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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 10TH, 1920.

GUMINA v. TORONTO GENERAL HOSPITAL TRUSTEES.

Bailment—Money of Patient in Hospital—Loss of by Theft or otherwise—Evidence—Findings of Jury—Negligence—Liability of Hospital Trustees.

An appeal by the defendants from the judgment of the County Court of the County of York, in favour of the plaintiff, after trial of the action with a jury at Toronto.

The plaintiff alleged that he was received into the Toronto General Hospital as a patient suffering from severe injuries as the result of an accident, and had with him when entering the hospital the sum of $461; that, while he was at the hospital, the defendants did not keep his money safe and without diminution or loss, and the whole sum of $461 was, owing to the neglect and default of the defendants or their servants, taken and carried away from the plaintiff by some person unknown to him, and the said sum was thereby lost to the plaintiff; and he claimed the sum of $461.

The defendants denied that the plaintiff had the sum of $461 taken or carried away while in the hospital owing to any neglect or default of their own or of their servants.

The jury answered, in favour of the plaintiff, questions left to them by the trial Judge; and judgment was directed to be entered for the plaintiff for $461.

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

H. D. Gamble, K.C., for the appellants.

G. Keogh, for the plaintiff, respondent.

At the conclusion of the argument, MEREDITH, C.J.O., said that the case was an unfortunate one. If this man lost his money after he was taken to the hospital, it was a pretty hard case upon him; but the Court must administer the law.

There was no finding that the money or the clothes or the purse were ever taken charge of by anybody connected with the hospital. The jury answered the first question in the affirmative. That question was: "Are you satisfied upon the evidence that the plaintiff had the money in question in his possession when he arrived at the hospital and was taken in charge by the authorities?" That was simply a finding of his being taken in charge; there was no finding that any of his property was taken in charge. They then found, in answer to a question, that the money was lost through the negligence of the defendants. Supposing that there had been a systematic search or verification, all that would have been done would have been to determine that the appellants had or had not the money—that was all.

If there were any idea that the case could be made clearer by a new trial being directed, the Chief Justice said, he would be willing to direct a new trial, but the evidence shewed that this would not be to the interest of the respondent.

He hoped that counsel for the appellants would see fit to suggest to the proper authorities that something be done to help the respondent.

The appeal should be allowed and the action should be dismissed. Costs were not asked.

HODGINS and FERGUSON, JJ.A., agreed with the Chief Justice.

MAGEE, J.A., said that the jury had found that the plaintiff had this money when he was taken in charge in the hospital after the accident—even if they did not mean that the money was taken in charge. From the evidence, as stated by counsel, it would appear that, when lying there, he was asked as to his belongings by the registry clerk, whose duty it presumably was to keep a record of the various articles of patients and take charge of them when the owners were not able to do so themselves. The plaintiff said that he then told the clerk that one of the nurses there had his purse or money. It was upon the plaintiff's statement that he saw the purse which contained the money in the hands of the nurse that the jury had made the direct finding that he had the money; and they had, therefore, given credence to his story. Yet, notwithstanding this statement to the registry clerk, it did not appear that any inquiry was made or care taken to see that the purse or its contents were placed in safe custody—and in some way the money had disappeared. It was said that the plaintiff was treated gratuitously at the hospital; but the trustees receive large grants of public money for the purposes of the hospital, which must include taking due care of patients brought in, perhaps unconscious or suffering, and unable to take charge of

their own property. The hospital trustees cannot of course be held responsible for thefts when proper care has been taken; but, even if they are only gratuitous bailees, reasonable care should be taken of the patients' property; and, if the story of the plaintiff, whom the jury seemed to have believed, were true, there must have been even gross negligence either in a system which did not provide for due care or in the carrying out of the system. A new trial should be granted in order that more specific findings might be made. See Giblin v. McMullen (1868), L.R. 2 P.C. 317; Wiehe v. Dennis Brothers (1913), 29 Times L.R. 250; Mitchell v. Davis (1920), 37 Times L.R. 68.

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

SECOND DIVISIONAL COURT. FEBRUARY 11TH, 1921.

GOODERHAM v. CAPES.

Contract—Payments Made by Plaintiffs to Defendant—Allegation of Overpayment—Dispute as to whether Payment Made for Wages or for Services to be Performed and not Performed—Evidence—Onus—Failure of Plaintiffs' Claim.

Appeal by the plaintiffs from the judgment of ELLIOTT, Co. C.J., sitting in the County Court of the County of York, dismissing the action, which was brought to recover $606.35 alleged to have been advanced to the defendant and not repaid. The defendant sold goods for the plaintiffs on commission, and it was alleged that he had in fact been overpaid.

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

O. H. King, for the appellants.

G. W. Mason, for the defendant, respondent.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the case upon which the trial Judge based his judgment dismissing this action—Schlesinger v. Burland (1903), 42 N.Y. Misc. 206, 85 N.Y. Supp. 350—was not binding upon him, and, if it had been, should not have governed this case. It was decided upon its own facts, which, though in some respects very like those of this case, were in others quite different from it; and quite different in the controlling factor upon which the decision of that case was based. It was decided upon the meaning of the word

"advance" contained in the contract there in question, a word which no one suggested had any part in the contract here in question, and one which might convey quite a different meaning under different circumstances.

If the defendant were really overpaid, there was no reason why the plaintiffs should not recover the amount overpaid as money payable by the defendant to the plaintiffs for money received by the defendant for the use of the plaintiffs, a count which at common law was said to cover all money had by a defendant to which a plaintiff might in any way be entitled in justice and equity. If the plaintiffs' contention on this appeal was right, then the defendant received the money in question for services to be rendered by him, which afterward he would not perform.

But it was for the plaintiffs to prove that contention, else they should have failed in the action; and the learned Chief Justice was unable to find that that was done.

Taking into consideration only the testimony of the witnesses whose testimony was given credence by the trial Judge, witnesses for the plaintiffs, it did not seem to establish the plaintiffs' claim; in places it did, but in other places it seemed to go the whole way in establishing the defendant's contention that the money in question was paid to him as wages which he was to have in any event.

Upon such testimony a judgment in the plaintiffs' favour could not properly be awarded; they had failed to satisfy the onus of proof which was upon them.

For this reason, the judgment dismissing the action should be affirmed.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 7TH, 1921.

*REX v. MOONEY.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Intoxicating Liquor without License——Absence of Evidence upon which Reasonable Man could Find Defendant Guilty—Theft of Liquor from Dwelling House—Allegation of Collusion—Failure to Prove—Onus of Proof—Sec. 88 of Act—Affidavit of Magistrate—Explanation of Findings—Conviction Quashed—Costs—Protection of Magistrate.

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

Motion to quash the conviction of the defendant, by the Police Magistrate for Essex, for that the defendant did, on the 22nd November, 1920, at the village of Belle River, in the county of Essex, unlawfully sell or dispose of 150 cases of liquor contrary to the provisions of the Ontario Temperance Act. The defendant was fined $2,000 and costs, and, in default of payment of the fine, it was directed by the conviction that he should be imprisoned in the common gaol for 3 months.

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

MIDDLETON, J., in a written judgment, said that in June, 1920, the defendant purchased 150 cases of whisky for his personal use. This was taken to his dwelling house and stored by him there. There did not appear to have been anything clandestine in the purchase of this liquor. The inspector under the Act, being suspicious as to the bona fides of such a large purchase, frequently visited the defendant's premises. In November he made an inspection and found that the stock of whisky was intact except some 8 cases which had been used by the defendant. The defendant and his wife were absent from their house from the 10th to the 12th November, 1920. When they got back they found that the house had been broken into, and that the 142 remaining cases of whisky were missing. The defendant was then prosecuted for selling the liquor. The evidence for the Crown was that of the inspector, who had called at the house and seen the liquor there on many occasions. He testified that until the 142 cases disappeared there was nothing to complain of—the liquor was being consumed by Mooney personally. Mooney admitted that he had the liquor; and that was the whole of the evidence for the Crown. The defendant testified to the purchase of the liquor, his reason for buying it, and explained all the circumstances. He emphatically denied selling or violating any provision of the Act. He was corroborated by his wife, and evidence of his high character was given. No evidence was given in reply.

At the close of the case the magistrate said that he believed the evidence of the defendant's wife, but there was very little evidence on one side or the other. He added that the defendant and his wife were negligent in leaving 142 cases of liquor in their house while they were away. He postponed his decision for a few days, and then gave judgment finding the defendant guilty and imposing punishment as above.

The theory of the Crown was that the whisky was bought for the purpose of being sold, and that the supposed robbery was

in truth a mode of delivering the whisky; and it was argued that, once the custody is proved, the effect of sec. 88 of the Act is, that the accused is liable to be found guilty unless he can prove, to the satisfaction of the magistrate, that he did not commit the offence, i.e., sell the liquor.

Rightly understood, sec. 88 does no more than shift the onus. It cannot have been the intention of the Legislature to deliver the accused to the tender mercies of the magistrate, without any opportunity of redress, simply because he has done that which the law does not prohibit—possess himself of intoxicating liquor.

Reference to Rex v. McEwan (1920), ante 149, 150; Rex v. Lemaire (1920) ante 295, 296.

The magistrate's acceptance, at the conclusion of the hearing, of the evidence of the wife, implied that he accepted the evidence of the husband upon all that was material in the case, because her testimony in regard to all vital matters was a mere corroboration of her husband's. His finding that the defendant and his wife were negligent in leaving liquor unguarded appeared to negative the finding that it was left unguarded for the purpose of having it taken in pursuance of some collusive scheme.

The magistrate now sought to support his conviction by an affidavit in which he gave his reasons for convicting. He first stated that he was unable to certify to the accurateness of the finding taken down at the close of the hearing and sworn to by the stenographer, but did not say that it was inaccurate. He based his conviction upon an entire disbelief of the evidence concerning the robbery, and said that his finding was that the defendant "disposed of the liquor directly or by collusion to some other parties." He then made the incredible statement that what he said as to the evidence of the wife was that he believed it only in so far as it related to unimportant particulars. The magistrate added that the statement made by a constable that he had made no attempt to recover the liquor "indicated to my mind that he believed it had been disposed of by the accused."

The magistrate's duty was to base his finding upon his own view, honestly formed, of the effect of the evidence, and not upon any idea as to what the constable thought.

Had there been anything in the evidence justifying disbelief of the story told by the defendant, the learned Judge would have thought it his duty to refuse to quash the conviction. The decision in Rex v. Lemaire justified an order to quash, it being clear upon the whole evidence that no reasonable man could have come to the conclusion to which the magistrate had given effect, and he having, without any explanation, changed his finding and given most shifty and evasive explanations of his conduct.

The conviction should be quashed; but the magistrate should be protected and costs should not be awarded against him. This course was adopted with some reluctance—the learned Judge thought it better to give the magistrate once more the benefit of the doubt.

ORDE, J. FEBRUARY 7TH, 1921.

*RE WOODS AND ARTHUR.

Vendor and Purchaser—Agreement for Sale of Land—Refusal of Vendor's Wife to Execute Conveyance for Purpose of Barring Dower—Wife Living Apart from Husband but not in Circumstances Entitling Husband to Benefit of sec. 14 of Dower Act, R.S.O. 1914 ch. 70—Application and Effect of sub-sec. 2—Conveyance to Purchaser Subject to Outstanding Inchoate Right to Dower with Sum Set aside to Answer Possible Claim to Dower—Purchaser not Bound to Accept—Order to be Made at Purchaser's Election.

Motion by a vendor of land, under the vendors and Purchasers Act and under the Dower Act, for an order determining a question as to the dower of the wife of the vendor.

E. F. Raney, for the vendor.
L. A. Richard, for the purchaser.
D. R. Leask, for the wife of the vendor.

ORDE, J., in a written judgment, said that the vendor was faced with the problem of giving the purchaser an unincumbered title in fee simple in spite of his (the vendor's) wife's refusal to bar her dower. The wife left her husband on the 22nd October, 1920, on account of some differences with him, and had not returned. She refused to join in the conveyance for the purpose of barring her dower. The purchaser desired a conveyance free from any inchoate right of dower, and the vendor wished to give it.

The case was not one to which sec. 14 of the Dower Act, R.S.O. 1914 ch. 70, applied, for the wife had not been living apart from her husband for two years under such circumstances as entitled her to alimony, nor was she confined in a hospital for the insane. It was urged that sub-sec. 2 of sec. 14 gives power to the Judge, in cases which do not come within sub-sec. 1, to value the wife's dower; but, on a true reading of sub-sec. 2, it is merely supplementary to sub-sec. 1, and has no independent operation whatever.

Reference to Skinner v. Ainsworth (1876), 24 Gr. 148; Wilson v. Williams (1857), 3 Jur. N.S. 810; Loughead v. Stubbs (1880), 27 Gr. 387; Van Norman v. Beaupré (1856), 5 Gr. 599.

Following Skinner v. Ainsworth, the learned Judge holds that the vendor cannot be forced to accept an abatement of the purchase-money to answer the wife's claim to dower; but that the purchaser is entitled, if he desires it, to a conveyance by the husband and to have a sum set aside, out of the purchase-money, to provide for the wife's claim to dower if she should become entitled to dower by surviving the vendor, and that during their joint lives the interest upon the moneys so set apart shall be paid to the husband. There should be a reference to the Master in Ordinary to fix the amount so to be set aside, unless the parties can agree upon the amount. This will involve, of course, the acceptance by the purchaser of a conveyance of the land subject to the inchoate right of dower of the wife of the vendor—which, so far as the learned Judge can see, he has no power to bar in the existing circumstances. And, for that reason, it must be optional with the purchaser whether he will accept such a conveyance or not. The defect to which the purchaser's title would be subject by reason of the outstanding inchoate right to dower, together with the ultimate prospect of possible litigation with the dowress, would be too burdensome to inflict upon an unwilling purchaser, even with compensation or an indemnity.

An order should be made in the terms above stated if the purchaser elects to take it. Otherwise the application of the vendor should be dismissed. In either case the vendor must pay the costs both of the purchaser and of the wife.

MIDDLETON, J., IN CHAMBERS. FEBRUARY 8TH, 1921.

*J. WITKOWSKI & CO. LIMITED v. GAULT BROS. CO. LIMITED.

Practice—Writ of Summons—Special Endorsement of Claim for Price of Goods Sold—Motion to Set aside Writ—Affidavit of Defendant Shewing that Plaintiff's Real Claim is for Damages for Refusal to Accept Goods—Additional Endorsement of Separate Claim for Damages—Necessity for Statement of Claim—Rules 33, 56, 111, 112, 124—Pleading—Defence.

Appeal by the defendants from an order of the Master in Chambers dismissing a motion made by the defendants to set aside the writ of summons, upon the ground that the plaintiffs

could not sue for the price of the goods said to have been sold to the defendants, but only for damages for refusal to accept, and a claim for such damages could not be made the subject of a special endorsement.

H. S. White, for the defendants.
Erichsen Brown, for the plaintiffs.

MIDDLETON, J., in a written judgment, said that it was not open to the defendants to dictate to the plaintiffs how they should sue. The claim as endorsed on the writ of summons was sufficient in form, and all that was said was that the plaintiffs could not succeed, and that, when the facts appeared, they would find themselves out of Court with respect to the cause of action alleged, for the cause of action implied that the property in the goods sold had passed. This might well be, and it was by no means a matter of course that an amendment should be permitted.

Regarding the endorsement as a pleading, Rule 124 applied, and it could not be struck out unless it disclosed no reasonable cause of action. If an attempt were made to endorse specially a claim which *on its face* did not fall within Rule 33, a motion would be proper.

In this case the writ was not only specially endorsed with a claim for the price of goods sold, but with another claim for damages, so that a statement of claim was necessary.

Rule 56, so far as it provides for a right of election and speedy trial, and Rules 111 and 112 (1) and (3) (clause 3 is added by amendment of Dec. 24, 1913), do not enable a plaintiff whose writ is endorsed with a claim other than that which is properly specially endorsed, to escape delivery of a statement of claim covering both claims.

The affidavit filed on the motion before the Master was quite adequate as an affidavit to accompany the appearance to a specially endorsed writ, and thus there was no real object in such a motion.

A special endorsement contains in most cases an adequate statement of the nature of the plaintiff's claim, and so may well be regarded as a statement of claim. If the issue raised by the defendant is simple, the plaintiff may elect to go to trial on this affidavit, leaving the defendant to obtain leave to deliver a further defence if it is deemed necessary: Rule 56(5). When the plaintiff does not so elect, the normal and proper course is for the defendant to file a defence. Leaving the affidavit to stand as a defence (under Rule 112(3)) should be regarded as abnormal.

The motion was not only misconceived, but its success would not advance the interest of either party.

The appeal should be dismissed with costs to the plaintiff in the cause in any event.

MIDDLETON, J. FEBRUARY 8TH, 1921.

CIRA v. HUNT.

Practice—Addition of Party Defendants—Order for—Improper Provisions Inserted in Order per Incuriam—Service of Process on Added Parties Dispensed with—Affidavit of Merits of Original Defendant Treated as Affidavit of all Defendants—Order Varied without Formal Appeal—Action not at Issue—Notice of Trial Set aside.

Motion by Walter Hunt, the original defendant, to set aside a notice of trial served by the plaintiff, upon the ground that the cause was not at issue as to the added defendants.

J. J. Maclennan, for the applicant.
D. B. Goodman, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the writ of summons was specially endorsed, and an appearance was entered and an affidavit of merits filed by the applicant. An examination for discovery then took place. The plaintiff then desired to amend by adding V. and the applicant's wife as defendants. The Master in Chambers, upon the plaintiff's application, pronounced an order adding them as defendants. This was on notice to the original defendants, but without notice to the added defendants. The order, as drawn up and issued, by mistake recited the appearance of counsel for the added defendants. The order provided, reasonably enough, that the amended writ need not be served on the original defendant and that it should not be necessary for him to enter another appearance or file another affidavit. The order also contained certain other provisions which were not brought to the Master's attention and which he did not knowingly authorise, viz.: that it should not be necessary to serve the writ on the added defendants or for them to appear or file an affidavit of merits, and that the appearance entered by the applicant and his affidavit of merits should be deemed to be also the appearance and affidavit of the added defendants. The order also purported to amend the affidavit of merits by substituting a new style of cause. On this it was assumed that the cause was at issue as to the added defendants without any notice or service. The solicitor for the applicant had in writing warned the plaintiff's solicitor that he did not in any way represent the added defendants and had no authority to act for them.

Process must be served upon all parties to an action, unless service is expressly waived. The Court has no jurisdiction to

declare a cause to be at issue when it is not, nor to add a party defendant and without notice to him proceed to trial against him by ordering that an appearance which he did not authorise, and which does not purport to be an appearance for him, and which was an appearance in an action to which he was then no party, shall stand as his appearance. Much less has it any power to order that an affidavit made by some one else shall stand as his oath.

The order having been made per incuriam, it was the duty of the Judge to whose attention it was brought to set matters right without any formal appeal. The learned Judge therefore directed that the order of the Master be amended by eliminating the improper provisions referred to, leaving Rules 134 (3) and 135 to their due operation.

The notice of trial should be set aside; and the costs of the motion should be costs to the applicant in any event.

KELLY, J., IN CHAMBERS. FEBRUARY 9TH, 1921.

REX v. McDONALD.

Ontario Temperance Act—Magistrate's Order for Confiscation of Intoxicating Liquor—No Evidence or Record of Conviction to Justify Order under secs. 66, 67, 68—No Indication that Proceedings Taken under sec. 70—Order Made without Authority—Motion to Quash—Notice not Served within 30 Days from Date of Order—Sec. 102 (2) of Act (7 Geo. V. ch. 50, sec. 33)—No Jurisdiction to Hear Motion—Dismissal—Costs.

Motion by the defendant to quash an order made by the Police Magistrate for the City of Windsor, directing the confiscation of a quantity of intoxicating liquor.

T. J. Agar, for the defendant.
F. P. Brennan, for the magistrate.

KELLY, J., in a written judgment, said that the defendant was charged with unlawfully having a quantity of liquor in a place other than his private dwelling house, contrary to the provisions of the Ontario Temperance Act. The investigation of the charge took place before the Police Magistrate for Windsor. The only record of the disposal of the matter was the certificate of the magistrate, given on the 28th July, 1920, that "I did summon and cause the above named to appear before me on the above charge,

and that I did, after hearing the evidence of all the parties in the said case, order that the liquor concerned in the said prosecution, amounting to 36 cases, be confiscated."

On the 18th September, 1920, notice of a motion to quash this order was served upon the magistrate, and on the 20th September the notice was served upon the inspector who had laid the information.

There was no evidence and no record that the defendant or any other person had been convicted in respect of the liquor referred to in the information, and there was consequently no foundation, under secs. 66, 67, and 68 of the Act for the magistrate's order confiscating the liquor. Nor could sec. 70 be appealed to in support of the order. There was nothing in the transcript of the evidence, which, in the proceedings before the magistrate, was taken down in shorthand, or in the record, in any way indicating that the proceedings before the magistrate were taken under sec. 70, or that the defendant was summoned under it.

In any view of the matter, no foundation had been laid for the confiscation order.

The defendant, however, was confronted with the fact that the notice of the present motion, though bearing a date within 30 days from the date of the order complained of, was not served within 30 days, as required by sub-sec. 2 of sec. 102 of the Act. Sub-section 2 was added by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 33, and provides: "No motion to quash a conviction or order made under this Act shall be heard . . . unless notice of such motion has been *served* within 30 days from the date of the conviction or order."

Though counsel opposing the motion had not insisted on this irregularity, that could not override the requirements of sub-sec. 2 or confer jurisdiction upon the Court or Judge to hear the motion.

The motion should, therefore, be dismissed, but, in the circumstances, without costs.

The result was that, although the learned Judge could not interfere with the order, the liquor had been confiscated without any authority under the Act, and the defendant had been deprived of what had not been shewn not to have been his property.

KELLY, J. FEBRUARY 9TH, 1921.

*RE DAINES AND CITY OF TORONTO.

Municipal Corporations—Powers of Council—By-law Regulating Time of Closing of Certain Shops—Discrimination—Uncertainty—Restraint of Trade—Monopoly—Necessity for Petition—Factory Shop and Office Building Act, R.S.O. 1914 ch. 229, sec. 84 (1), (3), (7)—Amendment to sub-sec. 7 by 10 & 11 Geo. V. ch. 86, sec. 3—Effect of.

Motion for an order quashing by-law 8276 of the City of Toronto, passed on the 1st December, 1919, requiring grocery-shops and fruit-shops within the city to be closed during certain hours.

The motion was heard in the Weekly Court, Toronto.

J. M. Ferguson, for the applicant.

G. R. Geary, K.C., for the city corporation.

KELLY, J., in a written judgment, said that several grounds were relied on: that the by-law was ultra vires; that it was unreasonable, unfair, and unjust; that it discriminates between different persons dealing in the same commodities; that it is uncertain, indefinite, and ambiguous; and that it is in restraint of trade, and creates a monopoly.

It was passed under the authority of the Factory Shop and Office Building Act, R.S.O. 1914 ch. 229. The learned Judge referred to the provisions of sec. 84 of that Act, sub-secs. 1, 3, and 7.

On the 2nd June, 1919, the city council passed by-law 8140, which, after reciting sub-sec. 7, enacts that "for the purposes of the said section 84 and of any by-law passed under said section, and of any application for such by-law, grocers' shops and fruit-shops shall be and are classified together as one class of shops."

Sub-section 3 of sec. 84 was on the 4th June, 1920, amended by the Factory Shop and Office Building Act, 1920, 10 & 11 Geo. V. ch. 86, sec. 3, by adding at the end thereof: "All by-laws heretofore passed under the authority of this sub-section shall on and after the 30th day of April, 1920, cease to be effective in so far as they apply to the sale of fresh fruit, and all by-laws hereafter passed under the provisions of this sub-section shall not apply to the sale of fresh fruit."

It was contended that a petition was necessary to initiate the by-law, and that such a course is implied from sub-sec. 7. That is not the case. Sub-section 3 is permissive; it gives the council a

discretion to pass a by-law for the purposes therein set out; while sub-sec. 4 makes it compulsory upon the council to pass such a by-law when an application therefor has been presented to it, and the council is satisfied that such application is signed by the proper and requisite number of occupiers of shops within the municipality to which such application relates; and in the latter case the council is also empowered, by sub-sec. 7, to make regulations by by-law as to the form of the application and as to the evidence to be produced respecting the proportion of persons signing the same, etc. This part of sub-sec. 7 applies to the procedure under sub-sec. 4, and not to a case where the council, in the exercise of its discretion, passes a by-law under sub-sec. 3.

The learned Judge referred to the decision of Osler, J.A., in Re Reddock and City of Toronto (1900), reported but not fully in 19 P.R. 247, as supporting the view that valid objection cannot be taken to the action of the council in passing this by-law without a petition or an application.

Except as to what may be said of the amendment made to sub-sec. 3 by the Act of 1920, the applicant's other objections are met by previous decisions. It is not questioned that the Legislature had power to confer upon the municipal council authority to pass these by-laws; and, if the council has kept within the authority, the fact that the by-law attacked operates severely upon persons affected by it is not necessarily a valid ground of attack.

Reference to Re Boylan and City of Toronto (1887), 15 O.R. 13, 14; In re Smith and City of Toronto (1860), 10 U.C.C.P. 225; Regina v. Flory (1889), 17 O.R. 715; Regina v. Levy (1899), 30 O.R. 403 (distinguishing the last two cases).

Under the authority of sub-sec. 7 the council had the power to make regulations as to the classification of shops for the purposes of that section; and, by by-law 8140, it classified grocers' shops and fruit-shops together.

The applicant contended that the 1920 amendment invalidated the whole of by-law 8140. It was not contended and could not be successfully contended that it was beyond the power of the Legislature to make the amendment. The modification so made in the operation of the by-law has legislative sanction just as effectively as if the Legislature had expressly delegated to the council the power so to modify the operation and effect of the by-law and the council had done that which the Legislature expressly said it might do.

The by-law was not open to attack on the grounds set forth.

Motion dismissed with costs.

ROSE, J. FEBRUARY 9TH, 1921.

*SMITH v. GURNETT.

Vendor and Purchaser—Lease of Land Containing Option of Purchase at Price Mentioned — Written Acceptance of Option before Expiry of Lease — Tender of Money before Expiry Unnecessary—Action by Purchaser for Specific Performance of Contract Formed by Option and Acceptance—Lease of 50 Acres with Reservation of Quarter-acre—Reservation Construed as Exception—Option to Purchase "said Lot"—Uncertainty as to Meaning—Purchaser Requiring Conveyance of Whole 50 Acres—Refusal of Specific Performance—Costs.

A purchaser's action for specific performance, tried without a jury at Sarnia.

F. W. Willson, for the plaintiff.
J. R. Logan, for the defendant.

ROSE, J., in a written judgment, said that by a lease under seal, dated the 28th August, 1919, the defendant leased to the plaintiff for one year commencing on the 15th October, 1919, and ending on the 15th October, 1920, "the north-east quarter of lot 32 in the 2nd concession of the township of Dawn, containing 50 acres more or less." At the end of the lease was the following: "The lessor reserves the house and about one quarter of an acre around the house. Also the privilege of using water from the well and using the lane for getting wood from the bush. The lessee shall have the option of buying said lot at the expiration of this lease for the sum of $2,100 plus such improvements put on place since this date in cash outlay."

On the 13th October, 1920, the plaintiff's solicitor wrote the defendant a letter in which he said that the plaintiff had decided to accept the option and asked the defendant to let the writer know "how you wish the sale to be completed." This was received by the defendant on the 14th October. No tender of any money was made until after the 15th October.

It was argued that the option was not validly exercised because the money was not tendered on or before the 15th October. The learned Judge did not agree with this argument. The option did not purport to make the payment of the money a condition. There was a valid acceptance of the offer to sell or a valid exercise of the option to purchase, whichever way it was expressed: Mills v. Haywood (1877), 6 Ch. D. 196.

The chief difficulty was in determining what property the defendant offered to sell. The lease was of the north-east quarter of lot 32, but the lessor "reserved" the house and a quarter of an acre around it. The option was to buy "said lot." If it was permissible to read "reserves" as meaning "excepts"—see Co. Litt. 143 (a); Doe d. Douglas v. Lock (1835), 2 A. & E. 705, 745, 746; Halsbury's Laws of England, vol. 18, pp. 427, 428—it should be so read in this case. And, according to that, the demised premises were the 50 acres less the quarter-acre in which the house stood. If the "said lot" meant "the demised premises," the offer to sell was an offer to sell the 50 acres less the quarter-acre.

If the words "said lot" were given their grammatical meaning, they would mean "lot 32." That could not be their real meaning, and the question was, whether the real meaning could be ascertained, or whether the words were too vague to be taken as the basis of a contract which could be specifically enforced. Could it be said either that the words certainly meant "the north-east quarter of lot 32" or "the demised premises?"

The learned Judge was at first inclined to think that resort might be had to the rule that, "as between the grantor and the grantee, if the words are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee;" but that rule appeared not to be applicable. He referred to a number of authorities, and particularly to Barthel v. Scotten (1895), 24 Can. S.C.R. 367.

The case with which the Supreme Court of Canada had to deal was that of a grant, whereas what was in question here was an agreement to sell; but that distinction did not help the plaintiff; for the reason for applying the rule in the case of a grant seems to be at least as strong as the reason for applying it in a case in which the question is whether there is a contract definite enough to be specifically enforced.

The plaintiff here did not desire to have specific performance unless he was entitled to a conveyance of the whole 50 acres, and he could not have that conveyance unless he could shew a contract clearly entitling him to it. In the learned Judge's opinion, the plaintiff did not shew such a contract, and his action failed.

While the objection to which effect was given was covered by the general denial in para. 3 of the statement of defence, that there was an agreement for the sale of the lands described in the lease, it was not specifically pleaded; and, at the trial, counsel for the defendant, while not formally waiving it, said that, in his opinion, the words of the option would cover the whole 50 acres. There should be no order as to costs.

Action dismissed without costs.

ROSE, J., IN CHAMBERS. FEBRUARY 10TH, 1921.

REX v. OLLMAN.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Evidence—Failure to Shew that Liquor was Owned by or under Control of Accused—Occupant of Premises—"Actual Offender"—Sec. 84 (1), (2)—Suspicion.

Motion to quash a conviction of the defendant, made by the Police Magistrate for the City of Hamilton, on the 26th January, 1921, for an offence against the Ontario Temperance Act.

J. L. Counsell, for the defendant.
F. P. Brennan, for the magistrate.

ROSE, J., in a written judgment, said that Ollman and Sawyer and Henderson were accused, each in a separate information, of having or keeping intoxicating liquor for the purpose of barter or sale, at a certain house in Hamilton, on the 22nd January, 1921. They were tried together, Henderson was acquitted, Sawyer pleaded guilty, and was convicted, Ollman pleaded "not guilty," but was also convicted.

There was evidence that Ollman had rented the house for the months of December and January for Henderson; but that, when Henderson found that he could not have it for so long a period, he had decided not to take it at all, and that Ollman had let Sawyer into possession. There was also evidence that on the day named in the information there was beer in the house, and that there were persons drinking and playing cards in the house, and that some money passed; so that it was quite fair to take it as established that the beer was there for sale. There was, however, no evidence that Ollman was in the house on that day or for some days previously. He lived next door, and was found outside when the policemen visited the premises; but, except for such inference as could be drawn from the fact that he had in the first place rented the house from the owner, there was no evidence that he had any possession or control over the beer. There was evidence that a week before, just after he had let Sawyer into possession, he had had beer there, which he had said was for his friends; but there was no evidence at all that the beer in respect of which he was prosecuted was his or was under his control. It was really unfair that he and Sawyer should be tried together, for the greater portion of the evidence consisted of an account by

the constables of statements made by Sawyer which were not made in Ollman's presence, and were, of course, no evidence against him.

If Sawyer was "the actual offender," and Ollman's guilt was to be taken as established by reason of the fact that he was the occupant (sec. 84, sub-sec. 1), the conviction of Sawyer was a bar to the conviction of Ollman (sub-sec. 2, added by the amending Act of 1917, 7 Geo. V. ch. 50, sec. 30). Therefore, if the conviction could be supported, it must be upon the ground that Ollman and Sawyer were acting together, and that each had the beer; and the learned Judge did not think there was any evidence at all upon which the magistrate was justified in finding that they were so acting together. Sawyer's statements were no evidence against Ollman, and Sawyer's latest statement, which was that he was the tenant and owned the beer, was no evidence in Ollman's favour; and it did not follow from the fact that Sawyer's last statement and his plea of "guilty" were accepted that it was established in Ollman's favour that Ollman was not the tenant and had no ownership in the beer. But the question was not whether Ollman proved that he was innocent; but whether there was any proof that he was guilty, and there was no proof of his guilt. No doubt there was suspicion, but magistrates cannot convict upon suspicion under this Act any more than under any other Act.

The conviction should be quashed, with the usual order for the protection of the magistrate and officers.

MASTEN, J. FEBRUARY 10TH, 1921.

GIBSON v. TORONTO R.W. CO.

Negligence—Nonrepair of Sidewalk in Amusement Park—Injury to Boy—Liability of Owner of Park—Occupation for Temporary Period by Club on Profit-sharing Basis—Injured Boy a Non-paying Licensee Coming to Park for his own Pleasure—Action for Damages—Nonsuit.

Action for damages for injury suffered by the plaintiff owing to the negligence of the defendants, as he alleged.

The action was tried with a jury at a Toronto sittings.

T. N. Phelan, for the plaintiff.

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

MASTEN, J., in a written judgment, said that the plaintiff alleged that the defendants were occupiers in control and management of an amusement park and athletic field; that he went to this park as an invitee of the defendants; that the sidewalk adjoining the grand-stand was defective in that one of its planks had become rotted and broken away, thus developing a hole in which the plaintiff tripped and fell and broke his arm.

At the close of the plaintiff's case, the defendants moved for a nonsuit, and renewed it after evidence had been given for them and the case had gone to the jury.

Considering the motion, the learned Judge said that the defendants and the St. Simon's Athletic Club were, for the afternoon on which the plaintiff was injured, joint adventurers—that it was not shewn by the evidence that the defendants gave up occupation of the premises. The defendants were operating the park as a permanent enterprise and for gain, as owners of the park and carriers of passengers to it. It was to the advantage of the defendants to get as many persons as possible to the park because they thus secured 30 per cent. of the entrance fees and the street railway fares of many of the spectators. The evidence established a license to the club to use the park on the afternoon referred to for their lacrosse match, that the club had a right to admit whom it chose, and a right to 70 per cent. of the gate-money, but no other rights. The evidence established a duty in respect of the fitness and safety of the premises on the part of the defendants to an invitee or licensee with an interest coming into and using the park in accordance with the general purpose for which the defendants maintained, operated, and managed the park; and the defendants were not absolved from that duty by the temporary arrangement with the club.

Nevertheless, the motion for a nonsuit must succeed, for the plaintiff paid no entrance-fee upon entering the park. He was a bare licensee, and had no right of recovery, in the circumstances shewn by the evidence.

Reference to Hayward v. Drury Lane Theatre Limited, [1917] 2 K.B. 899, 914; Pollock on Torts, 11th ed., p. 531; Latham v. R. Johnson & Nephew Limited, [1913] 1 K.B. 398, 404, 405, 406.

The plaintiff was a non-paying licensee who came to the premises merely for his own pleasure.

If the defendants had repaired the sidewalk with planks known to be rotten and dangerous, they might have been liable to him, but not where the only fault was nonrepair of a sidewalk which had in the ordinary course of time developed a hole through rot.

The defendants' motion should be granted and the action should be dismissed, with costs if asked.

KELLY, J., IN CHAMBERS. FEBRUARY 11TH, 1921.

BRYANS v. PETERSON.

Practice—Costs of Order for Commission and of Commission Reserved to be Disposed of by Trial Judge — By Inadvertence Costs not Disposed of at Trial—Application to Trial Judge after Judgment and Appeal therefrom—Jurisdiction—Rule 521—Disposition of Costs—Materiality of Commission-evidence.

Motion by the defendants for an order disposing of the costs of an order for a commission to take evidence abroad and of the costs of executing the commission.

G. R. Munnoch, for the defendants.
Grayson Smith, for the plaintiffs.

KELLY, J., in a written judgment, said that at the trial of this action, in June, 1919, the evidence of David B. Tees, taken on commission in Fredericton, N.B., was put in by the defendants. The action was dismissed with costs and an appeal to the Appellate Division was also dismissed.

It appeared that the order for the issue of the commission reserved the costs of the order and the commission to be disposed of by the trial Judge. The action was tried by Kelly, J. Through oversight or inadvertence, these costs were not disposed of at the trial.

The plaintiffs' counsel objected (1) that it was now too late to make an order for their payment, and (2) that, if the matter might still be dealt with, these costs should not be allowed to the defendants, contending that the commission-evidence was procured unnecessarily and did not in any way support the defence. This latter objection could not prevail. The commission-evidence was material to a proper understanding of the case.

The important feature of the application was that until now no order for payment of these costs had been made nor had they been otherwise disposed of. That distinguished the present from a case where the matter in dispute has already been dealt with either by the Court of first instance or on appeal. The power to dispose of what was thus referred to the trial Judge has not so far been exercised; it still existed.

In Fritz v. Hobson (1880), 14 Ch.D. 542, an application similar to the present one was granted on several grounds, one being that an error in not bringing to the attention of the trial Judge the interim injunction, which had been adjourned to the trial, arose from the accidental omission of counsel. The application

was made afterwards to the Judge who had presided at the trial, and he held that he had jurisdiction to grant the application under Order 41 (A), which is substantially the same as our Rule 521. Whether the reference of the costs now in question to the trial Judge was brought to the attention of the learned Judge at the time was immaterial. The fact remained that the costs had not so far been disposed of.

Reference also to Hardy v. Pickard (1888), 12 P.R. 428.

The application should be granted, and the defendants should be allowed the costs which were reserved by the order granting the commission, and taxation thereof should be directed.

KELLY, J. FEBRUARY 11TH, 1921.

McQUILLAN v. RYAN.

Negligence—Fall of High Wall of Building Left Standing after Fire —Injury to Adjoining Low Building—Lease—Duty to Repair—Party Wall—Fire Insurance—Limitations Act—Act of God—Violent Wind not Exclusive Cause of Fall of Wall—Liability—Damages—Expenditure for Replacement—Interest.

Action for damages for the destruction of the plaintiff's building by the collapse of a wall of the adjoining building, caused, as the plaintiff alleged, by the negligence of George B. Ryan, deceased, the defendants' testator.

The action was tried without a jury at Guelph.

H. Howitt, for the plaintiff.

W. S. Middleboro, K.C., for the defendants.

KELLY, J., in a written judgment, said that the plaintiff and the defendants' testator were the owners of adjoining lots fronting on a street in Guelph, upon each of which was erected a store-building, the buildings being separated only by a dividing wall, which was based half upon the property of each; that Ryan's building extended back 150 feet from the street, and was 3 storeys in height throughout its depth, while the plaintiff's building extended 50 feet from the street at the same height of 3 storeys and then 40 feet more at the height of one storey only; that on the 27th January, 1918, Ryan's building was destroyed by fire, the walls only remaining; and that on the 26th February, 1918, during a wind-storm, part of the southerly wall of the burnt building fell towards the south upon the one-storey portion of the plaintiff's building and crushed it to the ground. The negligence

alleged was the faulty construction of the wall and faulty binding and support, the narrowing of a portion of the wall after its erection, and permitting the wall to remain standing in a dangerous and insecure condition after the fire, without support. At the time of the fire Ryan was the plaintiff's tenant in possession of the plaintiff's building, and continued such possession after the fire. The plaintiff was not, after the fire, notified or called upon to repair or rebuild. There was nothing in the lease casting upon him, in the events which had happened, the obligation to do so; and he did not otherwise assume that obligation.

The defendants alleged that the wall which fell was a party wall, and that liability to maintain and repair it devolved upon the plaintiff, from which he was not relieved by anything that had happened between the adjoining owners down to the time of its collapse. The learned Judge said that a wall may be a party wall as to part of its length or part of its height and otherwise as to the remainder of it. If the part of the wall which fell was then or at any time a party wall, it was such only to the height of one storey. Above that it was built by Ryan independently and without any agreement or understanding or implication that the portion so added should be a party wall. That defence failed.

The defence that the plaintiff had been reimbursed by fire insurance also failed. The small sum he so received had no relation to the falling of the wall, but was for damage to other premises of his from the fire in January.

So, too, the defence of the Limitations Act failed.

The defence most seriously relied on was that the fall of the wall was caused by the "act of God" and not by any negligence of Ryan. But the occurrence was not due directly and exclusively to the violence of the wind. The inference from the evidence was, that the weakened and unprotected condition of the wall exposed it to the danger of collapse on the application of even a moderate degree of force. It fell during a violent storm, but not necessarily because of that violence.

Reference to Nugent v. Smith (1875), 1 C.P.D. 19, 34.

On the question of liability the learned Judge found against the defendants.

As to the damages, the plaintiff's expenditure for replacement was $2,086.70, to which should be added interest thereon from the time or times at which it was paid out. The dates of payment were not in evidence; and, if the parties could not agree upon them, the learned Judge might be spoken to and evidence might be given thereon.