damages which might be occasioned thereby.

If the defendant did not give to Forbes, the owner of the adjoining property, two days' notice of his intention to start the fire, his starting it was, as against Forbes, if it injured his property, a wrongful act. The contravention of the by-law was not in pleading set up by the plaintiff in either action; but at the trial counsel for the plaintiffs tendered the by-law in evidence. The County Court Judge declined to receive it. In the view of the learned Chief Justice, if, having regard to the facts, the by-law, in the absence of such notice, gave to the plaintiffs or either of them a cause of action, an amendment of the pleadings should have been allowed. The plaintiff McGregor not being "an owner or occupant of the adjoining property," the by-law did not create any duty owing to him by the defendant.

The evidence shewed that the brush in which the fire was started obstructed the defendant in the proper management of

his farm. The fire was, therefore, an instrument of husbandry, and the defendant would not be liable for injury caused by its spreading beyond his property unless he was guilty of negligence in having started it or in having allowed it to spread to McGregor's farm. There was no reason for disturbing the finding of the jury that the defendant was not guilty of negligence. The case was fairly submitted to the jury, and the charge was not open to objection.

McGregor's appeal should be dismissed with costs.

The by-law prohibited the defendant from starting a fire until after two days' notice to Forbes. Assuming that the defendant did not give Forbes such notice, the principle of Rylands v. Fletcher (1868), L.R. 3 H.L. 330, applied. See also Jones v. Festiniog R.W. Co. (1868), L.R. 3 Q.B. 733.

The defendant brought fire, a dangerous thing, on his land. It spread and injured the adjoining owner; and absence of negligence did not excuse the defendant. The defendant, therefore, by reason of the by-law, if no notice was given, would be liable to Forbes. The plaintiff should be allowed to amend his statement of claim by setting up a cause of action arising under the by-law. The defendant, if he desired it, should have the right to plead to the amended statement of claim and have a new trial. The judgment in the Forbes case should be set aside, and the defendant should pay the plaintiff his costs of the appeal; and, if the defendant should not within one month elect to have a new trial, judgment should be entered for the plaintiff Forbes for $60 damages and costs of the action and of this appeal.

Order accordingly.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*WAMPLER v. BRITISH UNDERWRITERS AGENCY.

Insurance (Automobile)—Proofs of Loss—Correspondence—Waiver—Construction of Policy—Peculiar Accident—Whether Covered by Terms of Policy—Absence of Ambiguity—Action Prematurely Brough—Pleading—Amendment Made at Trial—Technical Defence—Rule 183—Justice of the Case—Real Matter in Dispute.

Appeal by the plaintiff from the judgment of ORDE, J., 48 O.L.R. 13, 18 O.W.N. 312.

The appeal was heard by MULOCK, C.J.Ex., MAGEE, J.A., RIDDELL and MASTEN, JJ.

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

A. C. Heighington, for the defendants, respondents.

MASTEN, J., reading the judgment of the Court, said that the quantum of the claim was not disputed—if liability existed the plaintiff should have judgment for $1,181.47.

The correspondence between the parties operated as a waiver of any proofs of loss other than those which were delivered: Morrow v. Lancashire Insurance Co. (1899), 26 A.R. 173.

The policy, on its true construction, covered the plaintiff's loss. The policy contained no direct covenant to pay, but did evidence an agreement to insure; and the defendant, in his statement of defence, admitted that the "defendant did enter into a contract of insurance of the plaintiff's automobile, on certain terms and conditions."

The internal evidence afforded by the words of the policy and the manner in which they were printed shewed that the defendants intended to accept liability for loss or damage to the plaintiff's automobile, (A) from fire, (B) "while being transported in any conveyance by land or water," (C) from theft, robbery or pilferage —subject, however, to any exceptions clearly and unambiguously set forth in the subsequent portions of these three clauses; and no such clear and unambiguous exception was set forth in the latter part of clause (B).

But, apart from the form of the policy and the manner in which the words were printed, the inherent probabilities of the case strongly supported the plaintiff's contention; and, if the policy were considered ambiguous and uncertain in its phraseology, the ambiguity was to be resolved against the defendants.

But the clause was not in truth ambiguous. By clause (B), the vehicle was insured "while being transported in any conveyance by land or water—stranding, sinking, collision, burning, or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable." It is the better construction to hold the two parts of this clause to be distributive: that the first clause covers loss arising from the injury to the automobile itself while being transported in any conveyance by land or water; and the second clause provided, in addition, that, even though there was no physical injury to the automobile itself, yet loss arising from general average and salvage charges for which the insured was legally liable were insured against, thus giving full effect to every part of the contract.

As to the action being prematurely brought, an amendment of the defendants' pleadings ought not, in the circumstances, to have been allowed at the trial. The discretion to permit an amendment is to be exercised so as to do what justice may require in the particular case; and it seemed clear in the present case that justice did not require that a technical defence of this kind, which had not been pleaded, ought to be permitted at the trial.

Had this plea been set up in the statement of defence, the plaintiff could at once have abandoned this action and begun a new one the next day. At the trial such an amendment should have been permitted only on terms that the defendant should bear all costs thrown away in consequence of the amendment, and the plaintiff could then have commenced a new action. The amendment was not only technical but valueless in determining the real rights of the parties: Sales v. Lake Erie and Detroit River R.W. Co. (1896), 17 P.R. 224, and other cases.

Reference also to Rule 183 and to Witherspoon v. Township of East Williams (1918), 44 O.L.R. 584, 602.

The "real matter in dispute" was—what was insured against?

The appeal should be allowed, and judgment should be entered for the plaintiff for $1,181.47, with costs throughout.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

HILL v. WELLS.

Trial—Action for Damages for Injury Sustained in Collision between Automobiles—Negligence—Judge's Charge—Questions Left to Jury—Unsatisfactory Answers—New Trial.

Appeal by the plaintiff Ida Belle Hill from the judgment of the County Court of the County of Middlesex, in an action to recover damages for injury sustained by her in a collision upon a highway between an automobile in which she was seated and the defendant's automobile. The action was brought by Ida Belle Hill and her husband, and was dismissed after trial by one of the Judges of the County Court with a jury, and the plaintiffs were ordered to pay three-fourths of the defendant's costs; the counterclaim of the defendant was dismissed without costs.

The appeal was heard by MULOCK, C.J. Ex., HODGINS, J.A., RIDDELL and MASTEN, JJ.

W. R. Meredith, for the appellant.

J. C. Elliott, for the defendant, respondent.

HODGINS, J.A., in a written judgment, said that the question principally argued was, whether a wife, whose injury was partly caused by the negligence of her husband, who was driving the car in which she was a passenger, was so identified with him or so

under his control as to be incapable (a) of recovering at all against a negligent third party, or (b) of recovering where her husband sues with her. But the answers of the jury gave rise to difficulty in finding a proper basis to consider that problem.

By questions 1 and 2 the jury were asked whether they accepted the plaintiffs' account of what happened or the defendant's account. The jury answered both of these in the negative. But the questions which followed were all predicated upon the acceptance by the jury of one or other of these accounts, and were so expressed. Question 3 (a) was: "If you accept the plaintiffs' account, do you find the collision was caused by the defendant's negligence. The next two questions, 3 (b) and 3 (c), were subject to the same condition. Questions 4 (a), (b), and (c) were likewise based on the acceptance of the defendant's version, and were so expressed.

As the jury had negatived the acceptance of either of the accounts given of the accident by the respective parties and their witnesses, the answers were either useless or merely conveyed the information that, provided the plaintiffs' or defendant's version was accepted, the other party would appear to have been negligent, and this was equally void of legal import.

It was necessary, however, to read the charge of the trial Judge, as well as the questions and answers, so as to consider them in the light of the instructions under which they were given.

The entire discussion by the trial Judge of the negligence of the parties and the bearing of their acts upon the question of ultimate or perhaps contributory negligence was based wholly upon the truth of one or other of the versions of how the accident happened, and not upon the assumption that neither might be wholly correct. It was, no doubt, intended differently; but the basis was as stated, and the acts designated negligence by the trial Judge were those asserted as such by the plaintiffs and defendant respectively.

The jury were not in a position to deal with the real issues before them, and the bearing of the various events was not correctly placed before them.

The answer that "necessary caution not taken on approaching such a dangerous corner" was just the sort of vague statement that might be expected from a jury confused by the conflicting stories and without clear guidance as to negligence. That answer was not sufficiently clear to base upon it a definite finding of such negligence as would render either party liable. The result was all the more obscure because the jury failed to respond to the request of the trial Judge that they should specify the particular act which they considered negligent. The jury are bound to

indicate the connection between the negligence which they find and the accident, if they are directed to do so: Ryan v. Canadian Pacific R.W. Co. (1916), 37 O.L.R. 543.

The only course open was to send the case back for a new trial. The Court framed the questions; but where, after objection taken by one party, the other relies upon the questions, and claims judgment upon the footing of their correctness and upon the answers returned upon them, the objecting party is entitled to the costs thrown away by an abortive trial. The appeal should be allowed and the case remitted to the Court below, and the costs of the appeal and of the former trial should be to the appellant in any event.

MULOCK, C.J. Ex., agreed with HODGINS, J.A.

RIDDELL, J., read a short judgment. But for the opinion of two members of the Court he would have thought it clear that the effect of the findings of the jury was that both the male plaintiff and the defendant were both guilty of negligence; the learned Judge did not dissent from the ruling that there should be a new trial.

MASTEN, J., also read a short judgment. He was of opinion that there was so much doubt regarding the true meaning of the jury's findings that this Court ought to adopt the safe course of directing a new trial.

Order as stated by HODGINS, J.A.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*BONHAM v. BONHAM.

Promissory Notes—Action on, by Executor of Deceased Payee—Defence—Oral Agreement between Maker and Payee—Gift of Money—Payment of Interest—Consideration—Agreement in Defeasance of Contract Contained in Notes—Evidence—Admissibility—Uncompleted Gift—Failure to Shew Continuance of Intention to Give.

Appeal by the defendant from the judgment of ROSE, J., 47 O.L.R. 535, 18 O.W.N. 258.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and MASTEN, JJ.

W. S. MacBrayne, for the appellant.

H. Carpenter, for the plaintiff, respondent.

MASTEN, J., reading the judgment of the Court, said that it was contended for the appellant that evidence received at the trial subject to objection was admissible and shewed that the two instruments in question were not to become operative as promissory notes unless a condition, the death of the defendant in the lifetime of the testatrix, was fulfilled. The notes were given for money advanced to the defendant by his mother; and the plaintiff was the executor of the mother.

The learned Judge agreed with the trial Judge that the bargain was not that the commencement of the obligation represented by the notes should be suspended, but rather that the notes imported a definite present obligation, liable to be defeated if the event mentioned in the oral agreement happened. That finding of fact negatived the argument advanced on behalf of the appellant.

Another point was, whether the circumstances here shewn brought the case within the principle established by Strong v. Bird (1874), L.R. 18 Eq. 315, and followed in a number of cases cited in Halsbury's Laws of England, vol. 14, p. 270; see also Re Goff (1914), 11 L.T.R. 34; Re Barnes (1918), 42 O.L.R. 352; the principle being that, where there is an uncompleted gift, and the donor appoints the debtor to be the executor of his will, the debt is extinguished in law, though in equity the executor is answerable for the amount of the debt as assets of the testator in favour of creditors and all persons taking beneficially under the testator; and the further principle that the claim in equity may be rebutted by evidence of an intention on the part of the testator to forgive the defendant, the same principle applying where the testator, during his lifetime, attempted to make a gift, which, being uncompleted, failed on technical considerations.

Here the trial Judge found in favour of the defendant's account of what took place when the money was advanced, namely, that the mother had then said that she would not lend the money to him, but would give him the money provided that he paid her interest on it as long as she lived; and there was a further finding that the notes were given to secure the payment of the interest and the payment of the principal in case the son predeceased the mother. On this issue the evidence received subject to objection was admissible; but it established that the intention to give did not continue throughout the life of the testatrix. It is essential that the intention to give shall be plain and absolute, and shall be communicated to the donee. These things were proved; but it must further be established that the intention to give continued until the death, and there the defendant failed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*REX v. VOLL.

Criminal Law—Indictment for Administering Poison with Intent to Endanger Life—Amendment Made at Trial—Intent to Injure, Aggrieve, or Annoy—Conviction—Power to Amend—New Indictment—Criminal Code, secs. 278, 951, 1018 (e).

Case stated by LENNOX, J., after the trial and conviction of the defendant upon an indictment for administering poison to A.B.

The question stated was: "Was I right, and particularly had I the power to amend the indictment as I did amend it, and thereupon allow the trial to proceed?"

The case was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ., and FERGUSON, J.A.

R. T. Harding, for the defendant.

Edward Bayly, K.C., for the Attorney-General.

MULOCK, C.J.Ex., read a judgment in which he said that the indictment was that the defendant "unlawfully did cause to be taken by A.B. certain poison, to wit, a mixture of whisky and carbolic acid, with intent thereby to endanger the life of the said A.B." At the conclusion of the case for the Crown, the learned trial Judge expressed the opinion that there was not evidence to support the charge covered by the indictment, but that there was evidence proper to be laid before the jury in support of an offence properly chargeable under sec. 278 of the Criminal Code, and amended the indictment so that it read, "unlawfully did cause to be administered to or taken by A.B. certain poison, to wit, a mixture of whisky and carbolic acid, with intent to injure, aggrieve, or annoy the said A.B."

In the learned Chief Justice's opinion, an act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve, or annoy such other person; and, therefore, by sec. 951 of the Code, the accused, if not proved guilty of the offence charged in the unamended indictment, might, without any amendment, have been convicted of the offence of administering poison with the intent to injure, aggrieve, or annoy.

As the grand jury assented to the indictment for the major offence, they must be held to have approved of an indictment for the minor offence.

The answer of the Court should be that the learned trial Judge had power so to amend the indictment; and acted rightly in so amending it and allowing the trial to proceed.

SUTHERLAND, J., and FERGUSON, J.A., agreed with MULOCK, C.J.Ex.

MASTEN, J., agreed in the result, for reasons stated in writing.

RIDDELL, J., read a dissenting judgment. He was of opinion, for reasons stated, that the answer of the Court should be in the negative; but that the Court should exercise the powers expressly given by sec. 1018 (*e*) of the Criminal Code, and order that the defendant be indicted for the offence of which he had been found guilty.

Conviction affirmed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*ADAMS v. WINDSOR TRUCK AND STORAGE CO.

Appeal—Application for New Trial—Complaint as to Charge to Jury—General Verdict—Objection not Made at Trial and Grounds not Specified in Notice of Appeal—Rule 493—Evidence—Damages—Dismissal of Appeal.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Essex, in favour of the plaintiff, upon the verdict of a jury, for the recovery of $500 and costs, in an action for the value of goods alleged to have been delivered to the defendants for storage and sold by the defendants without notice to the plaintiff.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

D. L. McCarthy, K.C., for the appellants.

H. J. Scott, K.C., for the plaintiff, respondent.

MASTEN, J., in a written judgment, said that no specific relief was asked for in the notice of appeal—neither that the judgment should be set aside nor that a new trial should be directed. But on the hearing of the appeal counsel for the appellants asked for a new trial, and complained of the charge to the jury.

On the main question, the appeal failed because neither at the trial nor in the notice of appeal were any of the grounds upon which the appeal was argued set forth. The case certainly presented many elements of doubt and confusion.

Reference to Wilson v. United Counties Bank Limited, [1920] A.C. 102, 105.

No objection was taken at the trial to the charge, and no such objection was set out in the notice of appeal, as required by Rule 493.

Reference to the Wilson case, at pp. 106, 139, 141; Lowry v. Robins (1919), 45 O.L.R. 84.

The damages appeared to be excessive; but, as there was some evidence to support the finding of the jury, the Court should not interfere.

The appeal should be dismissed.

MULOCK, C.J. EX., and SUTHERLAND, J., agreed with MASTEN, J.

RIDDELL, J., reached the same result. He read a judgment in which, after discussing the evidence and the Judge's charge, he said that he had come to the conclusion that it could not be said that there was no evidence upon which the jury could reasonably find damages of $500, and that the verdict could not be disturbed. The damages were large, but not so large as to shock the conscience of the Court.

The appeal should be dismissed.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO v. ALBRIGHT.

Contract—Sale Agreement—Construction—Sales of Shares and Assets of Company—Liabilities—Mortgages to Secure Bondholders—Provisions of—Sinking Fund Payments—Interest—"Accrued"—"Proportion"—"Electrical Horse Power"—Computation of Time—Estimate—Payment of Sum in Adjustment—Method of Ascertaining—Declaration.

Appeal by the defendant from the judgment of ORDE, J., ante 54.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

A. W. Anglin, K.C., for the appellant.

C. S. MacInnes, K.C., and Christopher C. Robinson, for the plaintiffs, respondents.

RIDDELL, J., after setting out the facts and the main provisions of the two mortgages made by the Ontario Power Company to secure its bond indebtedness and the provisions contained in the bonds, and of a mortgage made by the Ontario Transmission Company with a subsequent sinking fund agreement, and of the sale contract between the plaintiffs and the defendant, said that the parties agreed that, as sinking fund under the last-named mortgage, the sum of $2,500 should be paid by the defendant under the clause in the sale contract, but disagreed as to the other two mortgages, the plaintiff contending that the amount to be paid as sinking fund began to accrue on the 1st January—the defendant that it began to accrue on the 1st July—both parties agreeing that "calendar year" means the year from the 1st January to the 31st December.

It was common ground that there was no accrual under the mortgages and independently of the sale contract. In the absence of statutory provision, a debt accrues only when it is due: Slack v. Sharpe (1838), 8 A. & E. 366, 373. It was also common ground that some meaning must be given to the words in the sale contract "shall have accrued but shall not be due at the time for the completion."

The payments of the sinking fund are periodical, and the logical meaning to be attached to the expression "sinking fund payments . . . which shall have accrued but shall not be due" must be obtained by considering the dates fixed for the payments—that, after one payment has become due, the next begins at once to accrue, and continues to accrue more and more until it becomes due. There cannot be two "payments" "accruing" at the same time, as there would be on the plaintiffs' theory between the 1st January and the 1st July, 1917.

It was argued that the payments must be considered as accruing on the 1st January because of the wording of the mortgages, but the learned Judge could not agree. In the first mortgage, a sinking fund payment is provided for, the amount of which is determined by the "electrical horse power" sold and paid for in the preceding calendar year; and it was argued that this shewed that the payment due on the 1st July was really a payment for that preceding year. But the reference to the "electrical horse power" in the previous year was merely to determine the amount of the payment.

The second mortgage was somewhat different. The bonds themselves contain a reference to the mortgage agreement, and from that it is quite clear that "proportion" in the bond does not mean an aliquot part or any definite proportion of the net earnings —it means nothing more than "portion" or "part."

The provision for payment in the mortgage is that it shall be "out of the net earnings," but it bears no necessary "ratio" or proportion thereto; and the provision that the payment is to be out of the net earnings is not for the benefit of the mortgagee, but in ease of the mortgagor, who is not to be compelled to pay if it has not "net earnings," and not more than 25 per cent. horse power sold and paid for.

The "electrical horse power," in this instance also, but furnishes the basis upon which to compute the amount of the payment to become due on the following 1st July, and has no other connection with such payment.

Where a payment becomes due on any 1st July, the next payment begins to accrue, and not sooner.

The third mortgage provides for a fixed sum to be paid on the 1st July; and all parties were agreed that that payment begins to accrue on the 1st July.

An "electrical horse power" means the equivalent in electric units, volts, amperes, or watts, of a mechanical horse power. A horse power is not a quantity, but a rate—the intensity of a force, not the amount. The payment to be made for electricity furnished to customers cannot depend upon the horse power alone—the element of time must be considered. To calculate an amount "for each electrical horse power sold . . . the preceding calendar year" would be simple if the amount sold were constant from hour to hour and day to day; but that is not the case, and means of averaging must be found. The method actually adopted is sufficiently accurate to give the total number of "horse power hours;" and that, distributed over the whole year, gives the number of "electrical horse powers" for the year.

To determine the amount to be paid upon any 1st July requires the experience of the full preceding calendar year, but an estimate can at any time be made, more or less accurate, of the "accrued" portions of the future payment, and provision is made for such an estimate in the sale agreement.

The appeal should be allowed with costs here and below, and judgment should be entered in accordance with the opinion now expressed. If the parties cannot adjust the matter, having regard to the principles stated, the case may be mentioned again.

MASTEN, J., and FERGUSON, J.A., agreed with RIDDELL, J.

MULOCK, C.J.Ex., read a dissenting judgment. He was of opinion, for reasons fully stated, that the learned trial Judge rightly decided the case.

Appeal allowed (MULOCK, C.J.Ex., *dissenting*).

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*REX v. SCOTT.

Criminal Law—Theft—Indictment for Stealing Specific Sum—Failure of Proof by Shewing Falsification of Entries in Books by Servant of Firm of Brokers—Evidence of Theft of Smaller Sum—Whether Included in Indictment and Capable of Sustaining Conviction.

Case stated by the Senior Judge of the County Court of the County of York after the trial and conviction of the defendant, before him and a jury at the General Sessions, upon a charge of theft. The question stated was: "Was there evidence upon which the defendant could properly have been convicted?"

The indictment was for stealing a definite sum of $7,800; but the defendant was in fact tried and convicted for stealing the aggregate amount of three cheques: one dated the 29th May, 1919, for $1,000, drawn by J. G. Beaty & Co.; one dated the 25th June, 1919, for $2,000, drawn by J. P. Bickell & Co.; and one dated the 7th August, 1919, for $4,835, drawn by J. G. Beaty & Co. Each of these cheques was payable to the order of McMillan Nicholson & Co., and each was deposited in the Dominion Bank to the credit of that firm—a firm of brokers. The defendant was the firm's bookkeeper. He represented to the firm that J. P. Barron was a neighbour and friend of his, and induced the firm to open an account with J. P. Barron. They opened the account and bought and sold stocks for J. P. Barron. There was no such person; "J. P. Barron" was a pseudonym for the defendant, but of this the firm was ignorant. The cheques, though properly deposited to the credit of the firm, were credited by the defendant to the account of J. P. Barron, instead of to J. G. Beaty & Co. and J. P. Bickell & Co.; and on the strength of the fictitious credit thus supposedly established with McMillan Nicholson & Co. by Barron, stocks were bought and sold, really for the defendant, and money was lost.

The case was heard by MULOCK, C.J. EX., MAGEE, J.A., RIDDELL, MIDDLETON, and MASTEN, JJ.

Keith Lennox, for the defendant.

Edward Bayly, K.C., for the Attorney-General.

MAGEE, J.A., in a written judgment, said that the defendant could not properly be convicted for theft of money in respect of his dealing with the three cheques.

But on the 11th August, 23rd August, 23rd October, 27th October, and 7th November, 1919, respectively, the defendant drew upon the firm's account in the bank five cheques for $155, $100, $175, $300, and $25, respectively, making in all $755, each payable to "cash," and each except the first marked "Barron on account." Each of them was charged to the Barron account, in which the credits had been made. They all bore the signature of the firm; but, even if they were not cheques signed in blank, the signers did not know that a cheque for Barron was really a cheque for the defendant, or that Barron's account, which appeared to have a balance at its credit, was fictitious. The five cheques were at the best obtained by false pretences. The evidence shewed that the defendant cashed them and used the money for his own purposes. As soon as he had the money so obtained in his hands, it was not his money and not intended for him. It was the money of the firm, and in misappropriating those sums he was guilty of theft upon each occasion.

The question was, whether these facts warranted a conviction upon the indictment for stealing about "$7,800 in money the property of McMillan Nicholson & Co." The indictment did not allege any date for the theft other than the year 1919. The Crown proved the theft of these five sums, and any one of them was sufficient to convict.

If the defendant were now discharged and again indicted for theft of the amount of any of those five cheques, he would be entitled to plead autrefois acquit: Criminal Code, sec. 907. The accused was in peril as to the five smaller sums, although they were not referred to in the charge to the jury.

The answer to the question stated by the County Court Judge should be: "There was evidence upon which the accused Maxwell Scott could properly have been convicted of the theft of the amount of any one of the five sums mentioned."

MULOCK, C.J. EX., and MIDDLETON, J., agreed with MAGEE, J.A.

MASTEN, J., read a dissenting judgment, in which RIDDELL, J., concurred.

Conviction affirmed (RIDDELL *and* MASTEN, JJ., *dissenting*).

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*McDOWELL v. TOWNSHIP OF ZONE.

Highway—Location of Original Road-allowance in Township—Strip of Land between Fence of Land-owner and Boundary of Road-allowance—Performance of Statute Labour—Dedication—Municipal Act, sec. 478—Mistake in Opening Road—Evidence.

Appeal by the defendants from the judgment of ORDE, J., 48 O.L.R. 268, ante 87.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

J. M. Pike, K.C., for the appellants.

T. G. Meredith, K.C., for the plaintiff, respondent.

MULOCK, C.J.Ex., in a written judgment, said, after stating the facts, that McCubben's survey shewed the position of the southern boundary line of the road-allowance, as situate a few feet north of the plaintiff's fence as it stood before the survey; and the defendants' counsel argued that the strip of land lying between the fence-line and the southern boundary-line had become and still was part of the public highway; and, therefore, the plaintiff was not entitled to move his fence northerly as far as the southerly boundary as established by McCubben's survey; and the sole question to be determined was, whether that strip of land belonged to the plaintiff or was vested in the defendants as a public highway.

In support of the defendants' contention it was said: (a) that statute labour had usually been performed on the base-line; (b) that the strip had passed to the defendants by dedication; or (c) that it became part of the public highway under the provisions of what is now sec. 478 of the Municipal Act.

The via trita is wholly within the boundary of the original road-allowance as marked by the McCubben survey, and at no place does it reach the southern boundary-line.

There was no evidence shewing the performance of any statute labour or the expenditure of any public money on any portion of the strip in question; nor, so far as appeared, had it ever been used as a highway. Nevertheless, the Court was asked to assume that, because the position of the plaintiff's original fence was a few feet south of the south boundary of the road-allowance, the intervening few feet which had been the plaintiff's land passed to the municipality, either by dedication or because statute labour had been performed on the public highway running past the

plaintiff's land. Dedication is a question of fact: Belford v. Haynes (1850), 7 U.C.R. 464; and the position of the plaintiff's fence, without more, would not warrant the inference that such position indicated an intention to dedicate to the public use the portion of the land lying between the fence and the road-allowance.

If the public had been trespassing upon the strip, by using it as a highway or by performing statute labour upon it, then it would have been incumbent upon the plaintiff to assert his rights, if he desired to preserve them; but neither of these things happened; and it is not the law that placing one's fence a few feet back of a highway warrants the conclusion that the owner intends to dedicate his intervening land to the public use, or that because statute labour is performed on the highway opposite such portion, it is assumed to have been expended on his land.

Thus the contention that the plaintiff had lost his land by dedication or performance of statute labour failed.

Section 478 of the Municipal Act afforded no defence. That section applies only where the council of a municipality has, by mistake, opened a road which was intended to be but was not wholly or partly upon the original road-allowance. There was no evidence of any intention on the part of the council to open up the original road-allowance, and, while such an intention might be assumed from the fact that statute labour was performed upon it, the performance of statute labour having been wholly within the limits of the original road-allowance, it was clear that the council did not thereby (by mistake or otherwise) open a road which was intended to be, but was not, wholly or partly upon the original allowance. Thus sec. 478 did not apply.

The trial Judge held that the effect of the McCubben survey, in determining the limits of the road allowance, was to vest in the plaintiff the strip of land in question, even if it had become part of the public highway. For the purpose of disposing of this appeal it was not necessary to decide that question, and the learned Chief Justice expressed no opinion upon it.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

BRITISH WHIG PUBLISHING CO. v. E. B. EDDY CO. LIMITED.

Contract—Construction—Supply of Paper—"150 Tons Approximately per Year"—"The Whole of the Purchasers' Requirements"—Delivery Exceeding 150 Tons in each of two first Years—Application of Excess on Amount to be Delivered in third Year—Estimate—Breach of Contract—Damages.

Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of MIDDLETON, J., 18 O.W.N. 378.

The appeals were heard by MULOCK, C.J.Ex., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

A. B. Cunningham and Christopher C. Robinson, for the plaintiffs.

G. F. Henderson, K.C., for the defendants.

MULOCK, C.J.Ex., in a written judgment, said that the plaintiffs' counsel contended that the language of the contract was ambiguous, and invoked the application of the rule that, where there is ambiguity, in order to give to the written contract the meaning intended by the parties, the Court should consider the construction which by their dealings they had placed upon it. But, if the language used is susceptible of but one meaning this rule has no application. The language seemed to the learned Chief Justice to be free from ambiguity. The defendants agreed to sell and the plaintiffs to purchase during the period of the contract, "for use in the publication," etc., 150 tons "approximately" of paper, "being the whole of the purchasers' requirements." The words "being the whole of the purchasers' requirements" do not form any controlling part of the contract, but are merely an intimation as to the purchasers' expected requirements. At most they are a mere statement that the purchasers will not require more than about 150 tons, and fall short of implying that, if the requirements exceed about 150 tons, the vendors are to be bound to supply the excess.

The defendants are bound by the contract to sell to the plaintiffs only 150 tons approximately each year during the currency of the contract.

The plaintiffs' appeal should, therefore, be dismissed with costs.

The cross-appeal of the defendants was not pressed, and should be dismissed with costs.

RIDDELL, J., was of the same opinion, for reasons stated in writing.

FERGUSON, J.A., in a written judgment, stated the facts elaborately and reviewed the authorities. He was of opinion that the parties were primarily contracting with reference to the requirements of the plaintiffs' business, described in the contract; that these requirements were the real subject-matter of the contract; that the words "being the whole of the purchasers' requirements" were intended to be an alternative and more definite description of the obligations assumed by the defendants, rather than an adjectival addition to the description "150 tons approximately;" that the parties had, prior to the making of the contract, interpreted for themselves the words used in the renewal contract as entitling the plaintiffs to ask for and obligating the defendants to supply the reasonable requirements of the plaintiffs' business, and that the parties contracted on the basis of such interpretation; that such interpretation was followed until war and market conditions rendered the fulfilment of the contract by the defendants onerous and unprofitable; and that the interpretation and contention set up by the defendants in 1918 was an afterthought and the result of changed conditions.

The appeal should be allowed, and the plaintiffs should be declared entitled to such damages as they suffered by reason of the defendants' failure to supply them with the paper reasonably required for the publication during 1918 of the plaintiffs' newspaper described in the contract.

The cross-appeal should be dismissed with costs.

MASTEN, J., agreed with FERGUSON, J.A.

In the result, the plaintiffs' appeal was dismissed, by reason of the equal division of the members of the Court, and the cross-appeal was also dismissed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

*FRANK v. ROWLANDSON.

Costs—Scale of—Taxation—Action Brought in District Court—Counterclaim Set up by Defendant—Both Claim and Counterclaim Dismissed with Costs—Costs of Counterclaim Taxed on County Court Scale—Jurisdiction of Division Court—Right to Costs of Counterclaim on same Scale as Action—Title to Land—Costs Limited to Amount by which Whole Costs Increased by Counterclaim—Order of County Court Judge Dismissing Appeal from Taxation—Right of Appeal from—County Courts Act, sec. 40.

Appeal by the defendant from an order of the Judge of the District Court of the District of Temiskaming, in Chambers, dismissing the defendant's appeal from a taxation of the plaintiff's costs by the officer of the Court.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

J. M. Ferguson, for the appellant.

J. M. Bullen, for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that the action was brought in the District Court. A defence was delivered, and also a counterclaim. Both claim and counterclaim were dismissed with costs. On taxing costs of the counterclaim the officer of the District Court allowed full costs on the District Court scale to the plaintiff (defendant by counterclaim). The defendant (plaintiff by counterclaim) appealed to the District Court Judge, who affirmed the ruling.

It was contended for the appellant, first, that the scale of costs should be as though the counterclaim was a separate action brought in a Division Court, the amount claimed in the counterclaim being (it was said) within the jurisdiction of a Division Court. For this contention much support could be found in Amon v. Bobbett (1889), 22 Q.B.D. 543, where it was held that the claim and counterclaim are for the purposes of taxation to be considered separate actions; but the Court of Appeal for Ontario, about the same time, held in Foster v. Viegel (1889), 13 P.R. 133, that where a defendant succeeds on his counterclaim he should (in the absence of a special order) have his costs on the scale of the Court in which the action is brought, even though his recovery be within the jurisdiction of an inferior Court. The defendant is not obliged to set up a counterclaim; he is not forced into the higher Court to assert his claim. It would be unjust that a defendant should be allowed to set up such a counterclaim with the result that if he won he would have costs on the higher scale, but if he lost he would have to pay on the lower scale only.

Moreover, the pleadings made it fairly clear that the title to land was in question, which would oust the jurisdiction of a Division Court.

The second contention was that the costs taxable on the counterclaim, both claim and counterclaim being dismissed, should not be the full costs, but only the amount by which the costs were increased by the counterclaim. This contention was well founded: Saner v. Bilton (1879), 11 Ch. D. 416; Mason v. Brentini (1880), 15 Ch. D. 287; and other cases; Holmested's Judicature Act, 4th ed., p. 262. The appeal should succeed on this point, if there was jurisdiction to entertain it.

Upon the question of jurisdiction, the learned Judge referred to the County Courts Act, R.S.O. 1914 ch. 59, sec. 40; and to Gibson v. Hawes (1911), 24 O.L.R. 543, a decision not binding on this Court, but a sound decision which should be followed. See also Weaver v. Sawyer (1889), 16 A.R. 422.

Paragraph (*d*) of sec. 40 gives a right of appeal in questions of costs, but that right is limited, and does not include the present case. The generality of paras. (*a*) and (*c*) is restricted by the provisions of para. (*d*); and the appeal cannot be entertained.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

SQUIER v. POWERS & SON.

Damages—Conversion of Goods—Measure of Damages—Duty to Minimise Loss—Counterclaim—Amount of Damages Reduced on Appeal—Costs.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Hastings, in an action for the price of goods sold by the plaintiff to the defendant. The County Court Judge gave judgment for the plaintiff for $793.25 and for the defendants upon their counterclaim for $406.25, and set off the one amount against the other, directing that the plaintiff should have judgment for $387. The plaintiff's appeal was directed to wiping out or reducing the amount allowed upon the counterclaim.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

H. J. Smith, for the appellant.

Daniel O'Connell, for the defendant, respondent.

MASTEN, J., reading the judgment of the Court, said that the grounds of appeal were: (1) that the judgment was against law and evidence and the weight of evidence; (2) that the second item of the counterclaim allowed was not properly chargeable to the plaintiff, as any such loss was not occasioned by any act or default of the plaintiff; (3) that the defendants by their own acts were estopped from claiming or recovering any damages against the plaintiff.

On the hearing, all the grounds of appeal were disallowed, except that with respect to the item of $128 allowed by the trial Judge for loss alleged to have been sustained by the defendant as special damage, on the ground that if they had received the chestnut coal which the plaintiff wrongfully converted, they could have mixed it with stove coal then in their possession and made this additional profit.

Two principles of law applicable to this branch of the case were clear: (1) that in conversion the damages recoverable are to be measured by the value to the owner of the goods converted at the date of conversion; (2) that the plaintiff was bound to take all steps which a reasonable man might take to minimise the loss.

Both these principles were applicable to the 107 tons of coal which the plaintiff, on the 6th January, 1919, wrongfully converted to his own use. The case was not presented to the Court in this aspect; and the learned Judge was by no means satisfied that the evidence as to the special profit of $128 which the defendant claimed was adequate to support the conclusions of the judgment now in review, particularly as no sufficient evidence appeared to have been adduced as to efforts to minimise the loss; but the amount in question was so small that a new trial ought not to be directed on this minor point.

Considering it therefore on the present evidence, the amount allowed on the counterclaim should be reduced by $63, and the amount of the plaintiff's judgment increased to $450; and otherwise the appeal should be dismissed, without costs to either party.

Judgment below varied.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

GILCHRIST v. MERCHANTS CASUALTY CO.

Insurance (Accident)—Death of Assured—Action by Beneficiary Named in Policy—Defences—Reduction in Amount of Insurance by Reason of Representation in Application that Occupation of Assured less Hazardous than it actually was—Findings of Jury—Classification of Risks—Construction of Policy—Misrepresentation as to Duties of Assured—Responsibility for Answers in Application—Jury not Directed as to Real Question—New Trial as to Misrepresentation only—Terms—Costs.

An appeal by the defendants from the judgment of LOGIE, J., upon the findings of a jury, in favour of the plaintiff, for the

recovery of $1,029.20, in an action upon a policy of insurance, dated the 15th February, 1919, whereby it was provided that in case of the death by accident of Benjamin Gilchrist, the plaintiff's husband, the plaintiff should receive from the defendants $1,000, subject to the terms and conditions of the policy. Benjamin Gilchrist was killed, through an accident, on the 6th November, 1919.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

J. A. Paterson, K.C., for the appellants.

W. J. McCallum, for the plaintiff, respondent.

MASTEN, J., reading the judgment of the Court, said that in the application made by the deceased for insurance his occupation was stated as "foreman, bridge and building;" his duties in that occupation as "supervising only bridge work;" that he was employed by the Grand Trunk Railway Company: and that "the business conducted" was "carpenter work."

It was contended for the appellants: (1) that under the terms of the policy no more than $100 was recoverable, because the deceased suffered the accident while performing an act outside the scope of "foreman, bridge and building . . . carpenter work," and an act belonging to an occupation classified by the appellants as more hazardous than the defendants' classification E., under which they placed him; and (2), in the alternative, that the policy was void for misrepresentations contained in the application—more particularly as to his duties.

Questions were submitted to the jury, and they found: (1) that the deceased did not misrepresent the classification of his occupation in the application; (4) that the agent of the defendants was not justified from anything said by the deceased at the time of the application in inserting the words "supervising only bridge work;" (5) that the deceased was not at the time of the accident doing an act which pertained to an occupation classified by the appellants as more hazardous than the occupation stated in the policy as grade E.; (9) that the deceased did not change his occupation, during the time he was insured, from a less hazardous to a more hazardous occupation.

Dealing with the appellants' first point on the hypothesis that the policy was valid and not voidable by the appellants, the terms of the policy must be considered. By it, the deceased was insured against accident to his person as a "foreman, bridge and building," classification E., but without any such limitation as would be created by the insertion of the words "only while supervising bridge work." The argument for the appellants in effect

asked the Court to incorporate into the policy such a limitation; but the phrase in the policy "with duties as therein described," while shewing the representation on which the policy was issued, was inapplicable to limit the ambit of the insurance granted, viz., as a foreman, bridge and building, classification E.

The deceased was insured as a "railway employee (steam)." Having regard to that fact and to the classification in the defendants' classification manual under the heading "Railway Employees (Steam)," which governed the situation, the provisions in the manual under the headings "Foreman" and "Carpenter or Joiner" had no bearing on this case.

The issue was completely and finally determined by the 5th finding of the jury, supra; and the first contention of the appellants could not prevail.

Turning to the second contention, it must be said that the 1st finding of the jury was correct; but the minds of the jurors were not directed to the crucial point, viz.: Did the deceased misrepresent his duties by his answer in the application that his duties in his occupation were "supervising only bridge work?"

The case of Provident Savings Life Assurance Society of New York v. Mowat (1902), 32 Can. S.C.R. 147, makes it plain that this representation was the representation of the deceased for which he was responsible.

But, as a matter of grace, the appellants, if they should so elect within 10 days, should, on terms, have the privilege of obtaining the answer of a jury to the question whether the answer of the deceased, "supervising only bridge work" was true or untrue; and, if the jury should find that it was untrue, they should then be asked to determine whether it was innocent or fraudulent, and, f innocent, whether it was material, and whether it induced the contract. The responsibility for the failure to obtain this finding from the jury at the first trial rested on the appellants; and, therefore, if they should elect to take a new trial upon the question indicated, it must be on payment, as a condition precedent, of the costs of the former trial and of this appeal.

The new trial must be solely on the question of misrepresentation as stated above; and all the answers of the jury at the first trial other than on the question of misrepresentation must stand.

If the appellants do not elect to take a new trial, the appeal should be dismissed with costs.

Order accordingly.

SECOND DIVISIONAL COURT. DECEMBER 20TH, 1920.

REX v. LEWIS.

Criminal Law—Juvenile Delinquent—Conviction by Judge of Juvenile Court for Stealing Post-letter—Sentence to Imprisonment in Dominion Penitentiary for three Years—Criminal Code, sec. 365—Repeal as Regards Juvenile Delinquent by sec. 33 of Juvenile Delinquents Act, 7 & 8 Edw. VII. ch. 40—Provisions of sec. 22—Motion to Court of Appeal under sec. 1016 (2) of Code to Impose Proper Sentence.

Motion on behalf of the defendant, under sec. 1016 (2) of the Criminal Code, upon notice to the Attorney-General, for an order or direction of the Court for the passing of a proper sentence upon the defendant, a boy under the age of 16 years, who was convicted, by the Judge of the Juvenile Court of the City of Ottawa, of the offence of stealing a post-letter containing $315, and sentenced to imprisonment for three years in the Dominion Penitentiary.

By sec. 22 of the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. ch. 40, "no juvenile delinquent shall, under any circumstances, upon or after conviction, be sentenced to be incarcerated in any penitentiary, or county or other gaol, or police station, or any other place in which adults are or may be imprisoned."

By sec. 33 of the same Act, any inconsistent provision of the Criminal Code is repealed. Therefore, as respects a juvenile delinquent, sec. 365 of the Code, which fixes at three years the minimum term of imprisonment upon a conviction for stealing a post-letter, is repealed.

The motion was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and MASTEN, JJ., and FERGUSON, J.A.

W. L. Scott, for the defendant, pointed out that the sentence imposed was "one which could not by law be passed;" sec. 1016 (2) of the Code.

The motion was not opposed.

THE COURT passed "a proper sentence," namely, that the defendant should be sent for an undetermined period to the Victoria Industrial School, Mimico.

SECOND DIVISIONAL COURT. DECEMBER 22ND, 1920.

PURITY SPRINGS WATER CO. LIMITED v. THE KING.

Crown—Ownership of Land—Islands in River—Change in Course of Channel since Grant from Crown in 1797—Erosion—Boundaries—Evidence—Declaration.

An appeal by the Crown from the judgment of LENNOX, J., 17 O.W.N. 455.

The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., RIDDELL and MASTEN, JJ.

G. R. Geary, K.C., and Irving S. Fairty, for the Crown.

J. W. Bain, K.C., and B. H. L. Symmes, for the suppliants.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. DECEMBER 24TH, 1920.

*REX v. MOUERS.

Criminal Law—Murder—Defences to Charge—Justifiable Homicide—Defending Honour of Girl under Protection of Prisoner—Shot Fired in Heat of Passion—Manslaughter—Evidence of Statements Made by Deceased to Girl and Companion but not Communicated to Prisoner before Shot Fired—Inadmissibility—Testimony of Prisoner—State of Mind at Time of Firing—Inflammatory Remarks of Crown Counsel in Addressing Jury not Ground for New Trial—Prejudice—Not Question of Law—Criminal Code, secs. 1018, 1021.

Case stated by ORDE, J., before whom and a jury the prisoner was tried at Sault Ste. Marie and convicted of the murder of George Elliott.

The defence of the accused, as developed by his counsel in addressing the jury, was based upon two grounds: first that the prisoner had fired the shot which caused Elliott's death in defending the honour of Margaret York and to prevent an assault upon one who was under his protection, and that the homicide was therefore justified and the accused not guilty; and, second, in the alternative, that the prisoner had fired the fatal shot in the heat of passion, and that the homicide was thereby reduced to manslaughter.

The trial Judge submitted 8 questions for the consideration of the Court. The most important were:—

1. Was I wrong in refusing to admit the evidence of Pearl Mouers (sister of the prisoner) and of Margaret York (a companion of Pearl and the girl who was the subject of the supposed assault) of any statements made to them by George Elliott and not communicated by them to the accused prior to the firing of the fatal shot?

8. Was the prisoner prejudiced on his trial by the remarks made by the counsel for the Crown in his closing address to the jury: (a) as to the prisoner travelling up and down the country with Margaret York alone; (b) that the prisoner was a bandit?

The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and LENNOX, J.

T. P. Galt, K.C., and E. V. McMillan, for the prisoner.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.O., in a written judgment, said, after setting out the facts, that the Court at the hearing came to the conclusion that all the questions except 1 and 8 should be answered in the negative (that is, against the prisoner); and indeed some of them were not argued by counsel for the prisoner, and some were but faintly pressed.

The first question should also be answered in the negative.

The learned Chief Justice was not prepared to say that if the prisoner, who testified in his own behalf, had sworn that when he fired the fatal shot he believed that the man whom he shot was endeavouring to drag the girl into the barn for the purpose of committing a criminal assault upon her, the evidence would not have been admissible as tending to shew that his belief was a reasonable one. Nowhere in his testimony did the prisoner say or suggest that he acted under such a belief; and, therefore, in the learned Chief Justice's view, the evidence which was rejected was irrelevant and inadmissible. The state of mind of the prisoner when he fired the fatal shot was an important circumstance to be considered in determining whether the homicide was murder or manslaughter; and, if the circumstances which were present to his mind were such as reasonably to lead him, and did lead him, to the conclusion that a criminal assault was about to be committed on the girl, it may be that he would have been justified in using such force as was reasonably necessary to prevent the crime from being committed, although in fact no crime was being attempted to be committed by the deceased.

If the testimony of the prisoner is accepted, he was under no such apprehension as the Chief Justice had suggested, and did not himself believe that in order to protect the girl from being outraged it was necessary for him to shoot her supposed aggressor;

for the prisoner's account of the firing of the fatal shot was that it was fired into the air to frighten and without any intention of its hitting the deceased.

If, as was probable on the facts, the deceased took hold of the girl, who was dressed in boy's clothes and presented all the appearance of a boy, practically as a lark in order to see whether she was boy or girl, and the prisoner shot him because he thought that that was what was being done, his crime would clearly have been murder. The Chief Justice could find nothing in the prisoner's testimony inconsistent with that having been what he thought.

The Chief Justice knew of no authority for stating the 8th question as a question of law, nor for the Court granting a new trial because of an inflammatory address to the jury by counsel for the Crown. The Criminal Code gives no such authority. Verdicts of juries have been set aside in civil cases on that ground; but the powers of the Court to grant a new trial in such cases are much wider than it possesses in criminal cases.

The only jurisdiction to direct a new trial is conferred by sec. 1021 of the Code, and is limited to directing a new trial "on the ground that the verdict was against the weight of evidence," and as incidental to the hearing of an appeal on a reserved case, as provided by sec. 1018.

The remarks complained of were ill-advised and ought not to have been made, but were not of such a character as would warrant the granting of a new trial in a civil action.

MACLAREN, J.A., with some hesitation, agreed with the Chief Justice.

HODGINS, J.A., for reasons stated by him in writing, and LENNOX, J., also agreed.

MAGEE, J.A., agreed as to question 8, but dissented as to question 1, thinking that it should be answered in favour of the prisoner.

Conviction affirmed (MAGEE, J.A., *dissenting*).

HIGH COURT DIVISION.

KELLY, J. DECEMBER 20TH, 1920.

RE MAILLOUX.

Will—Construction—Provision for Education of Children in "High Schools, Convents, or Universities"—"High Schools" not Restricted to Schools Coming under High Schools Act, R.S.O. 1914 ch. 268.

Motion by four beneficiaries under the will of Hypolite Mailloux for an order determining certain questions arising under the will.

The motion was heard in the Weekly Court, Toronto.

E. A. Cleary, for the applicants.

J. de Grandpré, for Eugene Mailloux.

A. St. G. Ellis, for the executors and the Official Guardian.

KELLY, J., in a written judgment, said that the only question of construction argued was as to the meaning of the words "High Schools," used in the will.

In the residuary clause, there was a direction to the trustees to pay, out of the income arising from the residue, which was to be invested for a period of 15 years, "for the benefit of such of my beneficiaries . . . as shall be during said 15 years or any part thereof of proper age, such sums as they shall deem advisable to assist them in obtaining educations in High Schools, Convents, or Universities."

The learned Judge's opinion was expressed as follows:—

"The testator was evidently a man who, though of limited education himself, was appreciative of the value of higher education, as distinguished from what is popularly referred to as primary education; and he was desirous that those whom he desired to benefit should enjoy the advantages in that respect of which he had himself not partaken. This desire manifested itself in his general attitude, and his having sent several of his own children to educational institutions of higher grade, both in this Province and elsewhere; and, being himself always a devout practical Catholic, the schools of his selection, both primary and higher, were in every instance under Catholic auspices and administration, but never High Schools as understood under the High Schools Act. His attitude towards higher education was undoubted; and, unless there can be found from the whole will a necessary inference that, in speaking of High Schools as amongst the schools to which those whom he intended to benefit should be sent, he meant only High Schools in their strict sense, as referred to in the High Schools Act, R.S.O. 1914 ch. 268, the conclusion must be that what he had in mind was schools such as Universities, Colleges, and Convents, not necessarily within this Province, in which education of a higher grade than is imparted in public or separate schools is obtainable, with a preference always for Catholic institutions.

"It is sufficiently clear that he did not intend to use the words 'High Schools' in a restricted sense, but in that broader sense which includes educational institutions of a higher grade such as I have indicated.

"In general terms 'High Schools' may be applied to schools in which is imparted instruction of a higher and more advanced character."

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

LOGIE, J. DECEMBER 20TH, 1920.

HAMILTON WOOL STOCK MILLS v. CLARK BLANKET CO. LIMITED.

Contract—Manufacture and Supply of Goods—Default of Purchasers in Making Payments for Goods as Supplied—Conduct of Purchasers—Persistent Breach of Contract—Abandonment—Refusal of Vendors to Supply Further Quantities—Action by Purchasers for Alleged Breach—Dismissal of Action.

Action for damages for breach of a contract by which the defendants undertook to manufacture for and supply goods to the plaintiffs.

The action was tried without a jury at Hamilton.

G. Lynch-Staunton, K.C., and W. F. Swenger, for the plaintiffs.

S. F. Washington, K.C., and J. W. Lawrason, for the defendants.

LOGIE, J., in a written judgment, after making certain findings of fact, said that, on the facts, sitting as a jury, he put to himself the questions, mutatis mutandis, which Brett, J., put to a jury in Bloomer v. Bernstein (1874), L.R. 9 C.P. 588:—

1. Had the defendants, by reason of the plaintiffs' conduct, reasonable grounds for believing that the plaintiffs would be unable to pay for future invoices to be presented under the contract within 10 days from the dates thereof.

2. Did the plaintiffs on or about the 22nd October come to a determination to abandon the contract?

3. Did the plaintiffs then and thereafter so conduct themselves as to lead the defendants reasonably to believe that the plaintiffs had determined to abandon the contract?

And, as the jury answered in that case, so the learned Judge in this case answered these questions in the affirmative.

On these answers, a state of things existed after the 22nd October, 1919, which justified the defendants in believing that the contract was intended by the plaintiffs to be put an end to, and which distinguished this case from William Hamilton Manufacturing Co. v. Hamilton Steel and Iron Co. (1911), 23 O.L.R. 270.

While it is admitted law that mere default in payment for an instalment of the goods does not discharge the seller, a persistent breach of contract in this respect does relieve them from performance and entitles them to cancel, and that without formal notice of rescission.

The defendants were in this position, at all events after the 13th December, 1919.

In Rhymney R.W. Co. v. Brecon and Merthyr Tydfil Junction R.W. Co. (C.A.), [1900] W.N. 169, Lord Alverstone, M.R., after a consideration of the cases, stated the law as follows:—

"If there was a distinct refusal by one party to a contract to be bound by its terms in the future, the other party might treat the contract as at an end. . . . Short of such a refusal, the true principle to be deduced from all the cases was that you must ascertain whether the action of the party who was breaking the contract was such that the other party was entitled to conclude that the former no longer intended to be bound by its provisions."

Applying these principles, the plaintiffs failed.

The findings of fact rendered it unnecessary to determine the true meaning of the last clause of the contract, by virtue of which the defendants claimed relief.

Action dismissed with costs.

HOLMESTED, REGISTRAR IN BANKRUPTCY. DECEMBER 20TH, 1920.

RE EXCELSIOR DAIRY MACHINERY LIMITED.

Bankruptcy and Insolvency—Adjudication of Bankruptcy and Making of Receiving Order—Notice of Order and of Meeting of Creditors—Neglect of Trustee to Publish Notice in Canada Gazette—Accidental Omission—Order Curing Defect in Proceedings—Bankruptcy Act, 1919, secs. 11 (4), (14), 84—Penalty.

Application by the trustee appointed in a bankruptcy matter for an order curing a defect or omission in the proceedings.

Tisdale, for the trustee.

THE REGISTRAR, in a written judgment, said that it appeared that the debtors were adjudicated bankrupt and a receiving order was made on the 25th October, 1920. Notice of the order and of the first meeting of creditors was duly published in a local newspaper, and also in the Ontario Gazette, but by misadvertence the notice was not published in the Canada Gazette, as required by sec. 11 (4) of the Bankruptcy Act, 1919. The meeting was held, inspectors were appointed, and the trustee had, with their approval, sold the assets, and was prepared to distribute them. By sec. 84,

no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made is of opinion that substantial injustice has been done which cannot be remedied by an order of the Court.

The omission here seemed to come fairly within the category of "formal defects."

It is true that it is important that the Act in this respect should be complied with, as the Canada Gazette is one of the mediums to which the public is to look for information respecting bankrupts and their estates. At the same time, in the circumstances, it did not appear to be in the least degree probable that any injustice had been done which the Court could not remedy. An order should, therefore, now be made directing an advertisement to be published in the Canada Gazette, giving due notice to creditors of the receiving order and of all that had taken place subsequent thereto, and appointing a time for a further meeting to consider and confirm what had been done, and also appointing a further day for sending in claims, if any.

The learned Registrar added that he had not overlooked the fact that the neglect of a trustee to gazette a receiving order or assignment may involve him in a serious liability at the suit of the debtor and its creditors: sec. 11 (14). In this case the omission was purely accidental and not in any sense whatever a wilful act of the trustee, and it was not a case for imposing any penalty.

MEREDITH, C.J.C.P., IN CHAMBERS. DECEMBER 21ST, 1920.

*MODERN CLOAK CO. v. BRUCE MANUFACTURING CO.

Discovery—Examination of Plaintiffs Resident Abroad—Place for Examination—Rule 328—"Just and Convenient"—Practice.

Appeal by the plaintiffs from an order made by one of the Registrars, sitting in Chambers in place of the Master in Chambers, upon the defendants' application, requiring that two members of the plaintiffs' unincorporated company, each of whom resided in Baltimore, Maryland, where the company's business was carried on and where the contract in question in this action was made, should attend, each at a different time, in Toronto, Ontario, and there submit to examination, at the defendants' instance, for discovery in the action.

J. A. Macintosh, for the plaintiffs.

J. C. McRuer, for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that another order was made about the same time, by the same officer, in this action, upon the application of the plaintiffs, for the examination on commission of several witnesses for the plaintiffs at Baltimore, so that their evidence so taken might be given at the trial in Toronto on the plaintiffs' behalf. And the order that the two members of the company should attend in Toronto was made in the face of the oath of one of them that the attendance of both or either of them would involve great hardship and result in a very serious loss of business by the plaintiffs; and not only in the face of such evidence, but also without a word, upon oath or otherwise, in contradiction of it, or in the assertion of any kind of loss or inconvenience to the defendants if the examinations should all be held in Baltimore at the same time.

The action was a simple one, involving only an everyday mercantile transaction.

In these circumstances, there should be no hesitation in allowing the appeal and directing that all examinations be had in Baltimore.

The officer who made the order thought that he was bound by the cases of Lick v. Rivers (1901), 1 O.L.R. 57, and Hamilton v. Hamilton (1920), 47 O.L.R. 359, to make the orders in question. In that the officer was mistaken. The practice is settled by the Rules of Court, confirmed by legislation—Rule 328 in this case—not by judicial opinion. The Rule is plain and explicit: the examination is to be taken at such place and in such manner as may seem just and convenient, both just and convenient, not one or the other; and the Rule is applicable to all parties alike. So the power of the Judge or officer making the order is merely to consider what is just and convenient in the case before him; and, no two cases being quite alike, no finding in any one case is binding in any other; though every case may afford some aid—may throw more or less light upon the questions involved in a later case. The exercise of discretion in such cases as these must always depend upon the circumstances of each particular case.

The learned Chief Justice then discussed the Lick and Hamilton cases, cited above, distinguishing the former, and referred to Duell v. Oxford Knitting Co. (1918), 42 O.L.R. 408. He also discussed generally the subject of examinations taken abroad and the practice in regard thereto.

The appeal should be allowed; all examinations should be held in Baltimore, and preferably at the one time; the costs of the appeal should be costs in the action to the plaintiffs only.

MEREDITH, C.J.C.P., IN CHAMBERS. DECEMBER 21ST, 1920.

*REX v. LEMAIRE.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale without License from Board of License Commissioners—Export Warehouse—Extra-provincial Trade—Secs. 40 and 46 of Act—Evidence—Onus—Sec. 88—Possession of Liquor for Sale out of Ontario only.

Motion for an order quashing the conviction of the defendant by the Police Magistrate for the City of Ottawa, for unlawfully keeping intoxicating liquor for sale without a license.

James Haverson, K.C., for the defendant.
Edward Bayly, K.C., for the magistrate.

MEREDITH, C.J.C.P., in a written judgment, said that the only ground upon which the conviction was supported in argument was, that, under sec. 88 of the Ontario Temperance Act, the defendant was prima facie liable to conviction; and that in such a case a conviction can never be quashed on the ground that there is not evidence to support it: Rex v. Le Clair (1917), 39 O.L.R. 436.

But that was not the only question involved; the magistrate had given his reasons for convicting; and if from them it appeared that the conviction was based upon an erroneous view of the law it could not stand. In his reasons the magistrate shewed that the conviction was not based on sec. 88; but upon the fact that the defendant's employers, who were carrying on the business of exporting intoxicating liquor, had no license or permission from the Board of License Commissioners; and also upon the fact that the building in which the business was carried on could not be considered a warehouse because not suitable for that purpose. The conviction was based entirely on secs. 40 and 46 of the Act, which sections, until the decision in Graham & Strang v. Dominion Express Co. (1920), 48 O.L.R. 83, were treated as lawfully applicable to extra-provincial, as well as intra-provincial, sales of liquor. Ever since that decision, the Board had apparently treated these two sections of the Act as ultra vires of the Ontario Legislature, and had ceased to inspect and grant licenses to any one carrying on extra-provincial trade only. The defendant's employers were, for that reason, without a license and had not had their building inspected.

The decision in the Graham case made the course taken by the Board necessary—the effect of the decision being that either sec. 139 of the Act takes extra-provincial trading out of secs. 40 and 46, or else those sections are ultra vires as to such trading.

The conviction based upon those sections, therefore, could not stand.

The magistrate's statement that the building could not be considered a warehouse was quite unsupported by the evidence.

The conviction could not be supported upon the ground upon which counsel for the magistrate attempted to support it. Section 88 must be given a reasonable meaning, the meaning that, when any one charged with an offence against the provisions of the Act is proved to be or to have been in possession, charge, or control of liquor in such circumstances as would make him guilty of the offence charged, then, if it is not shewn to be a lawful possession, charge, or control, he may be convicted. Mere possession, charge or control does not make an accused person even prima facie guilty of all the crimes of the Ontario Temperance Act calendar. When a case is made against an accused person under sec. 88, its weight must depend upon its circumstances.

The contention of counsel for the magistrate was that, once a case is brought within sec. 88, the magistrate's finding is conclusive upon such an application as this.

The fact that the onus may have been upon one side or the other cannot make any difference, if, upon the whole evidence, reasonable men could not have come to the conclusion to which the magistrate had given effect.

All that seemed to have been really decided in Rex v. Le Clair was, that, in view of the circumstantial evidence set out at the conclusion of the judgment, the magistrate could not be found fault with, in certiorari proceedings, for refusing to give effect to the unsupported testimony of the accused that he was not guilty.

There was no evidence in this case upon which reasonable men could find that the defendant or his employers was or were engaged in any but extra-provincial trade, or that they were in any but lawful possession of liquor. The magistrate had not found otherwise, and no one could so find. The charge of keeping for sale in Ontario, if that was what the charge meant, entirely failed on the evidence for the prosecution; and no one had yet been so absurd as to say that, when the prosecution disproves the charge, the onus is still upon the accused to prove that he is not guilty of it; but, if it were, he proved it.

What was proved for the prosecution was possession of liquor for sale out of Ontario only; and so sec. 88 never came into effect.

On all grounds the conviction should be quashed.

KELLY, J., IN CHAMBERS. DECEMBER 21ST, 1920.

RE SAGER.

Infant—Custody—Right of Father—Arrangement for Temporary Home with Grandparents—Evidence—Failure to Shew Abandonment or Forfeiture of Paternal Right—Application for Delivery over of Child by Grandparents—Costs.

Motion by Alva Delbert Sager, the father of Helen Sager, a child of four years, for an order for the delivery of the infant to his custody, she being now in the custody of her maternal grandfather, Thomas Henry, and the latter's wife, Ella Henry.

W. K. Fraser, for the applicant.
H. S. White, for Thomas and Ella Henry, respondents.

KELLY, J., in a written judgment, said that the applicant's first wife, the mother of the infant, died in June, 1919; and at that time the applicant arranged for her stay with the Henrys until he should be in a position to resume the custody, care, and control of her. He remarried in August, 1920, and was now living on his farm with his second wife and his two infant sons by his first wife, who were older then Helen.

The bulk of the evidence put forward by the respondents related to their ability to care for and maintain the infant in suitable and comfortable circumstances and to provide for her in the future. The disposition of the application did not turn upon that. The applicant's account of the terms and conditions on which his child was allowed to remain with her grandfather and his wife, corroborated as it was by the evidence of others, was not displaced; and the positive testimony of independent persons as to the character of the applicant's home and of himself and his present wife and his ability and willingness to provide a suitable home, care, and attention for his daughter, could not be ignored.

There was evidence that the respondents were able to provide a better home for the infant than her father could provide. It was not, however, a question whether their home was more comfortable and more luxurious than the father's, but whether he had deprived himself of his right, and whether his home, to which he now proposed to take this infant, was a well-ordered, normal home, where she could be suitably maintained and reared. If his is such a home, it is the natural thing, and unquestionably preferable, that that should be her home, where the family may be re-united, and where she will have the association and companionship of her brothers.

The respondents had formed an attachment for the child and were reluctant to part with her; but there was nothing on which to found a conclusion that the father had forfeited or deprived himself of the right to the custody of this infant. The arrangement was a mere temporary one, intended to continue until such time as the father had re-established his home, which had become disorganised through the death of his wife. If the father had so acted as to preclude himself from insisting upon his natural rights, or if he had contracted for or required something to be done which would be contrary to the best interests of the child, a different conclusion might be reached, on the principle stated in In re Agar-Ellis (1878), 10 Ch.D. 49, that the father may abrogate his right by a course of conduct which would make a resumption of his authority capricious and cruel towards the child.

No such conditions had arisen here; it was a simple case of refusal of the respondents to carry out the terms on which the infant was permitted to be temporarily in their custody; and the father, having now re-established a suitable home for himself and his children, had a right to the custody of this infant.

It was suggested that, in any event, an allowance should be made to the respondents for maintenance down to the time when the father made application for his daughter's return to his home. There was no evidence of any contract for maintenance, nor were the facts such as to raise a presumption of legal obligation for payment.

An order should be made for delivery of the infant to her father; but, in the circumstances, there should be no costs.

ORDE, J., IN CHAMBERS. DECEMBER 21ST, 1920.

*RE PETRIE MANUFACTURING CO. v. WRIGHT.

County Courts—Jurisdiction—Trial of Action in Place other than County Town of County in which Action Commenced—County Courts Act, secs. 25, 26—Rules 245 (a), 767, 768—Prohibition.

Motion by the defendant for an order prohibiting the Judges of the County Court of the County of Wentworth from proceeding with the trial of this action in that Court, on the ground of want of jurisdiction.

E. B. Titus, for the defendant.
G. R. Munnoch, for the plaintiffs.

ORDE, J., in a written judgment, said that the action was commenced by a writ of summons specially endorsed with a claim for the price of goods sold and delivered, issued out of the District Court of the District of Sudbury. By the writ, the plaintiffs purported to name Hamilton, in the County of Wentworth, as the place of trial.

The plaintiffs did not apply under Rule 767 for an order changing the place of trial to Hamilton, but served notice of trial for Hamilton for the 7th December, 1920, and the action was set down for trial there in the County Court of the County of Wentworth. The notice of trial and the præcipe to set down were both intituled "in the District Court of the District of Sudbury."

The defendant then moved before the Judge of the District Court of the District of Sudbury to set aside the notice of trial, but the motion was dismissed.

The question was, whether the County Court of one county or a Judge thereof had power to try, within that county, an action brought in another county, in the absence of any order transferring the action, under sec. 25 of the County Courts Act, or of an order changing the place of trial, under Rule 767.

Rule 768, which makes the Rules and the practice and procedure in Supreme Court actions applicable to County Court actions, is qualified by the words "so far as the same can be applied." In view of the special provisions of sec. 25 of the County Courts Act and of Rule 767, the provisions of Rule 245 (*a*) cannot be applied to County Court actions so as to give the plaintiff the right to commence an action in one County Court and lay the venue in another county. When a plaintiff begins an action in a County Court he impliedly lays the venue at the county town—any express laying of the venue there is a mere formality. All the provisions of the County Courts Act and Rule 767 are based upon the assumption that the jurisdiction of the County Court of each county and of the Judges thereof (except when sitting as ad hoc Judges in some other county) is limited to cases either properly brought in or transferred to the County Court of that county.

It is significant that, whether an action is, under sec. 25, transferred to the County Court which has jurisdiction, or whether the place of trial is changed under Rule 767, the action thereafter becomes an action within the jurisdiction and cognizance of the County Court to which it is removed. An order under Rule 767 in effect transfers the action to the County Court of the county to the county town of which the venue has been changed.

Reference to Corneil v. Irwin (1903), 2 O.W.R. 466; Leach v. Bruce (1905), 9 O.L.R. 380; Howard v. Herrington (1893), 20 A.R. 175, 179.

The plaintiffs in the present action cannot give notice of trial and set the action down for Hamilton; nor have the Judges of the County Court of the County of Wentworth any jurisdiction to entertain the action.

Section 26 of the County Courts Act has not taken away the power to prohibit in every case: it is limited to cases in which the action or counterclaim is transferable by reason of some lack of jurisdiction in the County Court in which the action is commenced; it has no application to cases coming properly under Rule 767.

It might be argued that the attempt of the plaintiffs to go down to trial at Hamilton was brutum fulmen, and might be ignored by the defendant; but the defendant could hardly be expected to take that risk. In these circumstances, prohibition is the only appropriate remedy for the defendant, and is still applicable to a case like this.

Oliver v. Frankford Canning Co. (1920), 47 O.L.R. 43, has no bearing upon the present case.

There should be an order prohibiting the Judges of the County Court of the County of Wentworth from proceeding with or entertaining the trial of this action until such time as an order (if any) shall be made, under Rule 767, changing the place of trial to Hamilton. The plaintiffs should pay the defendant his costs of the motion forthwith.

MEREDITH, C.J.C.P. DECEMBER 21ST, 1920.

RE DAWSON.

Will—Construction—Bequest of Residue to "Executors," not by Name—Evidence of Surrounding Circumstances—Admissibility—Executors Taking in Trust for Next of Kin as Beneficiaries.

Motion by the executors of the will of Jane Dawson, deceased, for an order determining a question as to the meaning and effect of the will.

The motion was heard in the Weekly Court, Toronto.

H. J. Smith, for the executors.

H. S. White, for three of the next of kin.

Two others were served with notice, but did not appear.

MEREDITH, C.J.C.P., in a written judgment, said that the testatrix by her will directed the payment of her debts by her executors, gave the bulk of her property to her son Arthur, and all that was left to her executors. The gift to the executors might

be to them in that character for the benefit of others, or it might be for their own benefit; and so search must be made for the intention of the giver, so that effect might be given to what was really her will.

The question must be one of intention, to be gathered from all the material circumstances of each particular case: see Williams v. Arkle (1875), L.R. 7 H.L. 606.

Did the testatrix intend that the "executors" should take beneficially, or that they should take in trust for her next of kin, of whom one of the executors was one, being one of her daughters?

Evidence of the material surrounding circumstances had been furnished. All evidence of that character was objected to, and Re Kenny (1911), 3 O.W.N. 317, was relied upon in support of the objection; but that case was inapplicable; and the evidence was admissible.

At the time when the will was made, the testatrix had no other property than that which by the will was to go to the son Arthur; and so her only purpose in regard to the property she then had was that her debts should be paid and the rest of her property should go to her son if he had fulfilled the terms upon which he was to become entitled to it. In the circumstances existing at the time of the making of the will, the executors could not take beneficially—there was nothing that they could so take.

Then the gift was to them as "executors," not by name; and there was nothing in the will to indicate that the testatrix was considering them in any other light than that of persons who should execute her will, except that, in parenthesis, in the clause appointing them her executors, the one secondly mentioned was described as her sister. And at the time the will was made the testatrix had another son living and several living daughters; and no reason had been suggested why, if she had anything more to leave to any one other than her son Arthur, she should not give something, if not everything else, to them.

Then the will was witnessed by the wife of one named as an executor, which should not have been if he were to take beneficially.

In such a case as this, with eyes open to the material and relevant surrounding circumstances, the learned Chief Justice said, no other conclusion could be reached by him than that the residue of the estate of the testatrix—a residue unlooked for when the will was made—went beneficially to her next of kin.

There should be an order declaring accordingly, with costs out of the residuary estate—those of the executors as between solicitor and client.

MEREDITH, C.J.C.P. DECEMBER 21ST, 1920.

*MACFIE v. CATER.

Assignments and Preferences—Transaction between Insolvent Trader and his Brother immediately before Assignment for Benefit of Creditors—Sale of Goods by Brother—Proceeds Paid to Insolvent—Purchase-price Transferred to Brother by Cheque of Insolvent—Payment of Debt Due to Brother—"Payment of Money to a Creditor"—Assignments and Preferences Act, R.S.O. 1914 ch. 134, sec. 6—Exception—Preference—Action by Assignee for Benefit of Creditors to Set aside—Sec. 13 of Act—Costs.

Action by the assignee for the benefit of the creditors of a trader to set aside a transaction between the defendant and the trader (his brother) and to recover the price or value of the goods which were the subject of the transaction for the general benefit of the trader's creditors.

The action was tried without a jury at London.

T. G. Meredith, K.C., and R. G. Fisher, for the plaintiff.

J. M. McEvoy, for the defendant.

MEREDITH, C.J.C.P., in a written judgment, said that the defendant's brother carried on, in a firm name, the business of cigar-making, and the defendant from time to time lent money to his brother for the purposes of the business, and at the time of the transaction attacked there was a considerable sum due to the defendant in respect of money lent. At and before this time the brother and his business were in a hopeless state of insolvency, as both brothers well knew. In these circumstances they devised a plan for giving to the defendant an advantage over all other creditors of the brother. The brother had in stock a considerable number of cigars, and their plan was, that the defendant should sell them and get the proceeds of the sale. The defendant had never sold cigars before, but he was a commercial traveller in some other line of business, and the plan could be easily carried out if no other creditor intervened. The sale was made for cash, payment to be made by way of a "sight-draft," instead of upon the usual credit terms, a discount of 10 per centum of the price being allowed to the purchaser for the cash payment. An "order" for the goods purchased on these terms was taken by the defendant from the purchaser, directed to the brother, in his firm name, and was sent by the defendant to the brother. The goods were in due course shipped; the draft was drawn and in due course paid by the purchaser; and afterwards a cheque for the amount was given

by the brother, in his firm name, to the defendant; and in that way the defendant got the whole benefit of the sale of the cigars. This part of the transaction took place through bankers other than the brother's bankers, for the purpose of preventing the brother's regular bankers, as creditors, applying any part of the money in payment of the brother's indebtedness to them.

In the books of the cigar business an entry was made in the defendant's account in these words: "May 20. By cash (McPhail acct.) $1,516.50;" and in the defendant's account rendered under oath in the insolvency proceedings which followed, it appeared in precisely the same manner. McPhail was the purchaser of the cigars, and his only account was for the price of them.

The date of the order for the cigars was the 7th May, and that of the cheque upon which the defendant got the money from the bank was the 22nd May; but the cheque was not accepted by the bank until the 30th May; and on the 31st May the brother made a general assignment for the benefit of all his creditors, "ratably and proportionably without preference or priority" to the defendant.

The object of the assignment to the defendant, instead of to some one else, was obviously to enable him to retain the preference which he had obtained; but that vantage-ground was soon lost by the action of the other creditors in appointing the plaintiff assignee in the defendant's place.

The single question was, whether the whole transaction was really only a "payment of money to a creditor," saved out of the general provisions of the Assignments and Preferences Act, by sec. 6.

The case was not really one of a mere payment by cheque of the money to the defendant by his brother; the effect of the transaction was rather to give the stock in trade, which he sold, as a preferential benefit to the defendant. Neither brother could say that the defendant took no interest in the cigars.

Robinson v. McGillivray (1906), 13 O.L.R. 232, distinguished.

The defendant's reliance must be solely on the exception out of the effect of the Act of a "payment of money to a creditor;" and it is for him who claims the exception to shew that he is within it.

The transaction was not one of a mere payment of money; it was rather the taking from the assets liable to execution of goods of the debtor and applying them in giving the creditor a preference over all other creditors. The transaction being substantially an appropriation of the cigars in part payment of a preferred creditor's claim, the proceeds of the sale of them can be reached by the assignee: sec. 13 of the Act.

The plaintiff should have judgment in the usual form applicable to the case.

The point being a new one, the law being in an unsatisfactory state, and the defendant himself being the largest creditor of his brother's estate, there should be no order as to costs.

MEREDITH, C.J.C.P. DECEMBER 21ST, 1920.

QUINN v. NORTH BRITISH AND MERCANTILE INSURANCE CO.

Insurance (Fire)—Action upon Policy—Insurance upon Contents of Automobile Repair-shop—Defences—Fire Procured by Assured—Breach of Warranty as to Use of Gasoline—Failure to Comply with Statutory Condition 18 (d)—Separation of Damaged from Undamaged Property—Examination of Remnants of Property—Conduct of Assured—Extent of Loss—Waiver—Ontario Insurance Act, sec. 199—Dismissal of Action.

Action upon a policy of fire insurance.

The action was tried without a jury at Ottawa.

R. A. Pringle, K.C., for the plaintiff.

A. E. Fripp, K.C., for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that one of the defences was, that the fire in question was caused through some wilful act or neglect or the procurement, means, or contrivance of the assured.

The fire broke out about 3 o'clock in the morning of the 8th July, 1920—18 days after the insurance had been effected. In the insured premises the plaintiff carried on a motor car service business—repairing cars, supplying gasoline, car-parts, and appliances, and housing some cars. Although the plaintiff had been in the same or a similar business for several years, this was the first insurance that he had effected.

No explanation of the cause of the fire had been given; the fire was such a suspicious one that an inquest was held, one result of which was that the plaintiff was charged with arson, but was discharged by a magistrate after the usual preliminary investigation.

Besides the defence indicated, the defendants set up: (1) Breach of the plaintiff's warranty "that machines are filled outside and that no gasoline is contained in the building except that which

is contained in the machines." (2) Failure to comply with statutory condition 18 (*d*), regarding separation of damaged from undamaged property, and especially as to exhibiting for examination all that remained of the insured property.

The learned Chief Justice said that, in his opinion, the defendants were entitled to succeed upon these two defences; and it was not needful or expedient to express any opinion upon the defence of arson.

Discussion of the facts and evidence bearing upon these two defences.

The real reason why the plaintiff did not comply with the provisions of condition 18 (*d*), but, when he could say that it was practically impossible, professed to be willing to have the remnants examined, was that he deemed it against his interest that any such examination should be had, an examination which he and his lawyer, if he were really advised by one, must have known could not but throw much light upon the case, not only upon the question whether he was guilty or not guilty of incendiarism, but also upon the nature and extent of his actual loss.

There had been nothing in the nature of a waiver by the defendants of any of the rights in respect of these defences; nor did sec. 199 of the Ontario Insurance Act put any obstacles in their way.

Action dismissed with costs.

LATCHFORD, J. DECEMBER 21ST, 1920.

FISHER v. ORIENT INSURANCE CO.

Interpleader—Goods Seized under Execution and Claimed by Wife of Execution Debtor—Issue Directed to be Tried between Execution Creditors and Claimant—Claim Subsequently Made by Father of Execution Debtor—Leave Given to Set up Jus Tertii—Evidence—Finding that Chattels Seized were not Property of either Claimant as against Execution Creditors.

An interpleader issue, tried without a jury at St. Catharines.

A. Courtney Kingstone and M. A. Seymour, for the plaintiff.
T. F. Battle, for the defendants.

LATCHFORD, J., in a written judgment, said that the trial of the issue was directed by the Local Judge at St. Catharines. The

plaintiff, the wife of C. Howard Fisher, the execution debtor, affirmed, and the defendants, the execution creditors, denied, that certain chattels seized by the Sheriff of the County of Lincoln were the plaintiff's property as against the execution creditors.

Before the trial, and after the issue was settled, application was made to the Local Judge by Carl E. Fisher, the father of the execution debtor, to be allowed to claim the chattels seized as his property as against the defendants, and this application was enlarged to be heard by the trial Judge.

Such an application, the learned Judge said, must as a rule be regarded with suspicion; but, as there was nothing in the new claim to work a surprise upon the execution creditors, he decided to allow the jus tertii to be set up, following Bryce Brothers v. Kinnee (1892), 14 P.R. 509.

The learned Judge, after a discussion of the evidence upon which the claims of the plaintiff and Carl E. Fisher were based, stated that little reliance could be placed on the testimony of either the execution debtor or his father; and that he (the learned Judge) placed implicit confidence in the evidence of Haldred Fisher, the brother of the execution debtor.

The finding must be against the plaintiff—that the chattels seized in satisfaction of the defendants' execution were not at the time of the seizure, with the exception of a certain desk—the property of the plaintiff or of Carl E. Fisher as against the defendants, the execution creditors.

The plaintiff should pay the costs of the defendants.

HODGINS, J.A., IN CHAMBERS. DECEMBER 23RD, 1920.

*REX v. POWELL.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor Contrary to Act—"Sale of Liquor"—Offence if not Authorised by License—Penalties—Power to Impose—Imprisonment for 3 Months at Hard Labour—Fine of $100 and Imprisonment for 3 Months at Hard Labour in Default of Payment—Sec. 58 of Act—Amending Act, 10 & 11 Geo. V. ch. 78, sec. 11—Amending Act, 7 Geo. V. ch. 50, sec. 10—Interpretation Act, sec. 25.

Motion to quash the conviction of the defendant, by a magistrate, for selling intoxicating liquor contrary to the Ontario Temperance Act, on the ground that the penalties imposed were beyond what the law allowed.

G. Lynch-Staunton, K.C., for the defendant.
F. P. Brennan, for the magistrate.

HODGINS, J.A., in a written judgment, said that the defendant was sentenced to imprisonment for 3 months at hard labour and to pay a fine of $1,000, and in default of payment to 3 months' imprisonment at hard labour.

It was argued for the defendant that, as the Ontario Temperance Act forbids a sale of liquor, there could be no such thing as a sale and so no conviction therefor. If this was seriously meant, it ignored the fact that a sale of liquor is an offence only if not authorised by license.

By sec. 58 of the Ontario Temperance Act, 1916, every person who sells, etc., shall be liable on summary conviction to a penalty for the first offence of not less than $200 nor more than $1,000, and in default of immediate payment to imprisonment for not less than 3 nor more than 6 months.

By the amending Act of 1920, 10 & 11 Geo. V. ch. 78, sec. 11, the above sec. 58 was added to by providing that, notwithstanding anything contained in it, the minimum penalty for any other offence (i.e., other than one under clause (*a*) of sub-sec. 1 of sec. 41) under secs. 40 and 41 shall be $2,000 and costs and in addition thereto imprisonment for a term not exceeding 3 months for a first offence; the imprisonment in both cases being in the discretion of the convicting magistrate; and, subject thereto, the provisions of sec. 58 are confirmed.

Clause (a) was added to sub-sec. 1 of sec. 41 by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 10, and deals with drinking liquor in a place where liquor cannot lawfully be kept.

Apart from the imposition of hard labour, the conviction followed the law as laid down in these sections.

By sec. 25 of the Interpretation Act, R.S.O. 1914 ch. 1, where power to impose imprisonment is conferred by any Act, it shall authorise the imposing of imprisonment with hard labour.

This power clearly applies to the penalty for non-payment of the fine: Rex v. Nelson (1914), 22 Can. Crim. Cas. 301; Rex v. Davidson (1917), 28 Can. Crim. Cas. 44.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 23RD, 1920.

*REX v. HAYTON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Box Said to Contain Liquor—Absence of Evidence to Shew Contents—Label not Evidence—Improper Conduct of Magistrate — Receiving Statements in Absence of Accused before Adjudication—Evidence—Prejudice—Conviction Quashed—Costs—Protection of Magistrate.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of Peterborough, for having intoxicating liquor in a place other than his (the defendant's) private dwelling, contrary to the provisions of the Ontario Temperance Act.

G. N. Gordon, for the defendant.

F. P. Brennan, for the magistrate and prosecutor.

MIDDLETON, J., in a written judgment, said that the proceedings before the magistrate were attacked as being unfair and contrary to natural justice, in that the magistrate acquired information from persons interested, behind the back of the defendant.

A box which was said to contain intoxicating liquor was sent by express from Montreal, addressed to a man named Edwards in Peterborough. The box was delivered, and the express charges were collected. Edwards said that he did not order the liquor, and thereupon the defendant, who was a driver for the express company, called at Edwards's house, repaid him the express charges, and took away the box, removing it to his own house. The defendant was prosecuted, not for stealing the box, but for having the supposed liquor at a place other than his private dwelling—presumably upon the street.

No evidence whatever was given to shew that the box contained liquor. It was said to have been branded "liquor," but whether truly or not no one knew. The defendant at the hearing before the magistrate relied upon the failure to prove his guilt in this vital respect.

The magistrate reserved judgment; and, after that, on two occasions, the prosecutor and the express agent discussed the matter with the magistrate, apparently endeavouring to persuade him that the label on the box and the entries in the express company's book amounted to proof of the contents of the box.

Counsel for the defendant objected to this and pointed out to the magistrate (as he, the counsel, swore) "that the magistrate should not take testimony not under oath in the absence of the accused and his counsel, and the said Police Magistrate stated that he desired to obtain all the facts from whatever source he could obtain them . . . and by reason of the said Joseph Stewart and the said W. F. Skitch giving unsworn statements to the said Police Magistrate in this case, in my belief the Police Magistrate's mind was prejudiced, and the defendant did not obtain a fair trial." Similar statements were made by another counsel present at the trial.

Three affidavits, made respectively by Stewart, the inspector, Skitch, the express agent, and the counsel for the prosecution, were filed in answer. One conversation with the magistrate was admitted; the second was neither admitted nor denied. The suggestive expression "No new evidence was taken" was used; and then a statement was made, in reference to the earlier and apparently the less objectionable interview, that "the magistrate chatted in a general way about the case." The counsel for the prosecution, apparently not knowing about either conversation, merely stated that "no evidence to my knowledge was taken by the magistrate after the trial."

In the absence of any denial by the magistrate, the statements quoted must be taken to be admitted; and the conviction cannot, in these circumstances, be permitted to stand.

The administration of justice should not only be free from impropriety, but it should be so conducted as to avoid all appearance of impropriety. A judicial officer ought not to receive communications from either side ex parte. From the nature of the discussion, it was hard to avoid the impression that the magistrate was influenced by the opinions, views, and unsworn statements of those interested in the prosecution.

The learned Judge would have been compelled to quash the conviction also on the ground that there was no evidence to shew what were the contents of the box. Such evidence could have been given without great difficulty, but was not; and there is no provision in the Ontario Temperance Act making the label upon a box or bottle conclusive or even prima facie evidence of its contents. In fact sec. 70 (9) indicates that too often "things are not as they seem."

The learned Judge, with some hesitation, decided to award no costs against the magistrate, and made the usual order for protection, awarding costs against the informant, who actively took part in the proceedings complained of.

MIDDLETON, J., IN CHAMBERS. DECEMBER 24TH, 1920.

*REX v. SOVA.

Ontario Temperance Act—Magistrate's Conviction for Offence against Act—Punishment for Second Offence—Sec. 58 of Act—Construction—Persons other than Licensees Liable to Imprisonment.

Motion to quash a conviction of the defendant, by a magistrate, for an offence against the Ontario Temperance Act, upon the ground that the punishment inflicted was unauthorised by the statute.

J. L. Counsell, for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that by consent of counsel, to avoid technical difficulties, the motion was argued as upon the return of a habeas corpus and certiorari in aid.

The defendant contended that the effect of sec. 58 of the Act was not to render the defendant liable upon a second conviction to imprisonment unless he was a licensee.

The clause is not well drafted and is obscure; but, when carefully considered, there is no real doubt as to its meaning. It provides for the penalty to be imposed for an offence against the provisions of the Act, and the dominant words are, "for the first offence," and "for a second or any subsequent offence." In each case there is an added provision and added punishment if the offence was committed by a licensee. Read thus, the section provides for a fine, and in default imprisonment for a first offence, and if the offence was committed by a licensee he is liable to have his license forfeited in the discretion of the magistrate. Where the offence is a second or subsequent offence, the accused is liable to imprisonment, and if the offence is committed by a licensee his license shall be forfeited. Thus read, effect is given to all the provisions of the section. If it is read as contended by counsel for the defendant, and the words "if the offence was committed by a licensee" are made to dominate all that follows, so that a licensee is alone liable to imprisonment for a second or subsequent offence, the last portion of the clause, commencing with the words "and if the offence be committed by a licensee," where they occur the second time, is rendered meaningless.

Giving this construction to the section makes the Legislature guilty of violating a rule of grammer and sound syntax; but this is nothing new, and it seems to be preferable to admit that in this

matter the Legislature may be fallible, rather than to suppose that an important part of the section is to be altogether devoid of any meaning, and the other portion is to have a forced and very unnatural construction.

Application dismissed with costs.

MIDDLETON, J. DECEMBER 24TH, 1920.

*REX v. McGONEGAL.

Ontario Temperance Act—Magistrate's Conviction for Having Intoxicating Liquor in a Public Place—Bottles of Liquor not Sealed, but not Opened during Transit from one Lawful Place to another—Sec. 43 of Act—Meaning and Effect.

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of North Bay, for having intoxicating liquor in his possession in a public place, not sealed. The defendant was sentenced to pay a fine of $200, and in default of payment to be imprisoned for 3 months.

J. W. Curry, K.C., for the defendant.
F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that the defendant received liquor for the purpose of carrying the same from Hull, Quebec, where it had been given to him, to his home in Ontario. The bottles were not sealed, but were not opened during the transit nor until after the accused reached his home. Before he reached his destination, he was accosted by a policeman, who, on searching his grip, found the bottles, and assumed that, because the bottles were not sealed, an offence against the Act had been committed. Upon the hearing, the magistrate took the view presented by the prosecution, and accordingly convicted.

It was admitted that, under sec. 43 of the Act, the defendant had the right to carry the liquor from a place outside of Ontario to a place where the same might lawfully be within Ontario, his private residence; but it was contended that the concluding clause of this section required the package to be sealed. The learned Judge did not agree with this. The words are: "but no person during the time such liquor is being carried or conveyed as aforesaid shall open or break or allow to be opened or broken any package or vessel containing the same, or drink or use or allow to be drunk or used any liquor therefrom."

All that this requires is, that, during the transit, the vessel or package containing the liquor shall not be opened or broken and that the liquor shall not be drunk or used. It is not required that the packages shall be sealed nor that they shall be the original and unopened bottles. In this case, there was no evidence whatever suggesting that the defendant's story should not be credited in its entirety. The magistrate in fact stated this, for the conviction was for having the liquor "not sealed."

The conviction, for these reasons, should be quashed. There should be no costs, and the usual order for protection should be made.

MIDDLETON, J., IN CHAMBERS. DECEMBER 24TH, 1920.

NORTHERN TIMBER CO. v. BUCCIARELLI.

Pleading — Counterclaim — Parties — Amendment — Crown Timber License—Attorney-General.

Appeal by the plaintiffs from an order of the Master in Chambers allowing the defendant to amend by pleading a counterclaim against the plaintiff and the Attorney-General attacking the license issued to the plaintiffs.

A. J. Thomson, for the plaintiffs.
H. J. Scott, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that he agreed with the proposition that a defendant cannot set up a counterclaim against the plaintiff unless he, the defendant, could alone maintain an action in respect of the same cause. If the cause of action is vested in the defendant and another, the defendant cannot counterclaim in respect of it. But here the defendant could sue in his own name in respect of the cause of action set up, and so he can counterclaim; and the Attorney-General, who would rightly be a defendant in any action, is rightly a defendant to the counterclaim. All the cases are collected in Farah v. Glen Lake Mining Co. (1908), 17 O.L.R. 1.

The appeal should be dismissed, with costs to the defendant in the cause.

MIDDLETON, J., IN CHAMBERS. DECEMBER 24TH, 1920.

RE PATTERSON.

Will—Construction—Apparently Inconsistent Residuary Clauses—Reconcilation.

Motion by the residuary legatees under the will of Bradford Patterson, deceased, for an order for payment over of money to them.

Daniel Urquhart, for the applicants.

W. J. Beaton, for those claiming under the widow of the testator.

MIDDLETON, J., in a written judgment, said that there were two clauses in the will which at first sight appeared to be both residuary and to be in conflict.

The executors were to hold in trust and pay the income to the widow for life, and, if there was not sufficient, were to use the corpus, for her maintenance. On the death of the widow—which had now taken place—a number of legacies were to be paid, and "the balance of my estate" was "to be divided between the Baptist Home and Foreign Missions." Immediately following this was the other clause, "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my said wife."

Those claiming under the widow's will invoked the rule that the latter of two inconsistent clauses in the will must prevail.

Reference to Re Nolan (1917), 40 O.L.R. 355.

The key-note here was to be found in the latter clause. The widow took nothing which was "hereinbefore disposed of." That made the gift to her subordinate. The residuary estate was validly disposed of by the earlier gift, so she could not take.

If the Baptist Home and Foreign Missions could not take by reason of any mortmain law, then the ultimate provision as to the residue would prevent an intestacy.

Costs of all parties should be paid out of the estate.

ORDE, J., IN CHAMBERS. DECEMBER 24TH, 1920.

*REX v. FAULKNER.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Proof of Receipt of Large Quantity of Liquor at Defendant's Private House—Disappearance of Most of it in 12 Days—Unwarranted Inference that Defendant Had it Elsewhere—Sec. 88 of Act—Conviction Quashed—Amendment—Secs. 78, 102.

Motion to quash the conviction of the defendant, by the Police Magistrate for the Town of Cobourg, for the offence of having intoxicating liquor in a place other than the private dwelling house in which he, the defendant, resided.

Keith Lennox, for the accused.
F. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that an information was laid against the defendant charging that, at some time between certain dates, he did have or keep liquor in a place other than the private dwelling house in which he resided. The sole evidence against the defendant was that on the 29th September, 1920, there had been a delivery of 5 cases of whisky, consisting of 120 Imperial pints, at the defendant's dwelling house, and that on the following 11th October, when the inspector searched the house, there were only 24 pints left. There was no evidence of any sale by the defendant, and there was some evidence of entertainment of his friends and also that he consumed a great deal of liquor himself. When delivering judgment, the magistrate said to the defendant: "The Crown has also proved that on the 11th October you had but one case, or about 24 Imperial pints, in your possession. It is for you to prove (sec. 188 of the Ontario Temperance Act) that you did not commit the offence for which you are charged, or to explain to the satisfaction of the Court what you have done with the 96 Imperial pints between the date you received them and the date of the inspector's search on the 11th October, 1920." The magistrate then pointed out that the defendant had not done so, and that there was no evidence to shew that he and his guests could have consumed 96 pints in 12 days, and said: "The conclusion of the Court is that you have disposed of the liquor in some other way in violation of the Ontario Temperance Act;" and he then convicted the defendant for that he "did have

liquor in a place other than the private dwelling house in which he then resided," etc., and imposed a fine of $500 or in default thereof 3 months' imprisonment.

It is possible to suggest many cases where sec. 88 may be applied so as to shift the burden of proof. But in the present case the proof that the place where the defendant had the liquor was his private dwelling house was clear, and the magistrate so found. How could such possession be prima facie proof of the offence of having liquor in a place other than his private dwelling house? The very evidence which, it is contended, shifts the onus to the accused, furnishes the proof in answer. Section 88 cannot, in the very nature of the circumstances, be deemed to apply to this case.

Rex v. Moore (1917), 13 O.W.N. 315, is not a decision upon the point raised here.

The conviction, therefore, could not stand.

It was open to the magistrate, under sec. 78, to amend the information, and, having due regard to the protection of the defendant under the concluding provisions of that section, to have convicted for an offence under sec. 40. But he had not done so; and no suggestion as to an amendment under sec. 102 had been made to the learned Judge. Had such suggestion been made, it could not have been complied with without remitting the case to the magistrate. The power to amend under sec. 102 is given only in cases where it appears that the merits have been tried. To amend by convicting for an offence under sec. 40, without giving the accused an opportunity of meeting that charge, would not be proper.

The conviction should, therefore, be quashed with the usual order for the magistrate's protection.

Reference to Rex v. Newton, ante 249.

McMILLAN v. DINGWALL—KELLY, J., IN CHAMBERS—DEC. 20.

Judgment—Action for Recovery of Land—Motion for Summary Judgment under Rule 57—Affidavit of Merits—Cross-examination—Disclosure of Triable Issue.]—An appeal by the defendant from an order of one of the Registrars, holding Chambers in the place of the Master in Chambers, granting summary judgment under Rule 57. KELLY, J., in a written judgment, said that the defendant's affidavit set out that he had a good defence on the merits, and it and his cross-examination thereon shewed the nature of his defence and referred to facts and circumstances—which he deemed entitled him to defend—with sufficient particularity to indicate that there was a triable issue which could not be properly disposed

of in a summary way. A perusal of the cross-examination led one to believe that the defendant was an astute and not altogether a satisfactory witness; but if, notwithstanding that circumstance and notwithstanding any admission by him, there still remained material questions or a material question open to contention, for the determination of which further evidence was necessary, it would be going outside of the Rules to refuse a trial in the usual way. The action was for the recovery of land, and the defence set up and the facts and circumstances sworn to as supporting that defence went to the merits of the whole claim. These, if substantiated, would afford some reasonable answer to the plaintiff's claim; and an opportunity should be given to try out the contentious question thus raised The appeal should be allowed; costs of the motion and appeal to be costs in the cause. C. W. Livingston, for the defendant. W. D. McPherson, K.C., for the plaintiff.

STEVENS v. BROWNLEE—LATCHFORD, J.—DEC. 21.

Sale of Goods—Action for Price—Rejection by Purchaser—Goods not Answering to Description in Contract—Unmerchantable Goods—Inspection—Notice of Rejection.]—Action for the price of three car-loads of reclaimed coke, sold by the plaintiff, a Detroit merchant, to the defendant, a coal-dealer at Galt, in December, 1918. The action was tried without a jury at Kitchener. LATCHFORD, J., in a written judgment, said that fuel was so scarce in the fall of 1918 that use was made of almost any material that would burn. In the three car-loads of coke shipped to the defendant there was such a quantity of cinders and, especially, fire-brick, that for that reason, if for no other, the defendant was justified in rejecting the shipments. The defendant was indeed warned that the reclaimed coke could not be used for certain purposes. He had, however, no reason to think that what he was buying was anything but coke, and coke that was composed of pieces not less than half an inch in diameter. The coke itself failed to conform to the contract. While it might, as stated by the plaintiff's witnesses, have been passed over a half-inch screen, it was not properly passed over such a screen. The purpose of passing material over a screen is that particles smaller than the mesh shall fall through. But the stuff from the piles, where some of it had lain for years, was carried over the screen in a thick bed, probably wet or at least moist, and more or less adhesive, with the result that a large percentage was not screened at all, but came over the screen unchanged, and, apart from the associated cinders

and brick-bats, did not conform to the description of what the plaintiff contracted to sell to the defendant. On that ground, and on the additional ground that the coke was so mixed with the foreign matter that it was not merchantable and could be burned only with difficulty, if at all, the defendant was entitled to reject the shipments. He never accepted the stuff. He had an opportunity of inspecting it at Galt, which he did not make use of, and sold one or two cars in the belief that they were as represented. As soon, however, as he became aware of the quality of the reclaimed coke, he notified the plaintiff of his rejection of the three car-loads. The case as to inspection was not unlike John Hallam Limited v. Bainton (1919), 45 O.L.R. 483, recently affirmed in the Supreme Court of Canada. Though the point was not of moment as matter of defence, it was not without signifiance that the plaintiff had not been required to pay for the coke by those who shipped it to him. The action failed and should be dismissed with costs. M. A. Secord, K.C., for the plaintiff. J. A. Hancock, for the defendant.

BARTOLOZZI v. MORRIS—LATCHFORD, J.—DEC. 21.

Vendor and Purchaser—Agreement for Sale of Land—Purchaser's Action for Specific Performance—Agreement Signed by Vendor's Father—Absence of Authority—Dismissal of Action.]—An action by the purchaser for specific performance of a contract for the purchase and sale of a house and lot in Hamilton. The action was tried without a jury at Hamilton. LATCHFORD, J., in a written judgment, said that the contract consisted of a memorandum signed by the defendant's father. The defendant signed no contract of any kind, but was, for some days after she knew the memorandum had been signed, willing that the sale should be carried out. Then, owing to the stopping of the payment of a cheque which had been given to her father as a deposit, she refused to execute a conveyance of the property. Her father had no authority from her, written or otherwise, to make the sale. He was not her agent, but took it upon himself to make the sale, feeling that he could induce her to approve of it. He did so induce her for a time, but she had not full knowledge of all the circumstances. As soon as these came to be realised, she repudiated the act of her father. The contention that the property was the father's had not been sustained by the evidence. As a fact, the property was her property. The action failed and should be dismissed with costs. W. S. MacBrayne, for the plaintiff. E. F. Lambier, for the defendant.

ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.—MIDDLETON, J., IN CHAMBERS—DEC. 23.

Practice—Default in Bringing Action to Trial—Order Dismissing Action for Want of Prosecution—Appeal—Order Vacated upon Plaintiff Undertaking to Enter Action for Next Sittings—Costs.]—An appeal by the plaintiff from an order of the Master in Chambers dismissing the action for want of prosecution. MIDDLETON, J., in a written judgment, said that the plaintiff was in default in not having brought the action to trial at the autumn sittings. Before the Master no excuse was offered, and the action was accordingly rightly dismissed, for it was not enough merely to request an extension of time without explaining the default. Upon the appeal the plaintiff's counsel was profuse in explanations, without material to justify his statements. The learned Judge permitted the filing of an affidavit verifying the statements made, and that had now been done; and, in view of what was disclosed, it seemed better to give an opportunity to enter the action for trial at the next sittings. Upon the plaintiff undertaking that this be done, the order below should be vacated. Costs here and below to the defendants in any event of the litigation. H. J. Macdonald, for the plaintiff. Shirley Denison, K.C., for the defendants.

MORLEY v. DOMINION SUGAR CO.—MIDDLETON, J., IN CHAMBERS—DEC. 24.

Discovery—Examination of Plaintiff—Action by Assignee of Chose in Action—Disclosure of Facts Relating to Making of Assignment—Relevancy—Undertaking to Add Assignor as Party Plaintiff—Admission—Claim for Damages—Conveyancing and Law of Property Act, sec. 49—Amendment of Pleadings.]—Appeal by the defendants from an order of the Master in Chambers refusing to direct the plaintiff, suing as assignee of a chose in action, to disclose (upon examination for discovery) the facts relating to the making of the assignment. MIDDLETON, J., in a written judgment, said that the plaintiff was ready, if the defendants so desired, to add the assignor as co-plaintiff, and this would render needless any discussion of the question whether the plaintiff was suing as a trustee for the assignor. The plaintiff was ready to admit, and to have the admission put in a binding form, that no claim could be made for damages to the plaintiff's business standing. Had this admission not been made, the question as to the facts relating to the making of the assignment would, the learned

Judge thought, have been relevant; for, if the plaintiff had no real interest in the contract, his business standing could not have been damaged. Then it was said that the discovery was necessary because the assignment might turn out to be a security only, and so the plaintiff could not sue. This argument was based upon a misunderstanding of sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, which enables the assignee to sue in his own name when there is a written assignment "not purporting to be by way of charge only." Upon the necessary amendments being made, the appeal should be dismissed; costs here and below to be costs in the cause. A. W. Langmuir, for the defendants. A. W. Roebuck, for the plaintiff.