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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 29TH, 1918.

MALOOF v. BICKELL.

Contract—Brokers—Dealings in Grain for Customer—Terms on which Dealings Conducted—Memorandum in Writing—Notice to Customer—Right of Brokers to Sell Grain when Margins Exhausted—Authority to Purchase Grain—Illegality of Transactions under sec. 231 of Criminal Code—Failure to Shew.

Appeal by the plaintiff from the judgment of KELLY, J., 13 O.W.N. 4.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

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

R. T. Harding, for the defendants, respondents.

FERGUSON, J.A., in a written judgment, after stating the facts and the conclusions of the trial Judge, said that he had no doubt as to the correctness of the finding that the plaintiff authorised the order of 50,000 bushels of corn put in by the witness Symmes on the 26th August, 1916; and the question arose whether the defendants were justified in selling, on the 28th August, the plaintiff's corn for lack of margin. On that day the market declined rapidly, so that the plaintiff's margin was not equal to the decline in value which had taken place. Owing to the plaintiff's absence in Northern Ontario, the defendants were unable to communicate with him readily, and thus receive either instructions or margin, and were thus under the necessity of either assuming the risk of the transactions by advancing money to protect the plaintiff's trades or of closing his account by orders to sell. They chose the latter alternative, with the result that the credit balance of the plaintiff was exhausted,

and there was a deficiency of $156, which the defendants had to pay, and for which they counterclaimed. The plaintiff had notice of, and carried on his trading account with the defendants under, the terms of a written memoradnum, which gave the defendants the right to sell, in such circumstances, without notice: see Nelson v. Baird (1915), 22 D.L.R. 132.

In any event the plaintiff failed to meet the demands for margins made by the telegram sent to him on the 28th August.

He telegraphed to the defendants on the 30th August, but did not in his telegram repudiate the 50 bushels' transaction. He knew of it, and his telegram should be read as a confirmation of that purchase; and if, at that time, he had furnished the requisite margin, the corn might have been repurchased at a lower price than that which he had agreed to buy it at originally. The loss he suffered, if any, was occasioned by his taking the unjustified position, indicated by his subsequent letter of the 8th September, that the 50 bushels' purchase was not authorised by him.

The plaintiff's action failed on the merits.

The learned trial Judge was of opinion that the transactions disclosed in evidence were within the prohibitions of sec. 231 of the Criminal Code, and that that was the effect of the decision in Beamish v. James Richardson & Sons Limited (1914), 49 S.C.R. 595. The learned Justice of Appeal was unable to agree in either of these conclusions.

Reference to Pearson v. Carpenter (1904), 35 S.C.R. 380; Forget v. Ostigny, [1895] A.C. 318; Buitenlandsche Bankvereeniging v. Hildesheim (1903), 19 Times L.R. 641; Halsbury's Laws of England, vol. 27, pp. 258-260.

The learned trial Judge dismissed both action and counterclaim; there was no cross-appeal; and the plaintiff's appeal should be dismissed with costs.

MAGEE and HODGINS, JJ.A., agreed with FERGUSON, J.A.

MACLAREN, J.A., agreed in the result.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 29TH, 1918.

WESTCOTT v. CITY OF WOODSTOCK.

Highway—Nonrepair—Opening in Roadway—Absence of Guard—Injury to Bicyclist—Defective Eyesight—Negligence of Municipal Corporation—Negligence of Bicyclist—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of SUTHERLAND J., 13 O.W.N. 480.

The appeal was heard by MACLAREN and MAGEE, JJ.A., KELLY, J., and FERGUSON, J.A.

Frank Arnoldi, K.C., and Peter McDonald, for the appellants.

W. T. McMullen, for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, after setting out the facts, said that the defendants set up that the trench into which the plaintiff fell was properly guarded and protected, and that the negligence of the plaintiff himself, in riding his bicycle too close to the trench, was the proximate cause of the accident; and contended that the trial Judge should have found that the embankment thrown up along the sides of the trench was a sufficient guard to the end of the trench.

The finding of the trial Judge was entitled to weight, and the Court should not reverse it unless the Court were of opinion that it was clearly wrong: Colonial Securities Trust Co. v. Massey, [1896] 1 Q.B. 38; George Matthews Co. v. Bouchard (1898), 28 S.C.R. 580. In this case the finding could not be said to be wrong; on the contrary, the evidence fully justified the finding of negligence on the part of the defendants.

Upon the question of the plaintiff's negligence, the law was correctly stated in Gordon v. City of Belleville (1887), 15 O.R. 26, at pp. 29, 30.

Any person riding for the first time up to the embankment beside the trench would reasonably conclude either that the end of the trench was protected in the same way as the sides, or that it was otherwise guarded so as to prevent persons riding or driving so close to it that they might meet with a mishap. Had the end of the trench been thus guarded, or even had the watchman been there, the accident would not have occurred. In the absence of a warning such as would be given by a watchman, it was not to be concluded that the plaintiff acted so unreasonably or imprudently as to relieve the defendants from the result of their negligence.

The learned trial Judge to some extent based his conclusions upon the defective eyesight of the plaintiff. But it was not necessary to the affirming of the judgment that the Court should pass upon the questions whether the plaintiff's eyesight was defective and whether his defective eyesight should be accepted as an excuse for his having ridden so close to the embankment as to touch it.

The appeal should be dismissed with costs.

KELLY, J., agreed with FERGUSON, J.A.

MACLAREN and MAGEE, JJ.A., gave a "grudging assent" to the affirmance of the judgment.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 29TH, 1918.

ROYAL BANK OF CANADA v. JOHNSTON.

Payment—Debt of Company to Bank—Promissory Note Held by Bank as Collateral Security—Deposits Made in Bank by two of the Makers of Sums Equalling whole Indebtedness—Question whether Deposits Equivalent to Payment—Evidence—Finding of Trial Judge—Appeal.

An appeal by the plaintiffs from the judgment of MIDDLETON, J., at the trial, dismissing an action on a joint and several promissory note for $4,000, made by the defendants and two other persons, Davis and Ryder, and hypothecated to the plaintiffs as collateral security for the indebtedness of the National Toy and Novelties Company. That company became insolvent and made an assignment, owing the plaintiffs $3,000. The plaintiffs sued the makers Johnston and Fritzken for the $3,000. These defendants set up that the $3,000 had been paid to the plaintiffs by Davis and Ryder, and that there was nothing due to the plaintiffs on the note; and they brought in Davis and Ryder as third parties.

The appeal was heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Peter White, K.C., and A. H. Robertson, for the appellants.

H. J. Scott, K.C., and N. Phillips, for the defendant Fritzken, respondent.

R. T. Harding, for the defendant Johnston, respondent.

MACLAREN, J.A., in a written judgment, said that it was proved that, when the plaintiffs demanded from the makers of the $4,000 note the $3,000 due by the company, Davis deposited $2,000 in the savings department of the plaintiffs' bank and Ryder deposited $1,000.

It was argued for the plaintiffs, on the authority of Commercial Bank of Australia v. Official Assignee of the Estate of Wilson, [1893] A.C. 181, that the plaintiffs, notwithstanding the deposit of these sums, were still entitled to recover from the defendants the full amount of the company's indebtedness. But the facts of that case were widely different from the facts of that now before the Court.

In the present case, the manager of the plaintiffs' bank strongly disclaimed any agreement whatever between the bank and Davis and Ryder with regard to the deposits made by them, and asserted that, although one of the deposits made by Davis was marked "special," that was an error, and there was nothing special about it. He said that the deposits were ordinary savings bank deposits and tangible evidence that the depositors did not intend to question or dispute their liability, and that there was no agreement whatever between them and the bank save as ordinary depositors. The trial Judge found as a fact, upon the evidence, that these deposits were in reality a payment of the debt of the company, and dismissed the action, upon the authority of the judgment of the Privy Council in Molsons Bank v. Cooper (1898), 26 A.R. 571 (appendix).

The facts of the present case fell within the Molsons Bank case rather than the Australian case; and, if there was any conflict between them, the later one should be followed.

Moreover, the finding of fact of the trial Judge should not be interfered with.

The appeal should be dismissed with costs.

HODGINS, J.A., agreed with MACLAREN, J.A.

FERGUSON, J.A., agreed in the result, for reasons stated in writing.

MAGEE, J.A., dissented.

Appeal dismissed with costs; MAGEE, J.A., *dissenting.*

HIGH COURT DIVISION.

FERGUSON, J.A. JUNE 24TH, 1918.

RE MONARCH BANK OF CANADA.

MURPHY'S CASE.

Company—Winding-up of Banking Company—Contributory—Subscription for Shares—Failure to Shew Acceptance by Notice of Allotment—Constructive Notice—Oral Agreement—Promissory Note.

An appeal by Murphy from the order or direction of an Official Referee, in the course of a reference for the winding-up of the bank, that the name of the appellant should be placed upon the list of contributories.

The appeal was heard in the Weekly Court, Toronto.
W. J. McWhinney, K.C., for the appellant.
J. H. Spence, for the liquidator, respondent.

FERGUSON, J.A., in a written judgment, said that the appellant signed an application for shares, agreeing to pay therefor in instalments, in the manner and at the times set out in the written application. At the same time, he and one Barry, an agent of the bank who solicited his (the appellant's) application, entered into an oral agreement whereby the appellant gave Barry a demand-note for the total amount of his subscription, and Barry agreed to have the note accepted by the bank as payment for the shares, and to have the appellant appointed a director of the bank, and that the bank would take over his trading account and furnish him and his firm with large credits. The bank did not proceed upon the note, but upon the original subscription. In the books of the bank the shares were allotted on the terms of the original subscription. It was not asserted that the appellant was sent or received any notice of such allotment. It was, however, urged that, because he was notified by letter that his note was overdue, he had constructive notice of allotment under his signed application.

The learned Judge said that he could not agree with that argument. It might be inferred from the letter that the bank had agreed to accept the subscription on the terms of the appellant's verbal offer to Barry, but the liquidator did not assert that this

was done, and the books of the bank did not shew it to have been considered.

The liquidator had failed to shew an acceptance by the bank of the written subscription, by proving both allotment and notice of allotment pursuant to that subscription; and for that reason had failed to make out his claim; and the appeal should be allowed with costs.

FERGUSON, J.A. JUNE 24TH, 1918.

RE MONARCH BANK OF CANADA.

SIMON'S CASE.

Company—Winding-up of Banking Company—Subscription for Shares—Contributory—Allotment Made and Notified to Subscriber—Attempt to Shew, after Winding-up Order, that Subscription Made upon Conditions not Fulfilled—Oral Variation of Written Application—Mistake or Misrepresentation.

An appeal by Simon from an order or direction of an Official Referee, in the course of a reference for the winding-up of the bank, that the name of the appellant should be placed upon the list of contributories.

The appeal was heard in the Weekly Court, Toronto.
W. J. McWhinney, K.C., for the appellant.
J. H. Spence, for the liquidator, respondent.

FERGUSON, J.A., in a written judgment, said that, in this case, subscription, allotment, and notice of allotment were proved; but the appellant sought now, in the winding-up, to assert that the subscription was conditional, and could not be accepted except subject to the condition that he should not be called upon to pay for his shares till a branch of the bank had been established in Halifax. This did not seem to be a condition precedent to the acceptance of the offer, but an attempt to add by parol a variation in contradiction of the terms of the written application—which could not be done.

In any event, what took place did not amount to a collateral condition or agreement, but was at most only a representation of what, in the opinion of the agent who solicited the subscription, would be done; and it was not now, after the winding-up order, and

long after notice of allotment, open to the appellant to seek to be relieved from his contract on the ground of mistake or misrepresentation. This applied also to other alleged misrepresentations.

The appeal should therefore be dismissed with costs.

FERGUSON, J.A. JUNE 24TH, 1918.

MORRIS v. MORRIS.

Contract—Construction of Agreement between Partners—Remuneration of Partner for Services as Manager of Farm and Business—Appointment by Court as Manager—Construction of Order and Judgment—Virtual Appointment as Receiver—Officer of Court—Fair Remuneration.

An appeal by the defendant David Z. Morris from the report of the Local Master at Welland and the Master's finding that the appellant was not entitled to remuneration for his services as manager of a nursery and farm owned by the parties to this appeal as tenants in common.

The appeal was heard in the Weekly Court, Toronto.

W. N. Tilley, K.C., for the appellant.

G. H. Pettit, for the plaintiffs, respondents.

FERGUSON, J.A., in a written judgment, said that the parties had conducted business in partnership as nurserymen. In the spring of 1915, they decided to wind up the business, and then sold their trade-name and goodwill, but did not dispose of the farm or their other assets. On the 6th May, 1915, they agreed that the appellant should be manager of the farm and business until it could be sold, his remuneration being fixed at $100 a month up to the 1st November, 1915, and, "if required" after that date, at the rate of $150 per month, up to July, 1917.

On the 18th October, 1915, the plaintiffs notified the defendant that his services would not be required after the 1st November; but the defendant took the position that, as the farm had not been sold, and it and the business required a manager, the meaning of the agreement was that the farm could not be sold until July, 1917, and that he was to act as manager in the meantime, at a salary of $150 per month.

Thereupon the plaintiffs commenced this action for partition or sale, and applied for the appointment of a receiver and manager

of the farm and business. Upon that application an order was made by Middleton, J. (22nd November, 1915), directing that until the trial or final determination of the action the appellant should remain in complete management of the properties.

The action was tried by Middleton, J., who gave judgment on the 22nd May, 1916, for partition or sale, with a reference to the Master at Welland; and also directed (para. 6) that (subject to any further direction) the Master should not enter upon the inquiry directed by the judgment until the 1st July, 1917—the management of the property in the meantime to continue under the appeal in pursuance of the agreement of the 6th May, 1915. Upon appeal the Court (4th October, 1916) struck out para. 6.

In the Master's office the appellant claimed salary for the month of October, 1915, at $100 and salary as manager at $150 a month until the sale of the farm in April, 1917. The Master refused to allow the appellant anything on this claim, being of opinion that the appellant's contract terminated on the 1st November, 1915, and that the services he did render were of no value.

Reading the judgment at the trial with the reasons for the interim order, it appeared that Middleton, J., thought that the appellant was entitled to remain as manager and be paid salary at the rate of $150 a month up to July, 1917. But the formal order of the 22nd November, 1915, did not contain any declaration as to the appellant's right to remuneration for services to be rendered under that order. If, however, on the proper construction of that order, the appellant was thereby appointed manager in the capacity of a receiver, until the determination of the action by the judgment of the appellate Court on the 4th October, 1916, he would be entitled to remuneration for the services performed as an officer of the Court under its order.

There was nothing in the evidence which justified the conclusion that the defendant neglected his duties.

The order, fairly interpreted, was an order appointing the appellant an officer of the Court and imposing upon him duties and obligations for the non-performance of which he would be responsible to the Court.

The sum of $1,100 would be a fair sum to allow for the appellant's services from the 22nd November, 1915, to the 4th October, 1916; and he should be allowed $100 for October, 1915.

But, after the judgment of the appellate Court, the appellant remained in possession for his own protection and without any legal claim to remuneration.

The appeal should, therefore, be allowed, and the report should be varied by allowing the appellant $1,200 for his services. The appellant's costs of the appeal should be paid by the respondents.

SUTHERLAND, J. JUNE 25TH, 1918.

ROWNSON DREW & CLYDESDALE LIMITED v. IMPERIAL STEEL AND IRON CO. LIMITED.

Contract—Agreement for Supply of Manufactured Goods—Formation of Contract—Written Memorandum—Evidence of Surrounding Circumstances — Admissibility — Authority of Agent of Company—Apparent Mandate—Necessity for New Machinery to Manufacture Goods Ordered—Effect on Question of Authority—Approbation of Contract—Ratification—Subsequent Repudiation—Necessity for Specifications by Buyers—Custom of Trade—Furnishing of Credit—Term of Contract—Notice of Intention to Cancel—Damages—Increased Prices of Goods—Increase in Freight Rates—Expenses of Special Journey—Remoteness.

Action for damages for breach of an agreement for the supply of 1,200 tons of wire and wire-nails by the defendants, a company incorporated in Canada, and having its chief place of business in Collingwood, Ontario, to the plaintiffs, a company incorporated and doing business in Great Britain.

The agreement was made on the 24th July, 1915, in New York, where one Donald, the managing director of the plaintiffs, and one Royal, a clerk or officer of the defendants, met by appointment. The agreement was in writing.

The action was tried without a jury at Toronto.

R. McKay, K.C., and Gideon Grant, for the plaintiffs.

J. B. Clarke, K.C., for the defendants.

SUTHERLAND, J., in a written judgment, after setting out the facts, said that it was argued for the defendants that on the face of the writing of the 24th July, 1915, there was no contract, nothing binding on the defendants or which indicated an agreement on their part to do anything. The document, however, should be looked at in the light of the surrounding circumstances: Bentsen v. Taylor Sons & Co., [1893] 2 Q.B. 274; Phipson on Evidence, 5th ed., pp. 490, 549; from which it sufficiently appeared that Royal had authority from the defendants, and that the writing in fact shewed a completed contract. It was more than an offer or option; it was a definite contract for the sale by the defendants and purchase by the plaintiffs of 1,200 tons of wire and wire-nails such as might be specified by the plaintiffs within a given time, and at prices which were certain within the provisions of the contract.

Royal was empowered to close the contract with the plaintiffs, and did so. If he were not so empowered, it was the duty of the defendants to repudiate his apparent assertions of authority immediately—which they did not do. The contract was with reference to a kind of business of which he was the apparent agent of the defendants to discuss and transact, and which the defendants might well have given him authority to execute: McKnight Construction Co. v. Vansickler (1915), 51 S.C.R. 374; Perry v. Suffields Limited, [1916] 2 Ch. 187.

Donald knew that the defendants would have to change their machinery and alter their plant in order to make the nails for the plaintiffs; but that was not in itself sufficient to render the contract ultra vires: National Malleable Castings Co. v. Smith's Falls Malleable Castings Co. (1907), 14 O.L.R. 22.

Again, the defendants treated the contract as an existing one—their conduct in fact amounting to a ratification.

The plaintiffs at once began to specify and continued to do so. They had made substantial specifications before any hint of repudiation reached them. When the defendants definitely repudiated, there was no longer any need for the plaintiffs to continue to specify.

The defendants sought to shew a custom of trade to the effect that there was no contract until the specifications were sent on—that it was up to then only an option. But no proper proof of the existence of such a custom was offered.

Even if the furnishing of a credit by the plaintiffs was a term of the contract, the defendants would not be warranted in cancelling the contract on the ground of the lack of such a credit, without giving the plaintiffs reasonable notice of their intention to cancel on that ground, so as to give the buyer an opportunity of complying with the condition: Panoutsos v. Raymond Hadley Corporation of New York, [1917] 2 K.B. 473.

The plaintiffs were entitled to succeed and to recover damages.

As to the damages, to the extent that they could not get similar goods to take the place of those which the defendants had agreed to supply, except at higher prices, the plaintiffs sustained loss. They acted with reasonable dispatch and thoroughness. They were obliged to pay at least $8 a ton more than the prices named in the contract, and were entitled to damages to that extent, amounting to $9,600.

They were entitled also to recover for their loss by reason of the increase in freight rates, after the delay in procuring the goods, caused by the defendants' default. On this head $1,000 should be allowed; if the plaintiffs were dissatisfied with that amount, they might have a reference, limited to this item of damage, and at their risk as to costs.

The plaintiffs also claimed as damages the expenses of a special journey from London to New York, made by Donald, as was said, in consequence of the failure of the defendants to perform the contract. But this could not be said to flow naturally from the breach or to be in the contemplation of the parties. Nothing should be allowed on this head.

The learned Judge referred to Featherston v. Wilkinson (1873), L.R. 8 Ex. 122; Roper v. Johnson (1873), L.R. 8 C.P. 167; Perkins Electric Co. v. Electric Specialty and Supply Co. (1918), ante 190.

Judgment for the plaintiffs for $10,600 and costs.

LATCHFORD, J., IN CHAMBERS. JUNE 25TH, 1918.

*RE HEWITT AND HEWITT.

Insurance (Life)—Change of Beneficiary—Policy Payable in Ontario—Deceased Assured Domiciled in British Columbia—Law of British Columbia not Applicable—Law of Ontario Applied—Soldier's Will—Intention of Testator—Bequest of Personal Estate—Inclusion of Insurance Moneys.

Motion on behalf of Sarah Hewitt for an order declaring that she is entitled to the insurance moneys payable under a policy of insurance issued by the Crown Life Insurance Company upon the life of James T. Hewitt, private soldier, killed in action.

The policy was dated the 7th November, 1904; the applicant, the mother of the deceased, was named in it as beneficiary; but the assured, in letters written when he was in active service in France, intimated an intention of changing the beneficiary to his wife, Gwendoline E. Hewitt.

The assured made a will upon a form the same as that in question in Re Monkman and Canadian Order of Chosen Friends (1918), ante 29, the words used being, "My personal estate I bequeath to," naming his wife; and there being under his signature the words: "N.B. — Personal estate includes . . . insurance policy."

The question was, whether the change in the beneficiary was validly effected.

A. R. Hassard, for the applicant.

R. H. Parmenter, for the widow of the assured.

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

LATCHFORD, J., in a written judgment, said that the policy was declared to be payable at the head office of the insurers in Toronto, and was effected while the assured was a resident in Manitoba; but the law of Manitoba had no application, because the assured, when he made his will, and when he was killed in action in France, had his domicile in British Columbia.

It was contended that the law of the domicile governed, and that the change in the designation of the beneficiary was by that law ineffective. But, in the opinion of the learned Judge—adopting the view of Middleton, J., in Re Baeder and Canadian Order of Chosen Friends (1916), 30 O.L.R. 30, at p. 32, approved by Riddell and Masten, JJ., in the same case—the law of British Columbia was not applicable.

The power which the testator exercised was, or was analogous to, a power of appointment, and was governed, not by the law of the domicile, but by the law of this Province; and the will was effective to substitute the testator's wife for his mother.

Order declaring accordingly. Costs of each party, fixed at $25, should be paid out of the fund.

MASTEN, J., IN CHAMBERS. JUNE 25TH, 1918.

*REX v. LEDUC.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having or Keeping Intoxicating Liquor—Conviction Bad on its Face—Insufficient Description of Offence—Objection not Taken in Notice of Motion—Judicature Act, sec. 63 (2)—Leave to Serve Supplemental Notice—Service after Expiry of 30 Days—Temperance Act, sec. 102 (2)—Amendment of Original Notice—Amendment of Conviction to Cure Defect—Sec. 101 of Act—Evidence to Prove Offence—Possession of Liquor Admitted—Presumption—Secs. 85, 88—Evidence to Rebut—Suspicious Circumstances—Finding of Magistrate—Liquor being Transported in Vehicle.

Motion to quash a conviction of the defendant, by a magistrate, for an offence against sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Grayson Smith, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MASTEN, J., in a written judgment, said that on the first return of the motion it was argued that the conviction was bad because it did not specify what offence had been committed. Thereupon, counsel for the Crown objected that the point was not specified in the notice of motion, as required by sec. 63 (2) of the Judicature Act, R.S.O. 1914 ch. 56. Leave was then given to the defendant to serve a supplemental notice, the original motion being retained. A supplemental notice having been served, taking the ground of attack upon the conviction mentioned, the motion again came on for hearing. Counsel for the Crown then contended that, the new notice not having been served within 30 days from the conviction, the ground of attack mentioned was not open to the defendant: sec. 102 (2) of the Ontario Temperance Act, as enacted by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 33. The learned Judge, however, was of opinion that the supplemental notice was not a new notice of motion; and, the original notice of motion having been served within 30 days, the motion should be entertained upon all the grounds raised.

By the notice of motion as originally drawn, the defendant sougnt to have the conviction quashed on the ground that there was no evidence to support it. It was conceded that liquor was found in the defendant's possession; and that raised a prima facie case against him: sec. 88 of the Act. Whether the evidence he adduced was sufficient to satisfy the onus that was upon him to prove that the did not commit the offence of having or keeping intoxicating liquor contrary to the provisions of the Act, was a question for the magistrate. The conviction could not be quashed upon this ground.

The conviction, however, was bad because it insufficiently described the offence. The words used in the conviction were, "unlawfully did keep liquor in contravention of the Ontario Temperance Act."

An amendment might, however, be made under sec. 101 of the Act, if there was evidence to prove some offence against the Act.

On behalf of the defendant it was contended that the evidence shewed that the liquor in question was being transported in the defendant's sleigh from a place in the Province of Quebec where it might lawfully be purchased to a place or places in the Province of Ontario where it might lawfully be kept, viz., the respective residences of the defendant and one Jodoin, who was with him.

Having regard to the presumptions prescribed by secs. 85 and 88 of the Act, it was essential, in this aspect, that the defendant should clearly establish, to the satisfaction of the learned Judge, that he was not keeping liquor elsewhere than in his private

residence, contrary to sec. 41. His denial to the constable that he had liquor in his sleigh, the fact that an unsealed bottle of the liquor was found only partly full, the fact that Jodoin was drunk in the sleigh, and the fact that two of the parcels found on the sleigh were consigned to fictitious consignees—all tended to raise a strong suspicion against the defendant.

The evidence of his possession of the liquor being undisputed, the presumptions created by secs. 85 and 88 would become proof unless the evidence satisfied the Judge's mind that the presumptions had been rebutted—and his mind was not so satisfied.

The conviction should be amended and the motion dismissed, but without costs.

LATCHFORD, J. JUNE 26TH, 1918.

COWAN v. FERGUSON.

Injunction—Breach of Covenant—Restriction upon Use of Land—Erection and Operation of Foundry—Unregistered Agreement—Purchaser for Value without Notice—Technical and Obsolete Restriction—Status of Plaintiff to Invoke Restriction—No Damage or Likelihood of Damage Shewn.

Action to restrain the defendants from erecting any building for a foundry and from maintaining and operating a foundry upon certain lands in the town of Galt, and for damages.

The action was tried without a jury at Kitchener.
Gideon Grant and J. B. Dalzell, for the plaintiffs.
M. A. Secord, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that the plaintiffs were manufacturers of woodworking machinery in the town of Galt, and, as an incident to their business, and only for their own requirements, maintained an iron-foundry. From Robert Dickson, who, in 1842, owned a large area of land in Galt, they had acquired, through one Fisher and others, a title in fee simple to lots 8A and 8B, as shewn on a plan prepared for Dickson.

The defendants were iron-founders, who, through many mesne conveyances, had become the owners in fee of lots 6A and 6B and 7A and 7B as shewn on the same plan. The root of their title, like that of the plaintiffs, was in Dickson.

The defendants did not in any way enter into competition with the plaintiffs; and the business which they carried on caused no appreciable damage to the plaintiffs—not even increasing their fire-risk or insurance-rates.

After the plaintiffs knew the purpose to which the defendants intended to devote their property, they not only made no objection but actually encouraged the defendants in establishing their foundry. There was no merit whatever in the plaintiff's action. They based it wholly upon a restriction to which Dickson wished to subject purchasers from him of the lands in question and other lands farther north, which were served, like the properties of the parties, by an hydraulic canal which Dickson had constructed.

It was undoubted that a restriction was imposed, in 1842, upon the predecessors in title of the parties, that only one foundry should be carried on upon the lots served by the canal. At the time no power except that of water was in use, ordinarily, in Upper Canada. Dickson's intention was, it would seem, to prevent competition among the lessees from him of the power which he had made available.

The restriction was contained in a form of agreement which was not registered, and the defendants were purchasers for value without notice of such restriction.

Since 1842, conditions had so changed in this Province that the object of the restriction could not be attained. As in Sobey v. Sainsbury, [1913] 2 Ch. 513, to give effect to the plaintiffs' contention would be to perpetuate, far beyond the real intention of the original contracting parties, restrictions which by the course of time had become obsolete and meaningless. The plaintiffs might not be actuated by mere caprice, or by a desire to make money out of a possible breach by the defendants of technical and obsolete restrictions; but, in the altered state of circumstances, the enterprise of the defendants should not be prohibited at the instance of persons who had not sustained and were never likely to sustain damage by what the defendants had done.

Action dismissed with costs.

LATCHFORD, J., IN CHAMBERS. JUNE 26TH, 1918.

REX v. BRACCI.

Ontario Temperance Act—Magistrate's Conviction for Keeping Intoxicating Liquor for Sale—Evidence Taken in another Case Improperly Admitted—Magistrate Influenced by Evidence—Certificates of Magistrate—Mutilation of Depositions—Credibility of Magistrate—Order Quashing Conviction.

Motion to quash the conviction of Luigi Bracci, by the Police Magistrate for the Town of Oakville, for keeping intoxicating liquor for sale in contravention of the Ontario Temperance Act, 6 Geo. V. ch. 50.

M. J. O'Reilly, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

LATCHFORD, J., in a written judgment, said that the magistrate had attempted to establish that the conviction was made on a day subsequent to that on which it was in fact made, and, by what he called a review of the evidence, dated the 8th March, 1918, to supplement the evidence given at the trial.

The trial undoubtedly took place on the 7th March. One certificate of the magistrate, forming part of the formal return, stated that the conviction also was on that date. Another certificate, read by counsel for the Crown, and the "review" of the evidence, both signed by the magistrate, set forth that the conviction was made on the 8th March. And the transcript of the evidence taken by the magistrate had been so mutilated that it appeared probable that the portion excised of one of the sheets of paper on which the depositions of the witnesses were set out had contained the date "7th March," with, possibly, a memorandum of the conviction.

It was beyond question that the conviction was made on the 7th March.

At the trial the magistrate admitted evidence of what one Gray had sworn in another case. This evidence was undoubtedly inadmissible and highly prejudicial to the accused.

Evidence was adduced on the 7th March that certain deliveries of express matter had been made to Bracci within one month; but the magistrate's original record failed to shew that any of such deliveries was of liquor.

All that was proved against the defendant was, that he had a case of gin in his house, almost intact.

In his review of the evidence, the magistrate stated that the evidence of Gray was not used or considered as evidence against the defendant.

Little, if any, reliance could be placed on the certificates of the magistrate as to what did or did not actuate him in making the conviction.

The learned Judge finds that, notwithstanding the magistrate's statement to the contrary, he was in fact influenced by the evidence which he improperly admitted; and that, upon the authority of Rex v. Melvin (1916), 38 O.L.R. 231, the conviction should be quashed.

Order quashing conviction without costs.

BURTON v. CUNDLE—LATCHFORD, J.—JUNE 25.

Promissory Notes—Collateral Agreement—Notes Payable only upon Event which did not Happen—Delivery up and Cancellation of Notes Held by Payee—Notes Transferred to Third Person—Claim for Damages for Transferring Notes—Validity of Agreement—Counterclaim—Fraud and Misrepresentation—Failure to Prove.]—An action to compel the delivery up and cancellation of certain promissory notes held by the defendant, delivered to him by the plaintiff in Chicago on the 28th September, 1915, and for damages. The defendant counterclaimed to set aside an agreement made on that date, on the ground of fraud and misrepresentation, or, in the alternative, for payment of the notes referred to. The action and counterclaim were tried without a jury at Toronto. LATCHFORD, J., in a written judgment, said that the plaintiff was entitled to the delivery up and cancellation of the promissory notes. By the agreement entered into on the 28th September, 1915, the payment of these notes was dependent upon the receipt by the plaintiff of payments agreed to be made to him by persons to whom he had sold, with other property, one of the two parcels of mining land on which it was supposed that the defendant had an option. The event upon which liability upon the notes held by Cundle was to arise did not happen, and the notes must be declared cancelled Judgment accordingly. But the plaintiff could not recover damages for his loss resulting from the course pursued by Huff, the endorsee of the notes, in discounting them. The plaintiff was aware that Huff had acquired a half interest in the option, and that one set of the notes was intended to be delivered to Huff. It had not been shewn that Cundle was in any way responsible for what

Huff did afterwards with the notes. His expectation and intention were that Huff would hold the notes subject to the agreement, and that they would not be payable unless the instalments were paid. This part of the plaintiff's action should be dismissed. There was no fraud nor misrepresentation on the part of the plaintiff which induced the contract. The counterclaim should be dismissed. No order as to the costs of the action or the costs of the counterclaim. D. L. McCarthy, K.C., for the plaintiff. J. Y. Murdoch, for the defendant.

HUFF v. BURTON—LATCHFORD, J.—JUNE 25.

Promissory Notes—Collateral Agreement—Notes Payable only upon Event which did not Happen—Transfer by Payee to Plaintiff—Notice to Transferee of Agreement—Transferee Subject to Equities between Original Parties—Action on Note Retained by Transferee—Dismissal—Damages for Fraudulently Transferring other Notes to Persons who Compelled Payment—Counterclaim.]—This action arose out of the agreement of the 28th September, 1915, referred to in Burton v. Cundle, ante; and, by consent of counsel, the evidence in that case, so far as applicable, was taken as if given in this. Huff sued upon one of the three promissory notes endorsed to him by Cundle, that for $250. The others, each for $1,000, he had previously transferred before maturity to holders who, asserting that they were holders for value, without notice of any equity preventing the negotiability of the notes, had compelled payment by the defendant. The defendant counterclaimed as to these notes. The action and counterclaim were tried without a jury at Barrie. LATCHFORD, J., in a written judgment, said that the plaintiff knew that all the notes endorsed to him by Cundle were not to be payable otherwise than out of instalments of purchase-money, which, to his knowledge, might never be paid. He took the notes subject to all the equities to which Cundle was subject. As no instalment of purchase-money was ever paid to the defendant after the agreement of the 28th September was made, and the sale thereupon became abortive and was cancelled, the plaintiff's action failed and should be dismissed with costs. The plaintiff acted dishonestly and in fraud of the defendant in transferring the two notes each for $1,000. The defendant counterclaimed, and was entitled to damages for such wrongful acts on the part of the plaintiff. Such damages amounted, in the case of the first note so improperly negotiated, to $1,064.24, with interest from the 28th February, 1917; and in the case of the other, which the

plaintiff also paid, to a like amount. The defendant paid more, but need not have defended the action. There should be judgment for the defendant upon his counterclaim for $2,128.48, interest, and costs. W. A. J. Bell, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendant.

PILKEY v. PYNE—BRITTON, J.—JUNE 27.

Vendor and Purchaser—Agreement for Sale of Land—Breach by Vendors—Conveyance to another Purchaser—Action by first Purchaser against Vendors and second Purchaser—Specific Performance or Damages—Knowledge of first Purchaser that Title not in Vendors—Possession—Improvements—Compensation—Costs.]—An action for specific performance of an agreement made by the plaintiff with the defendant Effie Pyne for the sale by her and the purchase by the plaintiff of land in the township of Devlin. The action was tried without a jury at Fort Frances. BRITTON, J., in a written judgment, said that before the 10th July, 1912, Alexander Thom was the owner of the land in question. The plaintiff desired to purchase it. Thom died some time before the agreement sought to be enforced; and his widow married Robert Pyne. The agreement was made between the plaintiff, of the one part, and the defendant Robert Pyne and his wife, the defendant Effie Pyne, of the other part. The price was $600. The plaintiff knew that Thom owned the land; that he died without a will; and that he left two children, both minors. An application was made to the Court to sanction, on behalf of the infants, the sale to the plaintiff, at $600, and the application was granted. But, before the sale was completed, the defendant Ganton offered $1,200 for the land; a sale to him was approved by the Court and completed, the land being conveyed to Ganton. The plaintiff, at the trial, conceded that the action for specific performance could not be maintained, but contended that the plaintiff should, in the alternative, have damages from the defendant Robert Pyne for non-performance of his part of the contract. Effie Pyne was made a defendant, not in her own right, but as administratrix of the estate of Thom. The plaintiff went into possession and made improvements. But he could not, in the face of his knowledge of the circumstances, recover damages from Robert Pyne. The plaintiff failed, and perhaps his improvements might be in some measure compensated if no costs were given against him. Judgment dismissing the action as against the defendant Ganton with costs; and as against the defendants the Pynes with-costs. C. R. Fitch, for the plaintiff. A. G. Murray, for the defendants.