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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 23RD, 1919.

LEONARD v. WHARTON.

Libel—Words in Letter, whether Capable of being Read in a Defamatory Sense—Verdict—General Damages for two Libels—Justification of one—Necessity for Separation—Mistrial—New Trial.

An appeal by the defendants from the judgment of LENNOX, J., of the 21st May, 1919, upon the verdict of a jury, in favour of the plaintiff Leonard for the recovery of $3,000 damages with costs in an action for libel.

The action was first tried before MEREDITH, C.J.C.P., who withdrew the case from the jury and dismissed the action. In November, 1918, the Second Divisional Court directed a new trial: Leonard v. Wharton, 15 O.W.N. 197.

The appeal from the judgment at the second trial was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

A. C. McMaster, for the appellants.

J. P. MacGregor, for the plaintiffs, respondents.

At the conclusion of the argument the judgment of the Court was delivered by MEREDITH, C.J.O., who said that the Court was of opinion that the appeal should be allowed, and that there must be a new trial, and that the costs of the appeal and of the last trial must be paid by the respondents.

As to the main question argued by counsel for the appellants—whether certain words in the letter of the 5th September were capable of being read in a defamatory sense—the Court was under

a difficulty owing to the judgment of the Second Divisional Court upon the appeal after the former trial of the action. That Court might have decided that the words were capable of being read in a defamatory sense. The better course would be to pronounce no opinion upon that matter. Perhaps, before another trial, it would be possible to ascertain what the Second Divisional Court really did decide.

The ground upon which the judgment should be reversed and a new trial ordered was that the respondents claimed and had recovered general damages for two libels, one in which there was, as was alleged, a charge that the respondent Leonard had stolen a large sum of money belonging to the appellants, and the other that there was a representation that the respondent company was not bonded, or that the lawyers who were its subscribers were not bonded. As to the latter, there was a plea of justification: the statement was true in fact at the date upon which the letters of the 5th and 13th September, which contained the statement, were published. The statement was perfectly true: the subscribers were not bonded. It was not enough that it was not a statement of that which perhaps fair dealing might have dictated to the gentlemen who sent the letters out, or that the statement made by the respondents in their letters should have stated that, although they were not bonded at the time they published the letters, yet they would in due course be bonded. That was all beside the question: the question was whether that statement was true in substance and in fact, and there was only one answer to that question.

The result, therefore, was that the respondents had recovered general damages for wrongs done to them, including that alleged libel. The jury were instructed by the trial Judge to take that into consideration, and that they might assess damages to the respondent company and Leonard in respect of all these charges.

It was manifest, therefore, that the verdict could not stand: the jury might, for all the Court knew, have allowed all the damages in respect of the concluding paragraph of the letter.

It was most unfortunate that the proposal that was made at the trial, that the damages should be assessed separately in respect to the two libels charged, was not accepted by counsel for the respondents, or that the trial Judge did not direct separate assessments.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 27TH, 1919.

LOUBRIE v. GRAHAM.

Principal and Agent—Agent's Commission on Sale of Goods—Action for—Evidence—Failure to Establish Claim—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of KELLY, J., ante 40.

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

E. G. Long, for the appellant.

M. Wright, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. OCTOBER 29TH, 1919.

BOOTH v. PROVINCIAL MOTORS LIVERY.

Contract—Share or Interest in Business—Written Agreement not Executed—Oral Evidence—Corroboration—Account—Finding of Fact of Trial Judge—Appeal—New Trial.

Appeal by the defendants the Provincial Motors Livery and Allen from the judgment of FALCONBRIDGE, C.J.K.B., 15 O.W.N. 403.

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

I. F. Hellmuth, K.C., and W. T. J. Lee, for the appellants.

S. H. Bradford, K.C., and B. N. Davis, for the plaintiff, respondent.

THE COURT directed a new trial; costs throughout to be in the discretion of the Judge at the new trial.

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

*RE MORROW.

Appeal—Right of Appeal to Divisional Court from Order of Judge of Surrogate Court Directing that Action be Brought in Supreme Court to Establish Claim—Terms and Conditions of Order—Surrogate Courts Act, sec. 69, sub-secs. 6, 7—Sec. 34 (1), (5)—Appeal Quashed.

An appeal by Robert James Morrow, the executor of the will of Mary Jane Morrow, deceased, from an order of the Judge of the Surrogate Court of the County of Lennox and Addington, made under the provisions of sec. 69, sub-sec. 7, of the Surrogate Courts Act, R.S.O. 1914 ch. 62, upon the application of the executor, directing that Daniel Henry Morrow, a claimant against the estate for $2,985, whose claim was contested by the executor, should bring an action in the Supreme Court of Ontario for the recovery or establishment of his claim, upon condition, however, that the executor and the estate should bear and pay the extra costs occasioned by this application and by proceeding by way of action in the Supreme Court, instead of proceeding in the Surrogate Court, in any event of the action, and that the action should be brought on for trial at the next sittings at Napanee.

The executor's appeal was against the part of the order imposing the condition as to payment of costs.

The appeal came on for hearing before MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

J. C. Thomson, for the appellant.

H. S. White, for the claimant, respondent, raised the preliminary objection that no appeal lay from the order of the Judge.

MIDDLETON, J., read a judgment in which he said that the provisions of sec. 69 of the Surrogate Courts Act related to the establishment of claims against an estate; and the contention was that the provisions of this section established a complete code of procedure with respect to the matter dealt with, and that there was no appeal save that given by the section itself, viz., the provision found in sub-sec. 6, that the order of the Judge dealing with the claim should be subject to appeal as provided by sub-sec. 5 of sec. 34, that is, an appeal to a Judge of the Supreme Court in like manner as from the report of a Master.

A careful consideration of the statute led to the conclusion that that contention was correct.

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

It was argued that there was a right of appeal to a Divisional Court under sec. 34 (1) of the Act; but the appeal there contemplated is from an order, determination, or judgment of a Surrogate Court, which is sharply contrasted with the right given by sub-sec. 5 to appeal from any order, decision, or determination of the Judge of a Surrogate Court on the taking of accounts.

The fact that a right of appeal is given by sec. 69, sub-sec. 6, from the order of the Judge dealing with the claim upon its merits, and that no further or other right of appeal is given, precludes the idea that it was the intention of the Legislature that there should be an appeal from merely interlocutory orders.

The appeal here was not from the order directing the bringing of an action in the Supreme Court for the establishment of the claim—for the making of such an order is obligatory when it is desired by either party, but it was from the terms and conditions which the Judge had seen fit to impose. As there was no right of appeal, it would not be proper to discuss the propriety of the terms imposed.

The appeal should be quashed with costs to be paid by the appellant to the respondent.

RIDDELL, J., agreed with MIDDLETON, J.

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

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal quashed (MEREDITH, C.J.C.P., *dissenting*).

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

*GOWANS v. CROCKER PRESS CO.

Promissory Note—Action in County Court upon Note for $200 plus Interest and Notarial Fees—Note Made by Defendants and Held by Plaintiff—Protest Unnecessary—Bills of Exchange Act, secs. 109, 186 (2)—Action of Proper Competence of Division Court—Costs—Scale of Costs—Appeal.

Appeal by the defendants from the judgment of the County Court of the County of York in favour of the plaintiff in an action upon a promissory note.

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

G. T. Walsh, for the appellants.

G. E. Newman, for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that the plaintiff received from the defendants a promissory note for $200, of which the defendants were makers. The Dominion Bank being the plaintiff's bank, the note was made payable there, and the plaintiff placed the note in the bank for collection only—he did not discount it or place it to his account or borrow money on it, but did endorse it in blank. The note was not paid at maturity, and the bank had it protested, sending notice to the plaintiff, as well as to the defendants. This action was brought in the County Court, and the defendants set up as a defence an agreement to extend the time for payment by renewal. The plaintiff claimed $200 and interest and the protest-fees. During the trial before Coatsworth, Co.C.J., without a jury, he asked why the action was not brought in a Division Court, and counsel said, "The protest-fees attached to it." After consideration, the learned County Court Judge directed judgment to be entered for the plaintiff for the amount of the note, interest, and notarial fees, and "costs on the County Court scale." It did not appear that he was exercising a discretion to award County Court costs in a case of the proper competence of a Division Court; but it was clear that he thought that the plaintiff could not have sued in a Division Court.

The defendants' appeal was restricted to the notarial fees and costs.

As to the notarial fees, those notified were the defendants and the plaintiff. The defendants were all makers of the note, and consequently were in the same case as acceptors of a bill: Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 186(2); and were bound without protest: sec. 109.

The bank was simply the agent of the plaintiff to collect the money on the note—it could not, by having the possession of the note, make the plaintiff liable to it; he was not liable on the note at all, but was the owner. It would be an absurdity to give the owner of a note notice for the pretended purpose of making him liable.

Protest was wholly unnecessary. That the bank did—if it did—charge these fees to the plaintiff was of no consequence. The plaintiff could not, by paying a wholly baseless claim, make the defendants his debtors for the amount paid.

The appeal should be allowed as to the notarial fees.

As to costs, the defendants raised and argued the point in the

trial Court; they were forced to come to this Court to obtain their legal rights; and they should have the costs of the appeal.

As to costs below, the plaintiff should have sued in a Division Court; but the defendants should not have set up the untenable defence they did. The plaintiff should have Division Court costs of the action and trial, with no set-off in favour of the defendants.

Appeal allowed.

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

*PETINATO v. SWIFT CANADIAN CO. LIMITED.

Insurance (Fire)—Stock of Goods Destroyed—Insurance Moneys Attached by Judgment Creditors of Assured—Claim of Chattel Mortgagee—Chattel Mortgage Registered without Affidavit of Execution—Invalidity as against Creditors—Bills of Sale and Chattel Mortgage Act, secs. 5, 7—Ownership of Goods—Covenant to Insure for Benefit of Mortgagee—Equitable Assignment—Issue Found in Favour of Chattel Mortgagee.

Appeal by the plaintiff (claimant) in an issue from the judgment of KELLY, J., after the trial, finding the issue in favour of the defendants (judgment creditors).

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

R. McKay, K.C., for the appellant.

H. E. Stone, for the defendants, respondents.

RIDDELL, J., read a judgment in which he said that the appellant sold his stock in trade to one Musolino for $3,700; Musolino paid $1,000 and made a chattel mortgage on the stock for $1,500. The stock was insured; a fire occurred; Musolino assigned the insurance moneys to the appellant. The amount payable was fixed at $1,200; it was claimed by the respondents as judgment creditors of Musolino, and also by the appellant. The issue was decided by the trial Judge in favour of the respondents. The chattel mortgage had no affidavit of execution, and so was fatally defective as against creditors. Section 7 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135, prevented the appellant from successfully asserting a right to the goods insured. Kelly, J., was of opinion that the contention that the appellant's right to the insurance moneys was superior to his right to the

mortgaged goods was unreasonable and not supported by authority; and that was the question for determination on this appeal.

Reference to Davies v. Rees (1886), 17 Q.B.D. 408; In re Burdett (1888), 20 Q.B.D. 310; Mumford v. Collier (1890), 25 Q.B.D. 279; In re Isaacson, [1895] 1 Q.B. 333.

The covenant or agreement to insure, which, if valid, was admittedly an equitable assignment, was not voided by the statute. The circumstances in which it was given shewed that it was not in fraud of creditors—the purchaser was receiving goods worth $3,500 for $1,000 cash and a mortgage for $2,500, for which the insurance was to be security. It would be nothing but plain honesty that the vendor should have such security.

The form did not prejudice the appellant—there was indeed a provision authorising the insurance company to pay to the appellant on production of the instrument, but there was also, before that clause, a complete equitable assignment.

The fact that the assignment was to the "mortgagee" was not of importance: the word "mortgagee" was short for the full name of the appellant; and it did not follow that, if he ceased to be "mortgagee" as against creditors, he was not to have the advantage of his assignment.

The appeal should be allowed, with costs, and the issue found in favour of the appellant, with costs.

LATCHFORD and MIDDLETON, JJ., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., read a dissenting judgment.

Appeal allowed (MEREDITH, C.J.C.P., *dissenting*.)

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

*BALL v. THORNE.

Assignments and Preferences—Assignment by Company for Benefit of Creditors—Preferred Claim of Wage-Earner—Wages Act. R.S.O. 1914 ch. 143, sec. 3—Judgment Obtained against Company for Wages before Assignment—Effect of—Remedy—Cause of Action—Merger.

Appeal by the defendant from the judgment of the County Court of the County of York in favour of the plaintiff. The action was brought by a wage-earner for a declaration of his

right to rank upon an insolvent estate as a preferred creditor for wages.

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

A. R. Clute, for the appellant.

No one appeared for the plaintiff, respondent.

MIDDLETON, J., read a judgment in which he said that the plaintiff sued and recovered a judgment for $195.75 wages due him by J. Frank Osborne Limited. After the recovery of judgment, the company assigned for the benefit of its creditors. The plaintiff then claimed to rank as a preferred creditor, but the defendant, the assignee, contested the claim, and this action was brought to establish the plaintiff's right.

The assignee (defendant) contended that, upon the recovery of judgment, the cause of action merged, and the plaintiff lost the right to a preference which he otherwise would have had. The Judge of the County Court held against this contention, and the defendant appealed.

The plaintiff's right must be determined upon the true construction of the Wages Act, R.S.O. 1914 ch. 143. In the case of an assignment for the general benefit of creditors, sec. 3 gives priority to the claim of the wage-earner for his wages for a limited period.

Upon the obtaining of a judgment the original cause of action is changed into matter of record, and no further action can be brought upon the original cause; but this is not conclusive of the question. The claim is yet a claim for wages, payable not by virtue of an obligation arising out of simple contract, but by virtue of the judgment upon that contract. There is nothing to prevent one looking behind the judgment to ascertain the nature of the original claim. The judgment does not merge or extinguish the debt—it merges the remedy by way of proceeding upon the simple contract: Price v. Moulton (1851), 10 C.B. 561, 573; King v. Hoare (1844), 13 M.&W. 494.

In the Wages Act there is found an indication that the wage-earner's right is not lost by the merging of the claim into a judgment, for the priority is recognised upon a distribution among execution creditors (sec. 4).

Where the Legislature has seen fit to grant a privilege in respect of claims for wages, it is the duty of the Court to see that this privilege is not cut down and the intention of the Legislature defeated by an undue application of artificial doctrines. To yield to the argument advanced for the defendant would interfere with what was plainly intended.

The appeal should be dismissed.

RIDDELL and LATCHFORD, JJ., agreed with MIDDLETON, J.

MEREDITH, C.J.C.P., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

*WALKER v. TOWNSHIP OF SOUTHWOLD.

*GOSNELL v. TOWNSHIP OF SOUTHWOLD.

Highway—Nonrepair—Injury to Passengers in Motor Vehicle—Statutory Obligation of Township Corporation—Municipal Act, sec. 460—Evidence—Condition of Road—Cause of Accident.

Appeals by the defendants in the two actions from the judgments of Masten, J., 16 O.W.N. 265 and 266.

The appeals were heard by MEREDITH, C.J.C.P., LATCHFORD and MIDDLETON, JJ., and FERGUSON, J.A.

Shirley Denison, K.C., and W. K. Cameron, for the appellants.

O. L. Lewis, K.C., and R. L. Gosnell, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that the judgments appealed against should not stand because altogether inconsistent with the judgment of this Court in the latest like case considered in it—Raymond v. Township of Bosanquet (1919), 45 O.L.R. 28—the only substantial difference being that this case was the stronger one for the defendants.

Each was the case of an abrupt turn into a narrower and more dangerous part of a highway: in the Bosanquet case the turn was more abrupt and was immediately upon a narrow bridge, not made for the purposes of a highway, but for the purposes of access to a highway from one farm only; whilst in this case it was all a roadway which had always been a highway. In the Bosanquet case a previous accident had occurred, and there was considerable evidence as to difficulty and danger encountered in turning sharply into the narrow bridge; in this case there was no evidence of that character—the contrary was well-proved. In the Bosanquet case there was evidence of complaints made and investigated; in this case it was proved that there were none. In

the Bosanquet case, the defendants, recognising the need of it, were about to widen the bridge; in this case no one saw any need for any change, and none was suggested until after the accident which gave rise to this action had happened. In the Bosanquet case, there was much motor-car traffic over the road; in this very little. In the Bosanquet case, the whole testimony of those who knew was that the approach of the vehicle to the bridge had been carefully and properly made, and the trial Judge gave credit to that testimony; in this case, the weight of the evidence was that the accident was caused by the driver of the car turning too quickly and running over the bank—that she might and should have followed in the usual track of the traffic and have been quite safe.

Following the Bosanquet case, it should be found that the accident was not due to the condition of the highway, but was due to some other cause for which the defendants were not liable.

The appeals should be allowed and the actions dismissed.

LATCHFORD and MIDDLETON, JJ., agreed in the result, for reasons stated by each of them in writing.

FERGUSON, J.A., read a dissenting judgment.

Appeals allowed (FERGUSON, J.A., *dissenting.*)

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

ROSENBES v. ROSENBES.

Husband and Wife—Transactions between in Regard to Lands—Action by Husband against Wife and Actions by Wife against Husband—Mortgage—Lien—Evidence—Appeals—New Trial—Costs.

Appeals by P. Rosenbes from the judgments of ROSE, J., and LLGIE, J., at the trials, in favour of the appellant's wife in three actions.

The first action was brought by the appellant, who claimed in it the whole benefit of a mortgage which seemed to have been made to him and his wife jointly.

The second action was brought by the wife with the object of having a deed of land by her to her husband set aside on the ground that he had obtained it from her by fraud.

The third action was brought by the wife to recover from the appellant $2,000 and "for a lien or mortgage" to secure repayment of that sum, or for a sale of land to enforce payment of the debt.

At the trial the wife succeeded in each action; and the husband now appealed against each of the three judgments.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, and MIDDLETON, JJ.

P. Rosenbes, the appellant in person.

D. B. Goodman, for the wife, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said, as to the first action, that, though there were some circumstances which supported the husband's contention and testimony, the weight of the testimony was overwhelmingly against him. This action was tried by Rose, J. The appeal from his judgment failed and should be dismissed.

The trial of the other two actions was begun before Rose, J., also, and they were (in part) tried together; but during this trial some fact was disclosed which the Judge thought should disqualify him, and thereupon he made a note on the records that the trial was adjourned until on or after the 5th May and the two actions were to be tried de novo.

The cases came on again for trial before Logie, J., on the 8th May. Why on that particular day did not appear; but it did appear that the husband, who was conducting his cases in person, had no notice or knowledge of the fact; and nothing appeared which indicated that any kind of inquiry was made respecting his absence or to shew why the trial proceeded in his absence.

The evidence adduced at this ex parte trial was of an unsatisfactory character. Upon the wife's testmony it could not but be found that the conveyance from husband to wife was made only to protect his property against his creditors, and that it was reconveyed when there was no longer need for such protection. The deeds and mortgages were then made, and all were executed in a solicitor's office. To find for the wife on this evidence would not be justifiable. But there was, in addition, the testimony of her solicitor to the effect that, whilst he was acting as her solicitor, and making these claims against the husband, the latter admitted that he had got his wife to sign "by a trick." It was easier to believe the solicitor to be mistaken than to believe that the husband could have made such an admission. Whether he did or not would have been better understood if the solicitor had been asked for and had been able to give some information as to what the nature of the trick was, or what was meant by "a trick."

Then in the third action there was no warrant for the judgment for a lien and sale in 30 days.

The appeals should be allowed and there should be a new trial of these two actions.

There should be no order as to the costs of the wasted trials; the wife should have her costs of the appeal in the first case, and the husband his in the other two.

LATCHFORD and MIDDLETON, JJ., agreed with MEREDITH, C.J.C.P.

RIDDELL, J., agreed in the disposition of the three cases made by the Chief Justice; but preferred to say nothing as to the probabilities or the evidence in the second case. The Judge presiding at the new trial should be left wholly untrammelled by any expression of opinion by the appellate Court—he must be guided by his own view of the credibility of the witnesses and the probabilities of the case.

MEREDITH, C.J.C.P., did not agree with the view of RIDDELL, J.

First appeal dismissed; second and third appeals allowed.

SECOND DIVISIONAL COURT. OCTOBER 31ST, 1919.

WANLESS v. SWARTZ.

Fraudulent Conveyance—Action to Set aside Conveyance of Land by Husband to Wife—Evidence—New Trial.

Appeal by the defendants from the judgment of LOGIE, J., in favour of the plaintiff, in an action to set aside a conveyance of land made by one of the defendants to his wife, the other defendant, as fraudulent and void against the plaintiff and all creditors of the husband.

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

J. E. Jones, for the appellants.

Gideon Grant, for the plaintiff, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that a majority of the members of the Court was of opinion that there should be a new trial of this action; a minority would allow the appeal and dismiss the action; the case must, therefore, go down to trial again for the purpose of eliciting the material facts more fully and clearly if possible, at which trial the defendants should be examined as witnesses if that was practically possible. All costs should be costs in the action.

HIGH COURT DIVISION

LOGIE, J. OCTOBER 30TH, 1919.

RE REINHARDT.

Executors and Administrators—Executor's Accounts—Passing before Surrogate Court—Items of Account—Sale of Mortgage at Discount—Commission Paid to Agent of Purchaser—Costs—Taxation—Executor's Commission—Appeal—Accounts Sent back to Surrogate Court.

Appeal by M. Davies from an order of MORGAN, Judge of the Surrogate Court of the County of York, dated the 24th June, 1919, upon the passing of an executor's accounts.

The appeal was heard in the Weekly Court, Toronto.
R. T. Harding and F. H. Snyder, for the appellant.
H. S. White, for the executor and his solicitor.
G. Cooper, for Arthur Reinhardt.

LOGIE, J., in a written judgment, said that three items allowed in the executor's accounts were particularly complained of:—

(1) The sale of a mortgage for $9,000, made by the purchaser of certain real estate, to the executor, at a discount of $900, and the allowance of a further sum of $450 as a commission to the agent of the purchaser on the sale of the said mortgage. No evidence was taken before the learned Surrogate Judge on these items. It was alleged by counsel for the executor that they were allowed by consent, all parties being sui juris—this was denied by counsel for the appellant. If there was a consent, common prudence should have induced the executor to have it put in writing. Upon the material before the Court, the propriety of one or both of these items being allowed was gravely in doubt. The case should go back to the Surrogate Court, and evidence should be taken upon both these items, and there should be a finding based upon such evidence.

(2) The costs allowed to the solicitor for the estate appeared to be excessive—some items shockingly so. There had been no real taxation of the solicitor's bill, but only an alleged moderation, and even then the amount fixed was said to have been so fixed by consent. Here again nothing was in writing, and no evidence was taken. The consent was denied. The bill should be taxed, in the strict sense of the word, and the Surrogate Court should undertake this.

(3) Certain doors alleged to have been missing and for which

an allowance of $300 was made to the purchaser were now stated to have been found. Evidence should be taken on this; and, if the fact is as stated, the $300 allowed the purchaser for these doors should be restored to the estate.

(4) No error in principle by the learned Surrogate Judge in allowing the executor's commission was disclosed, nor did the amount appear excessive. The appeal as to this item should be dismissed: Re Smith (1916), 38 O.L.R. 67.

When the case is again before the Surrogate Court, the appellant should be at liberty, should he be so advised, to reopen the whole of the accounts of the estate.

Success being divided, there should be no costs of the appeal.

FALCONBRIDGE, C.J.K.B. OCTOBER 31ST, 1919.

*KERRIGAN v. HARRISON.

Covenant—Conveyance of Land—Grant of Right of Way over Road—Covenant to Keep Road in Repair—Excuse for Nonperformance—Impossibility of Performance—Act of God—Erosion by Waters of Lake—Covenant Construed as Indemnifying Grantee against Impossibility of Repairing—Mandatory Injunction—Damages.

Action for a mandatory injunction to compel the defendant to repair and maintain a way or road for the use of the plaintiff, in accordance with a covenant of the defendant, and for damages.

The action was tried without a jury at London.

G. S. Gibbons and J. C. Elliott, for the plaintiff.

J. M. McEvoy, for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that before the 30th November, 1911, the defendant was the owner of two lots in the village of Port Stanley, marked upon a registered plan. By deed of that date he conveyed the lots to one Graham; and Graham, by deed of the 18th February, 1913, conveyed the whole of one of the lots and part of the other to the plaintiff. There was a covenant or proviso in the deed to Graham that he, his heirs and assigns, should have a right of way to his lands over a certain road shewn upon the plan, and the defendant agreed to maintain the road and the bridges thereon in as good condition as they were on the day of the date of the deed.

The plaintiff alleged that the defendant had allowed the road to become impassable and the bridges to be removed so that it

was impossible for the plaintiff to have access by waggon or other conveyance to her land. The plaintiff had built upon the land purchased by her and used it as a place of residence in summer.

The defendant, admitting the conveyances, pleaded that if any part of the road or bridges had been at any time not in as good condition as at the time of the conveyance to Graham, the condition was caused by the act of God and not by the defendant's fault or negligence.

It was clear upon the evidence that for years prior to the making of the covenant there had been a constant erosion of the lake-shore—this was known to every one who was familiar with that part of the country; and it was the continuance of this erosion which, according to the defendant, caused the condition of the road of which the plaintiff complained. The defendant contended that performance of the covenant was thus excused: Corpus Juris, vol. 13, pp. 642, 643, secs. 717, 718.

But, where a subsequent impossibility of performance might have been foreseen by the promisor and he chooses to bind himself absolutely, he is not excused: op. cit., p. 639, sec. 711; Paradine v. Jane (1648), Aleyn 27; Atkinson v. Ritchie (1809), 10 East 530, 533, 534; Halsbury's Laws of England, vol. 7, para. 877, p. 427.

In view of the history of the washing away by the waters of the lake, the covenant must be taken to have been obtained as a guaranty on the part of the grantor so to protect the road that the waters would not wash away the bank of the lake so as to render the road impassable and leave the grantee or his assigns without any means of access to the lands conveyed. The grantee knew that what had happened might happen again, and insisted upon and obtained the covenant, which was to be regarded as an absolute covenant, not merely to keep the road in repair so long as it should exist, but to indemnify the grantee against the impossibility of repairing on account of the washing away of the banks.

The plaintiff was, therefore, entitled to a judgment requiring the defendant to put the road in as good condition as it was at the time of the conveyance to Graham and to replace the bridges thereon and to maintain the same in such good condition—or alternatively to furnish and maintain a road and bridges sufficient to give the plaintiff access to her land over land of the defendant still remaining—with $5 damages and costs of the action.

If the plaintiff chooses to claim substantial damages, there should be a reference to the Master at London to assess the same.

MULOCK, C.J.Ex., IN CHAMBERS. OCTOBER 31ST, 1919

REX v. McCORD.

Motor Vehicles Act—Magistrate's Conviction for Unlawfully Driving Motor Vehicle on Highway for Hire without License—R.S.O. 1914 ch. 207, secs. 4, 29, 34—Motion to Quash Conviction—Jurisdiction of Magistrate—Trial before Magistrate—Nothing Said or Done to Prevent Defendant Giving Evidence—Sufficiency of Evidence to Sustain Conviction—Question for Magistrate or for Appellate Tribunal—Defendant Misled by being Informed that Charge Laid under By-law—Absence of By-law.

Motion for an order quashing a conviction of the defendant by a Police Magistrate for unlawfully driving a motor vehicle on a highway, for hire, pay, or gain, without being licensed to do so.

John Jennings, for the defendant.
Edward Bayly, K.C., for the prosecutor.

MULOCK, C.J.Ex., in a written judgment, said that sec. 4 of the Motor Vehicles Act, R.S.O. 1914 ch. 207, enacts that no person shall, for hire, pay, or gain, drive a motor vehicle on a highway unless he is licensed so to do; by sec. 29, a person violating the provisions of sec. 4 is liable to a penalty not exceeding $10 for the first offence; and, by sec. 34, the penalty is recoverable under the Summary Convictions Act. Under these statutory provisions, the Police Magistrate had jurisdiction to hear and determine the charge, and the first ground of attack upon the conviction failed.

The second ground was that the defendant was given no opportunity to submit evidence on his own behalf. Nothing was said or done to prevent the defendant from giving evidence, and so this ground failed also: Rex v. Keenan (1913), 28 O.L.R. 441.

Grounds 3, 4, 7, and 9 dealt with the sufficiency of the evidence before the convicting magistrate. The conviction was on its face good, and it was not the duty of a Judge of this Court to look at the evidence to determine whether or not it was sufficient. If insufficient, an appeal would afford an adequate remedy.

The 5th ground was, that the counsel who appeared for the defendant before the magistrate was advised by the informant, who acted as prosecutor, that the charge was under a by-law. That was not a ground for quashing the conviction.

Grounds 6 and 8 were, that the number or name of the by-law could not be ascertained, and that no by-law was produced at the hearing. But jurisdiction was derived directly from the statute, and not through any by-law.

Motion dismissed with costs.

LOGIE, J., IN CHAMBERS. OCTOBER 31ST, 1919.

RE DRISCOLL.

Infant—Custody—Neglected Child—Children's Aid Society—Foster-home Found by Society—Application by Parents for Custody of Child—Welfare of Child—Rights of Foster-parents.

Application by the father and mother of certain infants for an order giving them the custody of the infants.

D. W. Markham, for the applicants.

K. W. Wright, for the Superintendent of Neglected Children and the Inspector of Children's Aid Societies.

LOGIE, J., in a written judgment, said that natural sympathy with parents who had apparently recovered their proper position in the community, and who were now willing and able to support their infant children properly, would lead a Judge, were he not bound by authority, to restore such children to them.

But in such a case the applicant must prove or shew in some satisfactory way that the removal of a child from the custody of foster-parents will enure to the benefit of the child: Re D'Andrea (1916), 30 O.L.R. 30; and in this case that onus had not been discharged.

Two of the three children had been restored to the parents since the application was launched. The third, a girl, was, in 1915, at the age of 15 months, transferred to the custody of a young married couple, farmers, without children of their own; and that child, now more than 5 years old, had been well cared for and was an object of her foster-parents' deep devotion.

The natural parents had set up a home in a city, in a house said to be clean and well-kept, and the father had steady employment and was well able to support his family.

The parents here, as in the D'Andrea case, opened the door for the benevolent work of the Children's Aid Society; the society's work reached its culmination in finding a new and suitable home; and the decision in the case cited was, that such a status quo should not lightly be interfered with.

What the nature of the proof "that the removal of the child would enure to her benefit" should be need not be stated—it was sufficient to say that nothing other than the rehabilitated respectability of the natural parents had been shewn here. That was not sufficient, in view of the decision in the D'Andrea case.

Motion dismissed without costs.

EVANS v. WATSON—FALCONBRIDGE, C.J.K.B.—OCT. 28.

Contract—Sale of Cattle—Evidence—Onus—Recovery of Price—Payment out of Money Paid into Court.]—Action to recover $1,779.68, said to be the balance due to the plaintiff for cattle sold to the defendant and for one week's feed of the cattle. The action was tried without a jury at Brampton. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the bargain was undoubtedly made as the plaintiff stated. The market went down, the defendant rued his bargain, and was endeavouring to set up a new arrangement whereby the cattle should be sold in the stock-yards on behalf of the plaintiff. The onus was on the defendant; but, if it were not, the plaintiff's testimony was to be preferred, and all the surrounding circumstances were in his favour. There should be judgment for the plaintiff for $1,779.68, less $1,419.26 paid into Court by the defendant, that is, $360.42, with interest from the 11th February, 1919, and costs, and an order for payment out of Court to the plaintiff of the amount paid in with accrued interest. E. G. Graham, for the plaintiff. W. S. Morphy, for the defendant.

FIFE v. KEATING—FALCONBRIDGE, C.J.K.B.—OCT. 29.

Vendor and Purchaser—Agreement for Sale of Land—Action for Purchase-money—Necessity for Tender of Deed—Statement of Inability to Pay—New Agreement Set up by Purchaser—Failure to Prove.]—Action to recover the purchase-price of 6 lots in Chamberlain Park which the defendant agreed to purchase from the plaintiff. The action was tried without a jury at Orangeville. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the agreement set up in the 8th paragraph of the defendant's affidavit of merits was never entered into, and this was the finding of fact without reference to the burthen of proof. The learned Chief Justice gave the plaintiff's counsel leave to submit authorities on the question of the alleged necessity to tender a deed to the defendant; but it was unnecessary to wait, because it was clear that where (as in this case) the defendant by letter and orally stated his inability to pay, it would have been an idle formality to tender a conveyance. No such defence was suggested in the defendant's affidavit. It was a mere afterthought at the trial. There should be judgment for the plaintiff for $1,850, with interest and costs. J. R. Layton, for the plaintiff. W. D. Henry, for the defendant.