

APRIL 17TH, 1909.

DIVISIONAL COURT.

DUBORGEL v. WHITHAM.

*Building Contract — Sub-contract for Plastering Building —
“Rendering”—Contract Price—Retention of Percentage—
Premature Action—Extras—Set-off—Damages—Costs.*

Appeal by plaintiffs from judgment of ANGLIN, J., dismissing the action as to the greater part of the plaintiffs' claim. The action was brought to recover the balance of the contract price and extras for the plastering of a school building in the city of Hamilton, under a sub-contract with the defendant, the principal contractor. The trial Judge held that the plaintiffs' action was premature as to the main part of the claim, and gave judgment in their favour as to a small part, with costs on the County Court scale, and a set-off to the defendant of the excess of his costs over County Court costs.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

P. D. Crerar, K.C., for plaintiffs.

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

BRITTON, J.:— . . . The claim for balance on contract was \$340.50, and for extras \$216.43, making in all \$556.93. At the trial the plaintiffs were allowed to amend by adding a claim for damages for delay caused by defendant, and for being deprived of the use of a hoist to which the plaintiffs claimed to be entitled. A counterclaim was put in by the defendant. Particulars were furnished of the plaintiffs' claim for extras, and the learned trial Judge dealt with these, item by item. He found amount of contract \$1,700, and for extras \$85.68.

The items of plaintiffs' claim for extras which have been allowed are as follows (setting them out, amounting to \$85.-68) There was allowed to the defendant set-off in respect of removal of platforms, \$3, leaving \$82.68. Then the plaintiffs were allowed for damages for not having use