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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*KENDRICK v. DOMINION BANK AND BOWNAS.

Gift—Cheque Drawn by Customer on Savings-bank Account for Full Amount to Credit of Drawer—Delivery of Pass-book with Cheque—Deposit-receipt—Presentation for Payment after Death of Drawer—Bank not Notified of Death—Revocation of Authority of Bank to Pay Cheque—Bills of Exchange Act, sec. 167—Donatio Mortis Causa or inter Vivos—Evidence—Corroboration—Ontario Evidence Act, sec. 12.

Appeal by the plaintiff from the judgment of LATCHFORD, J., 47 O.L.R. 372, 18 O.W.N. 138.

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

R. B. Henderson, for the appellant.

W. Mulock, for the defendants the Dominion Bank.

James Haverson, K.C., for the defendant Irene Bownas, respondent.

MEREDITH, J.C.O., read a judgment in which he said that the question for decision was, whether or not there was a donatio mortis causa to the respondent Bownas by the deceased, whose personal representative the appellant was, of $803.20 which was at the credit of the deceased in the savings department of the Dominion Bank.

It was contended by counsel for the appellant: (1) that there was not that clear and satisfactory proof of the gift that was necessary to establish a donatio mortis causa; (2) that the gift was of a cheque on the bank which was not presented for payment until after the death of the deceased, and that the authority to the bank to pay was revoked by the death, and the gift was,

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

therefore, ineffective; (3) that there was not the corroboration of the evidence of the respondent Bownas which was required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76.

The learned Chief Justice said that none of these objections was, in his opinion, entitled to prevail.

To constitute a gift mortis causa, it is not necessary that the donor should, in terms, say that his gift was to be effective only in the event of his death: Gardner v. Parker (1818), 3 Madd. 184, and other cases.

It is sufficient that the gift is made in contemplation, though not necessarily in expectation, of death.

The pass-book handed to the respondent Bownas contained an acknowledgment of the indebtedness of the bank to the deceased and a regulation as to the mode in which money at his credit was to be withdrawn, and was in substance and effect an acknowledgment of indebtedness and an undertaking to pay in accordance with the regulations. It was in effect a deposit-receipt, and was a good subject, apart from the cheque, of a gift donatio mortis causa or even inter vivos.

Reference to In re Andrews, [1902] 2 Ch. 394; In re Lee, [1918] 2 Ch. 320, 323; In re Dillon (1890), 40 Ch.D. 76; McDonald v. McDonald (1903), 33 Can. S.C.R. 145; In re Weston, [1902] 1 Ch. 680; In re Westerton, [1919] 2 Ch. 104.

The attendant facts and circumstances and the possession by the respondent Bownas of the two pass-books and the two cheques afforded the corroboration which the statute requires: McDonald v. McDonald, supra.

The learned Chief Justice shared the doubt of Latchford, J., having regard to the provisions of the Bills of Exchange Act, as to the direction to the banker being revoked by the death of the drawer before payment of the cheque, and agreed with that learned Judge that it is at least open to serious question whether the revocation occurs until the banker has notice of the death of his customer.

The appeal should be dismissed with costs.

MACLAREN, J.A., read a judgment in which he gave reasons for the same result.

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

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

Appeal dismissed (HODGINS, J.A., *dissenting*).

FIRST DIVISIONAL COURT. NOVEMBER 25TH, 1920.

*KATZMAN v. MANNIE.

Judgment—Return of Car Held for Value of Repairs—Damages for Detention—Election—Revocation—Appeal—Value of Car—Amendment of Judgment—Terms—Costs.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 46 O.L.R. 121, 16 O.W.N. 362.

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

A. St. G. Ellis, for the appellant.

No one appeared for the defendant, respondent.

HODGINS, J.A., reading the judgment of the Court, said that Sutherland, J., had given judgment in favour of the plaintiff for the return of his motor car, which the defendant had held for a repair-bill of $67.75, with $20 damages to the plaintiff and costs fixed at $75, and directing that, unless the car should be returned in 10 days, the defendant should pay $800 damages, less the sum of $67.75, and costs of the action.

The defendant had possession of the car when judgment was delivered on the 16th July, 1919; but when the plaintiff took out the judgment on the 17th September, 1919, it contained an order for the return of the car. The plaintiff now said that this was done by inadvertence, and that he desired judgment for damages instead, urging that they should be increased to $1,200—the true value of the car, as he asserted.

The effect of the judgment as delivered was to determine that the defendant wrongfully detained the car; and it gave him 10 days to redeliver it. The delay in taking out the judgment and the apparent election of the plaintiff to insist on the return of the car, long after the expiry of the 10 days, and then to appeal against the provision for return, presented a somewhat unusual situation. The Court was in fact now asked to allow the plaintiff, the appellant, not only to change his election, but in so doing to increase the damages.

At the hearing of the appeal it was suggested that the learned trial Judge should be consulted as to whether, as was alleged, he had been in error as to the facts on which he arrived at the value of the car. The trial Judge had informed the Court that he adhered to his opinion that $800 was the proper amount, in the circumstances.

A perusal of the evidence disclosed that the car, the repairs on which were extensive, and only $35 of which were paid for by the plaintiff, had been run 4,500 miles, and without those repairs might well be only of the value stated. The plaintiff could not claim to add their value to that of the unrepaired car unless and until he had paid for them. There was, therefore, no sufficient reason for increasing the damages.

If the plaintiff files an affidavit shewing that the car was not returned or tendered before his notice of appeal was served or since, the judgment will be amended by striking out para. 2 thereof and substituting therefor judgment for $800 with $75 costs, less the $67.75 unpaid, and there will be no costs of the appeal. If the affidavit is not filed within two weeks, the appeal will be dismissed without costs.

Order accordingly.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

WILLOX v. NIAGARA AND ST. CATHARINES R.W. CO.

Negligence—Automobile Stalled on Track of Street Railway Company—Street-car Running into Automobile—Negligence of Motorman—Findings of Jury—Evidence—Onus—Nonsuit—Appeal.

Appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Welland, dismissing an action for damages for injury to the plaintiffs' motor car and to themselves personally by being struck by a car of the defendants running upon their electric railway.

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

D. Inglis Grant, for the appellants.

F. W. Griffiths, for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs were husband and wife. The action was tried with a jury, who found for the plaintiffs, but the trial Judge nonsuited. The evidence of the plaintiff Harvey Willox established that he backed his automobile into a ditch between the travelled part of the highway and the defendants' railway track; that there the engine stalled, with the result that part of the automobile projected into the course of the defendants' street-car; that at the

time of stalling the street-car was more than 500 feet down the track; that the car came on and struck the automobile before Willox could get his engine started.

The defendants' evidence was that the accident occurred at night; that the head-lights of the automobile shone into the face of their motorman and prevented him from seeing that the automobile was on his course until he was so close to it that it was impossible for him to stop the street-car. The defendants also said that the plaintiffs were guilty of contributory negligence in not giving the motorman warning of their danger.

The plaintiffs replied that the position of the automobile was such that its head-lights could not have blinded the motorman; that Willox was fully occupied in an endeavour to start his automobile; and that he acted reasonably in not leaving his car for the purpose of warning those in charge of the approaching street-car.

The defendants moved for a nonsuit, upon the ground that there was no evidence of negligence; upon this the County Court Judge reserved judgment until after he had submitted the case to the jury.

Questions were put to the jury which they answered by finding that the accident was caused by the defendants' negligence, in that the defendants "did not apply the means to stop soon enough;" and that there was no contributory negligence; they assessed the damages at $225 for the plaintiff Harvey Willox, and found that the plaintiff Florence Willox was entitled to no damages.

The County Court Judge dismissed the action upon the ground that there was no evidence of any negligence on the part of the motorman.

The County Court Judge appeared to have accepted the statement of the motorman as settling the issue of negligence or no negligence. He erroneously assumed that the jury were not entitled to pass upon the credibility of the motorman or to consider the surrounding circumstances as affording any evidence of negligence or grounds for believing or disbelieving the motorman. The track was straight, the street-car had a powerful search-light, it was more than 500 feet from the automobile when the stalling occurred. These circumstances afforded some evidence that the motorman could have seen the automobile before the moment at which he said he saw it; that he should have put the street-car under absolute control before he did; and that his failure to do this was negligence and the proximate cause of the accident. The jury were not bound to accept the motorman's story; they were entitled to reject it and draw their own inferences and conclusions as to what he should have done.

Where there is evidence of negligence on the part of the defendant, although there may also be contributory negligence on the part of the plaintiff, the question is for the jury, and the case is not one for a nonsuit.

When it was established that the street-car was more than 500 feet away on a clear track when the stalling occurred, and that the street-car was fitted with a powerful head-light, the onus was shifted, and it was for the defendants to satisfy the jury that the collision was not the result of their negligence: see Canadian Pacific R.W. Co. v. Pyne (1919), 48 D.L.R. 243.

The appeal should be allowed with costs, and judgment should be entered for the plaintiffs in accordance with the jury's findings, with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*GOODISON v. CROW.

Damages—Agreement for Sale of Farm—Covenant to Give Immediate Possession—Loss of Crops in Ground—Loss of Rent—Loss of Prospective Profits from Crop to be Grown—Damages for Deceit—Appeal and Cross-appeal—Variation of Judgment—Costs.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of LATCHFORD, J., in an action to recover damages for breach of covenant and for deceit in the matter of an exchange of lands between the parties. By the judgment the plaintiff was awarded $1,825 damages and costs of the action.

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

R. L. Brackin, for the defendant.

O. L. Lewis, K.C., for the plaintiff.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that the trial Judge treated the action as one simply for damages for breach of the defendant's covenant to give immediate possession of his farm. In assessing these damages, the learned Judge allowed $850 for the loss of a crop of wheat that was in the ground when the conveyance was made and the difference between that sum and $2,000 as the loss of the profit that the plaintiff would have made by growing on the farm, as he intended to do, sugar beets, from which

$175 was deducted in respect of one item of the counterclaim, and gave judgment for the plaintiff accordingly with costs; with a provision that the defendant was to receive the rent for 1920 and pay the taxes, including drainage rates. No reference was made by the trial Judge to the claim in deceit. The case based on deceit was a weak one, and probably for that reason was given the go-by by both Judge and counsel.

What then was the proper measure of the plaintiff's damages?

Reference to Marrin v. Graver (1885), 8 O.R. 39; Rotman v. Pennett (1920), 47 O.L.R. 433; Grindell v. Bass, [1920] 2 Ch. 487, 494; Hadley v. Baxendale (1854), 9 Ex. 341, 346, 355, 356.

There was no reason why the rule given in Hadley v. Baxendale should not be applied in the case at bar in assessing the damages which the defendant should pay for the breach of his covenant for quiet enjoyment. It was known to the defendant that the purpose of the plaintiff in buying the farm was to grow sugar beets upon it, and the parties to the contract must have contemplated that the result of the plaintiff not getting possession would be loss of the profit he would make from growing the beets on the farm; and the defendant was, therefore, liable for the loss which the plaintiff sustained by not being able to obtain possession.

Nothing that was decided in Marrin v. Graver was opposed to that view.

The cases as to damages for breach of an agreement to sell and convey, arising from defect of title, were not applicable.

In this view, it was unimportant whether the plaintiff was entitled to recover for breach of the covenant or for deceit, for the damages would be the same in either case.

As grantee of the reversion, the plaintiff became, by the conveyance to him, entitled to the rent payable by the tenant, and he had lost the crop of wheat which was in the ground at the time of the conveyance and also the profit which he would have made if he had been let into possession and had carried out his intention of growing sugar beets on the farm.

The trial Judge erred in assessing the damages as to the sugar beet crop at $1,200. It was satisfactorily shewn that it was practically impossible to grow sugar beets successfully during the season of 1920.

The damages in respect of the wheat were assessed at $850, made up of the value of the wheat raised, less the cost of harvesting, threshing, and hauling.

The loss the plaintiff sustained in respect of the wheat, assuming that he was to get the rent for 1920, was not $850, but that sum less the proportion of the rent attributable to the 18 acres on which it was grown. The farm consisted of 100 acres, and the rent was $625 per annum. The deduction would therefore be $112.50.

The plaintiff's damages should therefore be assessed at $737.50, from which should be deducted the $175 awarded to the defendant on his counterclaim, and the judgment should be varied by reducing the damages to $562.50, and the judgment should be affirmed with that variation—the plaintiff's cross-appeal to increase the amount of damages being dismissed.

There should be no costs of the appeal or of the cross-appeal to either party.

Judgment below varied.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*SAMUEL v. BLACK LAKE ASBESTOS AND CHROME CO. LIMITED.

Contract—Delivery of Ore—Breach—Refusal to Complete Delivery—Excuses for Non-delivery—"Pinching out" of Ore—Failure to Prove—Contingencies—Frustration—Increased Cost of Production—Expenditure—Adoption of New Methods—Impossibility of Performance—Extension of Time for Making Deliveries—Quantum of Damages—Measure of Damages—Conduct of Purchaser—Duty to Minimise Loss—Purchases Made by Purchaser from Other Persons—Allowance for, in Estimating Loss—Reference to Assess Damages—Costs.

Appeal by the defendants from the judgment of KELLY, J., 18 O.W.N. 149.

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

R. S. Cassels, K.C., for the appellants.

A. W. Anglin, K.C., and R. C. H. Cassels, for the plaintiff, respondent.

HODGINS, J.A., reading the judgment of the Court, said, after stating the facts, that, beginning in September, 1918, the appellants spent $80,000 up to July, 1919, with the result that under new methods they retrieved in development work 600 tons up to July, 1919, and afterwards got out 1,000 to 1,200 tons of high grade ore and some low ore, or in all about 2,000 tons at an average of 30 per cent.

This result seemed—subject to the further ground that the great expense to be incurred brought the appellants within the

cases dealing with impossibility of performance—to dispose not only of the contention that the alleged deficiency of ore was due to a cause beyond the reasonable control of the appellants within the meaning of the exception in the contract, but also of the contention that there was in fact an absence of ore sufficient to fill the contracts in question.

But the contention that the appellants were entirely relieved from performance of their contract because the basis upon which it was entered into was radically changed, and that they had to expend $80,000 and entirely reorganise their methods before they could produce ore in commercial quantities, was strongly pressed. The appellants, however, were not the sole producers of this ore, apart altogether from the fact that they had disposed of ore to other persons, diverting it from the respondent's contracts. They could, by paying wages as high as they were compelled to pay to their asbestos workers, have compassed the production of the article in commercial quantities. The doctrine of frustration depends upon implied contract, and it is said that "no such condition should be implied when it is possible to hold that reasonable men would have contemplated the circumstances as they existed and yet have entered into the bargain expressed in the document:" Scottish Navigation Co. Limited v. W. A. Souter & Co., [1917] 1 K.B. 222, 243; Bank Line Limited v. Arthur Capel & Co., [1919] A.C. 435. Here the parties knew the situation, were aware of the possibility of pits pinching out and of the existence of other sources, and might very well have made the contracts.

The appellants, therefore, had not shewn that performance was impossible owing to pinching out or that the expenditure which they made was, in the circumstances, absolutely necessary to put them in a position to fulfil or substantially complete their contracts, or that any implication should be added to the written contracts in case of their performance, in the events which had happened.

The learned Judge did not wish to be understood as expressing the opinion that expenditure or the adoption of new methods would alone bring the appellants within the principle of the cases cited where the performance of the contract was held to have because impossible. On the question of so-called commercial impossibility, see Tennants (Lancashire) Limited v. C. S. Wilson & Co. Limited, [1917] A.C. 495; and Blackburn Bobbin Co. v. T. W. Allen & Sons Limited, [1918] 1 K.B. 540, [1918] 2 K.B. 467.

The decision should be against the appellants on all the grounds raised by them in opposition to the liability imposed by the judgment.

Upon the question of the quantum of damages, the learned Judge said that a market existed, and the prices could be established by a reference to the transactions of both parties. The appellants admitted selling to others at higher prices. But the respondent practically cleared the only market into which the appellants could have profitably gone if they desired to supplement their own production, and thus the respondent got the benefit of the prices which prevailed during the whole period of default up to July, 1918, when actual repudiation took place. The respondent could not, in face of the rule that the injured party is bound, in reason, to minimise his loss, be allowed to assert that his purchases should not be a factor in deciding what his loss actually was. The damages are to be assessed on the basis of reasonable conduct on the part of the purchaser: C. Sharpe & Co. Limited v. Nosawa & Co., [1917] 2 K.B. 814, 820; Hill & Sons v. Edwin Showell & Sons Limited (1918), 87 L.J.K.B. 1106; Cockburn v. Trusts and Guarantee Co. (1917), 55 Can. S.C.R. 264; Findlay v. Howard (1919), 58 Can. S.C.R. 516; Jamal v. Moolla Dawood Sons & Co., [1916] 1 A.C. 175.

If the purchases which the respondent made in replacing the car-loads diverted from him, or in excess of his selling contracts on hand from time to time during the period in question, do not extend to 2,660 tons, then the measure adopted by the trial Judge may be applied as to the residue.

There should, therefore, be judgment setting aside the award of damages, in so far as regards their measure and amount, and there should be substituted therefor a judgment referring it to the Master in Ordinary to determine the proper amount of damages, having regard to the foregoing. Otherwise the judgment should be affirmed.

The appellants should pay the costs of the appeal and reference.

Order accordingly.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*LUCK v. TORONTO R.W. CO.

Negligence—Collision between Street-car and Automobile at Street Intersection in City—Findings of Jury—Negligence of Motorman—Excessive Speed of Street-car—Contributory Negligence of Driver of Automobile—Failure to Look twice before Crossing Intersecting Street—Motor Vehicles Act, sec. 11 (1) (9 Geo. V. ch. 57, sec. 3)—"Where the Driver has not a Clear View of Approaching Traffic"—Reduction of Speed—Evidence—Judge's Charge.

An appeal by the defendants from the judgment of the County Court of the County of York (DENTON, JUN. Co. C.J.), in favour of the plaintiff, upon the findings of a jury, for the recovery of $200 and costs of the action, which was brought for damages for injury to the plaintiff's motor car in a collision with a car of the defendants upon their electric street railway, by reason of the negligence of the defendants as alleged.

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

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

W. D. M. Shorey, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the respondent was driving his automobile in a northerly direction upon Markham street when it was struck by an east-bound street-car of the Harbord street line. The negligence charged was that the street-car was being driven at an excessive rate of speed and that the motorman did not have it under control.

The jury found that the plaintiff's damages were caused by the negligence of the defendants, and that the negligence consisted in "going at too fast a speed and not giving warning and sounding gong soon enough."

The Judge's charge was not open to objection, but was a clear and accurate statement of the law and of the duty of the jury in dealing with the question of contributory negligence. There was nothing in the charge to mislead the jury. It was clearly pointed out to them that, if they thought that the driver of the automobile should have looked to the east and west a second time before attempting to cross Harbord street, they should answer "yes" to the question whether there was contributory negligence.

Nothing was decided or said in Grand Trunk R.W. Co. v. McAlpine, [1913] A.C. 838, 845, which is opposed to that view.

An objection was based upon the alleged failure of the driver of the automobile to obey the provisions of the Motor Vehicles Act, sec. 11 (1), as enacted by the amending Act of 1919, 9 Geo. V. ch. 57, sec. 3, providing that "no motor vehicle shall be driven upon any highway . . . at a street intersection or curve where the driver of the vehicle has not a clear view of approaching traffic at a greater speed than 10 miles per hour in a city, town or village . . . ."

It was argued that the words "where the driver has not a clear view of approaching traffic" qualify only the word "curve;" but the learned Chief Justice was not of that opinion. The meaning is that the speed must be slackened to 10 miles an hour

unless the driver has a clear view of approaching traffic and there is nothing approaching to render it unsafe to cross the intersection at the normal speed of 20 miles an hour.

There was evidence that the driver had a clear view of approaching traffic, and if, as they no doubt did, the jury found that to be proved, there was no obligation on the driver to reduce his speed to 10 miles an hour; and the objection was not entitled to prevail.

Assuming, however, that the driver was not entitled to traverse the intersection at a greater speed than 10 miles an hour, it did not follow that the finding as to contributory negligence should have been against the respondent. Contributory negligence involves not only a finding of negligence but of such negligence that but for it the accident would not have happened. He may have disobeyed the law and yet not have been guilty of contributory negligence—it was a question to be determined by the jury on the facts proved.

Reference to the McAlpine case, at p. 845.

The appeal should be dismissed with costs.

MACLAREN, J.A., agreed with MEREDITH, C.J.O.

MAGEE, J.A., agreed that the appeal should be dismissed, for reasons stated in writing.

HODGINS, J.A., read a dissenting judgment. He agreed with the Chief Justice except in regard to contributory negligence, as to which he said that, while the question of contributory negligence was for the jury, their finding must be based upon a proper charge; and, in the circumstances, the case was not properly presented to them. There should be a new trial.

Appeal dismissed (HODGINS, J.A., *dissenting*).

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

PASTORIUS v. DANTO & CO.

Sale of Goods—Action for Price—Quality of Fish Delivered—Deduction for Shortage—Findings of Trial Judge—Appeal.

An appeal by the defendants from the judgment of KELLY, J., 18 O.W.N. 13.

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

J. H. Fraser, for the appellants.

E. S. Wigle, K.C., for the plaintiff, respondent.

FERGUSON, J., reading the judgment of the Court, said that the action was for a balance of the price of fish sold and delivered, and the defence was "that a heavy percentage of the fish were not merchantable, unfit for food, and of no value."

Counsel for the appellants contended that, even if the fish were merchantable and fit for food, they were not what is known in the trade as "good quality smokers," and pointed to the plaintiff's evidence as establishing that he contracted to sell the defendants a good quality of smokers; that the learned trial Judge had disposed of the case on the hypothesis that the contract called only for merchantable fish, while the evidence established that those delivered were not good quality smokers.

It appeared from a careful reading of the evidence that the learned trial Judge appreciated the issue and that his findings were justified.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*GALLINGER v. GALLINGER.

Contract—Parent and Child—Oral Bargain between Father and Son—Son Put in Possession of Land—Evidence to Establish Contract—Corroboration—Statute of Frauds—Acts of Part Performance—Improvements Made by Son—Assumption of Incumbrances—Death of Father Intestate—Action by Administratrix for Possession—Parties—Addition of Heirs at Law—Counterclaim—Undertaking.

Appeal by the defendant Zenas Gallinger from the judgment of SUTHERLAND, J., 18 O.W.N. 49.

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

W. R. Meredith, for the appellant.

J. M. McEvoy, for the plaintiffs, respondents.

E. C. Cattanach, for the Official Guardian.

HODGINS, J.A., reading the judgment of the Court, said that Sutherland, J., directed the appellant to give up possession of the 50 acres of land in question to the plaintiff, the administrator of his father's estate, and dismissed the counterclaim, by which the appellant sought a conveyance from the estate of the same 50 acres. The action was brought in the interest of the remaining members of the family, who had been added as parties.

The defence set up by the appellant was that his father gave him the land and put him in possession as the owner thereof, and upon the faith thereof he kept down all charges thereon and made great improvements thereon, and had continued in possession ever since.

Reference to Orr v. Orr (1874), 21 Gr. 397; Jibb v. Jibb (1877), 24 Gr. 487; and Smith v. Smith (1898), 29 O.R. 309.

These cases emphasise the necessity for clearness and definiteness in the promise and the necessity for ample corroboration, but do not deprive a son of the right to have relief, provided that these conditions are reasonably fulfilled, especially if the transaction takes the form of a change of position and circumstances in the lifetime and with the knowledge of the promisor.

The promise made by the father in this case was clear and definite, and was repeated more than once in practically the same terms; and the corroboration was unusually direct.

As against the evidence of the appellant and his witnesses, there was the fact that the father in 1916 made a mortgage upon the place, consolidating the other mortgages, and that for two years he paid the interest on it. The appellant, however, said that he gave his father the money to pay the interest after he had taken possession of the farm. The circumstance of the father making the mortgage was not of commanding importance. The deed had not been given, and the son could not, therefore, properly make a mortgage; and the consent of the mortgagee to the substitution would have been necessary.

The agreement or gift was sufficiently proved and corroborated. Possession was taken on the faith of that agreement, and was referable to the agreement and to nothing else indicated in the case. There was no foundation for the suggestion that the father was to will the land to the son. The father's subsequent recognition of the son's possession and acquiescence in it and in the putting of visible and substantial improvements on the property, made that possession such as would itself remove any difficulty caused by the Statute of Frauds: see Hodson v. Heuland, [1896] 2 Ch. 428. There was valid consideration in the change in the appellant's circumstances and his assumption of the incumbrances and the making of the promised improvements.

The appeal should be allowed, and judgment should be entered dismissing the action with costs and allowing the appellant's counterclaim with costs.

The judgment should be prefaced with an undertaking on the part of the appellant that when the 50 acres are conveyed to or vested in him with the assent of the other heirs, no claim will thereafter be made by him to a share in the homestead farm or in the proceeds thereof.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

BENSON v. GARVIN.

Contract—Construction—Commission on Sale of Company-shares —Evidence.

Appeal by the defendant from the judgment of the County Court of the County of Prince Edward in favour of the plaintiff for the recovery (without costs of the action) of $800, the balance of a commission claimed by the plaintiff upon a sale of stock for the defendants.

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

S. H. Bradford, K.C., for the appellant.

M. R. Allison, for the plaintiff, respondent.

MAGEE, J.A., reading the judgment of the Court, said that the plaintiff claimed this $800 by virtue of an offer contained in a letter from the defendant to him, dated the 6th September, 1918, which the plaintiff said he accepted. The defendant, who resided in Toronto, was at that date in Picton to make sales of shares in the Universal Tool Steel Company, which was then making munitions. The plaintiff was a manufacturer in Picton. The letter was headed, "Private and confidential," and contained this proposal which he asked the plaintiff to consider: "If you will purchase 100 shares ($10,000) at $25 a share ($2,500) and help me by advice and by furnishing some names of well to do people . . . I will allow you the commission ($1 per share) which usually goes to a local agent. As I shall sell at least 1,000 shares in this county, this will mean at least $1,000." The plaintiff said that he accepted the proposal. He bought the 100 shares

and paid $2,500 for them, and did his part in advising and furnishing names. This was not disputed. Only 200 shares, including those bought by the plaintiff, were sold by the defendant in the county of Prince Edward, and the plaintiff received his commission thereon, $200, and he sued for the remaining $800.

The learned Justice of Appeal discussed the terms of the letter and referred to the evidence of the plaintiff given at the trial, and stated his conclusion that the agreement did not call for payments beyond the $200 already received by the plaintiff.

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

Appeal allowed.

FIRST DIVISIONAL COURT. NOVEMBER 30TH, 1920.

*A. D. GORRIE CO. LIMITED v. WHITFIELD.

Promissory Note—Person Signing Note on Face thereof—Word "Endorsed" Written Opposite Signature—Evidence—Intention—Liability as Maker.

Appeal by the plaintiff company from the judgment of the County Court of the County of York dismissing as against the defendant Michaud (without costs) an action upon a promissory note.

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

F. J. Hughes, for the appellant company.

H. G. Smith, for the defendant Michaud, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the result of the appeal depended upon whether or not the respondent was liable as a maker or as an endorser upon a promissory note signed by him. The presiding Judge in the County Court (Elliott, Co.C.J.) found that the respondent was liable as an endorser only, and the action as against him was dismissed because there was no notice to him of the dishonour of the note.

One McKinnon, a salesman employed by the appellant company, advertised for sale a Ford car of the appellant company. Having seen the advertisement, the respondent came to the sales-room of the appellant company, where the car was, and inspected it and was satisfied with it, and told McKinnon that

he would buy it if he could dispose of his own car— a Studebaker —and asked McKinnon to go with him to see the defendant Whitfield, with whom the respondent had had some discussion as to selling his car. It was arranged that Whitfield would buy the Studebaker car if the appellant company would "finance the deal." What was proposed was submitted to the appellant company's manager, one Griffith, who declined it, saying that the price which Whitfield had agreed to pay was more than the value of the car. The arrangement was that Whitfield should pay part cash and the balance in monthly instalments, for which he was to give his note; and "financing the deal" meant that the appellant company should take the note as cash. Griffith offered to do that if the respondent would sign the note with Whitfield. The respondent agreed to do this, and the transaction was carried out by Whitfield signing an agreement to purchase the Studebaker car from the appellant company for $596:10, of which $206.10 was to be paid in cash and the balance in 10 instalments; by the appellant company signing a memorandum stating that the Ford car was "sold" to the respondent in exchange for the Studebaker car; and by the giving of the promissory note referred to, for $390. The note was signed by Whitfield and the respondent upon the face of it, and at the side of the respondent's signature the word "endorsed" was written, by McKinnon, in the presence and with the assent of the respondent after he had signed the document. At the trial, the respondent testified that the word was written without his knowledge, and that he signed as a witness only.

It is said that, though endorsement in its literal sense means writing one's name on the back of the bill, the endorsement may be on any part of it, even on the face.

Reference to Young v. Glover (1857), 3 Jur. N.S. 637; Ex p. Yates (1857), 2 DeG. & J. 191; Carrique v. Beatty (1896-7), 28 O.R. 175, 24 A.R. 302; Stack v. Dowd (1907), 15 O.L.R. 331, 333.

The proper conclusion upon the evidence was that the respondent did not sign the note with the intention of thereby endorsing it, but as maker in pursuance of an agreement that he should join as a maker—though as between him and Whitfield only as a surety.

It does not lie in the mouth of the respondent to assert that he intended to sign as an endorser. His defence was that he signed only as a witness, and that defence he endeavoured to support by his testimony at the trial.

The word "endorsed" was merely a memorandum intended to shew that the respondent was a surety.

Ex p. Yates, supra, distinguished.

The appeal should be allowed with costs, and the appellant company should have judgment against the defendant Michaud for the amount of its claim with costs.

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

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

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

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

CITY OF WINDSOR v. GORDON.

Nuisance—Obstruction in Highway—Stairway and Steps from Sidewalk to Basement of Building—Encroachment—Permission of Municipal Council—Public Right—Acquiescence—Evidence.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiffs, in an action for a declaration that a certain stairway and certain stone steps at the entrance to the British American block, in Ouellette street, in the city of Windsor, encroach upon and are illegally maintained upon the street; to compel their removal; and for other relief. The judgment was for the plaintiffs as asked, but without costs.

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

J. M. Pike, K.C., and J. H. Rodd, for the appellants.

F. D. Davis, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the ground of the action was that the stairway and steps encroached upon the street and constituted a nuisance. In his opinion, the judgment in favour of the plaintiffs was right.

Whatever doubt there might otherwise have been as to the easterly boundary of Ouellette street was set at rest when it was proved that Lucetta R. Medbury, from whom the situs of the street was acquired and under whom the appellants derived their title, sent a communication, on the 29th January, 1883, to the city council notifying them of the removal of the buildings and other obstructions from the extension of Ouellette street, and requiring the council to "grade and sidewalk the said extension in conformity with the provisions of by-law No. 393;" and also

petitioned the council on the 19th May, 1884, for permission to construct an entrance from Ouellette street to the basement of the British American Hotel, which was what was now complained of. The permission was granted on the 16th June, 1884, on the following terms: "that permission be and it is hereby granted to Mrs. Medbury to construct an entrance from the sidewalk on the east side of Ouellette street to the basement of the British American Hotel so as to gain access to the barber-shop under the said hotel, but for no other purpose, the said entrance to the said hotel to extend not more than 3 feet outward from the wall of the building, including the enclosure of the entrance, and to be surrounded by a suitable iron railing, having a gate on the northerly side."

The fact that the council had no authority to grant the permission was immaterial, and the fact that the obstructions now complained of had been allowed to remain there for so many years was no answer to the action and could not impair or affect the public right to have the street unobstructed; nor could acquiescence by the governing body of the municipality in the creation and continuance of the obstruction affect the public right.

The appellants were required by the judgment to remove the obstructions before the 1st December, 1920; that time should be extended for 6 months.

With that variation, the judgment should be affirmed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920

JARVIS v. CLARKSON.

Practice—Motion to Dismiss Action—Pleading—Statement of Claim—Disclosure of Cause of Action—Delay in Prosecution of Action—Dismissal for Want of Prosecution—Action to Establish Claim against Insolvent Estate—Effect of—Delay in Winding-up of Estate.

Appeal by the plaintiff from an order of MASTEN, J., in Chambers, allowing an appeal from an order of the Master in Chambers, and directing the dismissal of the action with costs.

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

T. R. Ferguson, K.C., for the appellant.

R. S. Cassels, K.C., for the defendant, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the order could not be supported upon the ground upon which Masten, J., proceeded, which was that the plaintiff's statement of claim disclosed no cause of action. The learned Judge's attention apparently was not called to one paragraph of the statement of claim setting up a claim which, if proved, would be maintainable.

But the appeal must be dismissed on the ground of the appellant's long delay, for which no reasonable excuse had been offered. A former action was brought by him by leave; that action was dismissed; the present action was brought pursuant to leave also, and there had been great delay in the prosecution of it. The only suggestion made upon the argument was that the appellant was ill and unable to instruct his solicitor as to framing the pleadings; but a statement of claim had been filed in the former action, and the statement of claim in the present one was practically the same, so that there would seem to be nothing in this excuse.

The appellant was seeking to prove a claim against an insolvent estate, and it was incumbent upon him to prosecute his action diligently, because the result of the pendency of it was necessarily to delay the winding-up of the estate.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*BRADLEY v. BAILEY AND JASPERSON.

Sale of Goods—Delivery at Warehouse—Dominion and Control Retained by Vendor—Property not Passing—Deterioration—Vendor's Risk—Damages—Measure of.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, awarding the plaintiff damages for the defendants' refusal to accept and pay for tobacco.

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

J. H. Rodd, for the appellants.

O. L. Lewis, K.C., and J. M. Pike, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that the appellants urged the following reasons for their appeal: (1) that the goods were not prepared and delivered in accordance with the contract;

(2) that the property in the goods never passed to the defendants; (3) that, consequently, the defendants were not responsible for any loss occasioned by depreciation in the value of the goods through deterioration; (4) that, the goods having deteriorated before resale, the difference between the price realised on the resale and the contract-price was not the proper measure of damages.

It was not intended that the property in the goods should pass until all things stipulated to be done to the tobacco to prepare it for the market had been done.

The trial Judge found that everything the plaintiff had to do to put the tobacco into condition for delivery was done, and that the defendants wrongfully refused to take delivery and pay. He did not find that the property in the goods passed.

The Court must, on the question raised as to the condition of the tobacco when taken to Paincourt, accept the findings of the trial Judge, made on contradictory evidence; and the question was: Was there a transfer of title by the plaintiff and some act of assent by the defendants to such transfer? And this question was to be answered by ascertaining the intention of the parties, as evidenced by what took place at the time of the offer to deliver and the frame of the plaintiff's action.

The wording of the contract as to delivery was, "to be delivered when ready up to March 31, 1919, at Jeanette's Creek or Paincourt. Will advise when to deliver. Payment at time of delivery."

In reference to part of the tobacco, this course was followed, but in February, 1919—the agreement having been made in October, 1918—there still remained in the plaintiff's possession a balance of about 17,000 lbs. The plaintiff asked the defendants to give orders for delivery; the defendants said they would let the plaintiff know when they could take delivery; the plaintiff did not wait for orders to deliver at Paincourt, but teamed the remainder of his tobacco to Paincourt, and there stored it under lock and key in two warehouses, and on the 18th March notified the defendants of what he had done. While in the warehouses the tobacco was inspected by the defendants and declared to be mouldy and otherwise not in proper condition.

Though the defendants did not object to the time or place of delivery, the plaintiff was careful to keep dominion and control over the tobacco. Had he, on the 18th March, when the tobacco was, according to the finding of the trial Judge, in proper condition, weighed and delivered possession and control of the tobacco to the defendants, and had they assented to his doing so, this case would have come within the principles enunciated in Wilson v. Shaver (1901), 3 O.L.R. 110; the property would have passed to the

defendants and been at their risk, and they would have been liable in an action for the price; but it could not be successfully contended that the circumstances here shewed an intention on the part of the plaintiff to pass the dominion and control to the defendants until the tobacco had been weighed and paid for.

The plaintiff did not intend to part with the property in the goods; the defendants did not intend to take the property in the goods; the property did not pass; and, consequently, the risk of depreciation in value from moulding, sweating, heating, or improper storing, was the plaintiff's and not the defendants,' and the damages had been assessed on an improper basis.

There should be a re-assessment of damages on the basis that the plaintiff was entitled to the difference between the contract-price and the market-value of the goods when they were refused on the 18th March; or, if there was no market there, to the difference in the value of the goods in the condition they then were and the contract-price—not the difference between the value of the goods when they were sold in May and the contract price: see Mason & Risch Limited v. Christner (1918-20), 44 O.L.R. 146, 47 O.L.R. 52, 48 O.L.R. 8.

The judgment appealed from should be set aside, and there should be a reference to the Master to re-assess the damages. The plaintiff should have costs of the action down to the trial; the defendants should have the costs of the appeal; and further directions and costs of the reference should be reserved.

MEREDITH, C.J.O., and HODGINS, J.A., agreed with FERGUSON, J.A.

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

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

*IDEAL PHONOGRAPH CO. v. SHAPIRO.

Damages—Lessor and Lessee—Covenant of Lessor to Install Elevator on Premises—Breach—Proviso as to Installation by Lessee and Deduction of Named Sum from Rent—Inapplicability as Measure of Damages—Actual Loss Duly Minimised—Damages for Delay.

Appeal by the defendant from the judgment of the County Court of the County of York in an action to enforce an agreement to install a rope elevator on premises leased to the plaintiffs

and for damages. The judgment was in the nature of a mandatory order to the defendant to install the elevator within 90 days and for $90 damages, with costs.

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

G. T. Walsh, for the appellant.

E. E. Wallace, for the plaintiffs, respondents.

FERGUSON, J.A., read a judgment in which he said that at the hearing counsel agreed that, if the plaintiffs were entitled to recover, a judgment for damages should be substituted for the mandatory order made by the Judge in the County Court; and, in that event, the question for consideration would be the measure of damages.

It was argued for the appellant that, by the proviso following his covenant, the parties had agreed, if not upon an alternative performance, at least upon the measure of the plaintiffs' relief in case the appellant failed to install the elevator.

The proviso was, "that, should there be any undue delay on the part of the lessor in the installation of the said elevator, the lessee shall have the right to install said elevator and deduct any amount paid by said lessee for same, not exceeding in all the sum of $350, from the rent herein reserved as the same becomes due."

The learned Justice of Appeal was of opinion that the proviso should be read as being inserted for the plaintiffs' benefit and to give them a remedy in addition to and not in substitution for any other remedy they would be entitled to on the defendant's breach of covenant.

The plaintiffs gave evidence of inconvenience, trouble, expense, and loss suffered in carrying on their business without an elevator. The appellant gave evidence that, at the time the lease was made, both parties estimated the cost of installing the elevator at $350; that subsequent inquiries established that it would cost $748.

Reference was made to two Alberta cases, Steven v. Pryce-Jones Limited (1913), 13 D.L.R. 746, and Tarrabain v. Ferring (1917), 35 D.L.R. 632. In the latter case it was laid down that the proper measure of damages for breach of a covenant by the lessor to erect a building suitable for the lessee's purposes was the actual damage sustained; but that the lessee must, as far as reasonably possible, minimise this loss, if that may be done, by having the defects repaired, and that he was entitled to recover from the lessor either his actual loss or the cost of repairing, whichever was the less.

The reasoning in support of that judgment commended itself to the learned Judge, and he applied it to the case at bar, holding that the plaintiffs' damages should be assessed at what it would cost to install the elevator, i.e., $748, and also to damages for

delay. The latter were assessed by the trial Judge at $90. Owing to the delay occasioned by the appeal, the amount should be increased to $140, and the plaintiffs should have judgment for $888 with costs here and below, but on the condition that they must install the elevator.

The entry of judgment should be stayed for one month, and if, during that time, the defendant shall have installed the elevator in manner provided in the covenant, he may apply to have the damages awarded reduced by $748.

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

HODGINS, J.A., agreed in the result, for reasons stated in writing. He thought the rule applicable was that stated in Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, 117.

Judgment below varied.

FIRST DIVISIONAL COURT. NOVEMBER 30TH, 1920.

EIBLER v. HENDERSON.

Judgment—Order for Summary Judgment—Rule 57—Appeal—Indulgence—Doubt as to Bona Fides of Transaction—Defendant Let in to Defend—Terms Imposed—Payment of Costs—Evidence at Trial.

Appeal by the defendant from an order of LENNOX, J., in Chambers, dismissing an appeal from an order of one of the Registrars in Chambers for summary judgment for the plaintiff for $3,373.05 and costs.

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

G. M. Jarvis, for the appellant.

J. P. MacGregor, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appeal came on for hearing on the 14th October, 1920, and it then appeared that the appellant's affidavit of merits was insufficient, inasmuch as the only ground of defence suggested was stated upon information and belief without giving the source of the information.

In view of the position in which the appellant was placed, owing to his omission to state the grounds of his information, the Court directed that the appeal should stand over to enable the appellant to cross-examine C., the person whose affidavit had been filed by the respondent, on that affidavit, and that the affidavit and cross-examination should be read on the appeal.

C. having been cross-examined on his affidavit, the appeal was argued on the 30th November, 1920.

Although the appellant was not strictly entitled to that relief, the Court thought it proper, in the circumstances, that the case should go down to trial in the usual way; but, as this was an indulgence to the appellant, he must, as a condition of obtaining that relief, pay the costs of the original motion and of the two appeals; if these costs are not paid within two weeks the appeal will be dismissed with costs.

The Court was led to grant this indulgence by doubts suggested as to the bona fides of the transaction which the appellant attacked. Either party should be at liberty at the trial to use the commission-evidence and to adduce such further evidence as he may see fit.

Appeal allowed upon terms.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

GOODYEAR TIRE AND RUBBER CO. v. GEORGE.

Negligence—Collision of Motor Vehicles in Highway—Cause of Collision—Fault of Plaintiffs—Finding of Trial Judge—Appeal.

An appeal by the plaintiffs from the judgment of the County Court of the County of Essex in an action for damages for injury to a motor car and personal injuries sustained by the plaintiffs Smalley and Irvine in a collision between automobiles. The plaintiffs and defendant each charged negligence on the part of the other. At the trial (by the Judge of the County Court without a jury) the action was dismissed with costs, and judgment was given for the defendant upon his counterclaim for $30 with costs.

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

A. C. McMaster, for the appellants.

E. S. Wigle, K.C., for the defendant, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the learned County Court Judge had carefully reviewed the evidence and come to the conclusion that the fault which led to the happening of the accident in respect of which the action was brought was that of the appellants, and with that conclusion the Court agreed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 30TH, 1920.

RE HOME BANK OF CANADA AND CANADIAN PACIFIC R.W. CO.

Railway—Construction of Subway in City—Lowering of Highway—Injurious Affection of Property of Owner Abutting on Highway—Compensation—Elements of Damage—Depreciation owing to Change in Character of Property in Neighbourhood of Subway—Allowance for—Award—Variation on Appeal—Reference back to Arbitrators.

Appeal by the railway company from an award of three arbitrators fixing at $12,700 the compensation to be paid by the appellants to the bank for injury to the bank's property in the north part of Yonge street, in the city of Toronto, by lowering the highway in front of it in the construction of a subway, and to pay costs fixed at $997.75.

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

C. M. Colquhoun, for the appellants.

R. S. Robertson, for the respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that two objections were raised by the appellants: first, that the arbitrators should not have awarded interest; second, that the arbitrators improperly took into consideration the lessening of the value of the respondents' property owing to the construction of the subway, instead of limiting the damages to those flowing from the lowering of the highway.

It appeared from the evidence that the effect of the construction of the subway was to alter the character of the property in the neighbourhood of it, and thereby to lessen its value. It was conceded by counsel for the respondents that the arbitrators erred

if they took into consideration and allowed for the depreciation of the respondents' property owing to that change in the character of the property in the neighbourhood of the subway.

The Court was of opinion that the arbitrators did take that element into consideration and allowed compensation in respect of it.

The appeal should be allowed, and there should be a reference back to the arbitrators to determine the compensation having regard to the opinion expressed.

The respondents must pay the appellants' costs of the appeal.

Appeal allowed.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. DECEMBER 27TH, 1920.

*BRENNER v. AMERICAN METAL CO.

Writ of Summons—Service out of Ontario upon Foreign Company—Assets in the Jurisdiction—Rule 25 (h)—Convenience—Discretion—Proper Forum for Litigation—Respect for Rights and Preferences of Foreigners.

Appeal by the defendants from an order of the Master in Chambers dismissing a motion to set aside a previous order allowing service of notice of the writ of summons out of Ontario, upon the defendants, a company doing business in a foreign country.

G. R. Munnoch, for the defendants.
H. H. Shaver, for the plaintiff.

MIDDLETON, J., in a written judgment, said that a motion had previously been made attacking the first order, and an appeal was heard by the Chief Justice of the Common Pleas, who regarded the order as indefensible without the material being supplemented, and gave leave to file an affidavit supplying the deficiency, whereupon the order was to be allowed to stand; but he further directed that leave be reserved to the defendants to apply—if so advised—to set aside the order allowing the service, upon the ground that the affidavit filed did not disclose sufficient ground for allowing service out of the jurisdiction, or for any other cause. Pursuant to this leave the present motion by way of appeal was made.

The motion should succeed.

Reference to J. J. Gibbons Limited v. Berliner Gramophone Co. Limited (1912-13), 27 O.L.R. 402, 28 O.L.R. 620; The Hagen, [1908] P. 189, 201, where it is said that if there is any doubt it ought to be resolved in favour of the foreigner.

Where our Court assumes to exercise an extra-territorial jurisdiction, and the foreigner has not in any way attorned to our jurisdiction, and the only excuse or justification for the assertion of jurisdiction over him is the existence within the Province of assets which may be reached by execution, manifestly the situation is one of delicacy and one calling for the exercise of the most careful judicial discretion. It is not seemly that a command should issue from our Sovereign to the subject of another State calling upon him to submit himself to the jurisdiction of our Courts save in the clearest possible cases.

The main assets of the defendants are in New York, and it is a mere accident that there is some transient property in this country; and convenience, as well as the exercise of due respect for the right and preference of foreigners to litigate in the Courts of their domicile, points out the Courts of New York as the proper forum for this litigation.

The proceedings in this action should be forever stayed.

The question of the liability for the costs of the action may be left to be dealt with after any litigation abroad shall have been determined.

HODGINS, J.A., IN CHAMBERS. DECEMBER 28TH, 1920.

*REX v. ROBINS.

Ontario Temperance Act—Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Date of Offence wrongly Stated—Motion to Quash Conviction—Amendment—Secs. 101 and 102 of Act—Evidence of Offence—"Sale"—Delivery—Appropriation of Goods to Contract—Time when Property Passes—Magistrate's Findings—Inferences—Right to Review—Sale of Goods Act, 10 & 11 Geo. V. ch. 40, sec. 20, Rule 5—Conviction for Second Offence—Information Laid before Conviction for First Offence—Secs. 96, 97, 98, 99 of Act—Penalty—Sec. 58, as Amended by 10 & 11 Geo. V. ch. 78, sec. 11—Amendment of Conviction and Notice of Motion.

Motion to quash the conviction of the defendant, by the Police Magistrate for the County of Haldimand, for unlawfully keeping upon his premises, in the town of Dunnville, intoxicating liquor for sale, in contravention of the Ontario Temperance Act.

H. J. Scott, K.C., for the defendant.
F. P. Brennan, for the Crown.

HODGINS, J.A., in a written judgment, said that the defendant received into his house on the 27th September, 1920, 25 cases of whisky, and on the 30th September, 1920, 25 similar cases.

On the 5th October, 1920, he was charged before the magistrate with keeping for sale on the 27th September, pleaded guilty, and was convicted accordingly.

On the 5th October, 1920, one Eacritt, a license inspector, swore to another information charging that since the 28th September the defendant had been guilty of unlawfully selling or keeping for sale liquor, contrary to sec. 40 of the Act. The trial was postponed from time to time until the 26th October, when evidence was taken and the defendant convicted.

The magistrate found the defendant "guilty as charged," but drew up a conviction "for that he, the said Allan Robins, on the 28th day of September . . . in his premises unlawfully did keep for sale liquor in contravention of the Ontario Temperance Act."

As the offence, if it was an offence, was clearly proved to have been committed since the 28th September, namely, on the 30th September and 1st October, when the 25 cases of the second consignment were delivered at the defendant's house, the learned Judge thought that, subject to a further question, the conviction could and should be amended, under secs. 101 and 102 of the Act, by inserting the date "30th September" instead of "28th September;" for it was evident that an error had intervened to prevent the conviction being properly drawn up.

The conviction was for keeping for sale in the dwelling house of the defendant. "Sale" includes delivery; and these goods were delivered by the defendant, in the early hours of the 1st October, to the Buffalo purchaser from him. This purchaser had, on the 19th September, paid to the accused $2,000 for 50 cases; but it was not pretended that any cases were then in his possession or were in any way appropriated to the contract. They were then unascertained, and came, on later days, from Montreal.

The last 25 cases, which the defendant bought in Montreal by a second and separate order, and for which he paid at a later date than that on which he settled for the first 25 cases, were appropriated to his contract there when shipped; but until the purchaser telephoned from Buffalo and was told that these cases had arrived and were at his disposal, he did not assent to their appropriation to him by the defendant, as fulfilling the antecedent obligation created by the payment of the $2,000.

Pursuant to the Sale of Goods Act, 10 & 11 Geo. V. ch. 40, sec. 20, Rule 5, an inference of an earlier date for the passing of the property in these 25 cases to the Buffalo purchaser than that of their arrival and acceptance by the defendant in Dunnville might have been drawn. But that inference of fact could be drawn only by the magistrate, and he apparently did not do so, as he convicted the accused of having these 25 cases for sale and undelivered after the 28th September.

It was not open to the learned Judge to draw that inference now, as the magistrate's finding on the facts could not be reviewed upon a motion to quash, nor could his inferences from those facts be rejected in favour of another and different view which might legitimately be drawn, if there was no evidence properly warranting the other conclusion at which he arrived.

The conviction should, therefore, be amended as indicated.

A further point, not taken in the notice of motion, was raised, namely, that this conviction, although for a second offence, was not in point of time subsequent to the conviction for a first offence committed by the defendant, and so was invalid: secs. 96, 97, 98, and 99.

The conviction on the 5th October, 1920, was for an offence against sec. 40, committed on the 27th September, 1920. The conviction in question upon this motion was for a second offence against the same section, committed on the 30th September, 1920.

Section 58 of the principal Act provides for both a first and a second offence against sec. 40 and other sections. By sec. 21 of the amending Act of 1917, 7 Geo. V. ch. 50, the words "or any subsequent" are inserted in the 12th line of sec. 58, so that it now reads, "and for a second or any subsequent offence, to imprisonment for not less than 6 months nor more than 17 months."

The magistrate had convicted for a second offence and had imposed 6 months' imprisonment, thus reading sec. 58 as imposing that penalty for an offence which is a second one in point of time.

Section 98 allows one conviction to be made for several offences committed on the same day, where a separate penalty is provided for each, and then proceeds: "but the increased penalty or punishment *hereinbefore* imposed shall only be incurred or awarded in the case of offences committed on different days and after conviction had for a first offence." The words "hereinbefore imposed" refer to sections where penalties are made more onerous if the offence is a second or subsequent one; and the word "incurred" indicates that, while a second or subsequent offence may have in fact been committed, the additional or more drastic penalty becomes due or exigible only after a previous conviction has been established. The penalties under sec. 58 are for a first and second offence, and the enactment says nothing about a conviction therefor. But the

language of sec. 97 indicates that the offence is one in which the prosecution is undertaken or brought to trial subsequent to a conviction under the Act, and this appears to be the practice adopted under earlier and contemporary temperance legislation in Canada.

The penalty imposed here was 6 months' imprisonment, which is in excess of the punishment allowed for an offence against sec. 40, not being such second offence as the statute appears to contemplate.

The conviction, however, may be amended in this respect, under secs. 101 and 102, by reducing the penalty to that provided in sec. 58 as amended. In view of the language of sub-sec. 2 of sec. 58, added by 10 & 11 Geo. V. ch. 78, sec. 11, the magistrate should have an opportunity to amend the conviction and fix the penalty and to strike out any reference to a second offence. To enable the magistrate to do this, the learned Judge retains the application, and will deal with it formally when the papers are returned. In the meantime the defendant may file an amended notice of motion including the point last dealt with.

KELLY, J., IN CHAMBERS. DECEMBER 28TH, 1920.

REX v. PERRON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House—Misconduct of Magistrate—Refusal to Adjourn Hearing—Acting upon Dictation of Prosecutor—Conviction Quashed—Protection of Magistrate.

Motion to quash the conviction of the defendant, by a magistrate, for unlawfully having liquor in his (the defendant's) possession in a place other than his private dwelling house.

J. M. Ferguson, for the defendant.
F. P. Brennan, for the magistrate.

KELLY, J., in a written judgment, said that a penalty was imposed of $1,000 and costs, and in default of payment six months' imprisonment with hard labour. The defendant was a common carrier; and during his trial, as appeared from an affidavit of the convicting magistrate filed on the present motion, his solicitor asked for an adjournment to enable him to procure the attendance of a witness who was then in the United States, and the magistrate

refused the application because the license inspector for the district, who, the magistrate said, was looking after the case for the Crown, informed him that the evidence which it was said this person could give would have no bearing upon the case. In fairness to the accused, the granting of his request would have been reasonable, as, in view of the character of the evidence which already had been taken, the evidence of this proposed witness might have had a very material bearing upon the case.

A circumstance of still graver moment arose from the magistrate having decided, not upon his own judgment as to the character of the evidence and the meaning of the Act, but upon the interpretation put upon part of it by the license inspector. It has frequently been pointed out that the numerous and repeated infractions of the provisions of the Ontario Temperance Act and the difficulties which continually arise in its administration and enforcement afford no justification for departure by magistrates from the regular and recognised mode of procedure in the trial of charges thereunder; and that respect for the Act cannot be built up if tribunals do not fully and impartially hear the evidence and give an unbiassed decision thereon. Responsibility rests upon magistrates in that regard; and their duty to hear and decide upon the evidence and interpret the law is not fulfilled by adopting the interpretation of inspectors or other officers or acting on their dictation.

The conviction should be quashed; and the learned Judge, with some hesitation, directed that the magistrate should be protected.

LATCHFORD, J. DECEMBER 28TH, 1920.

BROOKS v. TOWN OF STEELTON.

Municipal Corporations—Natural Stream Running through Town—Interference with by Building Bridge and Constructing Sewer—Effect of—Water Thrown on Plaintiff's Land—Injury to House and Contents—Negligence—Remedy—Action—Arbitration—Damages.

Action for damages for injury to the plaintiff's house by the waters of a stream running through the town, which were dammed back by a bridge built by the defendants, the town corporation, and thrown upon the plaintiff's land so as to break down the foundation of the house.

The action was tried without a jury at Sault Ste. Marie.

J. A. MacInnis, for the plaintiff.

J. E. Irving and Carmichael, for the defendants.

LATCHFORD, J., in a written judgment, said, after stating the facts, that, if the act of the defendants in constructing the bridge was authorised and was not negligent, the question of the extent to which the plaintiff's lands were injuriously affected would fall to be determined under the Municipal Act. No by-law had been proved. Even if a by-law had been proved, there was undoubted evidence that the bridge was negligently designed and constructed. The engineer employed was a young man with limited municipal experience. The natural course of the stream was blocked by the sewer crossing its bed, and the compensating method of relief was inadequate at times of flood. The flow of the stream during freshets was negligently impeded, not only by the sewer across its course, but by the diminished and totally inadequate sectional area of the new culvert. Further negligence was inclining the north wall of the culvert and prolonging it so that the natural course of the stream was so changed that the bank north of the plaintiff's house was washed away and the foundation undermined—results in both cases which would not have occurred even in heavy floods if the opening beneath the bridge had been ample and unobstructed, and in line with the previous course of the stream.

The fact that additional areas of land had been drained into the creek made all the more negligent any restriction to the flow of the stream, especially in view of the larger opening in the culvert immediately north of John street.

The damage sustained by the plaintiff was not owing to a defect in the foundation of the north wall of his house or to its proximity to the bank of the creek. The bank had been stable for many years. No reason existed, when the plaintiff built, for apprehending that it would ever be washed away.

The rainfall on the 4th September, 1916, was undoubtedly excessive, but for such excessive rainfall it was the duty of the defendants to make provision. See observations of Middleton, J., in Guelph Worsted Spinning Co. v. City of Guelph (1914), 30 O.L.R. 466, at p. 473.

The damages to the plaintiff's house should, upon the evidence, be assessed at $1,000. His claim for injury to its contents was somewhat excessive, and should be limited to $250.

There should be judgment in the plaintiff's favour for $1,250 and costs.

LATCHFORD, J. DECEMBER 28TH, 1920.

GORDON v. TROTTER.

Highway—Deviation from Road-allowance—Unorganised Township—Municipal Act, sec. 474—User by Public—Dedication—Evidence—Interference with Travelled Road—Obstruction—Injunction—Declaration—Damages—Costs.

Action for a declaration and an injunction and damages in respect of the defendant's interference with the use of a road across his land in the township of Kehoe.

The action was tried without a jury at Sault Ste. Marie.

J. L. O'Flynn and J. McEwen, for the plaintiff.

J. E. Irving, for the defendant.

LATCHFORD, J., in a written judgment, said that the parties were respectively owners of parts of section 6 in the township of Kehoe, an unorganised township. In the original Crown grant of the lands now owned by the defendant, there was reserved, for the purposes of a highway, an allowance of 4 rods between the lands of the defendant and Echo river. When, more than 30 years ago, this highway was opened up, it was found that one Ruttle, a former owner of the defendant's land, had erected his house and perhaps other buildings on the road-allowance near the point where the river leaves the lake. A deviation was then made from the road-allowance across the Ruttle lands to the lands now owned by the plaintiff, and the road, which would otherwise have continued in a north-easterly direction, was deflected towards the south-east as far as and through the lands now owned by the plaintiff. This deviation was for some distance fenced on both sides, nearly 30 years ago, and continued to be used by the public until interfered with, in May, 1920, by the defendant, who then placed an obstruction on the road-allowance at about the centre of his property, and in fencing the deviation encroached with his posts upon the travelled way, so that the plaintiff and the public were hindered from using the road as they had been wont to do.

The defendant had not a shadow of right to obstruct the road-allowance along Echo river, south of the deviation. As a matter of convenience, he or his predecessor in title may have put up bars or a gate across the road-allowance, as well as across the deviation, for the purpose of keeping back cattle, as in Johnston v. Boyle (1851), 8 U.C.R. 142, but not as a matter of right.

There was, the learned Judge finds, a real intention on Ruttle's part to dedicate the road across his property to the public: Folkestone Corporation v. Brockman, [1914] A.C. 338, 358.

Ever since the road was opened, there had been continuous, notorious, and uninterrupted use of it by the public; and such user was, apart from the oral testimony, evidence of dedication: Rowland v. City of Edmonton (1915), 50 Can. S.C.R. 520.

The strip dedicated by Ruttle as a road was probably of much less value to him than the part of the road-allowance which he was permitted to enjoy, and which was now in the possession of the defendant, who could not be deprived of it, because it "has not been opened to public use by reason of another being used in lieu of it," until the township has been organised and a by-law passed for opening it: Municipal Act, sec. 474.

The plaintiff had been specially injured by the attempted interference with the road by the defendant. The deviation is, in fact, the only means, apart from the lake and river, which the plaintiff has of reaching his lands. All the Echo lake traffic has followed the deviation for at least 30 years.

There should be judgment declaring that the road across the northerly part of the defendant's lands is, for a width of 33 feet, as defined by the existing fences, a public highway, also awarding the plaintiff nominal damages of $1, and restraining the defendant from in any way interfering with the deviation or with the road-allowance, so far as opened along Echo river, with costs of the action, including the costs of an interim injunction.

MIDDLETON, J. DECEMBER 28TH, 1920.

*FLEMING v. SPRACKLIN.

Ontario Temperance Act—Search by Inspector for Intoxicating Liquor in Private Yacht—Search Made without Warrant—Attempted Justification under Act—Effect of secs. 66 (1), 67, 70—Suspicion—Belief—"Vehicle"—Trespass—Damages—Costs.

Action for trespass, tried without a jury at Sandwich.

D. L. McCarthy, K.C., for the plaintiff.
J. H. Rodd, for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff was the owner of a pleasure-yacht, and on the 17th September, 1920, his sons were entertaining a party of friends upon the yacht, with his full consent and approval. The yacht left the

Government dock at Windsor, where it had been moored, ran up the river, and came to anchor in Lake St. Clair. Supper was being served in the cabin, when the defendant, himself armed, accompanied by two armed men, boarded the boat, and, after asking the name of the owner, which was at once given, proceeded to search the boat for intoxicating liquor, but found none. It appeared that the defendant was an inspector appointed by the Ontario Government for the purpose of enforcing the provisions of the Ontario Temperance Act, and that he assumed that that Act authorised his action.

He said that he saw the boat leaving Windsor, and followed it all the way up the river and into the lake, but did not come up to it until it came to anchor. At first he thought it was another boat which he had been watching. When he boarded the boat and was told that it was the plaintiff's yacht, he did not doubt the fact, for he recognised one of the sons. The plaintiff is a well-known citizen of Windsor—an eminent lawyer. The defendant admitted that he then had no suspicion that the boat was carrying liquor or in any way engaged in illicit liquor traffic, yet he searched it so as to convince his men of his impartiality. He searched all boats on the river quite irrespective of any suspicions he might have as to a particular boat carrying liquor. He had no warrant.

The plaintiff wrote to the defendant complaining of this action and asking for an explanation and an apology. The defendant made no written reply, but, meeting the plaintiff in the street, in an offensive manner attempted to justify his conduct. This action was then commenced.

By his defence the defendant did not set up any justification for his conduct, but denied the fact of the trespass.

There was no material conflict of evidence. The two men accompanying the defendant displayed revolvers, and the defendant had one in a holster or a pocket.

The right to obtain a search-warrant and to make search thereunder is given in wide terms in the Act, sec. 67; but the officer must, before obtaining the warrant, satisfy the magistrate "that there is reasonable ground for belief that . . . liquor is being kept for sale or disposal or otherwise contrary to the provisions of this Act:" sec. 67, as amended by sec. 23 of the amending Act of 1917, 7 Geo. V. ch. 50.

The statute also gives to the officer of the law the right to enter at any time a place of public entertainment or a place where liquors are reported to be sold "for the purpose of preventing or detecting the contravention of any of the provisions of this Act:" sec. 66 (1).

Section 70 deals with the right to seize liquor in transit, and provides (sub-sec. 2) that "any inspector . . . if he believes that liquor intended for sale or to be kept for sale or otherwise in contravention of this Act, is contained in any vehicle on a public highway or elsewhere, or is concealed upon the land of any person, may enter and search such vehicle . . . and remove any liquor found there."

This section could apply only if the defendant believed that liquor intended for sale or to be kept for sale or otherwise in contravention of the Act, was on the boat; and if the boat could be regarded as a "vehicle on a public highway or elsewhere." The defendant did not believe that there was any liquor upon this boat intended for sale or to be kept for sale or otherwise in contravention of the Act. The statute requires not suspicion but belief —the acceptance of the thing as true, founded upon reasonable evidence. Here even suspicion was gone before the searching took place. And a boat is not a "vehicle,' much less a "vehicle on a public highway or elsewhere:" see Murray's Oxford Dictionary and the Century Dictionary, "Vehicle."

In any view of the case, the defendant had not the right to do what he did, and his action was trespass, committed in a way that implied an accusation of an offensive character.

Had the defendant taken the position that he had made a mistake, but had acted in good faith, nominal damages would have been a sufficient vindication of the plaintiff's right; but the whole cause of the transaction indicated a spirit of defiance and an intention to give offence, even in the conduct of the trial; and the learned Judge was of opinion that punitive damages should be awarded.

The statute afforded no excuse for the lawless and ill-advised conduct of the defendant.

There should be judgment for the plaintiff with $500 damages and full costs.

MIDDLETON, J. DECEMBER 29TH, 1920.

*WHITELY v. RICHARDS.

Vendor and Purchaser—Agreement for Sale of Land—Default of Purchaser—Resale by Vendor pursuant to Provision in Agreement—Right of First Purchaser against Second—Registry Act—Specific Performance—Relief from Default—Refund of Money Paid—Right to—Sale-deposit—Forfeiture—Terms of Contract.

Action by the purchaser for specific performance of a contract for the sale and purchase of land or a refund of the money paid on account of the purchase-price.

The action was tried without a jury at Sandwich.

G. A. Urquhart, for the plaintiff.

J. H. Rodd, for the defendant.

MIDDLETON, J., in a written judgment, said that on the 24th March, 1920, a formal agreement was made by which the defendant agreed to sell and the plaintiff to purchase certain speculative lands for $15,000—$500 cash, $2,000 by the 1st April, 1920, $1,000 by the 1st May, 1920, $1,500 by the 1st June, 1920, and the balance, $10,000, to be secured by a mortgage.

By a preliminary writing the $500 was called "a deposit."

The plaintiff did not live up to his agreement, and paid $2,750 in all, in various small sums, after much pressure and great procrastination.

The agreement provided for resale upon default; and, default having occurred, the defendant had the right to sell, and he resold. The plaintiff had no right as against the new purchaser. The Registry Act protects the latter against any unregistered equity the plaintiff might have to be relieved from his default and the consequences.

The plaintiff then claims a refund of the money paid. The agreement contains no provision for the forfeiture of the money paid. Brown v. Walsh (1919), 45 O.L.R. 646, seems to establish that a purchaser can, by making default in his contract, confer upon himself the right to recover the money he has already paid, unless the contract makes express provision to the contrary, subject to the right of the vendor to claim out of such money sufficient to compensate him for any loss on resale.

The right of the vendor to retain the purchase-money upon the purchaser's default is said to arise only where there is an express contract; and Walsh v. Willaughan (1918), 42 O.L.R. 455, is said to be distinguishable upon that ground. But see remarks of Riddell, J., in the last-named case, at p. 466.

The initial payment of $500 was made as a sale-deposit, and so far no case has departed from Howe v. Smith (1884), 27 Ch. D. 89, that upon default this is forfeited.

From this time on, all well-drawn contracts will, no doubt, contain apt words to indicate that upon the purchaser's default he shall absolutely forfeit the payments made; but this will not fully protect the vendor, as both cases indicate that, in the exercise of the jurisdiction to relieve against forfeiture, the Court will not

allow the terms of the contract to prevail—a most singular result in the light of the impotence of the Courts to afford relief in Brickles v. Snell, [1916] A.C. 599.

The plaintiff should have judgment for $2,250; and, as success is divided, there should be no costs.

MIDDLETON, J. DECEMBER 29TH, 1920.

MARENTETTE v. STONEHOUSE.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance—Action by Purchasers—Payment according to Actual Acreage—Error in Agreement as to Number of Acres—Payment to Vendors' Vendor upon Basis of Price Fixed for Parcel irrespective of Acreage.

Action by purchasers for specific performance of an agreement for the sale and purchase of land.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiffs.

O. E. Fleming, K.C., for the defendants Stonehouse and Leaman.

A. St.G. Ellis, for the defendant Moore.

MIDDLETON, J., in a written judgment, said that the defendant Moore owned a parcel of land in the township of Sandwich, which in 1913 had value only as farm-land, with a remote prospect of some time being of value for subdivision purposes. There was on the land a large house, worth $6,000 or $7,000, which would be of no value if the land were subdivided. Some time after 1913, the property became "a subdivision proposition."

The parcel of land had been described in a series of conveyances under which Moore took title as containing 33 acres more or less. Moore believed that it did not contain so much, but did not know by what amount it was short. When, recently, a survey was made, the acreage was found to be 22.9.

In 1913, two expert real estate agents, Gignac and Janisse, acting for the defendant Stonehouse, scenting the coming boom, sought to buy Moore's land. They asked him his price per acre. He refused to sell by the acre, pointed out the boundaries of the land, and stated that he did not know the number of acres—that his price was $14,000, and that if this was not acceptable

be would not sell. The offer was accepted the next day, and the agreement of the 18th June, 1913, was drawn up and signed; $500 was paid; the purchaser took possession, and pulled down the house to clear the way for subdivision. On the 1st November, 1913, a formal document was executed by Moore, in which the description was taken from the old deed, giving the boundaries and stating that the parcel contained 33 acres more or less. This formal contract was not intended to introduce the number of acres as the basis of the price; if it had that meaning, it should be reformed so as to conform to the prior contract.

On the 26th January, 1920, Stonehouse and Leaman (the latter having become a joint owner with Stonehouse) agreed to sell the parcel to the plaintiffs at $750 per acre. Moore was asked to join in this agreement, for the purpose of waiving any forfeiture by reason of default in payments under the old arrangement. This agreement stated the balance due to Moore at $9,000, and provided that this sum was to be paid him out of the plaintiff's purchase-money. This was in accordance with Moore's contention.

The learned Judge was of opinion that the plaintiffs had the right to specific performance of this agreement on the basis of the actual acreage—for that was their bargain.

Moore was entitled to the balance due to him on the basis of a sale at $14,000—for that was his bargain.

There should be judgment for the plaintiffs accordingly; the costs to be paid by the defendants Stonehouse and Leaman.

MIDDLETON, J. DECEMBER 29TH, 1920.

MERETSKY v. MURPHY.

Vendor and Purchaser—Agreement for Sale of Land—Objection to Title—Action by Purchaser for Specific Performance—Purchaser in Default—Right of Vendor to Terminate Agreement if Objection Insisted upon—Trifling Sum Paid on Account of Purchase-price—Delay—Dismissal of Action.

Action by the purchasers for specific performance of a contract for the sale and purchase of land.

The action was tried without a jury at Sandwich.

F. D. Davis, for the plaintiffs.

M. Sheppard, for the defendant.

MIDDLETON, J., in a written judgment, said that the agreement was made on the 26th August, 1919, the defendant agreeing to sell to the plaintiffs certain lands in Windsor for $2,700—$50 down and the balance on the 26th August, 1924, with interest. The purchasers were to search the title in 30 days, and it was provided that the vendor might cancel the contract if an objection should be taken which he was unable or unwilling to remove. A number of objections were taken within the time, and some friction ensued. The purchaser changed his solicitors, and in February and May, 1920, further objections were made, and the vendor stated his unwillingness to comply with what was required, and terminated the agreement by the return of the $50.

The agreement called upon the purchasers to pay not only the interest but also the taxes on the land, and made time the essence of the agreement. Nothing was paid except the $50. This action was commenced on the 10th July, 1920. No conveyance was ever tendered by the purchasers. The agreement provided that on default it should become null and void.

One Peter McLaughlin, who died in 1887, was the owner at the time of his death of the land in question. By his will he devised all his estate to his wife, subject to certain provisions and conditions which cut down her absolute estate in the event of her marrying again. There was also a precatory clause in which the testator expressed his confidence that his wife would manage the estate in the interest of herself and children and would divide the remainder of the property between the children as she should deem just. The widow did not marry again and took absolutely. The widow died and left a will by which she directed her executrix to sell and divide the proceeds between her daughters. The daughters elected to take in specie, and on the 19th June, 1894, the executors of Peter and the executrix of his widow conveyed to the three daughters. The three daughters sold to Pinkham, and he to the defendant. The conveyances were not produced, and it was said that the registered title still stood in the names of the three daughters. An execution against one of the daughters for $600 was lodged, and the plaintiffs insisted that it should be paid off. The defendant asserted that this daughter had parted with her interest in the land before judgment was obtained against her, and she thus had no beneficial interest in the land, and he contended that he was not bound to remove the execution. This was the rock upon which the parties split. The plaintiffs were not willing to take title under a conveyance from the three daughters, and would not waive the objection.

The learned Judge was of opinion that the action failed for three reasons: (1) because the plaintiffs were themselves in default; (2) because the defendant was entitled to terminate the contract

on the objection being insisted upon; and (3) because the amount paid down was so small and the delay so great that it would be inequitable to enforce specific performance.

In re Jackson, [1906] 1 Ch. 412, when applied to the facts of this case, did not indicate that the defendant ought not to be allowed to cancel the agreement.

ORDE, J. DECEMBER 29TH, 1920.

BURK v. DOMINION CANNERS LIMITED AND TOWNSHIP OF HARWICH.

Highway—Nonrepair—Overturning of Motor Car—Death of Passenger—Negligence of Township Corporation—Evidence—Action under Fatal Accidents Act—Damages—Costs.

Action brought under the Fatal Accidents Act by the father of Rita Burk to recover damages for her death by reason, as he alleged, of the negligence of the defendants or one of them.

The action was tried without a jury at Chatham.

J. G. Kerr and W. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., for the defendant company.

J. M. Pike, K.C., for the defendant township corporation.

ORDE, J., in a written judgment, said that at the conclusion of the trial counsel for the plaintiff admitted that he could not recover against the Dominion Canners Limited, and the action was dismissed as against that defendant without costs—costs not being asked.

On the 25th September, 1919, Harry Havens, a boy of 17, employed by the Dominion Canners Limited, got leave from his father, the manager of the company, to take out a motor car belonging to the company for his own use that evening, and Rita Burk, the plaintiff's daughter, was with him in the car when, travelling upon a side-road, known as the Centre Road Extension, in the township of Harwich, the car was overturned into an open ditch at the side of the travelled way, and Rita Burk was killed.

After stating the facts and discussing the evidence, the learned Judge said the accident was due to the negligence of the township corporation and the lack of repair of the road. Notwithstanding the evidence of several witnesses called on behalf of the corporation to prove that the road was quite safe for travel, it hardly required evidence to prove that to dump loose earth from a ditch and leave

it in the form of a ridge along the crown of the road, with a distinct break in the ridge, was not leaving the highway in a fit state for travel. At a part of the highway which was dangerous because of the deep ditch along the roadway, the travelled way was left in an unsafe condition for vehicular traffic and especially for motor cars. The fact that ditches such as this are necessarily common throughout the county of Kent was no answer to the charge of negligence. The road was not in a proper state of repair at the time of the accident, and that lack of repair was due to the neglect of the township corporation. The accident was the direct result of that neglect, and the corporation must be held liable for the damages.

The plaintiff's daughter was only 14 years of age. His damages should be assessed at $1,000.

There should be judgment for the plaintiff against the defendant township corporation for $1,000 and costs; the plaintiff should not tax against that defendant any extra costs which he had incurred by having made the company a defendant.

ORDE, J., IN CHAMBERS. DECEMBER 30TH, 1920.

*REX v. MARK PARK.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than Private Dwelling House "in which he Resides"—House Undergoing Repair Rented but not Actually Occupied by Accused—Bona Fides—Possibility of Person Having more than one "Private Dwelling House."—Possession of Liquor not Restricted to one only.

Motion to quash the conviction of the defendant, by one of the Police Magistrates for the City of Toronto, for having intoxicating liquor in a place other than the private dwelling house in which he resided, contrary to sec. 41 of the Ontario Temperance Act.

N. S. Macdonnell, for the defendant.
F. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that before the acquisition of the liquor in respect of which the defendant was convicted, the defendant lived with his family at 16 Elizabeth street, in Toronto, in apartments over his shop. He had ordered some liquor from China; and, being informed that he could not keep it in the apart-

ments because of their connection with the shop, he rented a house, 130 Elm street, on the 1st August, 1920, intending to move into it with his family. He did not move in immediately because the house needed some repairs.

The liquor arrived from China, passed the Customs, and was delivered to the defendant at 130 Elm street on or about the 6th or 7th August. At the same time, the defendant sent one of his sons to sleep in the house.

Before the accused and the other members of his family moved from Elizabeth street to 130 Elm street, the liquor was seized, and the magistrate convicted the defendant. The magistrate had no doubt as to the good faith of the defendant, but felt that the Act compelled him to find the defendant guilty.

Section 41 makes it an offence for a person to have liquor in any place wheresoever "other than in the private dwelling house in which he resides." The intention is to exempt from the operation of the Act liquor kept in a private house for private consumption. The words "in which he resides" are used to limit the private dwelling house in which a person may have liquor to one in which he resides and to prohibit his having it in a dwelling house in which he does not reside. The words are not intended to mean an actual physical occupation of the place, if the bona fide residential character of it is otherwise established. A man may have more than one "residence." There is the common case of the man who has a town house and a country house. There is no reason for holding that a man's possession of liquor is restricted to one of his private dwelling houses.

Looking at the whole matter broadly and fairly, the defendant was in fact actually occupying and exclusively using 130 Elm street as his private residence at the time of his alleged offence. His occupation was actual, the house was being used as a private residence and for no other purpose, and the residence was his residence and not that of some other person. The whole proceeding on his part was in good faith, which in such cases as this is a material element in determining the character of the use to which the person charged is putting the place.

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

MIDDLETON, J. DECEMBER 30TH, 1920.

RE LISHMAN.

Will—Construction—Devise of Farm for Life to Stepson—Remainder in Fee to Son of Stepson who may be Born and Named after Testator—Son Born after Testaior's Death and Named accordingly—Death shortly after Birth while Life-tenant Living—Substituted Devise of Remainder to another Son of Stepson in Event of Stepson never Having Son Named after Testator—Remainder Passing to Heirs of Deceased Infant.

Motion by the executors of the will of Richard Lishman, deceased, and the adult beneficiaries other than Allen S. Lishman, for an order determining a question as to the proper construction of the will.

The motion was heard in the Weekly Court, Toronto.
R. S. Colter, for the applicants.
S. E. Lindsay, for Allen S. Lishman.
F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that the testator devised his farm to his stepson John for life, and then provided: "After the death of my said stepson . . . in the event of his having a son whose name shall be Richard I give devise and bequeath . . . my said described realty to the said Richard Lishman in fee simple but in the event of my said stepson never having a son whose name shall be Richard then I give devise and bequeath my said mentioned realty to my said stepson's son Allen Septimus Lishman."

The testator died on the 9th February, 1904, and a son was born to his stepson John on the 24th July, 1904, who was named Richard Ray Lishman. This son lived only a few months. John, the life-tenant, lived on till the 26th August, 1916.

Allen S. Lishman now claimed the farm. The Official Guardian contended that the reversion expectant on the life-estate of John vested in the grandson Richard, and on his death passed to his heirs—the father and mother and the brothers and sisters then born. The four children born to John after Richard Ray died could not take as his heirs.

There could be no doubt as to the real meaning of the will; and the learned Judge said that he must, while seeking the intention of the testator, find it from the will alone, viewing the words used by the testator from his standpoint.

Two expressions were used: the one in the gift to the grandson Richard if he should be born; the other in the gift over if no such son should be born; and both pointed in the one direction, in language too clear to permit any real doubt. In the event of John "having a son whose name shall be Richard," that son, subject to his father's life-estate, takes in fee simple. There is not in this any indication that his taking is to depend upon his surviving his father. In the clause providing for the gift over to Allen, the expression is even stronger. Allen takes only in the event of John "never having a son whose name shall be Richard:" John had a son whose name was Richard—so Allen cannot take.

It was idle to speculate. The testator, perhaps, did not think that the grandson would predecease his father and did not think that the farm would in this way come to be divided among so many. But what about the situation if Richard Ray had survived his father and died the next day? The truth probably was that the testator was content when a Richard was found to inherit his farm, and that he meant that Richard to be the absolute owner, for he was to take in fee simple—and an owner in fee simple may sell or may die intestate. Once Richard owned, the testator did not attempt to control the situation.

Order declaring that the heirs of Richard Ray Lishman were entitled under the will to an estate in fee simple; costs out of the estate.

MIDDLETON, J. DECEMBER 30TH, 1920.

LORANGER v. HAINES.

Contract—Agreement to Convey Land—Gift—Consideration—House Erected on Land with Permission of Owner—Refusal to Convey—Agreement not under Seal—Affixing of Seals to Duplicate—False Affidavit—Refusal of Specific Performance—Offer of Owner to Pay for House—Terms—Interest—Occupation-rent—Depreciation—Increased Cost of Materials—Costs—Reference.

Action for specific performance of an agreement by the defendant to convey land to the plaintiff.

The action was tried without a jury at Sandwich.

E. S. Wigle, K.C., for the plaintiff.

O. E. Fleming, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the parties were associated in the promotion of a company for the handling

of certain patents of invention. The headquarters of the project were in Detroit, where the plaintiff practised as an attorney. The defendant acquired a property in Sandwich, on the river-front, and intended to build a residence upon part of it, contemplating a sale of the rest. This parcel cost a large sum of money and had increased in value.

The parties becoming intimate friends, the defendant suggested that he would present the plaintiff with part of this land as a building site, upon which the plaintiff might build a house next to the defendant's. The plaintiff accepted the suggestion, and drafted an agreement in which, "for consideration hereinafter mentioned," the defendant and his wife agreed to convey a parcel 84 feet in width by 182 in depth to the plaintiff. The real consideration was one moving from the plaintiff to himself, for it was the building of a house for himself upon the land he was to acquire. The agreement called for the payment by the plaintiff of his equitable proportion of the cost of 7 water-mains and a roadway. This was said to be for the benefit of the defendant as well as of the plaintiff, and so to amount to some legal consideration.

The familiar "one dollar" was not mentioned, and there was no seal to import consideration.

The plaintiff built, without any conveyance to him of the land, a house upon it, which cost $12,500.

The patent scheme did not progress favourably, and the defendant ceased to have such a high regard for the plaintiff as he had entertained, and repented of his bargain.

The plaintiff naturally wanted a conveyance of the land, which had increased in value since the agreement.

The defendant took the position that the real consideration for his contemplated gift was the pleasure to be derived from proximity to his friend, and, that pleasure ceasing, he should not be compelled to convey.

The plaintiff's answer was, "Having permitted me to spend my money on the faith of your promise, you must convey;" and this took the case out of the class of cases in which equity refuses to award specific performance of an agreement to give.

The written agreement was not under seal, but seals were applied to the duplicate in Loranger's possession, and the witness falsely swore that he saw the document signed, sealed, and delivered by the parties. The plaintiff admitted that the deed was not sealed by the defendant and his wife. The instrument and the duplicate are one, and the principle that precludes the use of the one will prevent the wrongdoer from relying upon the other. For this reason specific performance should not be granted.

By the statement of defence the defendant offered to repay to the plaintiff the amount spent in erecting the building, on condition

that the action should be dismissed; and the action should be dismissed upon that being carried out. The amount should be determined by the Master if the parties cannot agree. Interest should not be allowed, or should be set off against an occupation-rent. Depreciation from ordinary wear and tear should be set off against increased cost of materials.

There should be no costs down to and including this judgment, and the costs of the reference should be left to the Master, trusting him to award or withhold in accordance with his view of the conduct of the parties upon the reference and in the light of any offer either party might make, without prejudice, to fix a sum which would render a reference unnecessary.

KELLY, J., IN CHAMBERS. DECEMBER 31ST, 1920.

*REX v. HELPERT.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Liquor in Place other than Private Dwelling House—Evidence to Support Conviction—Information for Second Offence—Proof of Previous Conviction—Procedure—Sec. 96 of Act—Magistrate's Certificate—Presumption of Regularity.

Motion to quash a conviction of the defendant by the Police Magistrate for the Town of Sudbury on the 20th October, 1920, for unlawfully having intoxicating liquor in his (the defendant's) possession (on the 9th October, 1920), in a place other than his private dwelling house. The magistrate also found that on the 9th February, 1919, the defendant was convicted of unlawfully selling liquor on that date, in the town of Sudbury, and that for such offence a penalty was then imposed upon him; and that, therefore, his conviction on the 20th October, 1920, was for a second offence against the Ontario Temperance Act.

G. M. Millar, for the defendant.
F. P. Brennan, for the magistrate.

KELLY, J., in a written judgment, said that on the record of the proceedings at the trial there was evidence on which the magistrate could reasonably convict; and there was no attempt on behalf of the defendant to contradict or explain away that evidence; no evidence was adduced on behalf of the defendant.

The information, in addition to charging an offence on the 9th October, 1920, alleged that the defendant, on the 9th February, 1919, at Sudbury, was convicted of having unlawfully sold liquor on that date at Sudbury, and that a penalty (naming it) was imposed upon him therefor.

The proceedings upon an information where a previous conviction is charged are set forth in para. (*a*) of sec. 96 of the Act.

The record signed by the magistrate set out that, "this being a subsequent or second offence, proof is made before me that the said Sam Helpert was, on the 9th day of February, 1919, at the town of Sudbury, duly convicted of an offence in contravention of the Ontario Temperance Act."

It was argued that there was no express finding that proof of the prior conviction was made in the manner required by sec. 96, and that it cannot be assumed that such proof was duly made. On the other hand, there was nothing to shew that the magistrate did not comply with the Act in that respect; the defendant offered no proof and made no objection. In the absence of such evidence or some circumstance indicating that the magistrate did not follow the directions of sec. 96, it must be presumed that, having formally certified that proof of the earlier conviction was made before him, he proceeded regularly.

The sequence of events at the trial, as recorded by the magistrate, was that, after the close of the evidence on the charge then being investigated, there was a finding of guilt thereon, and then proof was made before him of the prior conviction. The conviction stated that the prior conviction was made by the same magistrate.

While para. (*b*) of sec. 96 states a method by which a prior conviction *may* be proved—a method which is merely permissive—nowhere is the procedure expressly laid down by which the magistrate shall "inquire concerning such previous conviction or convictions."

Motion dismissed with costs.

LATCHFORD, J. DECEMBER 31ST, 1920.

HOJEM v. MARSHALL.

Sale of Goods—Motor Vehicle—Assertion of Lien for Price—"Lien-note"—No Provision that Ownership to Remain in Vendor—Provision for Repossession in Case of Default—Conditional Sales Act, sec. 6—Seizure of Car under Supposed Lien——Agreement to Transfer Lien to another Car—Note Signed in Blank—Authority to Fill in with Specified Sum—Filling in of Larger Sum—Effect of—Return of Vehicle—Damages for Detention.

Action to compel the return of an automobile and for damages for detention.

The action was tried without a jury at Sault Ste. Marie.

J. D. Becking, for the plaintiff.

J. A. MacInnis, for the defendants.

LATCHFORD, J., in a written judgment, said that on the 11th June, 1920, the plaintiff purchased from the defendants a second-hand Chevrolet automobile for $275 in cash and an old Ford car, valued by the parties at $375. He alleged that the defendants, at the time of the purchase, guaranteed the Chevrolet car to be in first class shape and in good running order. The plaintiff could not make it run, and asked for his money and the old Ford car. The defendants refused his request.

A few days later, the plaintiff was asked by one Lovett to buy a Chevrolet car; Lovett told the plaintiff that the defendants had a lien upon it. This car had been bought from the defendants in January, 1920, for $875. Lovett paid $50 a month until $200 had been paid, when, upon signing in blank what was called in the evidence a "lien-note" and an ordinary promissory note, both of which he supposed were for $675, he was given possession of the car. He did not read the notes at the time he signed them. They were filled in afterwards, the sum stated in each being $700. The "lien-note" was dated the 29th June, 1920, and contained a promise to pay that sum with interest by monthly instalments of $58.33 till the whole was paid—"if I make default you may retake possession of the machinery or property so sold to me for which this note is given, without process of law." This was not a contract that the ownership was to remain in the seller, etc., within sec. 3 of the Conditional Sales Act, R.S.O. 1914 ch. 136.

When Lovett asked the plaintiff to buy the car, the plaintiff said he was willing if Lovett would have the lien transferred. If that were done, the plaintiff was willing to pay Lovett $400 and give him the car which he had bought from and returned to the defendants. The defendants agreed to transfer the supposed lien to the returned Chevrolet car, that is, take a new lien upon it, and not seek to enforce the supposed lien against the car sold to Lovett.

The plaintiff was told by Lovett what the defendants had said, and was given possession of the Lovett car. In return he paid $400, and surrendered his claim to the car he had purchased from the defendants for $650.

This car turned out to be useless, but the defendants would not take it back. Lovett paid the defendants only $50 upon his indebtedness to them. On the 6th August he gave them his promis-

sory note for $637 as a renewal of the balance due on the lien-note and a collateral promissory note made about the same time. He did not give the defendants a lien on the useless Chevrolet, nor was he asked to do so.

The defendants were aware that the plaintiff had the car on which they claimed a lien, but they took no action for 4 months; they then seized the car and removed it from the plaintiff's possession.

The right of the defendants to the seized car depended wholly on the "lien-note" of the 29th June.

The authority of the defendants to fill in the blank for the amount was expressly limited by Lovett to the $675 due them upon the car. As payees, the defendants could not when they filled in the blank with $700 rely on the note. The blanks should have been filled in strictly in accordance with the authority given: Chalmers on Bills of Exchange, 8th ed. (1919), p. 54.

The contract expressed in the document did not provide that the ownership of the car should remain in the defendants. The property in the car sold to Lovett passed to him with the possession of the car.

It was admitted that the plaintiff had notice that the defendants claimed a lien on the car which the plaintiff bought from Lovett; but it had been proved that the defendants said they would transfer their lien to the car Lovett was obtaining from the plaintiff, and that the plaintiff believed that the Lovett car was thus freed from any claim the defendants had against it.

The plaintiff should have judgment declaring that the car seized by the defendants was his property and that it should be forthwith restored to him in good order, or that he should be paid its value, which, after his 4 months' user, should be placed at $700. The plaintiff should also recover damages for being deprived of the use of his car, estimated at $200, and his costs of the action.

LATCHFORD, J. DECEMBER 31ST, 1920.

ZINKANN v. FLEMING.

Negligence—Collision of Motor Vehicles in Highway—Injury to Passenger in Taxicab—Evidence as to which Driver at Fault—Conflict—Excessive Speed of one Vehicle—Findings of Trial Judge—Primary and Ultimate Negligence—Causa Causans and Causa sine qua non—Passenger not Identified with Driver—Damages.

Action for damages for injury sustained by the plaintiff in a collision between two automobiles, in one of which she was a passenger.

The action was tried without a jury at Kitchener.

V. H. Hattin and W. P. Clement, for the plaintiff.

T. H. Lennox, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that the plaintiff, an aged and infirm woman, on the 14th November, 1919, was on her way to her home in a taxicab, driven by a competent chauffeur, and proceeding easterly along King street in the city of Kitchener, when a collision occurred between the taxicab—a light Ford sedan—and a powerful Packard automobile, owned by the defendants the Toronto Railway Company and in charge of the defendant Fleming. The plaintiff sustained severe injury.

As to the negligence causing the collision there was a conflict of evidence, each driver attributing the blame to the other.

Each car was, before the collision, on the proper side of the street. Leis, the driver of the taxicab, by extending his left arm, had signified his intention to turn from the south side of King street northward into Louisa street. Fleming, approaching the intersection from the opposite direction, observed the signal and saw Leis turn to cross King street. Fleming realised that if both vehicles kept their respective courses and speeds there would be a collision. His speed was such that he could not bring his car to a stop before the courses intersected. He therefore turned to his left so as to pass the taxicab. Leis also realised that a collision was imminent; and, instead of continuing the turn he had begun, stopped his car. There was contradictory evidence on this point, but the learned Judge gave credit to those who said that, before it was struck, the taxicab had been brought to a full stop. Whether Leis turned to his right out of his former course before stopping was in doubt, but was immaterial, in the learned Judge's view. It was undoubted that, had Leis not stopped, the collision would not have occurred. His stopping was the causa sine qua non of the collision; but its causa causans was the speed at which Fleming approached the street intersection and turned to his left. According to his evidence, he was "probably going 14 or 15 miles an hour." Other witnesses put the speed of the Packard car as high was 20, 25, and 30 miles; no doubt it varied, and was probably diminished after Fleming observed the signal given by Leis. The learned Judge, however, could not avoid concluding from the credible evidence that Fleming approached within a very short distance of Louisa street at a speed in excess of 20 miles an hour.

That Fleming had the right of way did not help him. As soon as he saw that if both cars held their courses they would come into collision, his duty was to bring his car to a stop, or, lessening his speed, turn it so far to the left as to pass in rear of the taxicab if it continued the turn it had begun to make, or to stop if the taxicab stopped or turned to the south. He did not anticipate that Leis would stop or alter his course; and, when the situation was realised, it was too late, considering his speed, to avoid a collision, though he did so apply his brakes that little damage was sustained beyond that to the plaintiff.

Unless the Packard, when it turned to the south, was going much faster than the taxicab, it could have been stopped by a proper application of its powerful brakes in time to avoid the collision.

If, as contended by the defendants, Leis turned to his right after beginning the turn into Louisa street, his act was not negligent. He had not the slightest reason to apprehend that Fleming would not continue along the north side of King street, in which case a collision could be avoided by Leis only by stopping his car or turning it from the course it had begun.

Moreover, Leis's negligence, if any, could not affect the defendants' liability. The plaintiff was not so identified with Leis as to be affected by any negligence on his part; and the ultimate and at the same time primary negligence causing the collision was the speed at which Fleming was proceeding, his turning to the south, and then his inability to stop his car when he saw the position of danger occupied by the taxicab.

The defendants the Toronto Railway Company, the owners of the Packard, were, by the Motor Vehicles Act, as liable as the defendant Fleming.

The plaintiff's damages were assessed at $1,500, and it was adjudged that she should recover that amount with costs against both defendants.

KELLY, J. DECEMBER 31ST, 1920.

CITY OF BRANTFORD v. McDONALD.

Municipal Corporations—Regulation of Buildings—"Permit" Issued by Building Inspector for Erection of Building on Approval of Specifications—Power to Revoke Permit—By-law of Council—Municipal Act, sec. 400—Reasons Prompting Action of Council—Powers of Council.

Action by the Municipal Corporation of the City of Brantford to restrain the defendant from proceeding with the erection of a coal-shed in the city.

The action was tried without a jury at Brantford.

W. T. Henderson, K.C., for the plaintiffs.

W. S. Brewster, K.C., for the defendant.

KELLY, J., in a written judgment, said that on the 9th May, 1919, the defendant submitted to the acting building inspector of the city building specifications for a coal-shed which he proposed to erect on his land on the east side of Albion street in the city, and on the same day the officer issued to the defendant a permit for the building. Work on the building was begun and proceeded with until, on the 10th June, the plaintiff received a letter from the city clerk notifying him that the council had passed a resolution requiring him not to proceed further with the construction of the building, which had been petitioned against by the residents of the locality. Afterwards the mayor instructed the inspector to revoke the permit, and of this the defendant was notified.

A building by-law passed by the council contained a clause enacting that every permit shall be subject to revocation, should the city engineer ascertain that the work being carried on under it is being done in a manner that does not reasonably comply with the plans and specifications, etc.

By what is termed a "permit" the applicant acquires a right to erect a building which, when completed, will substantially comply with the approved specifications, and it is not intended that such permit shall be withdrawn at the caprice of the council or the engineer. It is not suggested that the council is without a remedy on failure of the applicant to live up to the specifications—there are such remedies. But the learned Judge had been unable to find that any authority, express or implied, is conferred by the Municipal Act upon a municipal council to pass a by-law revoking a permit. Although the Act gives, in very specific language, powers in several respects of regulating the construction and alteration of buildings and as to the kind, quality, and strength of materials (see sec. 400 of R.S.O. 1914 ch. 192), nowhere does it authorise the withdrawal of a permit, or, in other words, of the approval of the specifications, when once properly granted.

Reference to City of Toronto v. Wheeler (1912), 3 O.W.N. 1424.

Unless "regulation" includes "revocation," the council is not clothed with power to revoke. "Regulation" does not in this instance include "revocation."

Had it not been for the objection of the residents in the vicinity of the defendant's building—not to the manner of its construction,

but to the purpose to which it was intended to be put—there would have been no action by the council at the stage to which the building had advanced in June, 1919, and the defendant would in all probability have gone on without molestation to complete the building, at his own risk in producing a structure which, when completed, would be in compliance with the approved specifications. Subject to that risk, he is now entitled to proceed with the building, leaving it to the plaintiffs to take such action as they are entitled to take if the specifications are found not to have been complied with.

Action dismissed with costs.

ROSE, J. DECEMBER 31ST, 1920.

FRASER v. BEAVER BOARD TIMBER CO. LIMITED.

Contract—Cutting and Hauling Timber—Lots Specified in Contract—Implied Contract for Undisturbed Possession of Lots Specified—Contractor Prevented from Cutting on Some of the Lots—Right to Cut on Others and Retain Claim for Damages for Prevention—Waiver—Evidence—Counterclaim—Failure to Cut on all Lots where Cutting Permissible—Damages—Assessment of—Reference—Costs.

Action for damages for loss suffered by the plaintiff in being prevented from performing a contract made with the defendants, and counterclaim by the defendants for damages for the plaintiff's failure to complete the work under the contract.

The action and counterclaim were tried without a jury at Haileybury.

W. A. Gordon, for the plaintiff.

Everard Bristol, for the defendants.

ROSE, J., in a written judgment, said that by the contract, which was in writing and dated the 21st October, 1918, the plaintiff agreed to cut, skid, haul, and deliver on Long Lake, during the season of 1918-19, approximately 7,000 cords, of 128 cubic ft. each, of pulpwood, from 20 named lots in the townships of Sharpe and Savard; and the defendants agreed to pay $6.50 for each cord cut in Sharpe and $7 for each cord cut in Savard. The plaintiff was to cut all necessary main roads; and the defendants were to erect and allow the plaintiff to use a complete set of logging camps.

The plaintiff commenced his operations, and had begun or was about to begin to cut on two of the lots, when, about the 18th December, 1918, in consequence of a letter received by the defendants from the Crown timber agent, the defendants' woods-manager notified the plaintiff that cutting on these lots must not be proceeded with. The plaintiff went on with other work; but, soon after the 6th February, 1919, in consequence of further communications from the Crown timber agent, pointing out that on a number of lots the defendants had no right to cut, the defendants' agent told the plaintiff to stop cutting on those lots; and the plaintiff caused his workmen and sub-contractors to cease work.

There was, of course, an implied contract on the part of the defendants that the plaintiff should be left in undisturbed possession of all the lots mentioned in the written contract: Halsbury's Laws of England, vol. 3, p. 198; and, upon being told to stop work on the lots mentioned, the plaintiff was entitled to refuse to proceed further with his contract and to bring an action for damages. He did not do that, but wrote a letter to the defendants, telling them that, while he could not be expected to get out 7,500 cords, he was going on to get out all that could be got from the lots on which the defendants were entitled to cut. It was his right to proceed in that way, if he saw fit to do so, and to retain his claim for damages for being prevented from operating on the lots on which the defendants had no rights: Roberts v. Bury Commissioners (1870), L.R. 5 C.P. 310, 320. There was nothing to shew that this right had been waived.

Therefore from the 10th February onwards, the plaintiff was bound to cut what wood there was on the lots on which cutting was permissible, and was liable in damages if he failed to do so; and the defendants were liable in damages for preventing him from cutting on the lots on which cutting was not permitted.

The plaintiff did not cut on all the lots on which cutting was permissible; and the result was that the damages to which the plaintiff was entitled on account of the prevention of performance, and also the damages to which the defendants were entitled for the plaintiff's failure to complete, must be assessed.

After close consideration of the evidence, the learned Judge assessed the plaintiff's damages at $4,000.

Upon the counterclaim, the learned Judge found that the plaintiff had failed to cut 1,075 cords; and said that the evidence did not warrant him in going further in the attempt to assess the damages suffered by the defendants. The defendants should be allowed to take a reference to the Local Master to assess such damages as they may have sustained by reason of the failure of

the plaintiff to cut from the 6 lots upon which there was wood available for cutting, and to skid, haul, and deliver on Long Lake, the quantities now found to be on those lots.

There should be judgment in accordance with the foregoing. The plaintiff should have the costs of the action. There should be no costs to either party of the counterclaim or of the reference.

ROSE, J. DECEMBER 31ST, 1920.

*McCOOL v. GRANT & DUNN.

Contract—Formation—Letter Containing Offer—Letter in Answer—Construction—"We are Prepared to Accept"—Condition of Acceptance—Fulfilment—Intention.

Action for damages for breach of an agreement to sell and deliver a stock of lumber.

The action was tried without a jury at Haileybury.

J. M. Ferguson and W. A. Gordon, for the plaintiff.

F. L. Smiley, for the defendants.

ROSE, J., in a written judgment, said that, after negotiations by which a price was arrived at, the plaintiff, in the defendants' office and at the defendants' request, wrote to the defendants a letter offering to buy the lumber at a stated price (which was the price agreed upon) and setting out the terms of payment and the manner in which the lumber was to be sorted, shipped, etc.; and the defendants thereupon wrote and delivered to him a letter in which they said: "Referring to our conversation and your offer . . . will say we are prepared to accept your offer provided you can satisfy our bank that all this stuff will be paid for as per our conversation."

The plaintiff then saw the defendants' banker, and the latter wrote to the plaintiff's banker for information as to the plaintiff's financial standing. The information was given, and was satisfactory to the defendants' banker.

The plaintiff's case was, that the defendants' letter above quoted was a conditional acceptance of his offer; that he performed the condition by satisfying the banker that the lumber would be paid for; and that, thereupon, there was a binding contract.

The defendants said that what they meant was merely to state what they intended to do in case the report obtained by their banker was satisfactory to them; they said that the report obtained was not what they required; and they denied that there ever was a complete contract.

What the defendants said as to the intention with which they wrote the letter was immaterial. The question was, "What do the words mean, either standing alone or construed in the light of the circumstances in which they were used?"

Reference to Canadian Dyers Association Limited v. Burton (1920), 47 O.L.R. 259.

After some hesitation, the learned Judge said, he had reached the conclusion that the words, "we are prepared to accept your offer," used as they were in the defendants' letter, did not amount to an acceptance. Both the plaintiff and the defendants were accustomed to dealings in lumber and well knew the necessity for a complete written record of any contract; and this circumstance seemed to demand that the words used by them in their letters should be construed almost with the strictness which would be applied in the case of a formal document; and in the interpretation of a formal document a clause to the same effect as the whole sentence quoted from the defendants' letter would be not treated, unless in very exceptional circumstances, as meaning the same thing as "we accept your offer," etc. The words "are prepared to" must have been inserted for some purpose, and it was difficult to give any meaning to them unless the whole sentence was taken to amount to a statement merely that the defendants' intention was to accept the offer at a future time if something happened in the meantime.

Again, if the letter amounted to an acceptance upon condition, the plaintiff must shew strict performance of the condition. If the condition was that the banker should be satisfied that the lumber would be paid for *as per the conversation between the parties*, it would not be possible to find, on the evidence, that it was fulfilled. But it was unnecessary to decide this second point.

Action dismissed with costs.

ORDE, J. DECEMBER 31ST, 1920.

CITY OF STRATFORD v. ONTARIO ASPHALT BLOCK CO.

Contract—Sale and Delivery of Paving Blocks—Covenants as to Quality of Blocks—Breach—Damages—Retention of Moneys as "Drawback"—Application upon Damages—Bonds of Guaranty Company—Security for Payment of Damages—Liability—Declarations—Interest—Costs.

Action by the Municipal Corporation of the City of Stratford against the Ontario Asphalt Block Company for damages for the alleged breach of two contracts made respectively in 1905 and

1906 for the sale and delivery of certain asphalt paving blocks and for a declaration that the plaintiffs were entitled to retain the balance of certain sums now held by them by way of drawback, and also against the asphalt company and the United States Fidelity and Guaranty Company to recover the penalties payable under two bonds which were respectively conditioned upon the fulfilment of certain covenants as to the quality of the asphalt blocks to be furnished under the two contracts.

The action was tried without a jury at Stratford.

R. S. Robertson and W. G. Owens, for the plaintiffs.

J. H. Rodd, for the defendants the Ontario Asphalt Block Company.

W. B. Milliken, for the defendants the United States Fidelity and Guaranty Company.

ORDE, J., in a written judgment, dealt at length with the facts, and made findings thereon. He directed that judgment should be entered in favour of the plaintiffs as follows:—

(1) Declaring that the plaintiffs have sustained damage in respect of the 1905 contract, in excess of the moneys already expended upon repairs, to the extent of $7,500.

(2) Declaring that the plaintiffs are entitled to apply the whole of the moneys at the credit of the 1905 drawback account, namely, $3,306.31, and the interest accrued thereon since the 31st December, 1919, towards the payment of such damages.

(3) Against the defendants the asphalt company and also against the defendants the guaranty company for the balance of the said sum of $7,500, after applying the amount of the said drawback and interest.

(4) Declaring that the plaintiffs have sustained damage in respect of the 1906 contract, in excess of any moneys already expended upon repairs, to the extent of $5,000.

(5) Declaring that the plaintiffs are entitled to apply the whole of the moneys at the credit of the 1906 drawback account, namely, $1,495.77, and the interest accrued thereon since the 31st December, 1919, towards the payment of the said last mentioned damages.

(6) Against the defendants the asphalt company for the balance of the said sum of $5,000, after applying the amount of the said drawback and interest as aforesaid.

(7) Against the defendants the guaranty company for the sum of $2,000 in respect of their liability upon the 1906 guaranty

bond as security for the payment of the damages mentioned in the preceding paragraph, namely, that portion of the $5,000 damages remaining after the application of the 1906 drawback and interest.

(8) Against both defendants for the plaintiffs' costs of the action.

HONOR v. BANGLE—MIDDLETON, J.—DEC. 28.

Negligence—Collision of Motor Vehicles upon Highway—Each Driver Guilty of Negligence—Concurrent Negligence—Each Negligence a Proximate Cause of Collision—Claim and Counterclaim—Dismissal—Costs.]—The plaintiff owned a milk-waggon, a one-ton Ford car; the defendant owned a Hudson super-six, which, when a collision with the plaintiff's car occurred, was carrying a large quantity of liquor, admittedly illegally. At the street intersection the plaintiff had the right of way, being on the right of the other car, but the defendant's car passed in front of the milk-waggon, and so nearly escaped contact that it was hit upon the rear wheel. Both cars turned over, and neither driver was injured, but both milk and whisky were a complete loss. The plaintiff sought to recover for the damage to his car and for the lost milk. The defendant counterclaimed and asked for the amount of damage done to his car, admitting that the value of the lost liquor could not be recovered, and that the amount paid as a fine was too remote. The action was tried without a jury at Sandwich. MIDDLETON, J., in a written judgment, said that the driver of the milk-waggon had no license for the current year, but had passed all necessary examinations and had held a license the previous year. The illegality of the conduct of both parties was not the cause of the accident, and nothing turned on the right of way. Each driver was guilty of negligence; and the negligence of each was a proximate cause of the accident. Had either used due care or caution, the accident would not have taken place. It was a case of concurrent negligence. Both claim and counterclaim failed, and both should be dismissed without costs. W. D. Roach, for the plaintiff. F. W. Wilson, for the defendant.

LANE v. KERBY—MIDDLETON, J.—DEC. 28.

Landlord and Tenant—Action by Tenants for Relief against Forfeiture of Lease—Discretion—Conduct of Tenants.]—An action by tenants for relief from forfeiture, tried without a jury at Sandwich. MIDDLETON, J., in a written judgment, said that, so far as the forfeiture was for non-payment of rent in the strict sense of the term, the landlord was right, but relief would have been granted as a matter of course had the case ended there. There was no real endeavour on the part of the tenants to live up to the obligation to heat the building, and there was most serious misconduct on the part of one of the tenants in connection with the theft of alcohol from the Tanlac Company and injury done to the elevator machinery. The granting of the relief sought rests in the discretion of the Court; and, having regard to all the elements of the case, this should not be exercised in the plaintiffs' favour. The action should be dismissed, with a declaration that the lease was at an end, and the defendant should be awarded possession. J. H. Rodd, for the plaintiffs. F. C. Kerby, for the defendant.

RIZA v. DOWLER—MIDDLETON, J.—DEC. 28.

Building—Order of Municipal Inspector of Buildings for Destruction of Standing Walls of Building Destroyed by Fire—Wall Forming Part of Premises Leased to Plaintiffs not in Dangerous Condition—Refusal to Revoke Order—Admission—Injunction—Damages—Costs.]—Action for an injunction restraining the defendants from pulling down a wall so as to destroy the plaintiffs' premises and for damages. The action was tried without a jury at Sandwich. MIDDLETON, J., in a written judgment, said that adjoining an hotel in Windsor there was a small passage which the defendants, the owners of the hotel, roofed over, making a room 5 ft. 2 in. wide by 37 ft. deep. This was rented to the plaintiffs for 5 years at a monthly rental of $125. In this narrow place they carried on a shoe-shine business so successfully that the net earnings were $300 to $400 per month over all expenses. The hotel was burned, but this shoe-shine shop was not destroyed, as it was outside the main walls. The city authorities directed the standing walls to be pulled down, as they were a source of danger—one wall actually fell and the others were most dangerous. The wall which was between this shop and the hotel was undoubtedly in a very dangerous condition. It stood three storeys over the roof of the shop, and leaned out over it, and the heavy cornice tended to

make it fall outwards. A barricade was erected on the street, and the plaintiffs were excluded from their shop till the wall was down to the roof level. The defendants asserted that they never had any intention of doing more by way of destruction than they were obliged to do by the order of the building inspector, who gave wide instructions calling for the demolition of all the walls, but admitted that this wall was not dangerous and there was no need for its destruction; yet he refused to modify his order. The judgment should recite that the defendants assert no right and no intention to pull down the wall save in obedience to the municipal by-law and the order of the inspector issued thereunder, and that the inspector now admits that it is not necessary to pull down this wall—and thereupon this Court doth not see fit to make any order; this being without prejudice to the rights of either party, should the defendants desire and intend to pull down the wall, asserting any other right to do so. The plaintiffs had failed to shew that the defendants did anything which gives the plaintiffs a right of action for the damages claimed. To prevent further litigation, the defendants would be well advised if they should return to the plaintiffs the rent paid for the time they were out of possession. The plaintiffs were justified in seeking an injunction, in view of the facts shewn, and the defendants' notice of intention to pull the wall down, and so the plaintiffs should have the general costs of the action, but no costs of the claim for damages. A. St. G. Ellis, for the plaintiffs. H. L. Barnes, for the defendants.

PHILLIPS & SONS CO. v. KEYES SUPPLY CO.—LATCHFORD, J.—DEC. 29.

Contract—Rescission—Failure to Prove—Breach—Damages—Counterclaim—Commissions.]—Action for damages for breach of a contract and counterclaim for a commission on sales. The action and counterclaim were tried without a jury at Kitchener. LATCHFORD, J., in a written judgment, said that on the 1st October, 1919, the defendants agreed to purchase from the plaintiffs 50 gasoline pumps at a discount of 25 per cent. from list-prices. The pumps were to be ordered and delivered at certain stated times during the remainder of 1919 and the first 9 months of 1920. The defendants were to be entitled to the same commission on any pumps sold by the plaintiffs in a specified number of counties in Quebec and Eastern Ontario, the defendants being appointed exclusive sales-agents for the pumps in those counties. The defendants set up that the contract had been rescinded or cancelled; but rescission or cancellation of a contract must be by both

the parties, or one must have so acted as to justify the other in thinking that he intended to rescind: Morgan v. Bain (1874), L.R. 10 C.P. 15. Beyond submitting to the refusal of the defendants to give orders, the plaintiff did not consent to the so-called cancellation, nor did they release or agree to release the defendants from liability for their breach. The defendants had lost the profits which they would have made on 44 pumps; they should be allowed $50 as the probable profit on each pump if the contract had been carried out, or $2,200. If the plaintiffs should be dissatisfied with this approximation, they may have, at their own risk as to costs, a reference to the Master at Kitchener. Judgment for the plaintiffs accordingly with costs, and counterclaim dismissed with costs. Gideon Grant and J. A. Scellen, for the plaintiffs. T. A. Beament, for the defendants.

MORRISON v. CANADA OIL GAS HEATERS LIMITED—LATCHFORD, J.—DEC. 31.

Contract—License to Manufacture Mechanical Appliances in Certain Provinces of Canada—Payment of Royalty—Representation that Vendors Owned Patents for Appliances—Falsity—Return of Deposit Paid—Damages for Misrepresentation—Counterclaim—Costs.]—Action for the return of $1,000 paid by the plaintiffs to the defendants and for damages for misrepresentation. The action and a counterclaim were tried without a jury at a Toronto sittings. LATCHFORD, J., in a written judgment, said that on the 31st July, 1919, the plaintiffs entered into a written agreement with the defendant company, whereby the plaintiffs were licensed to manufacture and sell during a period of 5 years, within the Provinces of Canada east of Ontario, a range burner, furnace burner, and heater burner, controlled and owned by the defendant company. For every burner which the plaintiffs manufactured they were to pay monthly a royalty of $5. The total royalty in any year was not to be less than $5,000. A deposit of $1,000 was to be made by the plaintiffs, which pro tanto was to be applied on the minimum royalty payable. During the currency of the agreement the plaintiffs were to have the right "to purchase the patents covering the said burners" for $25,000. They were to commence manufacturing immediately and to use all their skill and means necessary to produce and sell the burners. It was recited in the agreement that the defendant company "owns and controls three separate inventions covering an oil gas range burner, an oil gas furnace burner, and an oil gas heater." There

was thus a representation that the company had, when the agreement was made, three distinct patents of invention for oil gas burners. The plaintiffs were induced to believe that the several appliances were covered at the time by Canadian patents. In that belief they paid the $1,000 deposit and took steps to manufacture and sell the burners in New Brunswick. Difficulties arose between the parties, and ultimately the plaintiffs discovered that the defendant company at the date of the agreement owned and controlled no patent whatever even for one heater. The plaintiffs then repudiated the contract, and brought this action. The defendant company counterclaimed for breach by the plaintiffs of their contract to manufacture and sell the burners and asked for rectification of a clause in the contract. The learned Judge found as a fact, upon the evidence, that the plaintiffs on the 31st July, 1919, relied on the representation that the defendant company owned and controlled for Canada three separate patents of invention. The defendant company could not escape liability by shewing that an application for a patent was pending at the time and was actually granted in the following September. The plaintiffs were entitled to a return by the company of the $1,000 deposit, with interest from the 31st July, 1919. The plaintiffs' claim for damages should be diminished by the sums paid for travelling expenses, etc., leaving it at $1,533. There should be judgment for that sum against the defendants William Duffy and the company. The action failed as against the other defendants, and should be dismissed as to them, but without costs. The counterclaim of the company should be dismissed with costs. H. J. Scott, K.C., for the plaintiffs. Daniel O'Connell, for the defendants.