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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*QUARTIER v. FARAH.

Currency—Action by French Advocate to Recover Amount of Counsel-fee—Charge Made in French Currency—Recovery of Judgment for Equivalent in Canadian Currency—Value in Canadian Currency to be Ascertained according to Rate of Exchange on Day when Judgment Pronounced—Currency Act, R.S.C. 1906 ch. 25, sec. 4—Bills of Exchange Act, R.S.C. 1906 ch. 119, secs. 136, 163.

Appeal by the defendant from the judgment of the County Court of the County of Carleton in favour of the plaintiff for the recovery of $400 for services of the plaintiff as counsel rendered to the defendant.

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

W. L. Scott, for the appellant.

A. Lemieux, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the questions for decision were, whether the respondent was entitled to recover $400 or only the equivalent in Canadian currency of 2,000 francs, and, if the latter sum, as of what date its value in Canadian currency was to be ascertained.

The respondent was an advocate residing and practising in Paris, France, and was retained on behalf of the appellant in connection with the taking of evidence under a commission in a proceeding against the appellant in a Court in the Province of Quebec.

The proper conclusion upon the evidence was that the respondent's fee for the services rendered by him was 2,000 francs, not $400.

For what sum in dollars then should judgment be entered? That was the very important question to be determined.

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

If our law permitted the amount recovered to be expressed in the foreign currency, the amount recovered would be 2,000 francs, and the judgment would be satisfied by the payment of the equivalent of that sum in the currency of Canada, which would be determined on the basis of the prevailing rate of exchange; and the learned Chief Justice could see no reason why the same result should not follow when the amount recovered is to be expressed, as it must be, in the currency of Canada: Currency Act, R.S.C. 1906 ch. 25, sec. 4.

There is a conflict of judicial opinion and in the views of text-writers upon the question. Reference was made to Westlake's Private International Law, 5th ed., p. 315, para. 226; Mayne on Damages, 9th ed., p. 271; Story's Conflict of Laws, 8th ed., p. 425 et seq.; Scott v. Bevan (1831), 2 B. & Ad. 78; Lobeaupin v. Crispin, [1920] 2 K.B. 714, 720; and many other cases, including some in this Province, viz.: Judson v. Griffin (1863), 13 U.C.C.P. 350; Crawford v. Beard (1864), 14 U.C.C.P. 87; Morrell v. Ward (1864), 10 Gr. 231; White v. Baker (1864), 15 U.C.C.P. 292; Stephens v. Berry (1865), 15 U.C.C.P. 548; Massachusetts Hospital v. Provincial Insurance Co. (1866), 25 U.C.R. 613; Hooper v. Leslie (1868), 27 U.C.R. 295.

Reference was also made to secs. 136 and 163 of the Bills of Exchange Act, R.S.C. 1906 ch. 119.

The learned Chief Justice thought that the decision of the English Court of Appeal in Di Ferdinando v. Simon, [1920] 3 K.B. 409, affirming the decision of Roche, J., [1920] 2 K.B. 704, ought to be taken to be correct, and to be followed in a similar case by a Divisional Court in Ontario. But the respondent's claim was not for the recovery of unliquidated damages for breach of a contract; he was suing for a debt owing to him for services performed by him for the appellant, and the principle of the case last referred to was not applicable.

The learned Chief Justice's conclusion was, that the value of the 2,000 francs owed to the respondent, not being damages for breach of a contract, and not being money payable at a fixed time and place, must be determined according to the rate of exchange which prevailed when judgment was pronounced in the Court below; and that, with that variation, the judgment should be affirmed.

If the parties should be unable to agree as to what that rate was, the case might be spoken to before a member of the Court.

Each party should be left to bear his own costs of the appeal.

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

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

Judgment below varied (MAGEE, J.A., *dissenting*).

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

JOHNSTON v. JOHNSTON.

Deed—Conveyance of Land by Mother to Son—Consideration—Covenant of Son to Maintain Mother on Land—Part Performance—Action by Administrator of Mother's Estate for Damages for Breach of Covenant—Acceptance of other Benefits in Lieu of Benefits Contracted for—Conduct of Mother—Inference—Claim by Virtue of Possession—Limitations Act.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 18 O.W.N. 11.

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

W. R. Meredith, for the appellant.

J. M. Donahue, for the defendant, respondent.

FERGUSON, J.A., in a written judgment, said that the plaintiff upon the appeal confined his claim to damages for breach of the defendant's covenant contained in the deed of the 27th July, 1900, whereby Charlotte Johnston, the mother of the defendant, conveyed a house and land to him, and he covenanted with her that "he will from the date hereof and for and throughout the rest of her natural life provide her with a comfortable home on said lands and premises and suitable maintenance, including food, fuel, clothing, medicine, medical attendance, and nursing."

The appellant contended that the trial Judge based his judgment on the erroneous opinion that the cause of action alleged was one which did not affect the property of the deceased, but was in reality a cause of action arising from the personal conduct of the defendant and affecting only the personalty of the deceased, and therefore did not survive and pass to the plaintiff as administrator of the deceased's estate.

The trial Judge did express the opinion that the cause of action did not survive; but it was not necessary to deal with that question; for, on the evidence, the proper conclusion was, that the deceased accepted, in lieu of a room in the defendant's house and her maintenance there, the exclusive use and occupation of the whole house and premises, where she could and did have with her other members of her family, and where she and they resided and maintained themselves by keeping boarders. At the time the deed was made the defendant was living in the house and paying his mother for his board and lodging. He continued to do this down to his marriage, and after his marriage he and his

wife for more than a year occupied certain rooms in the house, the deceased continuing to carry on a boarding house in the other portion. The evidence did not clearly shew whether the defendant paid anything to his mother during this period; but it could not with any show of reason be said that in these circumstances the deceased was, during that period, accumulating a claim against her son which the administrator of her estate would be entitled to enforce years afterwards.

It could not reasonably be maintained that, when the defendant and his wife, as a result of a quarrel with the deceased, instead of remaining in and taking possession and control of the house, and thus forcing the deceased to change her position of mistress of the household to that of a lodger, decided or agreed to permit her to continue in possession, and themselves move to other quarters, the defendant did not thereby give and the deceased did not in fact receive and accept something valuable in lieu of what she was entitled to receive under the covenant.

The deceased intended to and did accept the situation and its benefits and advantages in lieu of and in satisfaction of the benefits contracted for by the covenant. Her course of conduct for upwards of 20 years was inconsistent with any other intention.

The appeal should be dismissed with costs.

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

HODGINS, J.A., agreed with FERGUSON, J.A., not without some doubt as to whether it could be said that inaction was equivalent to abandoning the claim of the deceased.

MEREDITH, C.J.O., read a dissenting judgment. He said that the defendant was examined as a witness on his own behalf and did not say or suggest that there was any agreement or understanding between his mother and him to the effect now suggested; and it was impossible to draw any such inference. Besides, to draw such an inference would be in effect to substitute for the Limitations Act another statute of limitations of the Court's creation. In the absence of evidence to the contrary, a debt once proved to exist is presumed to remain unpaid: Jackson v. Cameron (1809), 2 Camp. 48, 50, 11 R.R. 658. The plaintiff was not suing for equitable relief, but to enforce a legal right, and therefore laches was no answer to his claim. There was no answer to the plaintiff's claim for the damages sustained by the deceased owing to the breaches of the defendant's covenant.

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

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*ST. CLAIR CONSTRUCTION CO. LIMITED v. FARRELL.

Mechanics' Liens—Claim of Sub-contractors—Proceeding to Enforce Lien—Registration of Certificate—Time—Last Delivery of Materials—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, secs. 22 (5), 24, 25—Abandonment—Sec. 22 (1)—Judgment against Contractor—Sec. 49—Damages for Non-completion—Costs of Appeal.

Appeal by the defendants Robert C. Hamilton and Charles D. Daniels from the judgment of the Assistant Master in Ordinary in favour of the plaintiffs in an action to enforce a mechanics' lien.

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

H. P. Edgar, for the appellants.

G. H. Gilday, for the defendant Farrell, respondent.

Alexander MacGregor, for the plaintiffs, respondents.

HODGINS, J.A., reading the judgment of the Court, said that the Referee had held the plaintiffs, sub-contractors and lien-holders, entitled to enforce their lien for $529.25 and costs, by sale of the property in default of payment into Court of that amount by the appellants, the owners. The defendant Farrell, the contractor, was primarily liable to pay this sum. The judgment required him only to pay the deficiency, if any, after sale. The contract was not completed by Farrell, but was taken over by the appellants and finished at a loss, having regard to the payments made to the contractor.

The lien was registered on the 8th January, 1918; a certificate of proceedings having been taken, registered on the 23rd May, 1918; the last delivery of material was on the 4th October, 1917.

Reference to secs. 24 and 25 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

Under sec. 24, the registered lien expires in case a certificate of proceedings having been taken has not been registered: (1) 90 days after completion or after the last furnishing of materials or after the expiry of the period of credit if mentioned in the registered lien; (2) 30 days after registration of the lien where it has been registered under sec. 22 (5), which states the time for registration when an architect refuses a final certificate.

The certificate here was out of time under this section, as the 90 days from the last delivery of materials and the 30 days after registration (if sec. 22 (5) applied) expired long before the 23rd May, 1918.

The question of abandonment was not material, as sec. 22 (1) applied only to extend the time for the registration of the lien and not to the taking of proceedings.

The appeal should be allowed, the judgment vacated and set aside, and the case remitted to the learned Referee to enter judgment against the contractor, pursuant to sec. 49, for the appellants, for $50 damages for non-completion as per the Referee's reasons for judgment, and for the plaintiffs against the contractor for their claim and costs; no costs of the appeal, as the value of the work done and material supplied, including what the plaintiffs furnished, appeared to have been in excess of payments made when the appellants intervened, and they escaped by this judgment from a very large liability.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*GORMAN v. YOUNG.

Principal and Agent—Agent's Commission on Sale of Land—Authority of Agent—Offer Obtained by Agent after Sale Made by Principal without Notice to Agent—Withdrawal of Authority when too Late to be Effective—Offer Made by Husband in Name of Wife—Knowledge and Approval of Wife—Right of Agent to Full Commission Promised—Quantum Meruit.

Appeal by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury in an action for a commission on the sale of property of the defendant. The action was dismissed by the County Court Judge.

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

J. E. Lawson, for the appellant.

F. W. Griffiths, for the defendant, respondent.

The judgment of the Court was read by HODGINS, J.A., who said that on the 16th September, 1919, the defendant signed a letter written on a card, authorising the plaintiff "from this date, and until withdrawn by me in writing, to offer for sale the property described on the reverse side of this card for the price of $7,500, and I agree to pay you the regular rate of commission, 2½ per cent.,

on this or the selling price, should you effect a sale." On the evening of the same day, the defendant himself sold the property to one Mulligan for $7,000.

On the 18th September, the plaintiff obtained an offer from one Busby, accompanied by a cheque for $1,000, to purchase the property for $7,500 cash, "subject to owner's acceptance." The offer to purchase and the cheque were forwarded by the plaintiff to the defendant on the same day, and reached the defendant on the following day.

No notice in writing was given to the plaintiff of the sale to Mulligan until the 20th September. On that day, the defendant, having received the Busby offer and cheque, returned them in a letter advising the plaintiff of the previous sale.

The offer was made by Busby on behalf of his wife, he signing as her attorney. Busby produced a power of attorney from his wife, which, however, did not confer authority to buy land. Its terms were wide enough to shew that he had warrant for believing that he was his wife's general agent. But, apart from that, the offer was in fact the wife's offer, as she knew of it and made all arrangements to complete the purchase.

The written notice of the 20th September was after the plaintiff had in good faith procured the offer at the stipulated price; and, if what was done was pursuant to the plaintiff's authority, was ineffective to deprive him of whatever rights he thereby acquired.

The defendant contended that the plaintiff was not entitled to the full commission but only to recover upon a quantum meruit, citing Adamson v. Yeager (1884), 10 A.R. 477. The authority of the plaintiff, however, was such that he might have completed the contract to sell by accepting Busby's offer: Keen v. Mear, [1920] 2 Ch. 574; instead of which he forwarded it to the defendant for his sanction. The Adamson case did not really help the defendant. The offer received was for the full price stated in the authority, and no objection to it was taken except on the ground that the property had already been disposed of. So that, as the terms of the plaintiff's authority had been duly fulfilled before it was withdrawn in writing by the defendant, he would be entitled to recover, not damages, but the agreed payment for his services.

The appeal should be allowed, and judgment should be entered for the plaintiff for $187.50 and interest from the 18th September, 1919, with costs of the action and of this appeal.

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*ROWLATT v. J. & G. GARMENT MANUFACTURING CO.

Assignments and Preferences—Action by Assignee for Benefit of Creditors of Trader to Set aside Transactions with one Creditor as Fraudulent—Transfer of Goods within 60 Days before Assignment—Evidence to Rebut Statutory Presumption—Finding of Trial Judge—Mistake as to what Witness Said—Appeal—Reversal of Finding by Appellate Court—Cheque Given by Insolvent to Creditor Shortly before Assignment—Payment of Money—Assignments and Preferences Act, sec. 6 (1)—Bills of Exchange Act, sec. 165—Failure to Shew whether Cheque Paid before Assignment—New Trial—Costs.

Appeal by the defendants from the judgment of LOGIE, J., at the trial, in favour of the plaintiff, in an action by the assignee for the benefit of creditors of M. Silverman, an insolvent, to set aside as fraudulent against creditors or as fraudulent preferences certain transactions between Silverman and the defendants.

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

A. J. Thomson, for the appellants.

A. C. McMaster, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the transactions attacked as fraudulent or as fraudulent preferences were: (1) a transfer by the insolvent to the appellants, in February, 1918, of a number of suits of clothing which, it was alleged, was made without consideration or for much less than their value and in fraud of creditors; (2) a transfer by the insolvent to the appellants, 4 or 5 days before the assignment, of a sum of $985.50, which, it was alleged, was made in fraud of creditors, and it was also alleged that this sum was given by the insolvent for an accommodation note held by the appellants.

The answer made by the appellants to the first attack was that in November, 1917, the appellants accepted, for the accommodation of the insolvent, two bills of exchange drawn by him on them for $726.50 and $552 respectively, and that as security he deposited with them 11 pieces of cloth; that, when the bills were about to fall due, he applied to them for a return of the cloth; that they refused to return it, but said that they could use some "made-up stuff," and that upon receipt of it the cloth would be released; and that he supplied them with "made-up stuff" to the amount of $1,708.56, and the cloth was then given up to him;

that the bills of exchange were paid at maturity by them; that for the difference between the $1,708.50 and the amount of the two bills, the appellants gave their promissory note to the insolvent for $432, which was paid by cheque of the 4th March, 1918.

The trial Judge held that the transaction was entered into within 60 days of the making of the assignment, and that the appellants had not rebutted the statutory presumption resulting from this, and gave judgment against them for $1,278.50. He did not credit the testimony of the insolvent or that of Jacobs, the president of the appellant company. He thought that Jacobs had said that suits were taken in lieu of the cloth—in this he was mistaken.

An appellate Court does not, in ordinary circumstances, reverse the finding of a trial Judge as to the credibility of a witness, but where in discrediting a witness he has proceeded upon an erroneous view of what the witness has said, an appellate Court ought to reverse a judgment founded upon that erroneous view. Even if the transaction had been what the learned Judge thought it was—an exchange of the suits for the cloth—it ought not to be set aside without restoring what had been given up by the appellants.

Upon this branch of the case, the ends of justice would be best served by directing a new trial.

The other transaction was this. The appellants purchased from the insolvent on the 27th February, 1918, a number of coats and suits for $1,000, for which the promissory note of the appellants, payable on the 10th March following, was given. This note was discounted by a bank for the insolvent, and was in the bank's hands unpaid on the 11th March, 1918. Some of the goods purchased were found to be badly made, and were returned to the insolvent, and the appellants were given a credit-note of the 28th February, 1918, for $535, which was the price at which they had been bought. On the 2nd March, 1918, the insolvent, being in need of money to pay wages, applied to the appellants for assistance, and on that day the appellants lent the insolvent $450. On the 11th March, 1918, the appellants, hearing that the insolvent was "getting weak," got from him his cheque on the bank for these two sums—$985; this cheque was presented for payment three times, but was not paid because there were not sufficient funds to meet it. The cheque was marked by the bank as accepted on the 14th March, but there was no evidence as to when it was actually paid. If it was paid on the 14th, it would, no doubt, have been paid during banking hours, and probably before the assignment came to the knowledge of the respondent, and would therefore be protected by sec. 6 (1) of the Assignments and Preferences Act, R.S.O. 1914 ch. 134.

A cheque does not operate as an assignment of the funds of the drawer in the hands of the person on whom it is drawn. It is, by the provisions of sec. 165 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, a bill of exchange; and, unless paid by the drawee before the assignment, would not be protected by sec. 6 (1).

Applying the principle of the decision in Delory v. Guyett (1920), 47 O.L.R. 137, the ruling should be that, where a cheque is paid by the bank on which it is drawn before an assignment by the drawer is made, it is a payment in cash as of the date when the cheque is paid by the drawee.

The date of that payment not having been proved, and as the action must go down for a new trial on the other branch, a new trial should be directed on this branch also.

In order to save expense, either party should be at liberty to use the evidence that had been taken and to supplement it with such other evidence as may seem fit to be adduced; and the costs of the last trial and of the appeal should be costs in the cause to the party who is ultimately successful unless the Judge at the new trial should otherwise direct.

New trial ordered.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

BOGLE v. CANADIAN PACIFIC R.W. CO.

Railway—Motor Vehicle Struck by Train at Level Highway Crossing —Negligence—Evidence—View Obstructed by Box-cars on Siding—Finding of Jury—Nonsuit—Appeal.

Appeal by the plaintiff from the judgment of KELLY, J., 18 O.W.N. 266.

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

M. J. O'Reilly, K.C., for the appellant.

Angus MacMurchy, K.C., for the defendants, respondents.

MAGEE, J.A., in a written judgment, said that the plaintiff alleged that, through the negligence of the defendants, the motor-truck which he was driving along a highway was run down at a level crossing of the defendants' railway, by one of their trains, and he and his truck and goods thereon were injured. The negligence alleged was failure to blow the whistle or give warning

of the approach of the train, and also preventing the plaintiff from seeing the coming train by allowing a great number of box-cars to remain on a siding which obstructed him and others from seeing the approach of trains. The jury found that there was negligence of the defendants causing the plaintiff's injuries, in the position of the box-cars on the siding; that the plaintiff could not, by reasonable care, have avoided the occurrence; and they found that "box-cars should have been in a reasonable and safe view from the highway."

The trial Judge held that leaving the cars where they admittedly were was not an act of negligence; and what the jury called negligence was not negligence.

The trial Judge's opinion was fully borne out by the evidence. The plaintiff did not even pretend that the railway track east of the box-cars was not in full view to him from his truck for the whole distance from the eastern end of the box-cars till he was struck. In fact, for the whole of that distance the highway adjoins the railway land. The highway approaches the crossing at an acute angle. The plaintiff did not say that he looked for a train earlier than when he was 10 feet from the crossing, but he swore that the cars obstructed his view until that point. It was physically impossible that that really inferential or argumentative statement could be true, taking the rest of his own testimony and that of his witnesses. The defendants having complied with the statutory requirements as to whistle and bell, and having allowed a clear space of 100 yards for their trains to be in the plain open, some duty of taking care was to be expected from one knowing the road as the plaintiff did. It could not be said that there was negligence at all upon the defendants' part. To hold that there was would be in effect to hold that it would not be safe for them to have trains pass each other near a highway crossing, lest one might hide the other from heedless wayfarers.

The collision was evidently the result of the plaintiff's vehicle becoming stalled at the south side of the crossing, owing to his flurried mismanagement of it, but for which he would have been able to cross in safety. That, however, was not the question here.

The judgment of the learned trial Judge should not be disturbed.

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

HODGINS and FERGUSON, JJ.A., agreed that the appeal should be dismissed, each giving reasons in writing.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*HOUSE REPAIR AND SERVICE CO. LIMITED v. MILLER.

Building Contract—Remodelling of Houses—Defective Work—Right to Recover for—Deduction from Contract-price for Defects—Evidence—Examination of Details of Work—Extras—Findings of Referee—Appeal—Satisfaction of Owner—Reasonable Conduct—"Putting Properties in First Class Shape"—Inspection by Referee—Complaint not Made Promptly by Owner—Proceeding to Enforce Lien under Mechanics and Wage-Earners Lien Act—Powers of Referee—Employment of Architect to Report—Rule 268—Sec. 34 of Act—Suggested Amendment.

An appeal by the defendant, the owner, from the judgment of a Referee, in a proceeding by contractors against the owner to enforce a mechanics' lien, finding the plaintiffs entitled to be paid $1,386.80, with interest from the 16th May, 1918, and costs.

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

D. L. McCarthy, K.C., and J. Singer, for the appellant.

B. N. Davis and F. A. A. Campbell, for the plaintiffs, the respondents.

HODGINS, J.A., reading the judgment of the Court, said that the sum of $1,386.80 was made up of the contract-price for remodelling three houses, $1,500 and $526.80 for extras, less $500 paid and $140 deducted for defects and omissions. The argument of the appeal was followed by lengthy written references to the evidence, which dealt not only with the case generally but traced up each item of defect or shortcoming.

Actions relating to the faulty execution of building contracts, where the parties indulge in evidence running to more than 400 pages, are an enormous and unnecessary expense to them, and result in a disproportionate length of time being devoted to them by the Court, under conditions which can never be satisfactory owing to the nature of the case. They should be dealt with under Rule 268, as was suggested in Brazeau v. Wilson (1916), 36 O.L.R. 396, at p. 397. There is some doubt, notwithstanding sec. 34 of the Mechanics and Wage-Earners Lien Act, whether the Referee can act under Rule 268. It would be well if this doubt were resolved by the granting of explicit power to the Referees in this regard, so as to obviate the expense and annoyance occasioned in these cases by the present mode of inquiry. The Act should be amended so as to permit the interposition of architects or

engineers, appointed by the Court to report to the Referee, instead of requiring him to spend days in listening to descriptions and discussions about conditions and operations which can only be fully understood through personal inspection.

In this case the Referee made an inspection, as did also T., an engineer and architect, and B., a builder, for the respondents, and two architects for the appellant. The architects differed.

The impression gained on reading the evidence was that the appellant wanted three old, uninhabited houses made over anew, while the respondents thought that "first class shape" was a relative term, and acted accordingly. The respondents were right in that view, because the houses were old, decayed, and tumble-down. "Putting these properties in first class shape" must have reference to their capacity for taking on repairs, which could be only those that their aged condition permitted.

The Referee found that the contract had been substantially performed by the plaintiffs, with some exceptions, and that the work had been accepted by the defendant, who was reaping a satisfactory return upon his investment; and it would be difficult, if not impossible, to reverse the findings of the Referee based upon his opinion of the value of the testimony and upon a personal inspection of the work in the presence of both parties.

The learned Judge examined the evidence upon the items of work done under the contract and also the extras which were complained of upon the appeal, but could not see his way to differ from the Referee's findings.

The result of the whole case was, that the contract had been substantially completed, though in some respects the work was inferior and the results not as beneficial as the appellant would like.

The defects had been appraised after an extremely patient hearing and a personal inspection, and, as deducted by the Referee, were not serious in amount. The absence of any definite written complaint until 18 months had passed must have a strong bearing in gauging the situation. Added to this was the fact that the houses were taken possession of before completion and well rented, and that the inspection of them, after occupation by tenants, 18 months later, could hardly give a proper view of their condition when they left the hands of the plaintiffs, the contractors.

These considerations made it impossible to apply the principle of Munro v. Butt (1858), 8 E. & B. 738—that the builder cannot recover anything for incomplete work. The decision in that case has a wide and well-recognised effect, but it has been held to be inapplicable to such a case as this: H. Dakin & Co. Limited v. Lee, [1916] 1 K.B. 566, followed by this Court in Diebel v. Stratford Improvement Co. (1917), 38 O.L.R. 407, and in Taylor Hardware

Co. v. Hunt (1917), 39 O.L.R. 85; also (with discrimination) by the Second Divisional Court in Burton v. Hookwith (1919), 45 O.L.R. 348; and also by the Appellate Division in Alberta in Canadian Western Foundry and Supply Co. v. Hoover (1917), 37 D.L.R. 285.

The stipulation that the work should be done to the entire satisfaction of the owner differs somewhat from what is demanded when a third person is to be the judge. In each case, however, there must be the element of reasonable conduct; and here there was no evidence of a desire to be reasonable upon the part of the owner, but rather the reverse. The provision as to satisfaction, as expressed, refers only to additional items. See Dallman v. King (1837), 4 Bing. N.C. 105.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Assessment and Taxes—Mining Companies—Exemptions—"Concentrators"—Assessment Act, R.S.O. 1914 ch. 195, sec. 40 (4)—Income Tax—Business Tax not Imposed—Mining Tax Act, R.S.O. 1914 ch. 26, secs. 5, 14—Sub-secs. 6 and 9 of sec. 40.

Appeals by Charles B. Morgan and Charles V. Gallagher from orders of the Ontario Railway and Municipal Board of the 28th May, 1920, allowing appeals from orders of the Junior Judge of the District Court of the District of Temiskaming, and setting aside assessments of the McIntyre Porcupine Mines and five other mining companies by the Municipal Corporation of the Township of Tisdale (confirmed by the Court of Revision), and declaring that the mines of these companies were not assessable.

The appeals were heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

McGregor Young, K.C., for the appellants.

J. Y. Murdoch, for the Schumacher Gold Mines, respondents.

R. S. Robertson, for the other mining companies, respondents.

MEREDITH, C.J.O., in a written judgment, said that the main question for decision was as to the meaning of sub-sec. 4 of sec. 40

of the Assessment Act, R.S.O. 1914 ch. 195, which provides that the building, plant, and machinery in, on, or under mineral land and used mainly for obtaining minerals from the ground or storing the same, and concentrators and sampling plant, and, subject to sub-sec. 8, the minerals in, on, or under such land, shall not be assessable. Sub-section 8 does not affect the question now arising.

The policy of the Legislature, as indicated by its enactments, is to impose a provincial tax on the profits of mines in excess of a stated sum: The Mining Tax Act, R.S.O. 1914 ch. 26, sec. 5. These profits are ascertained and fixed in the manner set out in sub-sec. 3. Section 14 of the Act provides that, where the mine-owner has to pay a municipal tax on income derived from the mine, it is to be deducted from the amount of the provincial tax payable by him. By sec. 40 (6) of the Assessment Act, the income from a mine or mineral work shall be assessed by, and the taxes leviable thereon shall be paid to, the municipality in which such mine or mineral work is situate; but, by sec. 40 (9), no income tax shall be payable to any municipality upon a mine or mineral work liable to taxation under sec. 5 of the Mining Tax Act in excess of one-third of the tax payable in respect of annual profits from such mine or mineral work under the provisions of the said section and amendments thereto.

The learned Chief Justice saw no reason for confining the operation of these sub-sections to income derived from the mineral according to its value when brought to the surface. In his opinion, they extend to the income derived from the mining operations, including the crushing, reducing, smelting, refining, and treating of the ore.

If this view is right, the mining business is not subject to a business tax. The business tax was substituted for a tax on income, as to the businesses in respect of which that tax is imposed; but the Legislature left mines to be taxed on the income from them.

The solution of the main question depends upon the meaning to be attached to the word "concentrators" as used in sub-sec. 4.

The proper conclusion is that the word has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found. There is no reason for confining it to a mechanical process. All the processes in use by the respondents are designed to produce the same result, and the concentration that takes place is the concentration of the valuable mineral by the separation of it from the dross.

To give effect to the contention of the appellants would mean the penalising of the operators of mines producing low-grade ore.

Any process the purpose of which is the separation of the valuable mineral from the dross is a concentrating process, and the building or plant used for that purpose is, within the meaning of sub-sec. 4, a concentrator.

The appeals should be dismissed with costs.

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

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

Appeals dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

MERRILL v. WADDELL.

Damages—Breach of Warranty—Sale of Hay—Quantum of Damages—Evidence—Finding of Trial Judge—Appeal.

An appeal by the defendant from the judgment of KELLY, J., ante 105.

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

F. H. Thompson, K.C., and J. C. Makins, K.C., for the appellant.

W. S. Brewster, K.C., for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the judgment of Kelly, J., was pronounced on a re-trial of the action, as to the quantum of damages only, pursuant to an order of this Court of the 9th June, 1920 (47 O.L.R. 572). The plaintiff's claim was for damages for breach of warranty on the purchase and sale of 9 car-loads of hay. On the first trial the plaintiff was awarded $1,647; on the second, $1,115. The trial Judge had not stated how he arrived at the amount of his award.

It was contended for the appellant that as to 4 of the car-loads there was not before the trial Judge evidence on which he could find damage; that if, in arriving at the amount of his award, the trial Judge did not allow anything for these 4 car-loads, then he must have been of opinion that the hay in the other 5 cars had no value, and made his award accordingly; that the evidence in

reference to these 5 cars did not justify a finding that the hay in the cars had no value, and that the amount awarded should be materially reduced.

The learned Justice of Appeal was of opinion, after reading the evidence, that there was not before the trial Judge sufficient evidence to permit him making any allowance for breach of warranty in reference to the hay in 4 of the 9 cars; but, on the other hand, there was ample evidence to support a finding that the hay in the other 5 cars had no commercial value at the point of delivery—Brantford.

According to the contract, the hay in the 5 cars should have been "No. 2 hay." The evidence established that it was "no grade hay." Some of it was not of the mixture of grasses required in No. 2 hay. All of it was either musty or so damp that, if it had not already commenced to heat, it would heat unless taken from the cars and dried; and the question was, had hay of that character any market-value at the time and place of delivery?

The weight of the evidence was that, after the hay arrived at Brantford, it could not have been resold or re-handled to advantage or for anything over and above the cost of handling; and that, consequently, the trial Judge would have been justified in concluding that the hay in these 5 cars had no commercial value at Brantford, and in awarding the plaintiff his loss on the 5 cars.

A statement had been prepared by counsel, from the evidence, shewing that, including switching, inspection, freight, cartage, and storage, the loss on these 5 cars was $1,350.85, and that, if the handling charges were deducted, the loss was $1,062.54. The trial Judge said that he had allowed interest; and, if interest were added to the $1,062.54, the result would be approximately $1,115 —the amount awarded.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

WILLETT v. McCARTHY.

Deed—Conveyance of Farm—Covenant for Quiet Possession Free from all Incumbrances save as Mentioned—Recital of Agreement for Sale of Standing Timber upon North Half of Lot—Reservation—Agreement in Fact Covering Part of South Half—Terms of Oral Bargain for Sale of Land—Knowledge of Purchaser—Action for Breach of Covenant—Construction of Covenant and Reservation—Finding of Trial Judge—Reversal on Appeal—Dismissal of Action.

Appeal by the defendant from the judgment of LENNOX, J., 18 O.W.N. 192.

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

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

F. W. Denton, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the dispute between the parties out of which the litigation had arisen was as to the extent of the reservation of the timber growing on a 200-acre farm, sold by the appellant to the respondent, which the parties had agreed and intended to make by the conveyance of the farm to the respondent. The deed of conveyance was dated the 20th May, 1918. The contention of the appellant was that the reservation which it was intended to provide for was of the timber on that part of the lot lying north of a road running in part diagonally through the lot, having the whole of the north half and part of the south half of the lot on the north of it. The contention of the respondent was that, as the deed stated, the reservation was to be of the timber on the north half and on that only.

Prior to the sale, the appellant had, by deed bearing date the 29th April, 1918, granted to one Chew all the trees and timber standing on the part of the lot lying to the north and northerly of the side road running through the lot, containing 60 acres more or less, subject to the condition that all trees and timber not removed by Chew within 4 years should revert to and become the property of the appellant.

The conveyance to the respondent was registered on the 12th June, 1918, and that to Chew on the 18th of that month. The latter conveyance was, therefore, by virtue of the Registry Act, fraudulent and void against the respondent unless before the registry of his conveyance he had notice of it.

The reservation in the conveyance to the respondent was, "And subject also to a certain agreement of sale of all the standing timber situate on the north half . . . made between the grantor herein and one Frederick Chew."

Chew had cut timber on that part of the south half of the lot the timber on which was conveyed to him; and the action was brought to recover damages for the cutting, which was alleged to be a breach of the covenant for quiet enjoyment contained in the conveyance to the respondent. That covenant followed the provision above-quoted, and was in the statutory form, with the words "save as aforesaid" added at the end.

The bargain between the parties was made orally on the 20th April, 1918. The respondent, before agreeing to buy, saw the

property, and was told that a sale to Chew of the timber on part of the lot had been made or was contemplated; and that the sale to him, the respondent, was to be subject to the rights of Chew. The parties differed as to what it was that the appellant said he had sold or contemplated to sell. The respondent said it was the timber on the north part of the lot, whilst the appellant asserted that it was the timber on the part of the lot lying to the north of the road.

The learned Chief Justice was of opinion, after a careful examination of the evidence, that the bargain was as stated by the appellant; and that the language of the conveyance to the respondent did not stand in the way of giving effect to what the bargain actually was. The conveyance was made subject to "a certain agreement of sale of all the standing timber . . . made between the grantor herein and one Frederick Chew." If the words omitted—"situate on the north half" etc.—were not there, the respondent would, of course, have taken subject to the rights which the agreement conferred on Chew; and the insertion of them, which was a mistake in describing the land over which the rights had been conferred on Chew, did not lessen the effect of the provision that the respondent was to take subject to Chew's rights under the agreement.

Severn v. McLellan (1872), 10 Gr. 220, referred to.

At most the reference to the north half of the lot was but a representation by the appellant that the agreement with Chew related to timber on the north part of the lot; but, assuming that to be the case, the respondent was not, according to the learned Chief Justice's view, misled by the representation.

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

Appeal allowed.

FIRST DIVISIONAL COURT. JANUARY 31ST, 1921.

*REX v. DUMONT.

Criminal Law—Murder—Evidence—Testimony of Widow of Victim—Contradiction of Previous Testimony—Accomplice or Accessory—Perjury with View to Shielding Prisoner—Trial—Judge's Charge—Nondirection as to Necessity for Corroboration of Testimony of Accomplice and as to Contradictory Statements—Misdirection or Nondirection as to Evidence Bearing upon Justification or Excuse in Self-defence—Charge not Objected to at Trial.

Case stated by LATCHFORD, J., pursuant to the order of the Second Divisional Court, ante 426.

The prisoner was found guilty of the murder of Cyrille Raymond after trial before LATCHFORD, J., and a jury, at North Bay.

Marie Raymond, the wife of the deceased, was the principal witness for the Crown. She admitted that the prisoner had been her paramour before and after the death of her husband. It appeared that at the inquest and at the preliminary inquiry before the magistrate she had, probably with the view of shielding the prisoner, withheld the story which she told at the trial.

The questions framed by the Second Divisional Court, and stated by the trial Judge, were as follows:—

1. Was there a want of direction to the jury, vitiating the verdict, in not pointedly directing the attention of the jury to the fact that, without the testimony of the woman, there was no evidence to support a conviction; and to the contradictory statements made by her going to shew that she was not a credible witness?

2. Was there misdirection or nondirection, or both, vitiating the verdict, in that part of the said charge dealing with the evidence regarding getting the axe and the effect of that evidence; and in not charging the jury as to the law respecting justification or excuse in self-defence?

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

J. W. Curry, K.C., and G. L. T. Bull, for the prisoner.

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

MEREDITH, C.J.O., read a judgment in which he said that the theory of the Crown was that Raymond was struck with a bottle in the hands of the prisoner and afterwards strangled. The defence was that the prisoner did not do this, and that he was not in Raymond's house when, according to the testimony of Marie Raymond, the widow of the deceased, the blow with the bottle was struck.

After stating the evidence and quoting portions of the trial Judge's charge to the jury, the learned Chief Justice said that he was unable to see any ground upon which Marie Raymond could be held to be an accomplice or an accessory after the fact. Reference to sec. 69 of the Criminal Code. There was nothing to shew that Marie Raymond, though she was present when her husband was struck with the bottle, did or omitted anything which rendered her guilty of the offence which was committed; there was nothing to indicate that she had any part in the killing, either by direct act or by aiding or abetting the murderer. Indeed everything

pointed to the opposite conclusion. The blow was struck as the result of an altercation between the prisoner and the deceased, which resulted in the deceased reaching for his axe and the prisoner striking him with the bottle. Even if she had been passively acquiescing in the act of the prisoner, that would not have made her a party to the offence: Rex v. Hendrie (1905), 11 O.L.R. 202. She did nothing after the offence was committed to make her an accessory after the fact: she did not receive, comfort, or assist the prisoner; her failure to disclose the offence did not make her an accessory after the fact: Hale P.C. 618; Regina v. Smith (1876), 38 U.C.R. 218.

The rule requiring the trial Judge to advise the jury that it is not safe to convict on the uncorroborated evidence of an accomplice is a rule of practice and not of law, and the cases in this Province have decided that failure to follow the rule is not the subject of a reservation under the statute: Regina v. Smith, supra; Regina v. Lloyd (1890), 19 O.R. 352, 356, and cases there cited.

The jurisdiction of the Court of Criminal Appeal in England is wider than that possessed by this Court—this Court's jurisdiction is limited to questions of law and to granting a new trial on the ground that the verdict is against the weight of evidence. Rex v. Tate, [1908] 2 K.B. 680, has no application here.

Both the questions asked should be answered in the negative.

The learned Chief Justice was quite unable to see that there was any want of direction by the learned Judge in not pointedly calling the attention of the jury to the fact that without the testimony of the woman there was no evidence to support a conviction and to the contradictory statements made by her going to shew that she was not a credible witness.

Reference to Rex v. Coppen (1920), 47 O.L.R. 399, and the cases there cited; also to Rex v. Immer (1917), 13 Cr. App. R. 22.

The Chief Justice was unable to understand on what ground the prisoner had the right to have it left to the jury to say whether he was not justified in striking the blow with the bottle as an act of self-defence. There was nothing to warrant that conclusion. Apart from the fact that, according to the medical testimony, the death of Raymond was caused by strangulation subsequent to the blow, the facts were such as to shew that there was no justification for striking with the bottle—although the deceased was reaching for his axe, there was nothing to prevent the prisoner from leaving the house, as he had been ordered to do, without having been injured. The very object of reaching for the axe was to compel him to leave the house. But, even if he was justified in striking the blow, he had no answer to the charge of strangulation except his defence of "not guilty."

The fact that the Judge's charge was not objected to, and that he was not asked to direct the jury to anything with which he had not dealt in his charge would seem to indicate that counsel for the prisoner was satisfied with it, except as to the one matter which he mentioned—that the attention of the jury should be directed to the fact that Marie Raymond did not mention the 23rd April, 1919, as the day of the killing.

The learned Chief Justice entertained the opinion that, if those who knew what happened on the fateful night and early morning would speak and speak the truth, it would be found that when the prisoner and Laberge saw the unconscious body of the man who had been struck with the bottle, lying on the floor, they came to the conclusion that he was dead and determined to get rid of what they thought to be the dead body; and that afterwards, having discovered that there still was life in the man, they finished their work by strangling him to death.

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

HODGINS, J.A., read a short judgment. He agreed entirely with the Chief Justice, and added some remarks in opposition to the suggestion that Marie Raymond was an accomplice, and that there was a miscarriage by reason of the jury not having been cautioned against accepting her uncorroborated testimony.

MAGEE, J.A., read a judgment in which he discussed with elaboration the questions stated. He agreed that question 2 and the second part of question 1 should be answered in the negative. As to the first part of question 1, he was of opinion that it meant want of direction that there was no corroboration of the woman; and that it must mean, in the circumstances of the case: "Was there such want of direction, and not merely of direction but of pointed reference—such pointed reference as the prisoner was entitled to have made upon the facts of the case? That pointed reference or direction to the absence of corroboration of an accomplice—the learned Judge was of opinion that Marie Raymond was an accomplice or accessory after the fact—surely called for the warning which for generations the Courts have in such cases felt it their duty to give; and its absence "vitiated the verdict." He was therefore of opinion that the first part of question 1 should be answered in the affirmative; that there was no ground for saying that sec. 1019 of the Criminal Code should be applied to sustain the conviction; and that there should be a new trial.

FERGUSON, J.A., was of opinion, for reasons stated in writing, that there was before the trial Judge and jury evidence from

which it could be reasonably inferred that Marie Raymond either consciously assisted in the commission of the crime or was an accessory after the fact, and that it was the duty of the trial Judge to have pointed out to the jury that without the evidence of the woman there was no evidence to support a conviction and to have warned them of the danger in acting on her uncorroborated testimony; and that the first part of question 1 should be answered in the affirmative.

Conviction affirmed (MAGEE *and* FERGUSON, JJ.A., *dissenting*).

HIGH COURT DIVISION.

ORDE, J, IN CHAMBERS. JANUARY 31ST, 1921.

REX v. DRURY.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor without License—Proof of Offence—Evidence of Alleged Purchaser—Evidence in Answer to Discredit Witness for Prosecution—Evidence in Reply as to Statement Made by Witness for Prosecution—Admissibility—Finding of Magistrate not Depending on Evidence of Witness in Reply—Motion to Quash Conviction—Dismissal.

Motion to quash the conviction of the defendant, by the Police Magistrate for the City of Sault Ste. Marie, for having sold intoxicating liquor contrary to the provisions of the Ontario Temperance Act.

S. H. Bradford, K.C., for the defendant.
F. P. Brennan, for the magistrate.

ORDE, J., in a written judgment, said that the only witness called by the prosecution in support of the charge was one Munroe, who swore that in company with a man named King he had gone to the blacksmith's shop kept by the defendant for the express purpose of getting a drink; that the defendant produced a bottle of whisky, for which the witness paid $8; that the bottle was opened then and there and they all had a drink.

This evidence, if the magistrate believed it, was sufficient to warrant a conviction. Upon cross-examination, however, Munroe admitted that he had been drunk the night before; and the object

of the cross-examination evidently was to cast doubt upon Munroe's recollection by establishing that he was drunk on the morning when he visited the defendant, and so unable to remember what had taken place. For the defence, the defendant denied having sold any liquor to Munroe, but admitted that Munroe and King had come to his shop on the day specified by Munroe. Several witnesses were called for the purpose of discrediting Munroe's evidence, both as to the condition in which he was on that day and as to his purpose in going to the shop. The defendant maintained that Munroe had gone there to look for a job. In reply the prosecutor called witnesses to rebut the evidence as to credit, among them being one McLean, who said that on the day mentioned he had been in the Algoma Hotel with Munroe and another man, and that Munroe and the other had left the hotel together, saying that they were going to get a bottle of liquor.

The motion to quash the conviction was on the ground that the magistrate improperly admitted this evidence of McLean, and that it weighed, or may have weighed, with the magistrate in determining the question of the defendant's guilt.

The magistrate in pronouncing judgment stated that he believed Munroe's evidence. After discussing the evidence, the magistrate said: "The witnesses all agree that Munroe was in the blacksmith's shop on the date as alleged; the weight of testimony also proves that King and the witness Munroe left the Algoma Hotel for the purpose of procuring a bottle of whisky."

If the evidence of McLean had been tendered by the prosecution in support of the charge, it would have been inadmissible; and, had it been admitted, the admission might perhaps be ground for quashing the conviction, though in this respect the concluding portion of sec. 102*a*. of the Ontario Temperance Act (added by 8 Geo. V. ch. 40, sec. 19) must not be overlooked. But McLean was called in reply for the purpose of rebutting the evidence which the defendant had given as to Munroe's real object in going to the defendant's shop. For that purpose it was admissible; and it might be difficult for the magistrate to avoid giving some weight to the fact that Munroe had said that he was going out to get a bottle of whisky. That was one of the risks which the defendant ran when he introduced evidence to shew that Munroe went to the shop for some other purpose.

McLean's evidence was attacked also because he did not positively identify the man with Munroe as King. From the evidence before him the magistrate concluded that the other man was King; but the learned Judge could not see that it was material whether the other man was King or not. So far as the evidence

went, it was admissible upon the question of credit; and the magistrate had not given it any more weight in coming to his conclusion than it was entitled to.

In view of the ruling that the evidence was properly admitted and that the magistrate's judgment did not depend upon that evidence, but upon the direct evidence of sale given by Munroe, it was not necessary to discuss the cases referred to by counsel for the purpose of shewing that the conviction should be quashed where evidence which may have prejudiced the accused before the magistrate has been improperly admitted.

Motion dismissed with costs.

ORDE, J. JANUARY 31ST, 1921.

*DELANEY v. CITY OF TORONTO.

Highway—Nonrepair—Automobile Accident—Death of Passenger—Action under Fatal Accidents Act—Negligence of Municipal Corporation—Contributory Negligence of Driver of Vehicle—Intoxication—Identification of Voluntary Passenger with Driver—Party to Negligent Driving of Vehicle—Voluntary Assumption of Risk—Dismissal of Action—Costs.

Action by William Delaney, as administrator of the estate of his son James Albert Delaney, for damages for the death of the latter in an automobile accident, in Dundas street, Toronto, caused, as alleged, by the negligence of the Municipal Corporation of the City of Toronto, the defendants, in allowing a portion of Dundas street to be and remain out of repair.

The action was tried without a jury at a Toronto sittings.

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

G. R. Geary, K.C., for the defendants.

ORDE, J., in a written judgment, said that the deceased, his brother Harry, and one Staunton, were, on Sunday the 2nd November, 1919, driving from place to place in Toronto, in an automobile owned by Harry and Staunton. Between 8 and 9 o'clock they were driving southerly along the west side of Dundas street, Harry driving with Staunton beside him and James in the rear-seat. At a point a few feet past the south-west corner of Kenneth avenue and Dundas street, the car struck a hole in the pavement, and, after running a distance of 90 feet, struck one of

the Toronto Railway Company's poles on the edge of the kerb on the west side of Dundas street, and James was so badly injured that he died shortly afterwards.

That this street was in a very bad state of repair and had been so for some time was abundantly proved. Counsel for the defendants did not attempt seriously to contend that the street was not in a state of disrepair which might render the defendants liable in certain circumstances; he contended that the accident was not caused by the negligence of the defendants or by the nonrepair of the road, but by that of the deceased or his brother, the driver of the car.

The evidence was to some extent conflicting as to the condition of the three men in the car; the learned Judge found that all three were under the influence of intoxicating liquor at the time of the accident. He also found that the car was travelling at a high rate of speed when it struck the hole. The car was either going at such a high rate of speed that it was impossible to stop it, or Harry Delaney was not in such a condition as to enable him to act in an emergency and stop the car in time to avoid the accident. The combined speed and lack of proper control constituted contributory negligence upon Harry Delaney's part.

It was contended on behalf of the plaintiff that, notwithstanding Harry being guilty of contributory negligence, James was not so identified with the car and its driver as to be affected by it, and that on the principle of Mills v. Armstrong, The Bernina (1888), 13 App. Cas. 1, the plaintiff was entitled to recover.

Reference also to Coop v. Robert Simpson Co. (1918), 42 O.L.R. 488; Godfrey v. Cooper (1920), 46 O.L.R. 565, 570, 575; Fafard v. La Cité de Québec (1917), 55 Can. S.C.R. 615; Dixon v. Grand Trunk R.W. Co. (1920), 47 O.L.R. 115; Thorogood v. Bryan (1849), 8 C.B. 115; Plant v. Township of Normanby (1905), 10 O.L.R. 16; Miller v. County of Wentworth (1913), 5 O.W.N. 317.

In the present case James Delaney voluntarily accompanied his brother and another as a guest in a motor car when all three were more or less intoxicated. Harry Delaney's condition was such that it was dangerous for him to drive the car. A man who, in such circumstances, chooses, even as a guest, to entrust himself to the care of a driver, cannot be allowed to escape the consequences of the driver's contributory negligence, when the contributory negligence is itself the result of the driver's intoxicated condition. While the doctrine of volenti non fit injuria is not strictly applicable, there is practically the same voluntary taking of the risks involved. James Delaney really made himself a party to the negligent driving of the car by his brother, and was himself, in the circumstances, equally guilty of contributory negligence.

The action should, therefore, be dismissed; but, as the negligence of the defendants also contributed to the accident, the dismissal should be without costs.

ORDE, J., IN BANKRUPTCY. JANUARY 31ST, 1921.

*RE GARDNER.

*EX PARTE WILLIAM CROFT & SONS LIMITED.

Bankruptcy and Insolvency—Scheme of Arrangement of Insolvent Debtor's Affairs—Approval of Court—Bankruptcy Act, 1919, sec. 13—Largest Creditor Advancing Money to Pay other Creditors' Claims to Extent of More than 50 per Cent.—Retention of Right of Largest Creditor to Obtain Payment in Full of his Claim—Interests of Debtor and Creditors—Scheme Approved.

An application by the authorised trustee of the estate of William Gardner, an insolvent debtor, under sec. 13 of the Bankruptcy Act, 1919, for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs, prepared by himself.

J. B. Bullen, for the authorised trustee.
The opposing creditor appeared in person.

ORDE, J., in a written judgment, said that the scheme was actively opposed by the creditor who appeared.

The report of the authorised trustee shewed that the debtor had assets consisting of stock in trade and fixtures nominally of the value of $66,163.44 and unsecured liabilities to the extent of $61,007.35, leaving an apparent surplus of $5,156.09. It was stated, however, and not contradicted, that the assets if forced to sale would realise hardly more than 35 cents on the dollar. Proof of claims to the amount of $57,636.07 was made to the trustee by 37 creditors. Of these creditors Gordon Mackay & Co. Limited were the largest, their claim amounting to $41,848.69. The other claims, except three which were for from $1,500 to $2,000, were all under $1,000. The proposal submitted to the creditors was that Gordon Mackay & Co. should advance—and they were willing to advance—a sum sufficient to pay all the creditors, other than themselves, 55 cents on the dollar. This meant that Gordon Mackay & Co. would still retain the right to call for payment of their claim in full; while the other creditors, if the scheme were approved by the Court, would forgo 45 per cent. of their claims.

At the meeting of creditors called by the trustee to consider the proposal, 29 creditors were present or communicated their decision to the trustee by letter. Apart from Gordon Mackay & Co., 26 of these, with claims aggregating $11,316.01, assented

to the scheme; while two, with claims of $211.96 and $954.10 respectively, dissented. Those who had not been heard from might fairly be regarded at least as not dissenting.

The creditor who opposed the application for approval, whose claim amounted to $211.96, objected because the effect of the scheme was to give a preference to Gordon Mackay & Co., by allowing them to be paid in full; and contended that, in the interest of the debtor, as well as of the other creditors, no minority creditor should be forced in effect to release part of his claim unless all the creditors were placed upon an equal footing.

The scheme of arrangement seemed to the learned Judge to to be one which, in the interests of the general body of creditors and of the debtor, ought to be approved, unless there was some rule or principle applicable in bankruptcy matters which would make it improper or inequitable that, in the exercise of a proper discretion, the Court's approval should be given to it.

In determining whether or not the scheme should be approved, the Court is governed by the provisions of sub-secs. 8, 9, and 16 of sec. 13. Sub-section 16 does not apply because none of the creditors held any security upon the property of the debtor, and there were no preferential claims.

The terms of the proposal were reasonable and calculated to benefit the general body of creditors, and they provide for the immediate payment to all but Gordon Mackay & Co. of more than 50 cents on the dollar. Gordon Mackay & Co. are willing to take the risk of getting payment of their claim from the debtor. If the arrangement whereby they are to be entitled to payment in full, if they are ultimately able to obtain it, had not been disclosed to the creditors, the scheme could not be approved; but, with full disclosure, the learned Judge was unable to find any principle which requires the Court to exercise its discretion by disapproval. It is the duty of the Court to take into consideration not only the wishes and interests of the creditors, but the conduct of the debtor, the interests of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme: Baldwin on Bankruptcy, 11th ed., pp. 784, 785.

The scheme of arrangement should be approved, and an order of the Court should issue accordingly. The scheme provides that the trustee's costs and expenses are to be included in the amount to be advanced by Gordon Mackay & Co.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 1ST, 1921.

RE SQUIRES v. OTTY.

Division Courts—Jurisdiction—Title to Land—Amendment—Admission of Title—Motion for Prohibition.

Motion by the defendant for an order prohibiting a Division Court from proceeding in a plaint entered therein.

T. Hislop, for the defendant.
J. E. Corcoran, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the claim was for the return of $100 paid at the time of the signing of a contract of sale, said to have been delivered conditionally and to have been obtained by fraud and misrepresentation.

At one time the plaintiff said that the defendant was not the owner of the land, and this was made one ground of his complaint. It turned out the plaintiff was wrong in this, as, though the defendant was not the owner according to the registry office, he had an unregistered deed.

The defendant relying on the allegation of lack of title precluding the Division Court from entertaining the action, the plaintiff asked and obtained leave to amend by expressly admitting title, and sought to proceed with the action upon the other grounds alleged. Counsel for the defendant does not deny the jurisdiction of the Court to entertain the action if the amended plaint had been originally set up; but, turning back the hands of the clock a century, said with Mr. Justice Maule that the Division Court Judge had no jurisdiction—"he can neither amend nor adjourn nor do anything else."

In In re Sebert v. Hodgson (1900), 32 O.R. 157, at the dawn of this century, it was held that this was too narrow a view to prevail now, and that the power to amend enabled justice to be administered in a more seemly way—no good purpose being served by dismissing an action, to allow it to be begun again in an amended form.

Prohibition should not be granted unless it is shewn that the title to land is actually in question.

The claim here was for $100; the Court had abundant jurisdiction to entertain the action. This being so, "we have to be satisfied that the title really comes in question before we can prohibit:" per Armour, C.J., in Re Crawford v. Seney (1889),

17 O.R. 74, 77, where a distinction is drawn between the law applicable upon a motion for prohibition and that which governs when the scale of costs is under discussion.

Those disposed to take a narrow view of the right to amend and its beneficial effect should carefully read Ellison v. Central Ry. Co. (1891), 87 Ga. 691.

The motion should be dismissed with costs fixed at $25.

ROSE, J., IN CHAMBERS. FEBRUARY 1ST, 1921.

*ATTORNEY-GENERAL FOR ONTARIO v. RUSSELL.

Appeal—Motion for Leave to Appeal to Appellate Division from Order of Judge in Chambers Striking out Portions of Pleading—Rule 507—No Conflict of Decisions—No Reason to Doubt Correctness of Order—Matters of Importance Involved—Counterclaim against Crown for Tort—No Fiat Obtained—Rule 5—Action Brought by Attorney-General on Behalf of Crown.

Motion by the defendants for leave to appeal from the order of ORDE, J., in Chambers, ante 461.

W. Lawr, for the defendants.
H. S. White, for the plaintiff.

ROSE, J., in a written judgment, said that, so far as he was aware, there had not been conflicting opinions by Judges in Ontario upon any matter involved in the proposed appeal. Indeed, upon the main issue, which was as to the right to counterclaim for damages without first obtaining a fiat, Orde, J., followed the only Ontario case cited upon the argument of the present motion, Attorney-General of Ontario v. Hargrave (1906), 11 O.L.R. 530. Paragraph 3 (*a*) of Rule 507 had, therefore, no application: Gage v. Reid (1917), 39 O.L.R. 52; and, if leave to appeal was to be granted, it must be under para. 3 (*b*)—it must appear to the Judge that there is good reason to doubt the correctness of the order, *and* the appeal must involve matters of such importance that, in his opinion, leave ought to be given.

The question whether, in such an action as this, Rule 5 requires that the writ of summons shall state in so many words that the Attorney-General is suing on behalf of His Majesty, or whether, as Orde, J., held, the provisions of Rule 5 (1) do not apply to an action instituted by the Attorney-General under Rule 5 (2), is interesting; but has no very important bearing upon the question

whether it was right to strike out the paragraphs of the defendant's pleading which were struck out. The action is, obviously, one brought on behalf of His Majesty; and, whether or not it can properly proceed without an amendment of the style of cause, it must, in the discussion of the question as to the right to set up any particular counterlcaim, be treated as what it really is, and not as an action by the Attorney-General in his personal capacity.

It is a little difficult to understand exactly what cause of action the pleader intended to assert by the paragraphs in question, and against whom he intended to assert it—it is possible to read the paragraphs as setting up a claim either against His Majesty or against the Attorney-General personally. If the claim is one against the Attorney-General personally, of course it cannot be set up in this action, in which the Attorney-General sues on behalf of His Majesty. If, therefore, it is to be allowed to go to trial, it must be because it is a claim against His Majesty—and in that case there are two difficulties in the way, the one that it is a claim for damages for tort, which does not lie against the King, and the other that no fiat was obtained to raise it by action. Both of these objections are stated by Orde, J., and the latter is elaborately discussed. In the face of them, it would require some very clear authority to make it appear that the defendants' case (as set up in these paragraphs) is not "so clearly bad as to make it right that the appellants should, by a summary order, be prevented from having it tried" in this action: see Electrical Development Co. v. Attorney-General for Ontario, [1919] A.C. 687, 695. None of the cases cited to Orde, J., seemed to be such an authority; nor was Hettihewage Siman Appu v. The Queen's Advocate (1884), 9 App. Cas. 571, a case in point.

There was no reason to doubt that it was correct to strike out the paragraphs; and the motion must be dismissed with costs to the plaintiff in any event in the action.

LOGIE, J. FEBRUARY 1ST, 1921.

McINTOSH v. PREMIER LANGMUIR MINES LIMITED.

Company—Transactions between Company and President—Money Lent by President—Stated Account—Action upon—Counterclaim—Commissions Paid to President on Sales of Shares——Authority for Payment—Payments to Alleged Agents of President—Approval of Directors and Shareholders—Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, sec. 96 (1)—Secret Commissions—Question whether Commissions Earned by President—Reference—Sale of Shares Owned by President for Benefit of Company—Loan of Proceeds—Terms of Repayment—Time-limit—Promissory Notes—Written Contract—Evidence to Vary—Inadmissibility.

Two actions between the same parties. The first action was to recover $6,617.59, upon a stated account, for money advanced by the plaintiff to the defendant company and paid for the use of the defendant company, passed by the directors and shareholders and admitted. The second action was for the amount of 4 promissory notes (and interest) given to the plaintiff by the defendant company, amounting in all to $20,333.32, and for money paid by the plaintiff for the defendant company, amounting to $308.85.

The same counterclaim was delivered in both actions. By it the defendant company claimed the return of certain commissions on the sale of its stock, received and retained by the plaintiff for his own use, and also commissions on the sale of the defendant company's stock, paid to alleged agents of the plaintiff without authority of the directors or shareholders of the company.

The actions and counterclaims were tried without a jury at Toronto.

N. W. Rowell, K.C., and Daniel Urquhart, for the plaintiff.

T. G. Meredith, K.C., and P. H. Bartlett, for the defendant company.

LOGIE, J., in a written judgment, said that in the first action liability for the $6,617.59 claimed was admitted; and there should be judgment for the plaintiff for that sum with interest from the 1st February, 1919, and costs.

No attempt was made at the trial to establish the relationship of principal and agent between the plaintiff and the various persons other than the plaintiff to whom commissions were paid.

The plaintiff, who was the president of the company, rested his right to commissions on these grounds: (1) the charter expressly provided for it; (2) the directors, by a resolution of the 20th March, 1914, authorised the payment to the plaintiff of a commission on two blocks of stock; (3) the shareholders, at the annual meeting of the company held on the 6th July, 1916, authorised the payment of commissions to "officers" of the company on the same terms as to outside salesmen—and the plaintiff, as president, was an officer; (4) the shareholders, at the meeting of the 25th August, 1916, expressly ratified all payments to officers for commission on the sale of stock; (5); the books of the company shewed that the course of business of the company was, from its inception, to pay commissions on shares sold; (6) this course of business was disclosed to the shareholders by the various annual financial statements of the company, which were duly ratified and confirmed without objection or comment by the shareholders; (7) that, if the payments to the plaintiff were not authorised, the company was estopped.

The company complied with the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, sec. 96 (1)—R.S.O. 1914 ch. 178, sec. 100 (1).

After considering the resolutions and the evidence, the learned Judge found that the plaintiff was entitled to the commissions paid to him and was not liable to refund them, much less to refund the commissions paid to others.

But it was said that the commissions were secret commissions and should be repaid. The learned Judge could not so find. Payments authorised by the charter, spread upon the pages of the company's books, disclosed in the prospectuses, passed by the directors, audited by the auditor, and included in the financial reports, could by no stretch of the imagination be classed as secret.

The counterclaims in both actions should be dismissed with costs.

The defendant company might have, at its own risk as to costs, a reference to determine the question whether the plaintiff actually earned the commissions paid him; and, if it should appear that any of the commissions paid to him were not properly earned by him, the case might be spoken to again as to this, and also as to the costs of the counterclaim.

In regard to the defence to the second action, it appeared that the plaintiff agreed to give 100,000 shares of his own to be sold for the benefit of the company and the proceeds repaid to him. He made the announcement with reference to these shares at an informal meeting of shareholders held on the 6th October, 1917. The evidence as to what he said was contradictory.

The learned Judge found that the plaintiff then proposed to lend money, the proceeds of the sale of these shares, to the company, to be repaid out of profits, when the mine was producing, but, as this was uncertain, though expected in a short time, to be repaid at all events within a year.

An agreement, dated the 1st February, 1919, under the seal of the company, was entered into between the plaintiff and the company. By it the company acknowledged its indebtedness to the plaintiff in the sum of $20,000 in respect of the proceeds of the sale of the 100,000 shares, and that it had given the plaintiff 4 promissory notes (the notes sued on) payable one year from the date thereof, and the plaintiff on his part agreed to place at the disposal of the company as a gift an additional 50,000 shares, to be sold at a certain price, the proceeds of which were to be used for the benefit of the company. This agreement was authorised at the directors' meeting of the 15th February, 1919, and the agreement, though dated the 1st February, was not executed until after the 15th.

At the trial, evidence tending to add to, vary, or contradict this transaction, which was in writing, was admitted subject to objection, but should not have been admitted, as it did not disclose an oral collateral agreement on the same subject, consistent with the written agreement, nor a collateral oral agreement suspending the operation of the written transaction. The evidence should therefore now be excluded.

The notes being past due and unpaid, there should be judgment in the second action for the plaintiff for $20,333.32 and for the small account of $308.55, with costs.

ORDE, J., IN BANKRUPTCY. FEBRUARY 1ST, 1921.

*RE AUTO EXPERTS LIMITED.

*EX PARTE TANNER.

Bankruptcy and Insolvency—Authorised Assignment under Bankruptcy Act, 1919—Landlord's Claim for Rent Accrued at Date of Assignment—Costs of Distress—Demised Premises Retained by Trustee after Assignment—Occupation Rent—Deficiency of Assets—Priorities—Expenses of Trustee—Secs. 2 (n), 51, and 52 of Act—"Debts"—Hardship upon Trustee—Provisions for Guarding against—Secs. 15 (5), 27 (b)—Costs—Liability of Trustee—Bankruptcy Rule 118.

An appeal by E. A. Tanner from an order of the Registrar in Bankruptcy.

L. M. Keachie, for the appellant.
J. H. Cooke, for N. L. Martin, trustee.

ORDE, J., in a written judgment, said that on the 19th October, 1920, Auto Experts Limited made an assignment under the Bankruptcy Act to N. L. Martin, an authorised trustee. The statement of affairs presented at a meeting of creditors held on the 26th October, 1920, gave the value of the debtor's assets at $5,295.91. The liabilities were $6,762.47, of which $323 was for rent, $291.05 for wages, and the remaining $6,148.42 for unsecured creditors. Before the assignment, the landlord, Tanner, had distrained for $300 rent due and had incurred $23 for bailiff's charges. Under sec. 52 (1) of the Act, upon the assignment being made, Tanner was obliged to give up possession of the goods to the trustee.

At the meeting on the 26th October the landlord was present. It was resolved by the creditors present that the trustee hould remain in occupation of the demised premises "pending negotiations for the sale of the assets to a prospective tenant." It was clear from the evidence that the landlord did not waive his right to occupation rent during such time as the trustee should see fit to retain the premises after the assignment. When the goods were ultimately sold by the trustee they realised only $642.40, and the total amount available for distribution was $690.12. If the landlord's claim for rent has priority over the trustee's fees and expenses, and the trustee has also to pay occupation rent, there will not only be nothing left for the preferred claims for wages, but the trustee will be out of pocket. His expenses, exclusive of his own remuneration and his solicitor's fees, amount to more than $400.

The Registrar held that the landlord's claim for rent accrued at the date of the assignment was not entitled to priority over the trustee's fees and expenses, and he disallowed part of the claim for occupation rent subsequent to the assignment. The appeal was from the order of the Registrar so declaring.

Section 52 of the Bankruptcy Act deprives the landlord of his right to distrain, even to the extent of requiring him to relinquish to the trustee goods upon which he has distrained, and also limits his priority to 3 months' accrued rent up to the date of the assignment or receiving order and the costs of distress, if any, if the value of the distrainable assets will so far extend. But it was not intended to do more than this, so far as the question of priority is concerned. Section 51, which deals with the priority of claims, commences, "Subject to the provisions of the next succeeding section as to rent," thereby making the whole of the provisions of sec. 51 subservient to those of sec. 52. This, of course, would not entitle the landlord to any greater priority than that preserved to him by sec. 52—if sec. 52 expressly deprived the landlord of rights which he would otherwise possess. Having regard to the fact that the landlord's rights are intended to be preserved, the learned Judge could not think that the words in sec. 52 "in priority to all other debts" were intended to give the trustee the right, when the assets are not sufficient, to cast upon the landlord the whole burden of the fees and expenses of the trustee. "Debts" means all other debts in so far as the landlord is concerned, and must, therefore, include the debts and other expenses involved in the administration of the estate. The definition of "debts" in sec. 2 (*n*) does not assist, and "debts" as used in sec. 52 (1) must be interpreted according to its natural meaning, having regard to the context.

It cannot have been intended that in a case where the whole

property of the debtor is so small as to be barely sufficient to pay the landlord, the tenant by making an assignment can destroy the landlord's lien by what, in the result, proves to be a useless expenditure in the administration of the estate.

The result of giving the landlord priority over the trustee's expenses may be to throw those expenses upon the trustee himself; but that is a contingency which it is his duty to guard against before taking or continuing the burden of the trusteeship. See secs. 15 (5) and 27 (*b*) of the Act.

It should, therefore, be declared that the landlord's claim for the arrears of rent which had accrued to the date of the assignment, amounting to $300, together with $23 for costs of the distress, has priority over all other claims, including the fees and expenses of the trustee.

The liability to pay occupation rent becomes a personal obligation of the trustee like any other item of expense—for which he is of course entitled to indemnify himself out of the estate. It is not a debt of the insolvent, and the landlord is not called upon to prove for it. As sec. 51 is made subject to sec. 52, the obligation to pay this occupation rent ranks ahead of all the obligations mentioned in sec. 51. This hardship upon the trustee, he might also have protected himself against: secs. 15 (5) and 27 (*b*).

Therefore, the landlord must be paid by the trustee the further sum of $300 for occupation rent for one month during which the trustee remained in possession after the assignment.

The landlord should also be paid his costs (fixed at $25) of this appeal, in addition to the costs allowed by the Registrar. Bankruptcy Rule 118 does not apply to a case where the trustee is resisting payment of a liability incurred by him subsequent to the assignment.

ROSE, J., IN CHAMBERS. FEBRUARY 4TH, 1921.

RE E.

Infant—Custody—Contest between Father and Mother—Decree of Divorce Obtained by Father from Manitoba Court, with Declaration that Father Entitled to Custody of Child—Jurisdiction—Effect of Declaration in Ontario—Welfare of Infant Subject to Jurisdiction of Ontario Court—Infants Act, R.S.O. 1914 ch. 153, sec. 2—Equal Rights of Father and Mother—Failure to Shew that Father Able to Make Proper Home for Child—Matrimonial Misconduct of Mother—No Proof of, apart from Foreign Judgment—Effect of, if Proved, as to Custody of Child—Sec. 2 (3) of Act—Religious Education of Child—Rights of Father.

Application by the father of the infant R. M. E., upon the return of a habeas corpus, for an order awarding him the custody of his child, a girl of 10 years, against the mother, in whose custody the child was.

The motion was heard as in Chambers at a sittings of the Weekly Court, Ottawa.

A. W. Greene, for the father.

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

ROSE, J., in a written judgment, said that the parties were married in New York in December, 1909, and the child was born in October, 1910. From November, 1910, they lived together in Toronto until February, 1919, when they separated, the wife leaving her husband and taking the child with her.

The man was a commercial traveller. After the separation, he was employed by an Ottawa company to travel in Western Canada, and in August, 1919, he took up his residence in Winnipeg, where, he said, he now lives with his aunt, paying part of the rent of the house which they occupy together. There seemed to be no reason to doubt his financial ability to maintain and educate his daughter.

After the separation, the man applied to Parliament for a divorce, which was refused. Then, in October, 1919, after he had moved to Winnipeg, he instituted proceedings in the Manitoba Court. The wife was served with notice of the proceedings, and instructed counsel to appear for her; but she did not attend personally. The charge made in Manitoba was adultery of the wife. The Court found the charge proven, and, by a decree nisi, dated the 26th February, 1920, adjudged that the marriage should be dissolved unless cause should be shewn within 6 months, and also declared that the father was entitled to the custody of the child. No cause was shewn, and on the 22nd September, 1920, the Court, by a final decree, declared the marriage dissolved. Nothing was said in it about the custody of the child; it might be assumed that the declaration of right contained in the decree nisi was intended to be confirmed. The woman said—and there was no contradiction of her evidence—that the notice served upon her made no reference to the custody, and that she did not know that that was in issue. The child never had been in Manitoba. The woman vehemently denied all charges of adultery, and no attempt was made to prove them upon this application; the man relied upon the Manitoba judgment.

In April, 1920, the woman remarried. She then knew that a decree had been pronounced in Manitoba, and said that she believed it to be final.

The evidence satisfied the learned Judge that, at least during the years immediately preceding the separation, the man was guilty of cruelty to his wife and child.

There seemed to be no doubt about the man's financial ability; but there was no evidence upon which it could safely be found that, if the child were taken to Winnipeg, she would be in a home in which she would be given as good care as her mother would be likely to give her, or, indeed, such care as she required. Reputable witnesses called by the man gave him a good character, but they were not able to speak as to his home-life or as to the state of affairs existing in the house in Winnipeg.

During her whole life the child had been with her mother, except for visits to her maternal grandmother. The child appeared to be well off where she was—with her mother in a home provided by the mother's husband, who was fairly prosperous. There was no certainty that she would be better off, or as well off, in any home which her father could provide for her. Granting the desire of the mother to care properly for her—and there seemed to be no reason to doubt either the desire or the ability—it seemed to the learned Judge that to take her from her mother and to give her to strangers about whom nothing was known would be to incur a grave risk of spoiling her life. The real care of the child would be committed to unknown persons who could not take the mother's place. To grant the father's application would not serve the interests of the child.

The man's application was based largely upon a legal right supposed to have been conferred by the Manitoba decree. It was not necessary to consider the question of jurisdiction of the Manitoba Court. The matter to be determined was not any proprietary right of either of the contending parties, but the order that ought to be made regarding the custody of the infant, having regard to her welfare and to the conduct of the parents and to the wishes as well of the mother as of the father: The Infants Act, R.S.O. 1914 ch. 153, sec. 2.

Great weight ought to be given to the judgment of the Court of the domicile of the parties: Re Ethel Davis (1894), 25 O.R. 579; but the guardian named by the foreign Court has no absolute right as such in this Province: ib.

Rex v. Hamilton (1910), 22 O.L.R. 484, and other kidnapping cases, distinguished.

Notwithstanding the foreign decree, the custody of the child ought to be given to the mother.

Under the Infants Act, the father and the mother are on an equal footing in any contest as to the custody of the child: Re Wilkites (1919), 45 O.L.R. 181.

Sub-section 3 of sec. 2 of the Infants Act does not apply here; and, apart from that enactment, proof that the mother has been guilty of matrimonial misconduct does not deprive the Court of the power to award the custody of the infant to her: In re A. and B. (Infants), [1897] 1 Ch. 786, 795.

The child is being sent by the mother to a Roman Catholic separate school; and counsel for the father referred to his right to have the child brought up in his faith—he was said to be a Methodist; but the matter of religious education was not put forward as a reason for imposing any terms upon the respondent, but rather as a reason for giving the custody of the child to the father. Put forward in the way it is, it is not a reason for taking the custody of the child from the mother; and it is unnecessary to consider it in any other aspect upon this motion.

Reference to Re Taggart (1917), 41 O.L.R. 85.

After 10 days, an order should issue dismissing the father's application, and, upon the mother's application, giving her the custody of the child. The father must pay the costs of the proceedings.

MIDDLETON, J. FEBRUARY 4TH, 1921.

*RE FERRIS AND ELLIS.

Vendor and Purchaser—Agreement for Sale of Land—Milling Property — Title — Preservation of Dam — Grant of Fishing Privileges to Club—Construction—"Dam," Meaning of—Bond, Construction of—Declaration as to Rights of Club—Interference with Milling Rights—Obligations of Bond not Running with Land—Application under Vendors and Purchasers Act—Rule 602—Declaration Binding on Third Persons—Costs.

A motion by Ellis, the purchaser, under the Vendors and Purchasers Act, for an order determining a question of title, notice having been given to persons claiming fishing rights in the land which was the subject of a contract of sale, pursuant to leave reserved in the judgment in Ferris v. Ellis (1920), ante 213.

The motion was heard in the Weekly Court, Toronto.

I. B. Lucas, K.C., for the purchaser.

C. R. McKeown, K.C., and J. R. Layton, for the vendor.

H. H. Davis, for the persons claiming fishing rights.

MIDDLETON, J., in a written judgment, said that it was contended for the persons claiming fishing rights that they extended

beyond the mere fishing right granted by the instrument of the 1st August, 1904, for which in Ferris v. Ellis compensation was allowed as between the vendor and purchaser.

The rights depend upon the effect of two instruments—the grant and the bond. In each of these instruments the word "dam" is used in more than one sense: sometimes it means the physical structure or barrier; sometimes the water detained by the barrier—the pond. In the grant the word is used as "pond" in the operative part; it conveys "the sole use of the dam" (pond) "and the streams or creeks flowing into the said dam" (pond) "for fishing and as a fishing reserve." It is true that the expression "dam erected on the described lands" is used; but this means "pond found on the lands" rather than the barrier. To treat it as the physical structure would render the document meaningless. This instrument gives only a right to use the pond for fishing and in a fishing reserve and for the propagation of fish, and does not preclude the use of the pond for the ordinary purposes of the mill.

The bond was taken as supplementary to this grant; it primarily deals with the dam in the sense of the physical barrier, and was intended to secure that it shall be kept in repair. Gadke is to "keep the dam on the said described lands at the height the said dam now is that is to say not less than six feet high and in a good state of repair so that the fish will be preserved in the said dam" (i.e. pond) "and in the streams and creeks flowing into the said dam" (i.e. pond).

The meaning of this bond cannot be that the water is to be kept at the height of 6 feet, for it must fluctuate in the use of the mill; and, beyond this, that which is to be kept at this height is also to be kept in repair.

It was contended that this bond is in effect a restrictive covenant and runs with the land; that it prevents the water being lowered; and the purchaser, having notice of it, will be bound by it, not only because it runs with the land, but upon the principle of De Mattos v. Gibson (1859), 4 DeG. & J. 276. The learned Judge was against this contention upon all grounds.

It was not the true construction of the bond; the bond was not a covenant at all; in the third place, it was not a covenant running with the land; and, lastly, De Mattos v. Gibson was one of a series of cases founded on Tulk v. Moxhay (1848), 2 Ph. 774, and, for the reasons pointed out Ferris v. Ellis, ante 213, has not the effect contended for.

The proper order now to make is to declare that Morgan and his associates and their successors in title under the grant acquire the sole right of fishing and using the water of the pond on the land in question as a fishing reserve and for the propagation of fish, but that the right does not prevent the use of the pond for the

purposes of the mill, nor does it prevent the repair of the dam. It should be further declared that the obligations of the bond do not run with the land or bind the purchaser of the mill.

There should be no costs of the application.

If the fishing club had any such rights as claimed, they would depreciate the mill to a greater extent than the amount of compensation awarded by the former judgment, and would be of great value to the club. This is a matter that ought not to be lost sight of in construing the documents; $400 was the price paid, and it is not likely that the intention was to render the mill a thing of no value, as well as to undertake the upkeep of a dam for all time for this sum.

MULOCK, C.J.Ex. FEBRUARY 4TH, 1921.

MAGUIRE v. MAGUIRE.

Foreign Judgment—Action to Enforce—Payment of Alimony—Proof of Foreign Law—Judgment not Final—Dismissal of Action.

Action to enforce a judgment of a District Court of the State of Minnesota, bearing date the 23rd August, 1911, whereby it was adjudged and decreed that the plaintiff should recover from the defendant "the sum of $365 temporary alimony and suit-money . . . and also the further sum of $20 per month, payable in advance, from the date of the order for judgment herein until the further order of this Court."

The action was tried without a jury at a Toronto sittings.

J. F. Boland, for the plaintiff.

G. M. Willoughby, for the defendant.

MULOCK, C.J.Ex., in a written judgment, said that at the trial counsel for the plaintiff put in an exemplification of the judgment and proved that the moneys therein mentioned had not been paid. Counsel agreed that the learned Chief Justice should accept the statutes of the State of Minnesota as evidence; and a volume purporting to contain the "General Statutes of Minnesota" was produced. Counsel for the defendant called attention to sec. 7129: "After an order or decree for alimony or other allowance for the wife and children or either of them . . . the Court may revise and alter such order or decree respecting the amount of such alimony or allowance and the payment thereof," etc.

Thus it appears that the District Court is still seised of the case to the extent that it may revise and alter its order or decree, both in respect of the $365 and also its payment; that is, the District Court still has jurisdiction to alter the decree by reducing or increasing the amount or by relieving the defendant wholly from payment. When it is sought to enforce in this Court a foreign judgment decreeing payment of a sum of money, it must appear that the foreign Court has finally established the existence of the debt so as to make it res adjudicata: Nouvion v. Freeman (1889), 15 App. Cas. 1. By reason of the provisions of the section above quoted, it is still open to the District Court to revise and alter its decree, by relieving the defendant wholly or partly from payment. Thus there has been no final adjudication by the District Court; and, therefore, this Court is not entitled to give effect to the judgment.

Action dismissed with costs.

ROSE, J., IN CHAMBERS. FEBRUARY 5TH, 1921.

*REX v. FIELDS.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Selling or Disposing of Intoxicating Liquor Contrary to Act—Conviction Bad on its Face—Motion to Quash—Amendment by Judge Hearing Motion so as to Make Conviction one under sec. 40—Exercise of Power Given by sec. 101—Consideration of Evidence by Judge—Onus of Proof under sec. 88—"Evidence to Prove some Offence under this Act"—Benefit of Doubt—Disbelieving Story Told by Accused.

Motion to quash a conviction of the defendant, by the Police Magistrate for the City of Windsor, for that the defendant did "unlawfully sell or dispose of a quantity of liquor, approximately 108 cases, contrary to the Provincial Act (sic) of section 41 of the Ontario Temperance Act."

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

ROSE, J., in a written judgment, said that in November, 1920, the defendant, who lived in a comparatively small house in the township of Sandwich West, at some distance from the town of

Sandwich, imported 110 cases of whisky, each case containing 12 quarts. The whisky was seized, and the defendant was called upon, under the Ontario Temperance Act, to shew cause why it should not be destroyed. He succeeded in convincing the magistrate (the same one who afterwards made the above conviction) that the whisky was not intended to be sold or kept for sale or otherwise in violation of the Act, and the whisky was accordingly delivered to him at the end of November. He stored it in his house; and it was probably well known in the neighbourhood that he had been laying in a considerable stock.

On the 27th December, the defendant told the license inspector that, on Christmas eve, 15 men had attempted to take his whisky from him, but had been frightened away. Later, the whisky, or all of it but some 18 or 20 bottles, which the defendant said he had consumed, was removed from the house. The defendant said that it was stolen on New Year's day; but the Crown charged that the removal was with the concurrence of the defendant, and constituted the unlawful sale or disposal of which he had been convicted.

The learned Judge set out the evidence given before the magistrate, as to what was said to have occurred at the defendant's house on Christmas eve and on New Year's day.

The conviction quoted above, which was in the exact words of the information, was defective in that it did not state an offence against the Ontario Temperance Act. The words "contrary to the Provincial Act of section 41 of the Ontario Temperance Act" may be supposed to mean "contrary to the provisions of section 41 of the Ontario Temperance Act;" but sec. 41 does not relate to selling or disposing of liquor: it relates merely to having or giving liquor in a place other than a private dwelling house. It is sec. 40 which makes it an offence to sell; and it must be supposed that what was intended was to charge the defendant with and convict him of a breach of sec. 40. The conviction was, therefore, bad on its face. It seemed also to be open to the objection that it is in the alternative—"did unlawfully sell *or* dispose of"—see Rex v. Kaplan (1920), 47 O.L.R. 110.

The conviction being bad on its face, the question to be determined was, whether a case was made out for the application of sec. 101 of the Act and for the amendment of the conviction.

It could be understood from the conviction that it was made for an offence against a provision of the Act within the jurisdiction of the magistrate. The inquiry, therefore, should be, whether there was evidence to prove an offence under the Act.

Proof was given that the defendant had had in his possession the liquor in respect of which he was prosecuted. Therefore, by sec. 88, it was open to the magistrate (subject to the objection

as to the form of the information) to convict the defendant unless he proved that he did not commit the offence with which he was charged; and, if the question was, whether the magistrate's decision that the defendant had not proved that he had not committed the offence could be supported, it would be impossible to set aside the conviction. But the question was, whether the conviction should be amended, which it must be if there be evidence to prove some offence. The meaning of "provided there be evidence to prove some offence under this Act," in sec. 101, is not as clear as the corresponding words in sec. 1124 of the Criminal Code; but the intention of the two sections is the same; and "the conclusion must depend on whether there is, in the opinion of the Court (not the magistrate), evidence to support the amended conviction:" Rex v. Newton (1920), ante 249, 250; and see, to the same effect, Rex v. Leduc (1918), 43 O.L.R. 290, 293.

Section 88 does not say, as is sometimes assumed, that the defendant shall be presumed to be guilty until he proves his innocence; but that, upon proof of the finding of the liquor, he *may* be convicted unless he proves his innocence. See Rex v. Lemaire (1920), ante 295.

The provisions of sec. 88 are to be invoked in a case in which it is fair and reasonable to invoke them; and a case like this—in which a man, living in a small house, in a place near to the border of a country in which whisky at present commands a high price, has had, but has not now, a store much in excess of that which most persons living in similar places, but more remote from a regular market, would probably lay in for their own individual use—is a case in which to invoke them.

The learned Judge then considered the evidence, not overlooking the right of the accused to the benefit of the doubt (Rex v. McKay (1919), 46 O.L.R. 125). That right entitles him, in a case in which the onus is upon him, to be acquitted if the story which he tells is convincing, even if there remains some little doubt in the mind of the Court as to whether that story is really true. The learned Judge, while recognising that the story of the defendant might possibly be true, was not so far convinced of its truth that he ought—by way of giving the defendant the benefit of the doubt—to say that it should be accepted.

The learned Judge was not convicting the defendant upon suspicion. The defendant had put himself in a position in which, having regard to sec. 88, it was impossible to hold that the onus of proof did not rest upon him, and he had not discharged that onus.

Sec. 101 must, therefore, be applied, the conviction amended, and the motion dismissed.

ORDE, J., IN CHAMBERS. FEBRUARY 5TH, 1921.

*REX v. BARNES.

Coroner—Jurisdiction—Witness Subpœnaed to Give Evidence at Inquest Refusing to Testify—Issue of Warrant for Apprehension—Motion to Quash or for Prohibition—Witness Charged with Manslaughter of Person on whose Body Inquest Held—Charge Laid before Issue of Subpœna—Committal for Trial—Compellable Witness—Canada Evidence Act, sec. 5—"Witness"—"Person"—Claim of Exemption—Warrant Enforceable beyond Limits of Coroner's County—Coroners Act, sec. 35—Style of Proceedings—Criminal Cause.

Motion by Henry G. Barnes for an order quashing a warrant for his apprehension issued by a coroner or prohibiting the coroner or any officer of his court or any peace officer from executing the warrant or arresting the applicant thereunder and prohibiting the coroner from issuing any further process, subpœna, or warrant to compel the applicant to attend and give evidence at an inquest or to arrest him for such purpose.

A. Courtney Kingstone, for the applicant.
Edward Bayly, K.C., for the coroner.

ORDE, J., in a written judgment, said that on the 19th September, 1920, one William E. Rossiter was injured upon the Toronto and Hamilton highway, in the county of Peel, and died the same day in Toronto. Dr. W. A. Young, an associate coroner for the County of York, thereupon proceeded to conduct an inquest upon the body of Rossiter; and on or about the 2nd October, 1920, the applicant, who resided in the township of Louth, in the county of Lincoln, was subpœnaed by the coroner to attend the inquest on the 4th October, 1920, and give evidence on behalf of the Crown touching the death of Rossiter.

Before the issue of the subpœna, Barnes was charged before the Police Magistrate for the Village of Port Credit, in the County of Peel, with manslaughter in having caused the death of Rossiter, and was, on the 27th September, 1920, committed by the magistrate for trial upon that charge, and was at the time of this motion in the custody of his bail awaiting trial.

At the inquest, on the 4th October, 1920, Barnes appeared with counsel, and, upon the advice of counsel, refused to give evidence or to hold himself bound by the subpœna, on the ground that a charge of manslaughter was then pending against him upon

which he had been committed for trial, and that he was neither a competent nor a compellable witness at the inquest, at the instance of the Crown.

The inquest was adjourned to the 12th November, 1920, but Barnes entered into no recognizance or undertaking to appear thereat, and no further subpœna was served upon him requiring his attendance at the inquest upon that day. Barnes not appearing on that day, the coroner issued a warrant for his apprehension, directed to the Chief Constable of the City of Toronto and to all peace officers in and for that city. The warrant directed that Barnes should be taken and brought before the coroner to give evidence.

The notice of this motion and other documents were headed "In the Supreme Court of Ontario," and styled, "Rex v. Henry G. Barnes," and the notice was directed to the coroner and the Attorney-General for Ontario.

The learned Judge referred to Regina v. Hammond (1898), 29 O.R. 211; and secs. 667 and 940 of the Criminal Code.

It was contended for Barnes that; as the criminal charge had been already laid against him, the provisions of sec. 5 of the Canada Evidence Act did not apply to him, and he was not bound to answer.

Section 5, as it stood in the Act of 1893 (56 Vict. ch. 31), read, "No person shall be excused," etc. In 1898 the section was repealed, and a new section substituted, beginning, "No witness shall be excused." It was said that the change indicated that the person who was not to be excused from answering must be one who is otherwise a compellable witness; and, as Barnes could not be compelled by the Crown to give evidence in the criminal proceedings now pending against him, he was not a "witness" to whom sec. 5 was applicable. The learned Judge was unable to see that the change was of any real consequence; nor did he attach any importance to the circumstance that "person" is the word used in sec. 4.

Does the fact that Barnes is not a compellable witness in the criminal proceedings exempt him from being compelled to give evidence before the coroner? The learned Judge was unable to discover upon what grounds any such exemption could be claimed. Although the coroner's court is a criminal court, no one is there on trial or charged with any offence. The question of competency or compellability must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness and not with reference to some other proceeding.

The coroner's warrant is enforceable beyond the limits of the county of York: sec. 35 of the Coroners Act, R.S.O. 1914 ch. 92, which was first enacted in 1911, after the decision in Re Anderson

and Kinrade (1909), 18 O.L.R. 363. While the coroner is limited to his own municipality in holding the inquest, the process of his court is intended by sec. 35 to run throughout the Province.

No objection was taken to the style of this proceeding, though the application is apparently made in the criminal cause now pending against Barnes.

Motion dismissed with costs.

SCOTT v. GARDNER—MIDDLETON, J.—FEB. 3.

Partnership—Dissolution—Accounting—Master's Report—Judgment on Further Directions—Interest—Costs—Absence of Special Circumstances.]—Motion by the plaintiff for judgment on further directions in a partnership action. The motion was heard in the Weekly Court, Toronto. MIDDLETON, J., in a written judgment, said that judgment should be entered in favour of the creditor-partner against the debtor-partners for the amount found due by the Master's report (as varied on appeal) and interest at 5 per cent. from the date of dissolution; and there should be no order as to costs. No circumstances were shewn by the report which would justify any departure from the ordinary rule in partnership cases; and nothing was disclosed upon the appeal from the report which would justify any special order. The claim for interest at 12 per cent. upon a sum advanced failed because that advance lost its individuality when absorbed in the general accounting; and, after that, the only claim was for the balance found due by the Master on such accounting. A. H. Foster, for the plaintiff. Peter White, K.C., for the defendants.