

up (inter alia) that the Division Court had no jurisdiction. The County Court Judge presiding in the Division Court held against that contention, and on the merits gave judgment for the plaintiff against both defendants.

In 1904, the Act 4 Edw. VII. ch. 12 was passed, the original of sec. 62 (1) (d) of the Division Courts Act, R.S.O. 1914 ch. 63, providing that a Division Court has jurisdiction in "an action for the recovery of a . . . money demand where the amount claimed . . . does not exceed \$200 and . . . is ascertained by the signature of the defendant;" but "an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it."

Reference to *Renaud v. Thibert* (1912), 27 O.L.R. 57, and *Re Harty v. Grattan* (1916), 35 O.L.R. 348.

This case goes down to trial, the plaintiff puts in the lease and proves the signature. As against the tenant, who expressly and unconditionally covenants to pay, he may rest—but what of the guarantor? He had not unconditionally promised to pay—he had promised to pay not simply when the rent became due, but if and when that happened and the tenant made default. The plaintiff must prove that the condition upon which the liability of the guarantor was based had been fulfilled. He could not do that by producing the document—he must "give other and extrinsic evidence."

In such a case a Division Court has no jurisdiction.

Where an appeal succeeds on the ground that the Court appealed from has no jurisdiction, the proper course now is to allow the appeal with costs and dismiss the action with costs (Rule 766), and there was no reason why this course should not be followed here.

KELLY, J., was of the same opinion, for reasons stated in writing.

MASTEN, J., agreed, and had nothing to add.

MEREDITH, C.J.C.P., in a dissenting judgment, considered the question of jurisdiction and the merits of the case, and referred to many authorities. He was of opinion that the Division Court had jurisdiction, and that the judgment below was right upon the merits.

In the result, the appeal was allowed with costs and the action dismissed with costs.