

KELLY, J.

JULY 24TH, 1916.

CUTHBERTSON v. ROSS.

Assignments and Preferences—Assignment for Benefit of Creditors—Landlord's Claim for Taxes for Period during which Demised Premises Occupied by Assignee—Claim for Taxes for Current Year—Conduct of Assignee—Estoppel—Personal Liability—Preferential Claim on Insolvent Estate—Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38(2).

Action by the landlord of Redferns Limited against the assignee for the benefit of the creditors of that company: (1) to recover payment of the taxes in respect of the demised premises during the time the defendant occupied them—from the 15th October, 1915, to the 15th January, 1916; (2) for a declaration that, out of the assets of the insolvent company in his hands, the defendant should pay the plaintiff, as a preferred creditor, the sum due for taxes from the 1st January, 1915, to the 15th October, 1915; (3), in the alternative, for a declaration that the plaintiff was entitled to rank as an ordinary creditor for the amount due in respect of the taxes from the 1st January, 1915; (4), in the alternative, if it should be held that the plaintiff was not entitled to the judgment first above asked for, for a declaration that the plaintiff was entitled to rank as a preferred creditor or as an ordinary creditor in respect of the last mentioned taxes.

The action was tried without a jury at Toronto.
N. Sommerville and V. H. Hattin, for the plaintiff.
F. J. Dunbar, for the defendant.

KELLY, J., in a written judgment, after setting out the facts, said that, in respect of the taxes from the 15th October, 1915, to the 15th January, 1916, the plaintiff was entitled to succeed. The defendant had the statutory right to elect to retain possession of the premises for the unexpired part of the term of the lease, or for such portion of the term as he should see fit, "upon the terms of the lease and subject to payment of the rent therefor provided by the lease:" Landlord and Tenant Act, R.S.O. 1914 ch. 155, sec. 38(2). One of the terms of the lease was the payment of taxes, local improvement rates, and all municipal rates and charges. Paying rent only was not a full compliance with the terms of the lease. Whether the rent reserved by the lease included taxes was immaterial. The right to retain was given not merely on