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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

*BASIL v. SPRATT.

Conspiracy—Assault—Expulsion from Religious Society—Actionable Wrongs—Liability of Several Defendants—Roman Catholic Episcopal Corporation—Corporation Sole—Incorporating Act, 7 & 8 Vict. (Can.) ch. 82, sec. 6—Liability of Benevolent Society Incorporated under Ontario Act—Personal Liability of Archbishop—Participation in Wrongful Acts—Liability of Physician—Findings of Jury—Admission of Evidence of Acts Committed after Assault—Examination for Discovery—Rule 330—Damages—Special Jury—Separate Assessments against Defendants—Appeal—Costs.

Appeal by certain of the defendants from the judgment of BRITTON, J., 13 O.W.N. 249, upon the findings of the jury at the trial of this action.

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

D. L. McCarthy, K.C., and T. J. Rigney, for the appellants.

W. N. Tilley, K.C., and A. B. Cunningham, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the action was brought to recover damages from the defendants—M. J. Spratt, Archbishop of Kingston, the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, the Sisters of Charity of the House of Providence, Daniel Phelan, John Naylor, Mary Vincent, Mary Magdalene, and Mary Alice.

The plaintiff alleged that she was a member of the society of the Sisters of Charity of the House of Providence; that the defend-

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

ants or some of them conspired together to deprive her of her status as a member and to compel her to leave the society; that, in pursuance of and in carrying out the conspiracy, she was assaulted with the view of taking her by force to a lunatic asylum in Montreal, and was by the conduct of the defendants compelled to leave the house of the society in which she lived, and as a member of the society was entitled to live; and that the result had been that she had been deprived of her rights as a member of the society, including her right to be maintained and supported during her life. The questions put to the jury and the answers were as follows:—

1. For what purpose was the plaintiff being taken from Kingston to Montreal? A. To confine her in an insane asylum.

2. Which, if any, of the defendants authorised the removal? A. M. J. Spratt and the Roman Catholic Episcopal Corporation of the Diocese of Kingston, Mary Francis Regis, and the Sisters of Charity of the House of Providence.

3. Was there any justification or excuse for such removal? A. None.

4. If so, what was the justification or excuse? A. None.

5. Was the defendant Phelan in any way responsible for the attempted removal of the plaintiff. A. He was.

6. If so, in what way did he make himself responsible? A. As an accomplice, by using his alleged authority and arranging with the Chief of Police to have Constable Naylon on hand when the time came for the removal of the plaintiff to the asylum.

7. Did the defendant Naylon, at the time he entered the plaintiff's room, have reasonable ground for believing that the plaintiff was insane? A. Yes.

8. If so, did he later know, or should he have known, that she was not insane, and, if so, when? A. After she was taken down to the room on the promise of being allowed to see Father Mea.

9. How do you assess the damages? A .On the defendants as named in clause 2 for $20,000; on the defendant Dr. Phelan $4,000; Policeman Naylon nil.

The trial Judge thereupon dismissed the action as against the defendants Naylon, Mary Vincent, Mary Magdalene, and Mary Alice; and directed judgment to be entered for the plaintiff against the other defendants for the amounts assessed against them respectively, with costs.

The defendants against whom judgment was directed to be entered were the appellants.

The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada was created by 8 Vict. ch. 82. The Act created a corporation for the purpose of exercising the powers

conferred by the Act; and sec. 6 was designed to prevent the vesting in the corporation of any spiritual jurisdiction or ecclesiastical rights—such jurisdiction and rights are not to be considered as conferred upon the Bishop of Kingston and his successors in the corporate status which the Act gives them. The action as against the corporation could not be maintained and should have been dismissed.

The society called "The Sisters of Charity of the House of Providence at Kingston" was incorporated under the authority of 37 Vict. ch. 34 (O.), an Act respecting Benevolent Provident and other Societies. The society is practically a self-governing one; by the constitution, the Bishop of Kingston has control over it in respect of three matters only; the constitution provides that the society is to be governed by a Superior-General, assisted by a council of members, and there is no warrant for subjecting the members of this Ontario corporation to the canon law of the Church of Rome or to the authority of the Bishop of Kingston, except in so far as authority is conferred on him by the constitution. The constitution makes no provision for disciplining or expelling a member; and, if any such power exists, it must be found in the ordinary law of the land, and not in the canon law. There was no direct evidence of any express authority given by the society to the defendant Regis to do what she did. A resolution of the council declared that it was necessary to remove the plaintiff to Montreal; but this did not confer or assume to confer upon the defendant Regis authority to remove the plaintiff by force; if it authorised anything to be done, it was to be done by lawful means. Assuming that the society would be liable if it had authorised what was done, no express authority was given, and the law would not imply against the society that it gave authority to its officers to do that which itself had no right to do. See Ormiston v. Great Western R.W.Co., [1917] 1 K.B. 598, 601, 602. The case against the society failed, and as to it the action should have been dismissed.

There was evidence which, if believed, warranted the jury in coming to the conclusion that the defendants Spratt and Phelan were active participants in the wrongful act of the defendant Regis in assaulting the plaintiff with a view to taking her against her will to Montreal.

The admission of evidence of acts committed after the assault upon the plaintiff was not improper; it was revelant because she was entitled to shew what happened in order to explain why she remained, after the assault, in a house of the society, and because she was entitled to shew that the assault was but one act in carrying out a scheme to deprive her of her status and rights as a member of the society, and to establish malice on the part of the defend-

ants, and to meet the contention that what was done was for the plaintiff's own good.

The contention that the ruling of the trial Judge as to the admission in evidence of the examination for discovery of the defendant Spratt was erroneous, was not well-founded. Under Rule 330, a part of the examination having been read by counsel for the plaintiff, it was not competent for counsel for the defendants to insist that the whole examination, so far as it related to a conversation the defendant Spratt had with Dr. Gibson, should be read—counsel should have pointed out the parts which he desired to have read.

The damages were large; but, if the jury agreed with the contention of the plaintiff that the defendants were not acting in good faith, the damages were not so large as to warrant the Court in interfering. The jury was a special jury selected by the parties.

No objection was made to the damages being separately assessed. If there had been an objection, it should not have prevailed: McLean v. Vokes (1914), 7 O.W.N. 490. The dictum of Lord Atkinson in London Association for Protection of Trade v. Greenlands Limited, [1916] 2 A.C. 15, at pp. 32 and 33, dissented from.

The appeal of the two defendant corporations should be allowed without costs and the action as against them be dismissed without costs; and the appeals of the defendants Spratt, Regis, and Phelan should be dismissed with costs.

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

FERGUSON, J. A., for reasons stated in writing, was of opinion that the appeals of all the appealing defendants should be dismissed with costs.

Judgment as stated by the Chief Justice.

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

*PETERSON LAKE SILVER COBALT MINING CO. LIMITED v. DOMINION REDUCTION CO. LIMITED.

Land—Deposit on, of Tailings, by Neighbour, with Permission of Owner—Property in Tailings—Evidence—License—Conduct of Parties.

Appeal by the defendant company from the judgment of MIDDLETON, J., 13 O.W.N. 222, 41 O.L.R. 182.

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

Wallace Nesbitt, K.C., and R. McKay, K.C., for the appellant company.

I. F. Hellmuth, K.C., and McGregor Young, K.C., for the plaintiff company, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said, after stating the facts, that, in his opinion, the tailings in question when discharged into the lake ceased to be the property of the appellant company—that is, the tailings discharged before the 3rd July, 1915, when an arrangement was made that the appellant company should have the right to remove them.

The tailings had no commercial value, and it was questionable whether they ever would have any such value.

It was quite consistent with the testimony of the appellant company's witnesses that it was not in the contemplation of the parties or either of them that the tailings which were discharged into the lake should be reclaimed by the appellant company, but that the true position was that the appellant company was finally getting rid of them, though it was thought that in the future tailings might have some commercial value, and was contemplated that, when that time should arrive, persons who had tailings produced in the course of their operations would dispose of them otherwise.

The arrangement that was proposed in 1917 afforded reasonable ground for concluding that it was only by draining the lake that it would be commercially practicable to remove the tailings, except those on, above, or very little below the surface of the lake.

If, as the appellant company contended, there was always a right to remove the tailings from the lake, it must follow that there was a reciprocal obligation upon it to remove them when required by the respondent company to do so. The license that was given was determinable on notice by the respondent company; and it

was not conceivable that any one dreamed that, if the license should be determined when tailings that had been discharged into the lake lay at the bottom of it, with many feet of water over them, the appellant company or its predecessor in title should be bound to remove them.

It was not until the 14th May, 1915, that the appellant company sought to obtain the right to remove the tailings from the lake; and, when agreeing that the appellant company should have that right, the respondent company stipulated that it should have the right "to deflect the point of deposit." The fact that the permission asked for was in respect of future deposits, and was not asked for as to the tailings then in the lake, was cogent evidence that the view of the appellant company then was that it did not own those tailings.

It was also a cogent circumstance, making against the contention of the appellant company, that when the assignee of the Nova Scotia company sold its property to David M. Steindler, the appellant company's predecessor in title, the tailings then in the lake were not treated as an asset of the company or transferred to him, and that no suggestion appeared to have been made by Steindler, who knew that the tailings were in the lake and the circumstances in which they had been discharged into it, that they belonged to the company, nor any complaint because they were not being transferred to him.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

*ROTH v. SOUTH EASTHOPE FARMERS MUTUAL FIRE INSURANCE CO.

Insurance—Indemnity against Loss or Damage by Fire or Lightning—Building Partly Torn by Lightning Stroke without Fire—Further Injury by Wind Following almost Immediately—Evidence—Liability of Insurers for Damage Caused by Wind—Proximate Cause—Finding of Fact of Trial Judge—Appeal—Contents of Building—Neglect to Put in Safe Place—Damage by Rain—Variation of Judgment—Costs.

Appeal by the defendant company from the judgment of MIDDLETON, J., 13 O.W.N. 208, 41 O.L.R. 52.

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

I. F. Hellmuth, K.C., and W. T. McMullen, for the appellant company.

Glyn Osler, for the plaintiff, respondent.

MEREDITH, C.J.O., read the judgment of the Court. He said that the respondent's case was that his barn was struck by lightning "by reason and in consequence of which" it was "destroyed and damaged" to the extent of $1,689, and the produce in it was "destroyed and damaged" to the extent of $230.

The appellant company's contention was that the barn was not struck by lightning, but that it was damaged by a violent windstorm; and, as to the claim for damage to the produce, that, even if the injury to the barn was caused by lightning, the damage was not the result of it, but was occasioned by the fault of the respondent and his failure "to use all ordinary means and precautions to save and preserve the property . . . insured at and after the fire," which by the policy it was made a condition that he should do.

The evidence established to the satisfaction of the trial Judge that the barn was struck by lightning and was thereby damaged; and he found "that the injury caused by the lightning was throughout an operating and continuing cause and a proximate cause" within the rule which he deduced from the cases to which he referred.

In an earlier part of his reasons for judgment the trial Judge had said, "Whether the wind would have damaged the barn if it had not previously been opened by the lightning, no one can say." There was no inconsistency. It may well be impossible to say whether, if the barn had been uninjured, it would have been blown down by the wind, and at the same time it may be a reasonable inference from the facts proved that the lightning was the proximate cause of the damage which was done by the wind.

As to the damages for injury to the barn, the judgment should be affirmed.

The grain was threshed about a week after the injury to the barn, the threshed grain was put in the granary, and was there injured by the rain. The lightning was not the proximate cause of this loss. The grain might and should have been put in a place of safety. The amount allowed on this head of the respondent's claim was $100, and the judgment should be varied by reducing by $100 the damages awarded.

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

Judgment below varied.

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

*McGLYNN v. HASTIE.

Bills Notes and Cheques—Effect of Acceptance by Seller from Buyer of Cheque of Third Person in Exchange for Goods—Barter of Cheque with all Risks—Dishonour of Cheque—Action against Buyer for Price of Goods.

Appeal by the defendant from the judgment of the County Court of the County of Huron in favour of the plaintiff in an action for $200.10, the price of 6 hogs sold and delivered to the defendant and the cost of protest of the dishonoured cheque given in payment for the hogs.

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

Charles Garrow, for the appellant.

William Proudfoot, K.C., for the plaintiff, respondent.

MACLAREN, J.A., read a judgment in which he said that the defendant alleged that he had bought the hogs as the agent of one Munro, and had so informed the plaintiff, and that the plaintiff accepted Munro's cheque in payment.

The trial Judge believed the testimony of the plaintiff and found that Munro's name was not mentioned on the evening of the 17th October, 1917, when the defendant called at the plaintiff's house and asked him if he had any hogs for sale. That finding should be accepted.

The trial Judge further held that the sale was made on the evening of the 17th October; but that was clearly wrong. The sale was not made until the morning of the 18th.

When the defendant, on the 18th, gave the plaintiff Munro's cheque in payment for the hogs, the plaintiff noticed that the cheque was signed by Munro, and not by the defendant; and the plaintiff went away without saying anything about it.

Where a bill, note, or cheque is taken for or on account of a pre-existing debt, the presumption is that it is only conditional payment, and, if it is dishonoured, the debt revives; but if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill with all its risks: Fydell v. Clark (1796), 1 Esp. 447, 448; Camidge v. Allenby (1827), 6 B. & C. 373, 381; Byles on Bills, 17th ed., p. 182; Roscoe's Nisi Prius Evidence, 18th ed., p. 699.

The appeal should be allowed and the action dismissed.

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

HODGINS, J.A., dissented, reading a judgment in which he made an elaborate review of the authorities, and said that the question was one of intention, and therefore of fact, as pointed out in Chalmers on Bills and Notes, 7th ed., p. 342. The learned Judge could not bring himself to regard the transaction as a barter or as the purchase of a negotiable security.

MAGEE, J.A., agreed with HODGINS, J.A.

Appeal allowed (MAGEE *and* HODGINS, JJ.A., *dissenting.*)

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

*UNION BANK OF CANADA v. MAKEPEACE.

Guaranty—Account of Customer with Bank—Liability of Guarantor—Assignment for Benefit of Creditors under Assignments and Preferences Act—Bank Holding Securities—Valuation of, at Amount of Claim—Release of Equity of Redemption by Assignee—Sale of Equity—Terms of Sale—Intention of Parties—Conveyance Accepted in Satisfaction—Release of Surety—Interference with Surety's Rights.

Appeals by the defendant from the order of SUTHERLAND, J., in the Weekly Court, 12 O.W.N. 397, dismissing the defendant's appeal from the report of the Master in Ordinary, and from the judgment of MIDDLETON, J., 13 O.W.N. 74, 40 O.L.R. 368, upon the trial of an issue, finding that the defendant had not been discharged from liability as surety.

The appeals were heard by MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ. A.

W. S. MacBrayne, for the appellant.

W. N. Tilley, K.C., and D. C. Ross, for the plaintiff bank, respondent.

FERGUSON, J.A., read a judgment in which he considered first the appeal from the judgment of Middleton, J., who had determined in favour of the plaintiffs an issue as to whether or not the defendant had been discharged from her liability to the plaintiffs upon a written guaranty given to secure the payment to the plain-

tiffs of a part of the indebtedness of the Specialty Manufacturing Company. In addition to the defendant's guaranty, the plaintiffs held as collateral security for the indebtedness of the Specialty company: (1) a mortgage on the company's land; (2) a mortgage on the plant, machinery, etc., of the company; (3) an assignment of book-debts. The company, on the 9th April, 1915, assigned to one Thompson for the benefit of creditors; whereupon the plaintiffs proved their claim and valued their securities at the amount of the claim as filed. Subsequently, the assignee conveyed all his right, title, and interest in the mortgaged property to the plaintiffs, and received from the plaintiffs therefor $300 and a release of the book-debts.

The defendant contended that the plaintiffs must be taken to have accepted the conveyances in satisfaction of their claim against the company, and to have thus determined her liability.

In the opinion of the learned Justice of Appeal, the rights of the parties must be ascertained on the basis that, at the time the conveyances were made and accepted, there had been no election under the Assignments and Preferences Act, and that the conveyances were executed and delivered to complete an actual sale of the equity of redemption. And, upon the evidence as to the terms of sale and the intentions of the parties, the conveyances were given and accepted in satisfaction of the plaintiffs' claim against the company, and the defendant was thereby freed from liability.

In view of the conclusion reached upon the appeal from the judgment of Middleton, J., it was not necessary to consider the accounts or to deal with the questions raised on the reference or in the appeal from the order of Sutherland, J.

Both appeals should be allowed, and judgment on further directions should be entered declaring that the defendant is not indebted. The defendant should have the costs of both appeals and of the proceedings subsequent to the judgment of a Divisional Court directing the reference to take accounts.

MACLAREN, J. A., agreed with FERGUSON, J. A.

MAGEE, J. A., agreed that the appeals should be allowed. He said that there was not, on the agreement for the release of the equity of redemption, any reservation of the plaintiffs' rights against the surety; and, in giving up their claim, the plaintiffs released any claim the surety might have, and so interfered with the surety's rights.

HODGINS, J. A., read a dissenting judgment. He was of opinion that both appeals should be dismissed.

Appeals allowed (HODGINS, J. A., *dissenting*.)

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

MANN v. GRAY.

Vendor and Purchaser—Agreement for Sale of Land—Purchase-money Payable by Instalments—Title to be Made after Deferred Payments Completed—Default by Purchaser—Possession Resumed by Vendor—Intention to Terminate Agreement not Shewn—Action by Purchaser to Recover Part of Purchase-money Paid—Counterclaim for Specific Performance—Claim for Conversion — Judgment — Account — Deductions — Damages — Interest — Appeal — Costs.

By agreement under seal, dated the 25th April, 1915, the defendant Margaret Gray agreed to sell and Alexander Mann to purchase a farm in the township of Paipoonge for $3,400, payable $1,000 in cash, $1,400 at the end of a year, and $1,000 in 5 consecutive yearly payments of $200 each, together with interest. Alexander Mann was, as expressed in the agreement, acting as trustee for himself, his two brothers and his sister. The agreement provided that the purchaser should pay the taxes, and that before the final payment the vendor should shew a clear and unincumbered title. It was also stipulated that the purchaser might occupy the land until default in payment; that time was to be of the essence of the agreement; and that, unless the payments were punctually made, the agreement should be null and void, and the vendor at liberty to resell. The purchaser paid $1,000 and went into possession. Subsequently he and one of his brothers went overseas, leaving their father, the plaintiff, and his son John, in possession, and they remained in possession until the 11th May, 1917, when the vendor wrote the father (the plaintiff) a letter, in which she demanded from him, as agent for his children, the interest and taxes to the 21st April, 1917, adding that she was "willing to hold the place until the boys return and to assume the interest and taxes from date of possession." On the date of the letter, the vendor, through her husband, entered into possession. The plaintiff did not re-enter, and nothing more was done until the return from overseas of Alexander Mann's brother—Alexander himself having been killed.

When he made the agreement, Alexander Mann knew that there was a mortgage upon the land and that some of the taxes had not been paid. Before the vendor, in May, 1917, repossessed, both the mortgagee and the municipality had taken proceedings to realise the arrears of taxes and the mortgage-moneys. The mortgage sale proceedings were abortive, and the tax sale proceedings terminated by redemption.

In April, 1918, the father, having obtained letters of administration of the estate of Alexander Mann, brought this action against the vendor and her husband to recover the $1,000 paid and interest, the cost of stumping and clearing part of the land, loss of profit on hay, and damages for conversion of some lumber and a shack that had been built on the premises—alleging that the vendor had, by reason of her default in respect of the mortgage-moneys and taxes, relieved the purchaser of his obligation to complete the purchase. The defendant Margaret Gray counterclaimed for specific performance of the agreement.

The action was brought in the Supreme Court of Ontario. The action and counterclaim were tried by O'LEARY, Co. C.J., sitting for and at the request of LENNOX, J., at Port Arthur.

The trial Judge was of opinion that the vendor, when she went into possession in May, 1917, elected that the agreement of purchase and sale should be deemed null and void; and he gave judgment for the plaintiff for the return of the $1,000 as money paid without consideration or on failure of consideration, for interest on the $1,000, and for $160 for the lumber converted by the defendants and $78 for the work and material expended in the erection of the shack, which was torn down or destroyed.

The defendants appealed from this judgment.

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

J. H. Moss, K.C., for the appellants.

Hamilton Cassels, K.C., for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said, after setting out the facts and reviewing the evidence, that he was clearly of opinion that the vendor and her husband never intended to terminate the agreement; that none of their acts, declarations, or statements amounted to a termination or a declaration of intention to that effect; and, consequently, that the plaintiff's claim for recovery of the part payment failed.

The plaintiff was entitled, however, to recover for conversion of the lumber, and the trial Judge's judgment as to that should stand.

The defendant Margaret Gray was entitled to succeed on her counterclaim, and there should be judgment for specific performance of the agreement, with a reference to the Local Master for that purpose. In taking the accounts, the plaintiff should have credit for the damages awarded by the trial Judge and also for $100 which the vendor, in September, 1915, agreed to credit on account of the purchase-money.

If the vendor should be unable to make title in accordance with the terms of the agreement, the plaintiff should recover the moneys paid on account of the purchase, with interest, and the damages allowed by the trial Judge.

The plaintiff should have the general costs of the action referable to the issue as to conversion; such costs to be taxed on the proper scale without set-off. The costs of the reference and further directions should be reserved until after report. There should be no costs of the appeal.

Appeal allowed in part.

FIRST DIVISIONAL COURT. DECEMBER 6TH, 1918.

MEADE v. GEORGE McLAGAN FURNITURE CO.

Principal and Agent—Agent's Commission on Sale of Goods—Travelling Salesman — Agency Agreement — Construction — Commission on Orders from Persons in Salesman's Territory—Order from Person from whom Previous Order Obtained by Salesman—Evidence—Findings of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of MIDDLETON, J., at the trial, dismissing the action, which was brought for an account of sales and for the recovery of a sum of money as commission on sales of shell-boxes.

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

I. F. Hellmuth, K.C., and J. P. MacGregor, for the appellant.

R. S. Robertson, for the defendants, respondents.

FERGUSON, J. A., read the judgment of the Court. He said that the appellant urged that, upon the proper construction of the correspondence, read in the light of the surrounding circumstances as adduced in evidence, and upon the proper view of the evidence, it should be found (1) that, no matter who secured them, the plaintiff is entitled to be paid a commission on all orders for shell-boxes which were received by the defendants from persons, firms, or corporations residing or having their head office in the territory allotted to him as travelling salesman for the defendants' furniture; (2) that, because the plaintiff secured in August a contract for 10,000 boxes, in reference to the performance of which contract the Shell Committee by letter, dated the 10th September, wrote making inquiries, and that letter was to some extent instru-

mental in prompting or deciding Messrs. Wright and Morphy to make a trip to Ottawa, and there themselves endeavour to secure for the defendants further or additional contracts, the plaintiff should, within the meaning of his contract of employment, as found by the trial Judge, be deemed to have been instrumental in securing the subsequent contract for 190,000 boxes awarded to the defendants on the 24th September, 1915.

Both contentions had some support in evidence; but, after careful consideration, the learned Justice of Appeal was unable to give effect to either of them. In his view, the learned trial Judge arrived at the right conclusion as to what was the agreement between the parties, and on that finding the appellant's first contention could not be supported.

The learned Justice of Appeal was also of opinion that the securing to the defendants of the contract of the 24th September should, in the circumstances, and on the evidence, be credited to the efforts, representations, and negotiations of Messrs. Wright and Morphy, rather than to the fact that the letter of the 10th September might have been or was to some extent instrumental in prompting or deciding Wright to make the efforts which he did make, and which resulted in the contract; and, consequently, that the plaintiff had not established sufficient to enable the Court to say that he was, according to the true intent and meaning of his contract of employment, instrumental in securing to the defendants the contract of the 24th September.

Appeal dismissed with costs.

FERGUSON, J.A., IN CHAMBERS. DECEMBER 5TH, 1918.

RE WATERLOO LOCAL BOARD OF HEALTH. CAMPBELL'S CASE.

Appeal—Leave to Appeal to Divisional Court from Order of Judge under sec. 81 (2) of Public Health Act—Application under sec. 4 of Judges' Orders Enforcement Act—Leave Granted on Terms—Abatement of Nuisance—Speedy Hearing.

Application by Campbell and the Corporation of the City of Kitchener, under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914 ch. 79, for leave to appeal to a Divisional Court of the Appellate Division from an order of HODGINS, J.A., of the 25th November, 1918, made under the provisions of sec. 81 (2) of the Public Health Act, R.S.O. 1914 ch. 218, on the application of the

Local Board of Health of the Township of Waterloo, directing the abatement of a nuisance.

R. McKay, K.C., and Grayson Smith, for the applicants.
J. C. Haight, for the Local Board of Health.

FERGUSON, J.A., in a written judgment, said that the applicants contended that they were not permitted properly to present their answer to the application made to the Local Board of Health, an adjournment, for the purpose of filing material and receiving further instructions, having been refused; also that the parts of the order which directed how the nuisance complained of should be abated, and which restrained Campbell from receiving on his property garbage for feeding hogs, and from feeding hogs upon garbage, were in excess of the powers of a Judge acting under the Public Health Act and an improper interference with a contract between the Corporation of the City of Kitchener and Campbell.

The learned Judge said that he was of opinion that the questions raised were such as to justify the granting of leave to appeal; and that leave should be granted upon the applicants undertaking to serve notice of appeal forthwith and to set the appeal down so that it should be ready for hearing on the 11th instant, and also to apply for a direction that the appeal be placed upon the peremptory list for hearing on the 11th instant or on a later day in the same week.

The costs of the application and order should be costs in the appeal.

HIGH COURT DIVISION.

FALCONBRIDGE, C. J. K. B., IN CHAMBERS. DECEMBER 2ND, 1918.

RE THOMAS.

Lunatic—Person Alleged to be Incompetent to Manage her own Affairs — Contradictory Evidence—Preponderance—Dismissal of Application for Appointment of Committee.

Application by Charles Parker for an order declaring Mary Ann Thomas to be a person incompetent to manage her own affairs and for the appointment of a trustee or committee of her estate.

C. W. Kerr, for the applicant.
A. W. Langmuir, for Mary Ann Thomas.

FALCONBRIDGE, C. J. K. B., in a written judgment, said that the attack on Mrs. Thomas's mental condition had been well met.

Where the material filed was contradictory, Sutherland, J., in Re Taylor (1915), 9 O.W.N. 110, refused to make an order. But here the evidence strongly preponderated in favour of the sanity of the alleged lunatic.

The case presented points of resemblance to Re Clark (1892), 14 P.R. 370, decided by the last of the Chancellors.

Application dismissed with costs.

MASTEN, J. DECEMBER 3RD, 1918.

*MASON & RISCH LIMITED v. CHRISTNER.

Sale of Goods—Contract—Price of Goods Payable Partly in Money and Partly by Delivery of Goods in Exchange—Refusal of Buyer to Accept—Repudiation of Contract—Goods not Appropriated to Contract until after Notice of Repudiation—Breach of Executory Contract—Damages for—Claim for Whole Price of Goods and Damages for Non-delivery of Goods in Exchange—Property in Goods not to Pass until Payment—Special Contract for Payment of Money Based on Delivery of Goods—Reasonable Time for Delivery—Actual Damage Resulting from Breach of Contract.

By a written instrument, dated the 29th April, 1918, the defendant agreed to purchase from the plaintiff company "one Mason & Risch player piano, style 70, No.—, and combination bench," for which he agreed to pay $500 "and in addition to this one upright piano by Heintzman & Co., No. 15123," which meant that a piano was to be delivered by the defendant to the plaintiff as part of the price of the player piano. The $500 was to be paid in instalments, $100 on the 1st September, 1918, and $75 each 6 months thereafter until paid, with interest. Until the whole of the purchase-price and interest was paid the player piano was to remain the property of the company. On default in payment of any instalment the whole of the balance was forthwith to become due. The company was to be at liberty to insert the number of the player piano, left blank as above. It was provided also that the written document contained the whole agreement between the parties.

The plaintiff company treated the writing signed by the defendant as an offer, and on the 14th May, 1918, accepted the offer by a letter addressed to the defendant, in which it was said that a player piano had been selected for the defendant from the company's stock. It appeared, however, that on the 14th May the

piano was not ready for delivery, and was not in fact completed until immediately before it was shipped on the 10th June.

Meantime, on the 28th May, the defendant wired the company, "I hereby cancel my order." The defendant paid nothing, and did not deliver the upright piano.

The plaintiff company sued for $500, interest from the date of the agreement, and damages for the conversion of the upright piano. The defendant set up in defence an alleged misrepresentation by the selling agent of the company, one Glassford, as to the make and quality of the player piano. The defendant also pleaded that the upright piano was, as the plaintiff company's agent knew, the property of the defendant's wife, who refused to permit him to "deal it off," whereupon the defendant notified the ompany "cancelling the said contract."

The action was tried without a jury at Chatham.

F.G. Kerr, for the plaintiff company.

R. L. Brackin, for the defendant.

MASTEN, J., in a written judgment, said that the defendant had failed to establish the defence of misrepresentation; but had established the facts alleged in the other defence, whatever the effect might be.

The contract was proved and established. It bound the defendant, who had no right to rescind or refuse acceptance.

The claim was for the full purchase-price, as in an action for goods bargained and sold.

The agreement was not an agreement of sale but of exchange or barter; and the plaintiff company could enforce the contract, according to its terms, only by an action for specific performance. But specific performance was impossible, because the defendant had no title to the upright piano. The plaintiff could, therefore, recover damages only.

The learned Judge pointed out the distinction between an agreement to sell, by which a mere jus in personam is created, and a sale, by which a jus in rem is transferred: Halsbury's Laws of England, vol. 25, para. 225.

It was specially agreed that the property in the player piano should not pass to the defendant until the purchase-price was paid in full; but such a provision does not enable the buyer to repudiate the contract, refuse to receive possession of the article sold when duly tendered, or absolve him from payment of the purchase-price: Tufts v. Poness (1900), 32 O.R. 51. The general rule that no action for the price of goods bargained ands old can be maintained unless delivery has been tendered of a specific article which has been legally appropriated to the fulfilment of the contract, is not negatived by the Tufts case.

On the 28th May, no specific player piano had been appropriated to the fulfilment of the contract. Up to that date, the plaintiff company was authorised to select, furnish, and ship the player piano, but on that date its authority so to do was revoked. If the player piano was to be effectively appropriated, there must be an appropriation by the plaintiff, assented to by the defendant.

Reference to Halsbury, vol. 25, para. 301.

The player piano which was completed after the repudiation, and which the plaintiff company assumed to appropriate to the contract after the repudiation, never became a specific article sold to the defendant, and which could be effectively tendered to him—the defendant never having assented to the appropriation.

No action for the price is maintainable until tender by the seller and refusal by the buyer of a specific article legally appropriated to the contract; the only cause of action of the company was for breach of an executory contract, and the recovery could be only for the actual damage resulting from breach of the contract.

Reference to Benjamin on Sale, 5th ed., p. 805; Sedgwick on Damages, 9th ed., para. 752; Unexcelled Fire-Works Co. v. Polites (1890), 130 Penn. St. 536.

It was agreed that the claim was on a special contract whereby $100 became due in any event on the 1st September, 1918; and, upon default, the whole unpaid balance became due. But the whole basis of the contract was the delivery by the plaintiff to the defendant of a piano. The contract did not name a day for delivery; but the law implied that delivery was to be made within a reasonable time; and a reasonable time had elapsed before the 1st September.

Judgment should be entered for the plaintiff company, declaring that the contract had been established, that the defendant had committed a breach of it, and directing a reference to the Master at Chatham to take an account of the loss directly and naturally resulting, in the ordinary course of events, from the breach.

On confirmation of the Master's report, judgment should be entered for the amount found due by it, without any motion on further directions.

The plaintiff company should recover from the defendant its costs of the action down to and inclusive of the trial; no costs of the reference should be allowed to either party.

MASTEN, J. DECEMBER 4TH, 1918.

RUBBERSET CO. LIMITED v. BOECKH BROTHERS CO. LIMITED.

Trade Name — Infringement — "Passing-off" — Evidence—Deception—Reasonable Possibility of Deception.

Action for infringement of a registered trade mark and for "passing-off" goods manufactured by the defendants as those of the plaintiffs.

The action was tried without a jury at Toronto.

R. S. Robertson and J. W. Pickup, for the plaintiffs.

A. W. Anglin, K.C., and S.W.McKeown, for the defendants.

MASTEN, J., in a written judgment, said that the original plaintiffs, the Rubberset Company Limited, carried on in Ontario the business of manufacturing and selling brushes; an American company, with a similar name, carrying on the like business in the United States, was added as a plaintiff at the trial. The defendants were brush manufacturers carrying on business in Ontario.

No evidence was adduced in support of the claim on the trade mark.

On the claim for passing-off two questions arose: (1) Had the word "Rubberset," as applied to brushes, acquired a secondary significance so as to mean to the public, and in the trade, brushes manufactured by the plaintiffs? (2) Had the defendants infringed the plaintiffs' right?

Dealing with the question of infringement, the learned Judge said that, in such an action as this, if an injunction be granted, it is granted to protect the property in the trade or goodwill of the plaintiff, which will be injured by its use by the defendant. If the use of a word or name be restrained, it can only be on the ground that such use involves misrepresentation, and that such misrepresentation has injured or is calculated to injure another in his trade or business.

Reference to Burberrys v. J.C. Cording & Co. Limited (1909), 26 R.P.C. 693, 701.

No case of actual deception was established or indeed put forward in the evidence; the claim was based solely on the ground that there was a reasonable probability of deception.

The outstanding facts made it difficult to establish a reasonable probability of deception; but, passing over such difficulties, there was no reasonable probability of the ordinary retail customer

buying a brush made by the defendants in the belief that he was getting a brush of the plaintiffs' manufacture.

The evidence raised a suspicion that the defendants expected to gain some advantage by using the word "Rubbefset," which had previously been employed exclusively by the plaintiff; but notwithstanding that circumstance, the learned Judge arrived at the conclusion that no reasonable probability of deception was established.

It was unnecessary to consider whether "Rubberset" had come to be so appropriated by user to mean the goods of the plaintiffs.

The action should be dismissed, without prejudice to the right of the plaintiffs to maintain another action if cases of deception whould actually occur hereafter.

Action dismissed with costs.

RIDDELL, J., IN CHAMBERS. DECEMBER 6TH, 1918.

*REX v. HACKAM.

Alien Enemy—Magistrate's Conviction for Neglecting to Register—Dominion Order in Council of 20th September, 1916—Permanent Place of Residence—No Evidence to Support Conviction—Attempt to Support under Later Orders in Council—Military Service Act, 7 & 8 Geo. V. ch. 19—Quashing Conviction—Costs—Refusal to Protect Magistrate and Prosecutor.

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Bracebridge, "for that he, the said Sam Hackam, did neglect to register as an enemy alien, as required by order in council P.C. No. 2194 of September 20th, 1916."

H. H. Davis, for the defendant, the applicant.

W. R. Smyth, K.C., for the magistrate and the prosecutor, the respondents.

RIDDELL, J., in a written judgment, said that on the 27th August, 1918, R. H. Stewart, of the Dominion Police, laid an information before the Police Magistrate, charging that the defendant, an enemy alien, had neglected to fulfil the requirements of P.C. No. 2194 of the 20th September, 1916. On the same day, the accused appeared before the Police Magistrate and pleaded "not guilty."

The prosecutor had "no evidence to give except that he believes he" (the accused) "is an enemy alien." The accused said: "I am not a Turk, but a Syrian. . . . I was born and lived under Turkish rule, but I am a Christian; I have no passport; I am not naturalised, and I have not been registered as an alien."

The order in council No. 2194 requires every alien enemy who has no permanent place of residence or abode in Canada to report within 20 days. There was no evidence that the defendant had no such place of residence. He swore, in an affidavit filed on this application, that he has and has had for many years a permanent place of residence in Canada, to the knowledge of the magistrate. This was not disputed; and the respondents admitted that the conviction could not stand as for an offence under order 2194.

It was urged that the defendant should be convicted under order 1908 of the 5th August, 1918, which cancels order 2194, and provides that every alien enemy residing or being in Canada shall, unless previously registered or reported, report within 20 days after the publication in the Canada Gazette. The order in council was published on the 17th August; and every alien enemy (if he did not come under order 2194) had until the 6th September to report, and he was not in default until the end of that day.

The defendant could not be convicted on the 27th August of an offence of which he could not be guilty till the following month.

Order in council No. 1013 of the 30th April, 1918, was invoked; that order prescribes a penalty for every male person, not on active service, "who apparently may be, or is reasonably suspected to be, within class 1 under the Military Service Act, 1917," and who claims exemption, but has not a certificate to exhibit.

There was nothing to shew that the defendant apparently was or was suspected of being in class 1. If the magistrate, seeing the defendant, had certified that he apparently was in class 1, the case might be different; but the magistrate's mind was not directed to such a matter.

The learned Judge had not considered the question whether he had power to amend so as to bring the case within order 1013 of 1908; he was clearly of opinion that, on the evidence, no charge under either could succeed.

The conviction must be granted; and, by reason of facts sworn to by the defendant and not contradicted, the costs of the motion must be paid by the magistrate and prosecutor, and there should be no order of protection.

The whole proceedings were a travesty of justice, and such as should not be tolerated in any civilised community.

MIDDLETON, J. DECEMBER 6TH, 1918.

*BARR v. TORONTO R.W. CO. AND CITY OF TORONTO.

Street Railway—Injury to Person in Highway by outward Swing of Rear Steps of Car in Rounding Curve—Duty of Conductor—Negligence—Proximate Cause of Injury—Damages—Claim against City Corporation—Costs.

Action by a husband and wife to recover damages arising from an injury to the wife, upon McCaul street, in the city of Toronto, after she had alighted from a car of the defendant company, by reason, as they alleged, of the negligence of the servants of the defendant railway company or of those of the defendant city corporation in charge of a waggon owned by the corporation, which was standing in the street.

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

William Proudfoot., K.C., for the plaintiff.

H. H. Dewart, K.C., and G. S. Hodgson, for the defendant railway company.

C. M. Colquhoun, for the defendant city corporation.

MIDDLETON, J., in a written judgment, said that McCaul street is very narrow; upon it double tracks are laid; cars running upon it from the north turn east upon Queen street; the distance from track to kerb is 12 feet; and, as a car rounds the curve, the steps at the rear of the car swing 6 feet over the narrow roadway. On the day of the occurrence which gave rise to the action, a team and large waggon owned by the defendant city corporation was removing snow from McCaul street, and at the time of the accident was standing in the road just above Queen street, while being loaded.

The plaintiff and her sister-in-law had been passengers on the car, and had alighted for the purpose of making a transfer to a Queen street car, and would have gone from the McCaul car west to the sidewalk and then across Queen street, if the conditions had been normal. There was, however, a pool of water and slush between the place where they alighted from the car and the sidewalk. To avoid this, they passed north, between the car and the waggon to reach ground from which snow and slush had been removed. The space between the car and the waggon was between 3 and 4 feet. When the plaintiff and her companion were about opposite the middle, the car started round the curve, and the rear steps, swinging sideways, passed a few inches from the waggon; before the plaintiff could escape, she was struck and injured.

The obligations of the railway company to the plaintiff as a passenger were ended when she reached a place of safety upon the road, and the liability of the company to her must be based upon the company's obligation to individuals lawfully upon the street.

The conductor said that his duty began and ended with seeing that passengers made safe entry and exit by the rear door—that he had no duty towards pedestrians on the road. The motorman cares for passengers at the front door, and takes care that he does not run any one down by the forward motion of the car.

No one takes any precaution against the obvious danger to persons in the roadway by reason of the sideward swing of a car which has a wheel base much shorter than its length when it goes round a curve. The railway company must not run down persons who are in a dangerous position in front of a car; and there must be a precisely similar obligation towards persons who are in danger from the lateral motion. The conductor might well be called upon to see that all is safe before he signals the motorman to round a curve.

The proximate cause of the accident was the negligence of the company in starting the car when the plaintiff was in such a position that it was plain that there was no escape from the swing of the rear steps.

No case was made against the defendant city corporation.

Judgment for the plaintiffs for $1,350—$1,000 for the wife and $350 for the husband— with costs against the defendant railway company, and dismissing the action as against the defendant city corporation with costs.

MIDDLETON, J., IN CHAMBERS. DECEMBER 7TH, 1918.

*McCURDY v. OAK TIRE CO.

Discovery — Production of Documents by Stranger to Action — Rule 350.

Appeal by the defendants from an order of the Master in Chambers under Rule 350, requiring the Imperial Trust Company of Canada (not a party to the action) to produce documents as a means of discovery before the trial.

C. W. Plaxton, for the defendants.

T. R. Ferguson, for the plaintiff.

MIDDLETON, J., in a written judgment, said that since this motion was heard the action had been tried, and it was not necessary to deal with the questions discussed.

Rule 350 was intended to simplify the procuring of evidence and to avoid the taking of a witness who is the custodian of documents, to a trial, and was not intended to be a means of obtaining discovery from strangers to an action.

Incidentally information may be obtained before a trial, e.g., when a banker is compelled at an earlier stage than usual to disclose his customer's accounts—but this is not the main but a subsidiary purpose of the Rule, and care must be exercised in all applications under it to avoid abuse.

The order here should be vacated, and there should be no costs here or below.

MIDDLETON, J., IN CHAMBERS. DECEMBER 7TH, 1918.

*RE GLASS v. GLASS.

Division Courts—Jurisdiction—Claim for $96 for Conversion of Goods—Division Courts Act, sec. 62 (1)—Prohibition.

Motion by the defendant for prohibition to a Division Court.

D. C. Ross, for the defendant.
J. H. Naughton, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the sole question was whether this action was founded on contract or on tort. (By sec. 62 (1) of the Division Courts Act, R.S.O. 1914 ch. 63, a Division Court has jurisdiction in an action founded on tort only up to $60.)

The claim was "for the sum of $96, being the price of 8 tons of hay at $12 per ton taken by the defendant."

The plaintiff and defendant were brothers, and along with others were tenants in common of a farm. There was a partition and an adjustment of claims. Some hay upon the farm, it was said, was allotted to the plaintiff; but the defendant, it was said, took it and converted it to his own use.

The action was tried by a jury, and the jury found for the plaintiff.

The defendant's main contention was that the question as to this hay was covered by the disputes included in the adjustment of accounts in the partition proceedings. The plaintiff contended

that the present dispute arose out of a subsequent transaction, by which it was agreed that the hay in question should be his, but the defendant, in violation of this agreement, took it.

The plaintiff's title rested in agreement and contract, but his complaint here was conversion, and so the action was founded on tort.

Reference to Sachs v. Henderson, [1902] 1 K.B. 612; Edwards v. Mallan, [1908] 1 K.B. 1002; Bryant v. Herbert (1878), 3 C.P.D. 389.

The prohibition must be granted with costs, fixed at $20.