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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*FAIRWEATHER v. McCULLOUGH.

Husband and Wife—Security Given by Wife at Instance of Husband for Liability of Husband to his Employers—Consideration—Stifling Prosecution—Executed Transaction—Absence of Duress and Undue Influence—Prosecution not Threatened by Employers, but Husband Apprehensive of Arrest—Action to Set aside Security—Findings of Fact of Trial Judge—Appeal.

An appeal by the plaintiff from the judgment of MASTEN, J., ante 175, dismissing the action with costs.

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

Gideon Grant and L. C. Smith, for the appellant.

D. O. Cameron, for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant brought the action to set aside a chattel mortgage given by her to the respondents, and based her claim to that relief on the ground that she executed the mortgage through the duress, undue influence, and misrepresentation of the respondents, and also of her husband, and without independent and competent advice and without full knowledge of the facts and of the transaction into which she entered.

The chief ground relied on in argument was, that the mortgage was given to stifle the prosecution of the husband.

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

It is settled law that, where the consideration upon which an agreement to give money or property or a security is illegal, e.g., the stifling of a criminal prosecution, the money or property cannot be recovered back or the security be set aside, at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution.

Reference to Wood v. Adams (1905), 10 O.L.R. 631, 637; Jones v. Merionethshire Permanent Benefit Building Society, [1892] 1 Ch. 173, 182.

The appellant could not succeed upon the ground principally relied upon.

If she had established that in the giving of the mortgage she was not a free agent, but gave it because of threats by the respondents that they would prosecute her husband criminally if she did not give it, she was entitled to succeed. The learned trial Judge had found against her on this branch of the case, and the appellant had failed to satisfy the Court that his conclusion was wrong. What was said did not amount to a threat to prosecute if the mortgage was not signed, nor did it warrant a finding in favour of the appellant on the issue as to pressure or duress.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*MAHONEY v. CITY OF GUELPH.

Municipal Corporations—Work Directed to be Done by Board of Commissioners of Sewage and Public Works of City—Act respecting the City of Guelph, 1 Geo. V. ch. 90, sec. 4 (7)—Use of Explosives—Negligence of Engineer—Injury to Member of Board—Liability of City Corporation—"Volenti non Fit Injuria," Application of—Common Employment—Volunteer—Absence of Contractual Relation.

Appeal by the plaintiff from the judgment of CLUTE, J., 13 O.W.N. 279, 41 O.L.R. 308, dismissing the action without costs.

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

Sir George Gibbons, K.C., and V. H. Hattin, for the appellant.

I. F. Hellmuth, K.C., and P. Kerwin, for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the trial Judge had found that the respondents' engineer was negligent in not having a covering placed over the place where the explosives were set and in not taking proper steps to remove the crowd from the danger area, or to warn them of the danger. These findings of the trial Judge were supported by the evidence; and the case must be dealt with on the hypothesis that the appellant's injuries were caused by the negligence of the engineer.

The appellant was in no sense an employee of the respondents, and occupied no different position with regard to the work that was being done than a member of the municipal council would have occupied if there had been no Board of Commissioners, and the work was being done under the direction of the council.

It was clear, upon the evidence, that what the members of the Board did was merely to approve of the recommendation of the engineer that the dam should be blown up, leaving entirely to him the selection of the means by which that should be accomplished and the carrying out of the work. The engineer was an officer of the respondents, and it was his duty as such, under the provisions of the by-law by which he was appointed, to carry out the directions of the Board as to matters which, under the provisions of the by-law by which it was constituted, were committed to its charge. He having been guilty of negligence in the performance of those duties, the respondents were answerable for the consequences of that negligence.

The maxim "volenti non fit injuria" has no application where there is not a full appreciation of the risk that is being run.

The learned Chief Justice said that he knew of no reason why a member of a municipal council, which has directed work to be done by its engineer, and who (the member), whether from curiosity or any other motive, is present when the work is being done, and is injured owing to the negligence or want of skill of the engineer in doing it, may not recover from the corporation damages for the injuries he has sustained; and, if he may, there is no reason why a member of a Board to which the council has delegated the performance of its duties may not, in the like circumstances, recover.

The doctrine of common employment could have no application, because the appellant was not an employee of the respondents.

It was argued that the appellant, having undertaken the duty

of keeping back the people on one side of the river, was a mere volunteer and could not recover for injuries sustained by him owing to the negligence of the engineer. The cases cited in support of that contention—Degg v. Midland R.W. Co. (1857), 1 H. & N. 773, and Potter v Faulkner (1861), 1 B. & S. 800—had no application.

Reference to Hayward v. Drury Lane Theatre Limited, [1917] 2 K.B. 899, 906.

There was no contractual relation between the appellant and the respondents, and the appellant as a member of the Board had a common interest with the respondent in the work that was being done, and what he did in undertaking to keep the people back was done by the invitation and with the acquiescence of the engineer acting within the scope of his employment.

The appellant was not a volunteer or a trespasser in any sense. The work was being done under the direction of the Board of which he was a member, and he had a right to take such part as he might think necessary in the doing of the work; but there was no ground for thinking that he took any part in it beyond undertaking to keep the people back on one side of the river.

The appeal should be allowed with costs, and judgment should be entered for the appellant for the amount at which the damages were contingently assessed, with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*BAILEY COBALT MINES LIMITED v. BENSON.

Security for Costs—Company out of the Jurisdiction Brought into Winding-up Proceedings in Ontario—Company Desiring to Appeal from Interim Report—Security for Costs of Appeal—Inherent Power to Order—Amount of Security—Practice—Order Styled in Effete Action—Amendment of Style of Cause so as to Bring it under Winding-up Proceeding—Jurisdiction to Order Security Limited to Referee under Winding-up Order—Order Made by Master in Chambers without Jurisdiction—Affirmance by Judge in Chambers—Order of Judge Treated as Substantive Order—Appeal to Appellate Division—Costs.

Appeal by the defendants the Profit Sharing Construction Company from an order of FALCONBRIDGE, C.J.K.B., in Chambers,

of the 9th April, 1918, dismissing an appeal from an order of the Master in Chambers requiring the appellants to give security to the extent of $3,000 on their appeal from a Master's interim report on the winding-up of the plaintiff company.

Leave to appeal was granted by SUTHERLAND, J., in Chambers: see ante 174.

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

R. S. Robertson and G. H. Sedgewick, for the appellants.

W. Laidlaw, K.C., for the plaintiffs and the liquidator, respondents.

HODGINS, J.A., in a written judgment, said that there was enough apparent in the proceedings to warrant the direction that security be given on the appeal for the costs thereof, if attention was to be paid to special circumstances.

But the point was really one of practice, and could be stated thus: "If a foreign person or company is brought into an action here, either by being properly served abroad, or on his application to be added as a party defendant, and, after having been heard, is unsuccessful and desires to appeal, is there power to treat such person or company as he or they would be treated under the Rules if he or they come here originally to sue?"

There is inherent power in the Court so to deal with them, notwithstanding that an appeal is in this Province merely a step in the cause. Such a person or company becomes, on the appeal, an actor desiring relief against the rights decreed to other parties; and, being outside the jurisdiction, should give such security as will enable the resident parties to recover their costs if they succeed.

Reference to J. H. Billington Limited v. Billington, [1907] 2 K.B. 106; Stow v. Currie (1910), 20 O.L.R. 353.

While, therefore, the jurisdiction of the Court to order security may be maintained, the amount fixed should be sufficient only to cover the costs of an appeal to a Judge in Court: Re Sarnia Oil Co. (1891), 14 P.R. 335; Re McLean Stinson and Brodie Limited (1910), 2 O.W.N. 435.

The amount of security should therefore be reduced to $200.

The proceedings appeared to have been misconceived. The order appealed against was styled in an action which came to a conclusion when its end was served. On the 24th January, 1917, Masten, J., directed that the matters in question in the action be referred to the Master, "to be heard and determined by him in the

winding-up proceedings and as part thereof." That order put an end to the action as a proceeding collateral to the winding-up. There is no such thing as consolidation of an action and a winding-up: per North, J., in Lovatt v. Oxfordshire Ironstone Co. (1886), 30 Sol. J. 338.

The Master in Chambers had no jurisdiction to make the order which was affirmed by Falconbridge, C.J.K.B.—the order of reference being in the usual form: Re Joseph Hall Manufacturing Co. (1884), 10 P.R. 485; Re Sarnia Oil Co. (1893), 15 P.R. 182. The proper officer was the Master in Ordinary, who had charge of the reference, and before whom it was still pending: Re Sarnia Oil Co., 14 P.R. 335. But, treating the order of the learned Chief Justice as a substantive order, notwithstanding what is pointed out in Re J. McCarthy & Sons Co. of Prescott Limited (1916), 38 O.L.R. 3, it might, after amendment of the style of cause so as to limit it to the winding-up proceedings, be affirmed, save as to the amount, which should be reduced to $200, stated to be security only for the costs of the appeal.

There should be no costs of the present appeal.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

MACLAREN, J.A., dissented.

Order below varied.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*McPHERSON v. CITY OF TORONTO.

Master and Servant—Dismissal of Member of Municipal Fire Brigade by Brigade Chief—Action against Municipal Corporation for Wrongful Dismissal—Justification—Refusal of Servant to Terminate Illicit Relations with Neighbour's Wife—Boasting to Fellow-servants of Existence of Relations—Justification on Ground not Known and not Assigned as Ground for Dismissal.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing the action, which was brought against the city corporation to recover damages for the wrongful dismissal of the plaintiff from the service of the corporation as a member of the fire brigade.

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

T. N. Phelan, for the appellant.

Irving S. Fairty, for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the main question for decision was, whether the ground upon which the appellant was dismissed by the Chief of the fire brigade was a sufficient ground to justify the dismissal.

The appellant was a young man, not living with his wife, and he had living with him the wife of another man, a comparatively young woman, who was separated from her husband. Complaint was made to the Chief on account of this; and, after investigation, he informed the appellant that he must leave the brigade if he did not cease to have the other man's wife living under the same roof with him. The appellant refused to put an end to the relations; and the Chief, being of opinion that the appellant's conduct was prejudicial to the interests of the brigade and the public, dismissed him.

Reference to Marshall v. Central Ontario R.W. Co. (1897), 28 O.R. 241, 243; Pearce v. Foster (1886), 17 Q.B.D. 536, 542; Labatt on Master and Servant, 2nd ed., vol. 1, p. 926, sec. 297.

Having regard to the nature of his employment, the conduct of the appellant was such as to justify his dismissal—such as prejudicially to affect the reputation of his employer. He was apparently living in open adultery, and his refusal to comply with the request of the Chief to cease to have his neighbour's wife living under his roof justified the Chief in dismissing him.

The judgment might also be supported upon the ground that the appellant was guilty of boasting to his comrades in the brigade of having illicit relations with his neighbour's wife.

Although it was not known to the Chief that these boasts were made, and the making of them was not assigned as a ground for the dismissal, it is clear law that the dismissal of an employee may be justified for a cause not known to the employer at the time when the dismissal took place.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*GRAIN GROWERS EXPORT CO. v. CANADA STEAMSHIP LINES LIMITED.

Ship—Carriage of Grain—Damage by Water—Hole Made in Barge by Collision with Dock—Seaworthiness—Due Diligence—Negligence—Peril of Navigation—Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, secs. 6 and 7 (D.)—Findings of Trial Judge—Appeal.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 11 O.W.N. 355, dismissing the action with costs.

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

J. H. Moss, K.C., and Christopher C. Robinson, for the appellants.

Casey Wood and E. G. McMillan, for the defendants, respondents.

HODGINS, J.A., read a judgment, in which he said that the issues must be determined by the common law as expressed in maritime jurisprudence. At common law the ship-owner is a common carrier, and as such the insurer of the goods he receives, and bound to carry them safely, and he warrants the seaworthiness of his vessel. Seaworthiness is a necessary condition of the carriage. The absence of this prime factor of safety adds to every peril mentioned in sec. 6 of the Water-Carriage of Goods Act, 9 & 10 Edw. VII. ch. 61, namely, those encountered in navigation or caused by mismanagement of the ship or resulting from any latent defect.

The only finding of fact made by the trial Judge was, that there was a hole in the ship's side; and he drew the inference that the hole spoken of in the evidence was the cause of the flooding. The proper conclusion from the evidence was that the defendants' vessel was not seaworthy so far as the plaintiff's cargo of grain was concerned. The onus of shewing seaworthiness is upon the ship-owner, especially when the vessel is found to be leaking badly within 10 or 15 minutes after she leaves the dock. There must be something to account for the rapid rise of the water after leaving the loading berth and before any accident could have happened, and it was not an unreasonable inference that the leakage which had produced the extra foot of water in the first 10 or 15 minutes

was then reinforced by the water through the hole, the effects of which began to tell. Both causes, therefore, resulted in damage to the grain. The hole, however made, was not the whole reason for that damage, but unseaworthiness was an efficient cause.

Reference to secs. 6 and 7 of the statute.

The learned Judge said that he was unable to find that the owner had exercised due diligence to make the ship in all respects seaworthy; and, if the loss or damage was caused wholly or partly by the hole made owing to the collision with the dock, the evidence led to the conclusion that the damage resulted from fault or error in navigation or in managing the ship; and, the ship not being seaworthy, and the owner not having shewn due diligence to make it so, he would not be protected: sec. 6.

If the vessel struck the dock at all, it was due to an error of navigation or in the management of the vessel. If unseaworthiness exists in fact, or want of due diligence in that direction is shewn, the statute gives no help to the ship-owner in case of negligent navigation.

Under sec. 7, the owner is not to be held liable for loss arising from the dangers of the sea or for loss arising without his actual fault or privity, or without the fault or neglect of his agents, servants, or employees. In view of the contract of carriage and the warranty of seaworthiness, the onus was on the owner to bring himself within the exceptions; and it had not been proved that the loss had arisen wholly from a danger of the sea or without the fault or privity of the owner.

The appeal should be allowed, and judgment should be entered for the appellants for the amount agreed upon as the damages suffered by them. The respondents should pay the costs of the action and of the appeal.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., agreed in the result.

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

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

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*DOMINION RADIATOR CO. LIMITED v. STEEL CO. OF CANADA.

Contract—Breach—Failure to Deliver Goods Contracted for—Specifications — Statute of Frauds — Repudiation — Rescission — Damages — Measure of — Findings of Trial Judge — Appeal.

Appeal by the defendant company from the judgment of MIDDLETON, J., 13 O.W.N. 124.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

George Lynch-Staunton, K.C., and J. G. Farmer, K.C., for the appellant company.

R. S. Robertson and G. H. Sedgewick, for the plaintiff company, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the action was brought to recover damages for alleged breaches of two contracts for the sale and delivery of pig-iron by the appellant to the respondent, one dated the 23rd December, 1915, for 1,000 tons, and the other dated the 25th September, 1916, for 1,200 tons. The contracts were both on printed forms, and it was a term of them that "all specifications are to be sent by buyer at least 15 days before time fixed for shipment." In each form there was a space for the statement of the specifications, which referred to the chemical analysis of the contract. By the earlier contract, the time for delivery was stated to be, "between date of completion of current contract and the 30th June, 1916, in equal monthly instalments;" the blank opposite to the word "specifications" was filled in with the words "to follow;" and opposite to the word "remarks" were the words and figures, "Order No. 5555." By the later contract, the time for delivery was stated to be, "in about equal monthly instalments between the 1st January and the 30th June, 1917;" the blank for "specifications" was filled in with "to follow;" and opposite to "remarks" was written "Order 6398."

At the time when these two contracts were made, there were two existing contracts between the parties: one dated the 14th January, 1914, for 2,000 tons, to be delivered "as required from time to time and as nearly as possible in equal monthly instalments between above date and the 30th June, 1914;" and the

other dated the 14th October, 1915, for 1,000 tons, to be delivered "in about equal monthly instalments between date of current contract and the 30th June,1916."

Deliveries under the contract of the 14th January, 1914, were not completed until the 12th January, 1916; the deliveries under the contract of the 14th October, 1915, were to begin at the date of completion of "current contract;" deliveries under this October contract began on the 12th January, 1916, and were completed on the 1st December, 1916. Thus, when the contract of December, 1915, was entered into, there was no existing contract under which the respondent was then entitled to have deliveries made, but the contract of the 14th January, 1914.

None of the iron, the subject of the contract of December, 1915, had been delivered, and the ground taken by the appellant with respect to it was, that the respondent had lost its right to have it delivered because of its failure to send specifications as to it in due time.

The appellant also relied upon the Statute of Frauds to meet the case of a parol variation of the contract as to the time for delivery.

What was meant by "current contract" might be shewn by parol evidence; and the trial Judge was right in holding that it was established that the reference was to the contract of January, 1914.

The trial Judge found that the respondent had supplied specifications for all the iron it had bought from the appellant, and that it was well understood by both parties that the specifications which had been supplied were to govern as to all the iron unless the respondent should desire to vary them and send other specifications. That finding was warranted by the evidence, and sufficed to dispose of the contention of the appellant adversely to it. In both cases, the provisions of the contracts as to sending specifications were strictly complied with.

The position taken by the appellant as to the contract of September, 1916, was, that the action was brought prematurely; that when it was begun the time for commencing deliveries had not arrived. The respondent answered that the appellant had, before the action was begun, repudiated the contract. The learned trial Judge treated the position taken by the appellant as being that, unless the respondent would formally abandon its contention with regard to the earlier contract, no deliveries would be made under the later one. In this the Judge could not be said to have erred; and, so treating it, the respondent was entitled to rescind and to sue for damages in respect of the breach.

But if the position taken by the appellant was, that it would make no deliveries under the later contract until the dispute as to the earlier one was settled, that was such a repudiation of the appellant's obligation under the later contract as warranted the respondent in rescinding.

On the question of what is a repudiation, reference to In re Rubel Bronze and Metal Co. and Vos, [1918] 1 K.B. 315, 322; Metropolitan Water Board v. Dick Kerr and Co. Limited, [1918] A.C. 119.

What the appellant proposed was to substitute for its obligation under the contract an entirely different obligation—one which would enable the appellant to delay for an indefinite period the delivery of the iron, all of which it had contracted to deliver before the 30th June, 1917. That was such a repudiation of its obligation as to warrant the respondent in rescinding.

As to damages, the learned Chief Justice saw no reason to differ from the trial Judge; and was inclined to think that, as what the appellant had agreed to sell was Hamilton pig-iron, and the market price of it was $39, the respondent was entitled to recover the difference between that price and the selling price, even if other iron which would answer the same purpose could be bought at $34.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*MAGILL v. TOWNSHIP OF MOORE.

Negligence—Obstruction or Nuisance in Highway—Telephone Wires Strung too Low—Proximate Cause of Accident Occasioning Death of Person Lawfully Passing under Wires—Liability of Township Corporation—Contributory Negligence—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of CLUTE, J., 13 O.W.N. 318, 41 O.L.R. 375.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

R. I. Towers and A. Weir, for the appellants.

J. R. Logan, for the plaintiffs, respondents.

FERGUSON, J.A., read a judgment in which, after stating the facts and examining the evidence and referring to many cases, he cited Pollock on Torts, 10th ed., p. 500, as shewing, on the authority of Clayards v. Dethick (1848), 12 Q.B. 439, that the defendants could not, by creating a dangerous obstruction, take away the right of the deceased to come out of the gate; but, while the deceased was entitled to use the dangerous gate, he could not disregard the obstruction; he must use extra care commensurate with the danger; and the question to be decided, in such circumstances, is, whether or not, in using the gateway with knowledge of the danger, he used common prudence in making the attempt in the manner he did. The deceased was not bound to refrain altogether from the use of the gateway; but, had he used care or prudence commensurate with the danger, the accident could not have happened from the cause found—loss of control of the horses which he was driving from the top of the load on a farm-waggon. He could have had his waggon more securely equipped and his rack more securely fastened; he might have driven from a sitting position on the load; he could have built the load lower, or have so built it as to leave himself a place to stand while driving under the wires; he could have walked and driven or led the horses. He could even have abated the nuisance. He was not forced to take the risk he did. Although he was not obliged to do the wisest thing, he was obliged to act as a prudent man would have acted in the circumstances; and he did not act according to that standard.

The plaintiffs had failed to make out that the accident occurred solely by reason of the negligence of the defendants and without negligence on the part of the deceased.

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

MAGEE, J.A., agreed with FERGUSON, J.A.

HODGINS, J.A., was of opinion, for reasons stated in writing, that there was such a lack of certainty in arriving at the right conclusion as to the proximate cause, that the Court was justified in saying that the plaintiffs had failed to prove negligence in the defendants, and that the appeal should succeed and the action be dismissed.

MEREDITH, C.J.O., was of opinion, for reasons stated in writing, that the trial Judge's finding that the obstruction caused by the wires was the proximate cause of the accident was based on a

reasonable inference from the evidence; and that finding and his other findings of fact should not be reversed unless they were clearly wrong, which had not been shewn.

The appeal should be dismissed.

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

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

*REX v. QUINN.

Criminal Law—Procuring Girls for Unlawful Carnal Connection with Men—Criminal Code, sec. 216 (1) (a)—3 & 4 Geo. V. ch. 13, sec. 9—Evidence—"Procure"—Bringing Prostitutes and Men together — Corroboration — Indictment — Uncertainty — Duplicity.

Case stated by the Junior Judge of the County Court of the County of Carleton in respect of questions arising upon the trial of the defendant upon a charge of unlawfully procuring girls to have unlawful carnal connection with another person or persons within Canada, viz.: (1) Was there evidence of procuring? (2) Was the evidence of witnesses for the Crown corroborated? (3) Was the indictment bad for uncertainty or for having charged in one count more offences than one?

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

Gordon Henderson, for the defendant.

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

MEREDITH, C.J.O., read a judgment in which he said that, in his opinion, the first question should be answered in the negative. In what the prisoner did he did not procure the girls, in respect of whom the charge against him was made, to have unlawful carnal connection with men, within the meaning of sec. 216, sub-sec. 1, cl. *a*, of the Criminal Code as enacted by (1913) 3 & 4 Geo. V. ch. 13, sec. 9. The prisoner was a cab-driver, and the girls were prostitutes. They were desirous of plying their trade, and there were men who were desirous of having carnal connection with them; and what the prisoner did was to drive the girls and men in his cab to a place where they could have and had carnal inter-

course with the men. That is not what the provision of the Code under which the prisoner was charged is aimed at; nor what, according to the fair meaning of the provision, it makes an offence. One who merely provides the means by which men and women who are desirous of having carnal intercourse can conveniently gratify their desires, does not, in any fair meaning of the word, "procure" the women to have that intercourse with the men.

The first question being answered in the negative, it was unnecessary to answer the others.

MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

CLUTE, J., read a judgment in which he discussed the third question and concluded that the conviction was bad for uncertainty and for having charged in one count more offences than one, and that it could not be amended. He was, therefore, of opinion that the conviction should be quashed.

HODGINS, J.A., read a dissenting judgment. He was of opinion that the conviction should be affirmed.

Conviction quashed (HODGINS, J.A., *dissenting*).

FIRST DIVISIONAL COURT. JULY 15TH, 1918.

GORDON v. GORDON.

Husband and Wife—Separation Deed—Construction—Allowance to Wife—Cesser—Act "Entitling" Husband to Divorce—Adultery—Appeal—Authority of Previous Decision.

Appeal by the defendant from the judgment of the County Court of the County of Hastings, in favour of the plaintiff, a wife living apart from her husband, in an action against her husband to recover $679.43, the aggregate of overdue payments under a separation deed.

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

George Wilkie, for the appellant.

W. C. Mikel, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the question raised by the appeal was the same as that which was dealt with by the Second Divisional Court in a former action between the same parties—Gordon v. Gordon (1916), 38 O.L.R. 167—and this Court was bound to follow that decision, which was that the defence set up by the appellant was no answer to the respondent's action.

Appeal dismissed with costs.

HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS. JULY 15TH, 1918.

MASON v. FLORENCE.

Mortgage—Action for Foreclosure—Motion for Summary Judgment —Defence—Interest—Costs—Stay of Proceedings.

By an order pronounced by KELLY, J., on the 14th December, 1917, 13 O.W.N. 289, the plaintiff's appeal from an order of the Master in Chambers dismissing a motion for judgment for foreclosure, was dismissed.

After the pronouncing of the order, further evidence was brought before the learned Judge, and he reconsidered his decision.

A. C. Heighington, for the plaintiff.
J. S. Lundy, for the defendants.

KELLY, J., in a written memorandum, said that, after he had given his decision, it was brought to his attention that the defendant Joseph L. Florence was, before the motion was argued, cross-examined on his affidavit filed with his appearance. That fact was not mentioned on the argument, nor was the transcript of the evidence on cross-examination made part of the material. After the learned Judge had become aware of the cross-examination, counsel, at his request, again appeared before him, and, so that all the facts of the case should be on record, he allowed the cross-examination to be put in as part of the material. It was now made clear, he said, that whatever took place between the parties about charging interest only from the dates of the respective

advances (a conversation by telephone, Joseph L. Florence said) was "long before" the mortgage was executed — something merely leading up to the making of the mortgage.

The order should, therefore, be an order allowing the appeal from the order of the Master in Chambers, and directing judgment to be entered as asked, with costs of the action (including costs of the examination of the defendant Joseph L. Florence, but exclusive of other costs of the motion and of the appeal), but not to take effect until 10 days; and if, within that time, the overdue interest and said costs should be paid, further proceedings would be stayed.

There should be no costs to either party of the motion or of the appeal except costs to the plaintiff of the examination of the defendant Joseph L. Florence, as above directed.

Any moneys paid into Court on account of overdue interest should be paid out to the plaintiff.

BRITTON, J. JULY 20TH, 1918.

MOLSONS BANK v. CRANSTON.

Guaranty—Liability of Trading Company to Bank—Bond Executed by Certain Directors on Condition that all Directors should Execute—Knowledge of Bank—Failure of one Director to Execute—Provision in Bond—Delivery of Bond to Bank in Escrow—Contemporaneous Oral Agreement—Evidence.

Action against guarantors to recover the amount of the indebtedness of a company called "The Canadian National Features Limited" to the plaintiffs, a banking corporation.

The action was tried without a jury at Belleville.

Stewart Masson, K.C., for the plaintiffs.

M. H. Ludwig, K.C., A. Abbott, and E. D. O'Flynn, for the defendants.

BRITTON, J., in a written judgment, after setting out the facts, said that, looking at the correspondence between the manager of the bank at Trenton and the head of the bank, and considering all the evidence that was given, it must be found that there was an agreement among the directors of the company that the guaranty bond was not to be used until all the directors had signed, and

that the plaintiffs had knowledge of that agreement. The bond was not signed by one Farley, a director, but was signed by all the other directors. The bond itself contained this clause: "This guaranty shall be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor." But this bond was held only in escrow by the plaintiffs and did not become operative at all, as the condition upon which it was given to the bank was never complied with. A contemporaneous oral agreement, collateral to a written one, may be entered into to prevent the original agreement from being operative until the happening of some event or until some future time to be named. Reference to Dominion Bank v. Cameron (1918), 13 O.W.N. 420, and cases there cited. In that case the bank had no notice or knowledge of the agreement—in this case the plaintiffs had notice and knowledge.

Action dismissed without costs.