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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. APRIL 13TH, 1917.

*NEVEREN v. WRIGHT.

Mortgage—Covenant for Payment—Exchange of Properties—Agreement—Liability for Proportionate Part of Prior Mortgage—Covenant of Mortgagees to Protect Mortgagor—Separate and Distinct Covenants—Assignment of Mortgage—Notice of—Sufficiency—Conveyancing and Law of Property Act, R.S.O. 1914 ch. 109, sec. 49—Assignment by Plaintiff and Reassignment pendente Lite—Rule 300—Abatement—Failure to Obtain Order to Proceed—Addition of Parties.

Appeal by the defendant from the judgment of KELLY, J., 11 O.W.N. 409.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

W. J. Elliott and J. J. Greenan, for the appellant.

J. M. Ferguson, for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that if the mortgage transaction upon which alone this action was based were separated (as it should be) from the somewhat complicated transaction between the same parties which resulted in an exchange of lands, this case became simple. The mortgagees lent to the defendant the moneys secured by the mortgage; the mortgage was given and taken for the separate and sole purpose of securing the repayment of that loan. The exchange of lands would not have taken place but for the loan; but that could not

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

affect the mortgagees' right to repayment. The money lent formed no part of the value or price put by either party upon his lands in making the exchange: the money was no part of the consideration on either side. The fact that the mortgagees had contracted, in the exchange transaction, to pay off part of a first mortgage upon the land they conveyed to the defendant, and had not done so, and that foreclosure proceedings were pending upon that mortgage, could not be a defence to this action—though it might sustain a counterclaim for damages for breach of that contract. No such counterclaim was made. The defendant also contracted, with the other parties to the exchange, that he himself would pay off part of that first mortgage, which covered other land than that which he got in the exchange; and in his depositions he said: "I kept the interest up and made certain payments, and was able to meet all payments up to the time the war started; after that, I was placed so that I couldn't." the defendant could not compel the other parties to pay their share if he were not able to pay his.

The case was not one of an assignment of a chose in action, such as the Conveyancing and Law of Property Act provides for, but was an assignment of a covenant made by the defendant with the mortgagees, their "heirs, executors, administrators, successors, and assigns." A transfer of the mortgage security alone would effect in equity a transfer of the debt, and notice of it would not be necessary except for the purpose of intercepting payments which might be made, in ignorance of the assignment, by the mortgagor.

Soon after the commencement of this action, the plaintiff made an absolute assignment of the mortgage in question to one Fussell; but some months afterwards Fussell reassigned the mortgage to the plaintiff. No order for leave to proceed was obtained after either assignment. Proceeding without an order was in each case irregular. It was not a mere matter of form. If no proceedings were taken during Fussell's ownership, there was no need for an order until the plaintiff acquired title again; but an order should have been applied for then. The defendant was entitled to have the question of these transfers investigated and to have it proved that the property was really revested in the plaintiff.

In all the circumstances, the defendant was entitled to be made secure by the addition as parties to the action of the mortgagees and of the assignees, at any time, of the mortgage, in such a manner that, if they had any interests in the matters in question, such interests might be bound by the judgment in the plaintiff's favour.

Upon that being done, at the plaintiff's cost, the appeal should be dismissed with costs.

RIDDELL, J., in a written judgment, in which ROSE, J., concurred, reached the same conclusions as the Chief Justice, but on somewhat different reasoning. He did not think it necessary, in the circumstances, that new parties should be added, and said that the appeal should be dismissed with costs.

LENNOX, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. APRIL 17TH, 1917.

*REX v. HOGUE.

Criminal Law—Murder—Conviction—Application by Prisoner for Leave to Appeal—Judge's Charge—Evidence Alleged to have been Improperly Admitted—Evidence Admitted at Request of Prisoner—New Trial—Discretion—Criminal Code, sec. 1019—Substantial Wrong or Miscarriage.

Motion on behalf of the prisoner, under sec. 1015 of the Criminal Code, for leave to appeal from the conviction of the prisoner for murder, upon trial before SUTHERLAND, J., and a jury, at Sandwich, and for a direction to the trial Judge to state a case for the opinion of the Court, which he had refused to do. The prisoner complained of error in the charge of the trial Judge and of the improper admission of evidence.

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

A. C. McMaster, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O., who said that it was not proper, even in a capital case, because it might be possible to pick out isolated sentences in the charge of a trial Judge, which might seem, when divorced from their context, to be inaccurate or incomplete, to hold that there had been error, if, reading the

charge as a whole, it was manifest that it was a proper one, and that the inaccuracies, real or supposed, could not have misled the jury.

Reading the charge in this case as a whole, it was a very fair and proper one, and stated clearly the questions that were to be determined and what was necessary to be proved in order to warrant a finding of "guilty;" the defence was fairly and fully put before the jury, and they were clearly told what the defence was.

Upon the other question, the Court was clearly of opinion that it ought not to require a case to be stated. It is not competent for a prisoner, at whose request evidence has been admitted, especially where that evidence would have been properly received if an affidavit had been filed proving that the witnesses were absent and unable to attend, afterwards to turn round and seek to obtain a new trial upon the ground that the evidence was improperly admitted.

The granting of a new trial, even in a capital case, is in the discretion of the Court; and in a case such as this that discretion ought not to be exercised in favour of the prisoner. There was ample evidence to warrant the conclusion to which the jury came.

In any view, sec. 1019 of the Criminal Code ("substantial wrong or miscarriage") is applicable, and affords ground for refusing to direct that a special case be stated.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. APRIL 16TH, 1917.

*RE WILLIAMSON, PENNELL v. McCUTCHEON.

Distribution of Estates—Insolvent Estate of Deceased Person—Moneys Made by Sheriff under Execution before Administration Order—Rule 613 (2)—Creditors Relief Act, R.S.O. 1914 ch. 81—Priority of Execution Creditors over other Creditors—Trustee Act, R.S.O. 1914 ch. 121, sec. 63 (1)—Distribution among all Creditors pro Rata—Payment of Money into Court—Distribution in Administration Proceedings—Costs.

Motion by a sheriff for leave to pay into Court moneys realised by him under execution.

H. S. White, for the sheriff.

W. Proudfoot, K.C., for the plaintiff in this administration proceeding.

W. D. Gwynne, for the Bank of Montreal.

A. C. Heighington, for the Bank of Ottawa.

M. L. Gordon, for the Imperial Bank of Canada.

W. D. Cowan, for the Standard Bank of Canada.

W. Lawr, for the Royal Bank of Canada.

Munnoch (Raymond Ross & Ardagh), for the Union Bank of Canada.

E. H. Senior, for the Publishers' Association.

MIDDLETON, J., in a written judgment, said that the deceased Williamson, whose estate was being administered, left some property and many creditors. His executors, instead of taking proceedings under Rule 613 (2) to prevent the creditors suing pending realisation of the estate, allowed the goods of the deceased to be sold (14th October, 1916); and the sheriff was in possession of the money realised, some $1,760. An entry was made under the Creditors Relief Act, R.S.O. 1914 ch. 81, on the 21st October. The administration order was made on the 3rd November. In the administration proceeding, the Master assumed that the money made by the sheriff would be available for distribution; and that money with other moneys arising from the sale of lands would pay 17 per cent. of the proved claims of creditors.

Those execution creditors who had executions in the sheriff's hands within 30 days sought to have the moneys distributed under the Creditors Relief Act, and so obtain priority over the other creditors. The sheriff maintained that all assets must be distributed pari passu among all the creditors.

Reference to the Trustee Act, R.S.O. 1914 ch. 121, sec. 63 (1); Bank of British North America v. Mallory (1870), 17 Gr. 102.

The assets of a deceased person become, in the hands of his representative, a trust for the benefit of creditors; and this trust has, by virtue of sec. 63 (1), priority over and prevails against any execution.

The Creditors Relief Act makes no change; its provisions are for the purpose of regulating the rights of execution creditors among themselves—instead of priority being given to the first, those who place their executions with the sheriff in a reasonable time share pro rata. This can have no effect upon the superior right of the creditors as a whole to have the assets dealt with as the statute directs.

It is the duty of the Court while the fund is yet in its hands to see that the fund is duly administered.

The fund in the hands of the sheriff should be paid into Court to the credit of the administration proceeding, and will be dealt with under the report and distributed under the administration order.

The sheriff should deduct his costs (fixed at $40) from the fund. In strictness, the creditors who sought to obtain priority ought to bear the expense; but, as the point has not been raised since the Creditors Relief Act, justice will be done by making no order as to costs save that relating to the sheriff's costs.

CLUTE, J., IN CHAMBERS. APRIL 18TH, 1917.

*REX v. MACLAREN.

Ontario Temperance Act—Magistrates' Conviction for Offence against sec. 51, 6 Geo. V. ch. 50—Physician—Prescriptions for Intoxicating Liquor—Evasion or Violation of Act—Absence of Evidence to Support Conviction.

Motion to quash the conviction of the defendant, a practising physician, for an offence against sec. 51 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

Section 51 permits a practising physician, under certain restrictions, to give his patient a written prescription, addressed to a druggist, for not more than six ounces of intoxicating liquor, with the proviso that "every physician who shall give such prescription . . . in evasion or violation of this Act or who shall give to or write for any person a prescription for or including intoxicating liquor for the purpose of enabling or assisting any person to evade any of the provisions of this Act, or for the purpose of enabling or assisting any person to obtain liquor for use as a beverage, or to be sold or disposed of in any manner in violation of the provisions of this Act, shall be guilty of an offence under this Act."

The conviction was made by two Justices of the Peace for the City of London, and was for that the defendant between the 16th February and the 17th March, 1917, did, at the city of London, unlawfully give prescriptions in evasion or violation of the Ontario Temperance Act, contrary to sec. 51.

There was evidence that the defendant had, during the period mentioned, given 261 prescriptions for intoxicating liquor.

The motion was heard in Chambers at the London Weekly Court.

N. P. Graydon, for the defendant.

J. B. McKillop, for the complainant and the Justices.

CLUTE, J., in a written judgment, set forth the objections to the conviction and portions of the evidence taken by the Justices. He then said that the first question that arose was, whether the conviction disclosed a crime by simply declaring that the prescriptions were given in evasion or violation of the Act, without saying in what manner they violated the Act. The portion of sec. 51 which declares that every physician who shall give such prescription in evasion or violation of the Act shall be guilty of an offence, would seem to make that an offence without stating what the act is which constitutes the offence.

There is an evasion or violation of the Act where a physician gives a prescription when he does not deem the liquor necessary for the health of his patient, or gives the same (1) to enable any person to evade the Act; or (2) to obtain liquor as a beverage; or (3) to be sold in violation of the Act.

It thus appears that the physician is the person to judge, in the first instance, whether the liquor is necessary for the health of his patient. If he deems it so, there is no offence under the Act.

In this case there was not a tittle of evidence that the prescription was given in any case in evasion or violation of the Act. The accused swore that in every instance he deemed it necessary, and in no instance did he prescribe it when not necessary.

The prosecution asked for a conviction upon the inference to be drawn from the number of prescriptions given within the time. The number given might raise a suspicion in one's mind, but was no evidence in proof of the fact.

Other objections to the conviction were formidable, but it was unnecessary to consider them. The motion should be disposed of upon the ground that there was no proof whatever of any offence under the Act.

The conviction should be quashed without costs.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS APRIL 19TH, 1917.

O'GRADY v. PULLMAN CO. AND GRAND TRUNK R.W. CO.

Writ of Summons—Action against Foreign Corporation—Service on Agent in Ontario—Rule 23.

Appeal by the defendants the Pullman Company, a foreign corporation, from an order of the Master in Chambers dismissing their motion to set aside the writ of summons and the service thereof upon one Kinnear, in Ontario, for them.

A. C. Heighington, for the appellants.
F. H. Vanstone, for the plaintiff.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that in Murphy v. Phœnix Bridge Co. (1899), 18 P.R. 406, 495, the company had practically ceased to do business in the Province, and the person served was merely employed to settle up some trifling matters consequent on the cessation of business. Here, Kinnear's duties and line of operation were set forth in his affidavit and cross-examination thereon. The case was more like Wagner Braiser & Co. v. Erie R.R. Co. (1914), 6 O.W.N. 386. Kinnear was clearly an agent for the purpose of being served under Rule 23.

Appeal dismissed; costs in the cause to the plaintiff in any event.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. APRIL 19TH, 1917.

ARGLES v. POLLOCK.

Discovery—Examination of Person for whose Benefit Action Prosecuted—Rule 334—Action by Trustee for Creditors—Examination of Member of Creditor-firm.

Appeal by the defendants from an order of the Master in Chambers refusing their application for leave to examine for discovery one William Denton, a member of the firm of Denton, Mitchell, & Duncan, one of the creditors of Goren Brothers, the action being brought by a trustee for the creditors of Goren Brothers.

P. E. F. Smily, for the defendants.
A. A. Macdonald, for the plaintiff.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the plaintiff was a mere trustee. He was examined for discovery, and had no personal information about the matters in question. The person who did know all about them was William Denton, whose firm was the largest creditor, except a bank. The action was prosecuted for the immediate benefit of this firm, as appeared by the endorsement on the writ of summons, and none the less so because there were about forty other creditors.

William Denton was clearly examinable under Rule 334.

Appeal allowed; costs here and below to the defendants in any event.

CLUTE, J. APRIL 19TH, 1917.

RE McKENZIE.

Will—Construction—Devise and Bequest to Wife for Life—At Death to "be Divided among her Heirs as she may Direct"—Gift to Class—Death of Wife without Direction—Division among Heirs in Equal Shares per Capita—Ascertainment of Class at Date of Wife's Death.

Motion by the executor of the will of William McKenzie, deceased, for an order determining questions arising as to the proper construction of the will.

The motion was heard in the Weekly Court at London.
T. Scullard, for the executor.
R. L. Brackin, for three beneficiaries.

CLUTE, J., in a written judgment, said that the testator, dealing with his whole estate, real and personal, devised and bequeathed it to his wife during her lifetime, and directed that after her death it should "be divided into two equal shares of one-half each, the first half to be equally divided share and share alike among the three surviving children of my deceased sister Grace. . . . Second, at the death of . . . my wife, the second half of said estate shall be divided among her heirs as she may direct."

The testator died on the 24th April, 1906; his widow on the 15th March, 1916, intestate. No direction was made by her.

No question arose as to the first half. As to the second half, the question was, whether it should be divided among the widow's heirs, or among the heirs and next of kin of the testator.

The learned Judge said that, in his opinion, there was no lapse in respect to the second half of the estate. The gift was to a class, clearly and definitely designated. The fact that it was to be divided as she might direct did not annul the gift. The property should be divided among the members of the class equally, per capita, and the class should be ascertained at the date of the widow's death.

Reference to Kingsbury v. Walter, [1901] A.C. 187, 192; In re Jones, [1910] Vict. L.R. 306; Shaw v. McMahon (1843), 4 Dr. & War. 431; Theobald on Wills, 7th ed. (Can. notes), pp. 325, 738, 739, 787, 788; Cole v. Wade (1809), 16 Ves. 27; Harding v. Glyn (1739), 1 Atk. 468; Brown v. Higgs (1799-1803), 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; Burrough v. Philcox (1840), 5 My. & Cr. 73; Coatsworth v. Carson (1893), 24 O.R. 185; Stephens v. Beatty (1895), 27 O.R. 75; Wright v. Bell (1890), 18 A.R. 25, reversed in Houghton v. Bell (1891), 23 S.C.R. 498; In re Stone, [1895] 2 Ch. 196; Jarman on Wills, 6th ed., vol. 2, p. 1711; Re Bauman (1916), 11 O.W.N. 55.

Order declaring accordingly; costs of all parties out of the estate.

LATCHFORD, J. APRIL 19TH, 1917.

*JAMES RICHARDSON & SONS LIMITED v. GILBERTSON.

Contract—Broker—Dealings in Grain for Customer—Speculation in "Futures"—Wagering Contract—Malum Prohibitum—Criminal Code, sec. 231.

Action to recover $1,287, the balance alleged to be due to the plaintiffs, grain merchants and grain brokers, in respect of the loss upon certain quantities of May wheat bought and sold for the defendant by the plaintiffs upon the Winnipeg Grain Exchange in February, 1916.

The action was tried without a jury at Toronto.

B. N. Davis and H. C. Fowler, for the plaintiffs.

W. Proudfoot, K.C., for the defendant.

LATCHFORD, J., in a written judgment, said that the transactions in February, 1916, were the culmination of a series of purchases and sales of "futures" conducted by the plaintiffs for the defendant. If the purchases and sales were made by the plaintiffs with the authority of the defendant, and were not prohibited by sec. 231 of the Criminal Code, there was no defence to the claim.

At the time the first order was given to Mr. Plewes, the manager of the plaintiffs' Toronto office, with whom the defendant dealt, on the 29th December, 1915, the defendant was a clerk in a bank at Lucknow; he had no intention, when ordering a purchase or sale, to accept or make delivery of May wheat; and Mr. Plewes was well aware from the 31st December, 1915, that the defendant was merely a bank clerk, and that his orders were purely speculative. It was "buy to-day and sell to-morrow" for some time, to the common advantage of the plaintiffs and defendant; but when, with holdings of 10,000 bushels, the price of May wheat fell nearly 20 cents, the margin and profits of the defendant disappeared, and he was "short the sum now claimed by the plaintiffs."

The case was similar in nearly all respects to Beamish v. James Richardson & Sons Limited (1914), 49 S.C.R. 595, where the majority of the Supreme Court of Canada held that the transactions there in question were malum prohibitum.

In this case, the result was the same. The transactions came within the literal terms of sec. 231 of the Code, and the action failed.

Action dismissed with costs.

MULOCK, C.J.EX., IN CHAMBERS. APRIL 20TH, 1917.

*REX v. JACKSON.

Criminal Law—Vagrancy—Common Prostitute—Summary Conviction—Criminal Code, sec. 238 (i)—"Satisfactory Account of herself"—No Offence until Asked for by Peace Officer and not Given—Order Refusing to Quash Conviction—Motion for Leave to Appeal—No Right of Appeal—Rule 1287 (27th March, 1908)—Judicature Act, R.S.O. 1897 ch. 51, sec. 101a (9)—8 Edw. VII. ch. 34, sec. 1—Inapplicability to Offence against Provisions of Criminal Code.

Motion by the defendant for leave to appeal to the Appellate Division from the order of FALCONBRIDGE, C.J.K.B., in Chambers,

ante 77, refusing to quash a summary conviction of the defendant for vagrancy.

T. N. Phelan, for the prisoner.
No one opposed the motion.

MULOCK, C.J. Ex., in a written judgment, said that the defendant was convicted as a "loose, idle and disorderly person, being a common vagrant," within the meaning of the Criminal Code, sec. 238 (*i*). The defendant was arrested in an alleyway in circumstances which entitled the peace officer to ask her to account for her presence there. Without asking her for an explanation, he arrested her and brought her before the magistrate who convicted her. The magistrate did not ask her for an explanation of her presence in the alleyway. It was contended that until the peace officer asked her for an explanation and until her failure to give a satisfactory account of herself, she was guilty of no offence, and not liable to arrest. That contention was right: Regina v. Arscott (1855), 9 O.R. 541; Arscott v. Lilley (1886), 11 O.R. 153, 182.

The view that the satisfactory account contemplated by the Code is to be given to the magistrate is not shared by the learned Chief Justice of the Exchequer. Prostitutes or night walkers, like other citizens, have the right to the use of the public streets for lawful purposes. Vagrancy is a statutory offence. A prostitute, though on the public street, is not, without more, a vagrant within the meaning of the Act, and therefore is not liable to arrest until after a peace officer has asked her for a satisfactory account of herself and she has failed to give it.

Leave to appeal should be granted, if there were a right of appeal.

As to the right of appeal, counsel for the defendant relied on Rule 1287, one of the Rules made by the Judges of the Supreme Court of Judicature for Ontario on the 27th March, 1908: "An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court." The same provision is found in sec. 101*a* (9) of the Judicature Act, R.S.O. 1897 ch. 51, as added by 8 Edw. VII. ch. 34, sec. 1.

The Criminal Code not authorising an appeal such as is here sought, the Ontario Legislature cannot do so in respect of what is an offence only under the Code. The scope of Rule 1287 and of sec. 101*a* (9) is limited to cases within the jurisdiction of the Legislature of Ontario, and therefore their provisions do not apply to the present case.

Motion refused.

MIDDLETON, J., IN CHAMBERS. APRIL 21ST, 1917.

*REX v. LE CLAIR.

Ontario Temperance Act—Keeping Intoxicating Liquor for Sale—Use of Fictitious Name in Shipping—6 Geo. V. ch. 50, sec. 70 (9)—Application of—Possession of Liquor—Presumption under sec. 88—Evidence of Accused in Rebuttal not Credited by Magistrate—Question for Magistrate—Conviction—Motion to Quash.

Motion to quash a magistrate's conviction of Louis Le Clair for keeping liquor for sale contrary to the Ontario Temperance Act, 6 Geo. V. ch. 50.

G. A. Stiles, for the accused.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that a few days before Christmas the accused went to Montreal and purchased some liquor, according to his statement, for his own lawful use. There were 6 bottles of high wines, 4 bottles of gin, 3 of brandy, and 2 of wine. These were shipped to the defendant at Moose Creek in the name of J. Braillard. Braillard was a friend of the accused, living in Montreal. His connection with the transaction was not shewn, save that he received the money to pay for the goods. The accused received the box on the 20th December. On the 8th January, a search was made, and two bottles of high wines were found in the shipping box placed under the cellar stairs, covered over with some old bags. No other liquor was found, nor the empty bottles. The accused's family consists of himself, his brother, and a niece. There was no evidence as to the assistance, if any, rendered Le Clair by his friends in the consumption of the liquor.

It was said that the magistrate relied largely upon sec. 70 (9) of the Act, as raising a presumption that the liquor was intended to be sold or kept for sale, because it was consigned in "a fictitious name." Braillard was a real person, the actual consignor: but Bank of England v. Vagliano, [1891] A.C. 107, shews that when the name of a real person is used for the purpose of deception, he may be, so far as that transaction is concerned, a "fictitious person." Here Braillard's name was used for the purpose of deceit, and Le Clair, and not Braillard, was the real consignee;

the use of Braillard's name was a "fiction" intended to conceal the truth, and so his name was rightly found to be a fictitious name adopted by the accused.

But sec. 70 must be regarded as confined to the seizure of liquor in transit or in the course of deliveryat a railway station, express office, &c., and its destruction. When liquor found under the circumstances detailed in sub-secs. 1 and 2 is seized, notice is to be given, and if it is found it was intended to be illegally used it is to be destroyed; if it is found that it was not to be used in contravention of the Act it is to be handed over to the owner; and the presumption raised by the use of the "fictitious name" only arises upon the investigation under this section with reference to liquor seized in the manner described. The section has no application to prosecutions under sec. 40, or any of the general provisions of the Act.

But this did not entitle the accused to have the conviction quashed. He was undoubtedly in possession of liquor; and, under sec. 88, "unless such person" (i.e., the person having liquor in his possession) "prove that he did not commit the offence with which he is so charged he may be convicted accordingly," i.e., as charged.

The accused swore that he did not commit the offence charged. If the magistrate believed him, he had proved that he did not commit it; but, if the magistrate did not believe him, he had not proved his innocence.

The section means that possession of liquor in Ontario is *primâ facie* unlawful. Once possession is proved, a conviction may follow if the accused is unable to satisfy the magistrate that he is not guilty. This is a question for the magistrate, and his decision cannot be reviewed upon a motion to quash.

The result is that wherever there is possession of liquor there is liability to a fine unless the magistrate accepts the evidence of the accused.

There is a statutory presumption of guilt upon proof of custody of the dangerous thing, and the common law rule is reversed—the accused must *prove* his innocence to the satisfaction of the magistrate or take the consequences.

The evidence in this case pointed rather to guilt than the contrary. There were many suspicious circumstances which may have influenced the magistrate.

Motion dismissed with costs.

BRITTON, J., IN CHAMBERS. APRIL 21ST, 1917.

WHITE v. BELLEPERCHE.

Parties—Joinder of Plaintiffs and Causes of Action—Rule 66.

Appeal by the plaintiffs from an order of DROMGOLE, Local Judge at Sandwich, staying the action until the plaintiffs elect which one of them will proceed with the action, and, upon such election being made, striking out the names and claims for relief of the other plaintiffs; but without prejudice to subsequent actions.

The plaintiffs, four in number, claimed a declaration that five agreements for sale were null and void and to recover moneys paid to the defendants thereunder. The Local Judge was of opinion that the right to relief claimed by the four plaintiffs respectively did not arise out of the same transaction.

H. S. White, for the plaintiff.
J. H. Rodd, for the defendant.

BRITTON, J., in a written judgment, said that, in his opinion, Rule 66 completely covered this case and permitted what had been done in joining the plaintiffs in this action. It certainly would be a saving of time and costs if all the plaintiffs are brought to Court together. If each plaintiff had commenced suit, and if all the actions were pending, such actions should be consolidated, if consolidation were applied for. This was the converse of that. There was no good reason for not permitting the plaintiffs joining, and it would be a distinct hardship upon the plaintiffs to stay the action until they should elect to proceed as to one cause of action only and for one plaintiff only.

The appeal should be allowed, with costs here and below to the plaintiffs in any event, unless the trial Judge should otherwise order.

CLUTE, J.

APRIL 21ST, 1917.

KERR v. TOWNSEND.

THOMPSON v. TOWNSEND.

Negligence—Collision of Vehicles on Highway—Excessive and Illegal Speed—Failure to Slow down at Intersection of Highways — Contributory Negligence — Ultimate Negligence — Damages.

Actions for damages for injuries sustained by the plaintiffs by reason of a collision of the cart of the plaintiff Kerr, in which he and the plaintiff Thompson were seated, with the automobile of the defendant, at the intersection of Wilton avenue and Victoria street, in the city of Toronto, on the 20th November, 1915—the plaintiffs alleging negligence on the part of the defendant or his servant.

The actions were tried together, without a jury, at Toronto.
D. L. Sinclair, for the plaintiffs.
H. A. Newman, for the defendant.

CLUTE, J., in a written judgment, said that about 6.45 p.m. the plaintiffs were proceeding westerly along Wilton avenue, on the north side, and had reached a point about 4 or 5 feet east of the east limit of Victoria street, when the plaintiff Kerr observed two automobiles abreast coming along Victoria street on the east side, about 80 to 100 feet south of Wilton avenue. Thinking that the automobiles would slow down as they approached the crossing, Kerr drove on at a jog-trot. The chauffeur of the defendant's car said that he saw a "rig" approaching the crossing when about 80 feet away, and thought that he could "shoot" in front of the "rig" and pass it on the west side, going north. This he attempted to do, increasing his speed to from 25 to 30 miles an hour, as he said; but he was not able to avoid a collision, and struck the horse on his front part with such force that the shafts were broken off and the horse was carried or thrown a distance of more than 50 feet, the cart turning over, but remaining where it was.

The defendant contended that his car had the right of way, and the plaintiff was in fault in crossing in front of it. At the moment of collision, the horse was on the west side of the centre of Victoria street, and the waggon about east of the centre line.

The learned Judge finds that the defendant's car was travelling at an illegal speed, more than 20 miles an hour, and at the time of the collision at least 30 miles an hour; that, had the defendant's car been travelling at a legal rate of speed, after it was seen by Kerr, his horse and cart would have been across the street before the defendant's car would have reached the south side of the travelled portion of Wilton avenue; that the collision was owing to the negligence of the defendant's chauffeur, such negligence consisting of his driving at an illegal speed, and also in not slowing down, but increasing his speed, when he saw the horse and cart and attempted to "shoot" in front of it; that the plaintiff Kerr was not guilty of negligence; but, even assuming that he was, the defendant (by his chauffeur) was guilty of a subsequent negligence that caused the collision by not slowing down and by increasing his rate of speed and so continuing the illegal act of excessive speed until the collision occurred.

The plaintiff Thompson was not guilty of any contributory negligence, and was not affected by the negligence, if any, of the plaintiff Kerr.

Judgment for the plaintiff Kerr for $575 damages and costs.

Judgment for the plaintiff Thompson for $1,400 damages and costs.

MIZON v. POHORETZKY—LATCHFORD, J.—APRIL 19.

Covenant—Restraint of Trade—Sale of Business—Undertaking of Vendor not to Carry on Business in same City—Reasonable Necessity—Injunction—Damages.]—On the 22nd August, 1916, the defendant, a Ruthenian grocer, sold to the plaintiff, a fellow-countryman, the business which he had till then carried on at 463 Richmond street west, in the city of Toronto. The consideration was $575 cash. A document was signed by the vendor, roughly embodying the transaction. The defendant understood quite well the purport of the document, one term of which was thus expressed, "From this date I cannot open store in Toronto." At the time, he had no intention of again doing business in Toronto. He introduced the plaintiff to his former customers, and for a time assisted him in conducting the shop. He then sought to find a suitable location in Hamilton or St. Catharines, and, not succeeding, returned to Toronto, and on the 27th November opened a grocery at 579 King street west, within two or three

blocks of his old place of business. The receipts of the plaintiff at once began to fall off, and he sustained damage owing to the defendant's competition. This action was brought to restrain the defendant from carrying on business as he was doing and for damages. As soon as the writ of summons was served, the defendant executed a bill of sale of a half interest in his new business in favour of a relative. He obliterated his name from the sign painted on the window, but continued as before to manage the business. The action was tried without a jury at Toronto. LATCHFORD, J., in a written judgment, after setting out the facts as above, said that the only question involved seemed to be whether or not the protection agreed to be given the purchaser was reasonably necessary, having regard to the circumstances: Halsbury's Laws of England, vol. 27, p. 552. The learned Judge had no hesitation in answering in the affirmative. The damages sustained, he estimated at $300. Judgment for the plaintiff for that amount, with costs (including costs of interim injunction) on the High Court scale without set-off. The interim injunction restraining the defendant from carrying on business as he did, or in opposition to the plaintiff, should be made permanent. J. Earl Lawson, for the plaintiff. S. Factor, for the defendant.

HENRY HOPE & SONS LIMITED v. CANADA FOUNDRY CO.—LATCHFORD, J.—APRIL 20.

Contract—Supply of Manufactured Material for Building—Delay—Responsibility—Evidence—Action for Damages for Refusal to Accept—Claim of Defendants against Third Parties.]—Action for damages for refusal to accept steel sash manufactured by the plaintiffs for the defendants; and claim over by the defendants against R. Lyall & Sons Construction Company Limited, third parties. The action and the claim against the third parties were tried without a jury at Toronto. LATCHFORD, J., in a written judgment, said that for the delays which occurred between the submission of the plaintiffs' tender of the 4th April, 1913, and its formal acceptance by the defendants on the 19th September, the plaintiffs were not to blame. They even anticipated the order by communicating on the 2nd September with their head office at Birmingham, England, where, to the knowledge of the

defendants, the steel ceiling lights were to be manufactured. No time-limit was fixed by the contract between the plaintiffs and the defendants; and the testimony of the plaintiffs' manager in Canada, that he would not have undertaken the work with an obligation to complete it within a definite time, should be accepted. The lights required sash composed in part of members which had to be milled from standard bars or specially rolled. Other components also had to be specially manufactured. Bars of standard section might indeed have been used, but they would not have conformed to the designs submitted and approved, nor to the exceptionally high quality of the steel sash ordinarily made by the plaintiffs. Some little delay was not improbably occasioned in England owing to the fact that an inquiry as to whether the saddle bars were shewn in the approved drawing, as looked at from above or from below, was answered by letter instead of by cable; but any such delay was trivial and incidental to the work. In any event, it would not have resulted in the completion of the work by the 22nd November, when the plaintiffs' employees began a strike which lasted until long after the contract between the defendants and the third parties had been cancelled, on the 28th December; and the defendants had thereupon notified the plaintiffs that the contract between them and the plaintiffs was also cancelled. Had the defendants acted with reasonable promptness after receiving the order from the third parties and the tender of the plaintiffs, the work would have been completed long before the strike began. It was not open to the defendants to say that the third parties should not have cancelled their contract with the defendants. Responsibility for the inaction in the early summer of 1913 rested upon the defendants, and upon them alone, and they could not shift the burden to the third parties. It was agreed at the trial that damages, if recoverable, should be fixed at £225, plus 10 per cent., equal, at exchange $4.86, to $1,202.85. Judgment for the plaintiffs for that amount with costs, and dismissing with costs the claim of the defendants against the third parties. George Wilkie, for the plaintiffs. J. A. Paterson, K.C., for the defendants. M. K. Cowan, K.C., and A. G. Ross, for the third parties.