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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

*DELBRIDGE v. TOWNSHIP OF BRANTFORD.

Ditches and Watercourses Act—Award of Engineer—Construction of Ditches—Culvert—Lowering of—Injury to Land by Water Brought down—Liability of Township Corporation—Responsibility for Acts and Omissions of Engineer—Liability of other Land-owners—Failure to Register Award—"Instrument"—Registry Act, R.S.O. 1914 ch. 124, sec. 71—Purchaser for Value without Notice—Easement Affecting Land—Damages—Costs—Amendment.

An appeal by the plaintiff from the judgment of the County Court of the County of Brant dismissing an action to recover damages for injury done to the plaintiff's land by the bringing down to and discharging upon it of large quantities of water.

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

W. S. Brewster, K.C., for the appellant.

A. E. Watts, K.C., for the defendant the Corporation of the Township of Brantford, respondent.

J. Harley, K.C., for the defendant Grummett, respondent.

W. M. Charlton, for the defendant Greenwood, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the appellant's land had an area of about $2\frac{2}{5}$ acres,

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

formed part of lot 38 in the 4th concession of the township of Brantford, and was conveyed to him on the 30th April, 1913, by Maria Harriman, the then owner of it. In 1908, proceedings were taken under the Ditches and Watercourses Act, R.S.O. 1914 ch. 260, at the instance of the respondent Greenwood for the drainage of his land, lying to the west of the appellant's land. The respondent Grummett, Martha Harriman, a other neighbouring land-owners, were duly notified of Greenwood's requisition; and in due course an award was made by the engineer, dated the 17th November, 1908. The award provided for the making of a drain in three sections across the lands of the persons who were parties to the proceedings. Section A. was located on the south half of a lot in the 4th concession, and had "outlet through culvert leading from Echo Place to the Grand Trunk Railway crossing said lot." This culvert was shewn on a plan, and was situate in or near the land of the appellant; the plan shewed a drain, partly open and partly tiled, running north-easterly through it to the culvert. The award provided that Martha Harriman should make and complete that portion of section A. commencing at 10 feet west of the west end of the culvert, on the side-road, through lot 38, to a point 14 feet westerly from stake No. 1 (70 feet) etc. The culvert in the side-road was shewn on the plan. The award made no provision for continuing the drain north-easterly beyond the point of commencement mentioned in it. The culvert in the side-road was, at the time the award was made, an ordinary road-culvert, put in by the defendant township corporation. The drain was constructed according to the award, and Martha Harriman constructed her part.

The appellant complained that the respondents Greenwood and Grummett had lowered the culvert in the side-road, and thereby caused more water flowing from the upper land to pass through the culvert and on to his land; and the appellant sought to make the township corporation liable because it had suffered the culvert to be lowered.

The appellant based his claim also on the ground that the drain constructed in 1908 was not continued to a proper outlet, but was brought down to and left at the side-road, from which the water brought down to it flowed to and upon his land.

The appellant also contended that, having registered the conveyance to him from Martha Harriman, without notice of the rights conferred by the proceedings under the Ditches and Watercourses Act, his land was not affected by them.

Dealing with this last point, the learned Chief Justice said

that the award was not registered; and, if it was an instrument which should have been registered in order to prevent the rights acquired under it from being lost, in case of the sale of any of the land affected by the easement which it conferred, to a purchaser for value without notice, whose conveyance was registered, the appellant's land was not in his hands affected by it, for the award was, as against him, fraudulent and void: sec. 71 of the Registry Act, R.S.O. 1914 ch. 124. The effect of the award was, to subject the lands affected by it to an easement; and it was, therefore, an instrument affecting land to which sec. 71 applied: see sec. 2 of the Act, as to the interpretation of "instrument," and Ross v. Hunter (1882), 7 S.C.R. 289.

Even if the award were binding on the appellant, there was no legal justification for the action of the respondents Grummett and Greenwood in lowering the culvert on the side-road.

The wrong complained of was a continuing wrong, and for the consequences of it to the appellant since he became the owner of the land (though the acts of which he complained were done before he became owner) these respondents were answerable to him: Ross v. Hunter, supra.

The appellant had been damnified to some extent by the wrongful acts of these respondents, and his damages should be assessed at $50.

The lowering of the culvert was not done by the township corporation or by its authority, and it was not responsible for the consequences of the making of the ditches for which the award provided. The engineer who made the award was, in the performance of his duties, a statutory officer, and the corporation was not answerable for anything done or omitted by him in the performance of his duties under the Ditches and Watercourses Act: Gray v. Town of Dundas (1886-7), 11 O.R. 317, 13 A.R. 588, and cases there cited; Seymour v. Township of Maidstone (1897), 24 A.R. 370.

As against the respondent corporation, the appeal should be dismissed with costs.

As against the other respondents, the appeal should be allowed with costs, and judgment should be entered for the appellant against these respondents with County Court costs and without set-off.

The pleadings should be amended.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

*GAZEY v. TORONTO R.W. CO.

Street Railway—Injury to Passenger Alighting from Car—Invitation to Alight while Car Moving—Opening of Exit-door—Evidence—Negligence—Findings of Jury.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, upon the findings of a jury, in favour of the plaintiff Rebecca Gazey for the recovery of $2,000 damages and in favour of her husband, the plaintiff James Gazey, for the recovery of $1,500 damages, with costs, in an action for damages arising from injury sustained by the plaintiff Rebecca Gazey when alighting from one of the defendants' street-cars, by reason, as alleged, of the negligence of the defendants' servants in charge of the car.

On the evening of the 4th February, 1916, the plaintiff Rebecca was a passenger on a car; being desirous of alighting at the corner of Roncesvalles avenue and High Park boulevard, she requested the conductor to let her off there; as that corner was approached, the conductor signalled the motorman to stop. When the car arrived at the corner, and had, as the plaintiff thought, stopped, the motorman opened the door leading from the vestibule to the steps of the car; the plaintiff attempted to alight, but was, by the movement of the car, thrown to the ground and seriously injured.

The questions left to the jury and their answers were as follows:—

(1) Was the accident to the plaintiff Rebecca Gazey caused by any negligence on the part of the defendants? A. Yes.

(2) If so, in what did such negligence consist? A. Owing to motorman opening front door of car before being stopped.

(3) Could the plaintiff Rebecca Gazey, by the exercise of reasonable care, have avoided the accident? A. No.

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

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

I. F. Hellmuth, K.C., and E. C. Cattanach, for the plaintiffs, respondents.

FERGUSON, J. A., reading the judgment of the Court, after setting out the facts, and referring to many authorities, said that the opening of the door of a standing train or street-car, at a regular stopping-place, is prima facie an invitation to alight; but opening it when the train or car is not at a stopping-place and is moving so fast as to make the motion perceptible to any reasonably careful passenger is not, without more, an invitation to alight; opening the door at a stopping-place and slowing down the train is some evidence of an invitation to alight. Circumstances alter cases—each case of any of these kinds must depend on its own circumstances.

The question in the case at bar was not: "Was the opening of the door of a moving car in itself negligence or an invitation to alight?" The question was: "Was it, in the circumstances of the case, an invitation to alight or part of the evidence or chain of circumstances going to make up an invitation?"

The plaintiff and another witness said that they thought that the car had actually stopped—it was in fact moving so slowly that the movement was not readily noticeable; and the jury concluded that, in the circumstances, the plaintiff had acted reasonably, carefully, and with ordinary prudence, in stepping off the car at the place where and when she did; that, the car having arrived at the stopping-place, and the plaintiff having, to the knowledge of the motorman, come to the door for the purpose of alighting, it was negligent of the motorman to open the door of the car when the car was moving so slowly as probably to deceive the plaintiff into the belief that it had actually stopped, and by his very act of opening the door strengthening that belief, and creating in the plaintiff's mind a belief that she should alight and might do so with safety.

These were questions of fact for the jury; and it could not be said that there was no evidence to support the findings of the jury, or that the jury acted unreasonably in finding that the opening of the door was a negligent act. If there is any reasonable evidence to support the finding of the jury, their verdict should stand—it is not the duty of an appellate Court to be astute to find reasons for setting aside verdicts: Commissioner for Railways v. Brown (1887), 13 App. Cas. 133, 134; Toronto R.W. Co. v. King, [1908] A.C. 260, 270.

There was sufficient evidence to support the findings of the jury; and the findings, when read in the light of the circumstances, supported the judgment.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

*CONKLIN v. DICKSON.

Landlord and Tenant—Lease of House—Injury to House by Acts of Tenant—Negligence—Liability in Damages.

An appeal by the defendant from the judgment of MACWATT, Co. C. J., in an action in the County Court of the County of Lambton, tried without a jury, in favour of the plaintiff, landlord, for the recovery of damages for injury to the demised premises by the wrongful acts or negligence of the defendant, tenant.

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

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

A. Weir, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the appellant was the tenant of the respondent of a frame dwelling-house in Sarnia. The tenancy was a monthly one, and there was no written lease. There was no furnace in the house. Water was brought into the basement by a pipe and carried by a connecting pipe to the bath-room on the second storey. In the bath-room there was an instantaneous heater, heated by natural gas, and also a 30-gallon water-tank or boiler, a water-closet, and a wash-basin. The water in the tank could be drained off by a tap provided for that purpose. This heater was the only appliance for heating the house with which the building was provided, but the appellant had a stove in the kitchen and a gas-heater in the dining-room, both on the ground-floor. The house was provided with storm-doors for every outer door, and there was a storm-sash for the north bed-room window.

The night of the 3rd February, 1917, was very cold; the water in the tank or boiler and in the water-closet froze, with the result that both of them were damaged, and that the water which escaped, owing to the bursting of the tank and the injury to the water-closet, damaged the papering and the plastering in the rooms below the bath-room.

All this damage was caused, as the County Court Judge found, by the action of the appellant in discontinuing the fires in the kitchen and dining-room, shutting off the gas from the heater in the bath-room, and turning off the water in the basement, without draining off the water in the pipes and in the heater and

water-closet, the result of which was that the water ceased to flow, and therefore was in a condition that made it more than likely that it would freeze. Draining off the water would have lessened the danger from the action of the frost, though it would probably not have entirely obviated it. The danger of the water freezing was increased by the failure of the appellant to put up the storm-doors and storm-window.

The County Court Judge in effect found that the injuries to the house were the direct result of the acts of the appellant; and the Judge also found that the appellant was guilty of gross negligence in acting as he did.

The learned Chief Justice was of opinion that the Judge's findings were warranted by the evidence, and entitled the respondent to recover, apart from the finding of gross negligence.

Reference to Wood's Landlord and Tenant, 2nd ed., sec. 422; Holden v. Liverpool New Gas Co. (1846), 3 C.B. 1, 5; Sticklehorne v. Hatchman (1586), Owen 43; Steggles v. New River Co. (1863), 11 W.R. 234.

In the case at bar, the appellant evidently knew that damage from the frost was likely to happen if precautions were not taken to prevent the water from freezing, and he failed to take reasonable precautions to that end; on the contrary, he did that which increased the danger and which undoubtedly led to the freezing of the water and the consequent injury to the premises of which the respondent complained.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

*BUCKLEY v. VAIR.

Interest—Money Claim—Discretion of Trial Judge—Unsuccessful Appeal—Costs—Appeal "as to Costs only"—Judicature Act, sec. 24—County Courts Act, sec. 32.

An appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Grey in favour of the plaintiff in an action in that Court brought to recover a sum of money alleged to be due to the plaintiff as commission upon the sale of land.

The appeal was upon two grounds: (1) that interest on the plaintiff's claim was improperly allowed; (2) that the County

Court Judge erred in awarding the costs of the action to the plaintiff.

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

M. Wilkins, for the appellant.

W. Lawr, for the plaintiff, respondent.

MEREDITH C.J.O., reading the judgment of the Court, said that the discretion exercised by the learned Judge in allowing the interest ought not to be interfered with: Toronto R.W. Co. v. Toronto Corporation, [1906] A.C. 117.

The appeal as to costs was an appeal "as to costs only," within the meaning of sec. 24 of the Judicature Act, R.S.O. 1914 ch. 56, which section, by sec. 32 of the County Courts Act, R.S.O. 1914 ch. 59, is applicable to County Courts; and the appeal did not lie without the leave of the Judge, which had not been obtained.

An appellant cannot, by joining with an appeal as to costs, an appeal as to other parts of the judgment, in which he fails, escape from the effect of these provisions: Harpham v. Shacklock (1881), 19 Ch. D. 207, 215; Llanover v. Homfray (1881), ib. 224, 231, 232; Bew v. Bew, [1899] 2 Ch. 467, 472.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

KITCHEN v. MALCOLM.

Contract—Agreement to Supply Bye-product of Manufacture—Consideration—Action for Breach—Waiver—Damages.

Appeal by the plaintiff from the judgment of BRITTON, J., 11 O.W.N. 336.

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

W. S. Brewster, K.C., for the appellant.

M. A. Secord, K.C., for the defendant, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that the action was brought to recover damages alleged

to have been sustained by the appellant in consequence of an alleged breach of an agreement, entered into between him and the respondent on the 7th March, 1907, for a supply of whey and buttermilk from a cheese and butter factory, upon a sale of the factory by the plaintiff to the defendant.

After stating the facts, the learned Chief Justice said that, whatever may have been the original rights of the appellant under the agreement, his right to have whey supplied to him after the factory ceased to manufacture cheese was put an end to by his conduct with regard to the change. He was not only a consenting party to its being made, but was active in procuring it to be brought about. After the change was made, the appellant received the bye-product of the butter-making, and there had been no breach of the agreement as to it. It was manifest that the whey and buttermilk which, by the provisions of the agreement, the appellant was to have, were to be the bye-product from the manufacture of cheese and butter at the factory; and there was no ground, moral or legal, for requiring the respondent to do what the appellant dispensed him from doing by becoming an active participant in making a change in the business to be done at the factory—the result of which was that no whey was produced there.

In the view taken, it was unimportant whether or not the effect of the agreement was that the respondent agreed to furnish not less than 50 tons in any one year; but (as the learned Chief Justice was at present advised) the respondent's case for a rectification of the agreement by the elimination of that provision failed upon the evidence.

There was good consideration for the respondent's making the agreement; for it formed part of the bargain as to the sale of the factory; and there was little doubt that no sale would have been made but for the agreement as to the whey and buttermilk.

Had a different conclusion been reached as to the appellant's rights, it was doubtful whether he would have been entitled to any damages. It was only because of the proximity of his hog-pens to the factory, and the means in use to convey the bye-products to the pens, that they had value to him; they were not worth the cost of teaming them. He would have been entitled (if the learned Chief Justice read his testimony aright) to no damages because he had no right to have the bye-products conveyed to his hog-pens by the means in use when he sold the factory to the respondent; and, ex hypothesi, they would have been of no value to him if they could not be conveyed in that way.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. OCTOBER 15TH, 1917.

MAIL PRINTING CO. v. BLEAKLEY.

Judgment—Summary Judgment—Rule 57—Specially Endorsed Writ of Summons—Claim for Price of Advertising in Newspaper—Contract—Suggested Defence—Breach of Contract—Construction and Effect of Contract.

Appeal by the defendant from an order of DENTON, Jun. Co. C.J., in an action in the County Court of the County of York, allowing the plaintiffs to sign judgment under Rule 57.

The writ of summons was specially endorsed with a claim for $522.53, the balance of an account for advertising and for the price of goods sold and delivered, and for interest on $522.53 until judgment. A large part of the advertising was, according to the endorsement, under a contract in writing of the 25th September, 1916.

The defendant filed an affidavit in which he deposed (para. 2) that he had a good defence to the action on the merits, as he was advised by his solicitor and believed; (3) that, when the contract was made with the plaintiffs, it was for one year's advertising, and he was informed and believed that the blank form which was used in connection with this contract was the form used in connection with all the plaintiffs' advertising contracts in the city of Toronto, in cases where the advertising extends over a period of 12 months; (4) that, after he had advertised with the plaintiffs for about 3 months, they notified him that they would not accept any more "liquor advertisements," and, by reason thereof, he had suffered loss and damage much more than the amount of the plaintiffs' claim; (5) that he was ready and willing to pay the plaintiffs the full amount to which they would be entitled, if they would proceed and carry his advertisement for the remaining 9 months; (6) that the first breach of the contract was a breach on the plaintiffs' part, they refusing to publish any more advertisements, notwithstanding their contract.

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

W. J. Boland, for the appellant.

E. G. Long, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said (after stating the facts) that the contract referred to in the appellant's affidavit was the contract in writing of the 25th September, 1916; and it was not denied that this contract was signed by the

appellant. The cross-examination, on his affidavit filed, of Peter H. Auger, the advertising solicitor of the respondents who procured the signing of the contract by the appellant, shewed that, at the time it was signed, he (Auger) signed on behalf of the respondents an acceptance of it; but, even if that had not been done, the doing of the work for which the contract provided was a sufficient assent by the respondents to the terms of it.

The contract was produced; and, according to its terms, the appellant agreed with the respondents to advertise his regular business of selling liquors etc., in the display advertising columns of the respondents' newspaper to the amount of 10,000 agate lines, to be used within 12 months of the date of the contract, at 8 cents per agate line, payable monthly in advance.

The schedule rates and charges on which the contract was made were stated in it, and the rate for 10,000 lines or over was stated to be 8 cents per agate line.

The contract further provided that "if more or less space than contracted for be used within 12 months, schedule rates as herewith to apply. Failure to comply with the monthly payment condition shall terminate this contract forthwith, and schedule rates may be collected at once for space used."

No case was made by the statements in the appellants' affidavit for reforming the writing; it was not even suggested that it did not contain the true agreement of the parties; and, for all that appeared, the position the appellant took was, that the respondents were bound, under the terms of the contract, to publish any advertisement of the character mentioned in it which he might at any time request them to publish, notwithstanding that it exceeded in all 10,000 agate lines.

What happened was, that, after 10,000 agate lines had been published, the respondents refused to publish any more, and that the appellant relied on a breach of the contract entitling him to refuse to pay for the advertising that had been done. This refusal took place, according to the appellant's affidavit, about 3 months after the contract was made, or about the 25th December, 1916. It was not disputed that 10,000 agate lines had been published between the 27th September and the 16th December following; and there was nothing to shew that the refusal of the respondents to publish further advertisements took place before the $800, the cost of this advertising, became payable—indeed the affidavit indicated the contrary.

Assuming everything stated in the affidavit to be true, no defence to the claim of the respondents was shewn.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MASTEN, J. OCTOBER 3RD, 1917.

*UPPER CANADA COLLEGE v. CITY OF TORONTO.

Injunction—Interim Order—Undertaking as to Damages—Dissolution of Injunction—Inquiry as to Damages—Discretion as to Directing—Forum—Trial Judge.

Motion by the defendants for an order of reference to the Master to ascertain and assess the damages alleged to have been sustained by the defendants by reason of an interim injunction order granted upon the plaintiffs' undertaking as to damages in the usual form.

The motion was heard in the Weekly Court at Toronto.
Irving S. Fairty, for the defendants.
Frank Arnoldi, K.C., for the plaintiffs.

MASTEN, J., said that there was a well-settled practice that such an application should be made to the trial Judge, and that the function of disposing of it appertained to him alone.

Reference to Smith v. Day (1882), 21 Ch. D. 421, 427; Gault v. Murray (1892), 21 O.R. 458.

Motion enlarged to be heard by the Chief Justice of the King's Bench, who tried the action without a jury, and whose determination of it in favour of the defendants was upheld by a Divisional Court; see Upper Canada College v. City of Toronto (1916), 37 O.L.R. 665.

CLUTE, J. OCTOBER 15TH, 1917.

WYCHWOOD CORPORATION LIMITED v. HOWELL.

Vendor and Purchaser—Agreement for Sale of Land—Promissory Note Taken for Purchase-money—Land Conveyed to Purchasers—No Mortgage Given back—Note not Accepted in Satisfaction—Vendor's Lien—Preservation and Enforcement—Breach of Representations Made by Officers of Vendor-company—Absence of Fraud—Counterclaim.

Action to recover $2,664.81, the balance of the purchase-money of a lot in Wychwood Park sold by the plaintiffs to the defendants or one of them, and to enforce a vendor's lien therefor.

The defendants alleged that the value of the property had been depreciated by acts of the plaintiffs to a greater extent than was represented by the balance of purchase-money, and counterclaimed for damages.

The action and counterclaim were tried without a jury at Toronto.

C. W. Kerr, for the plaintiffs.

George Wilkie, for the defendants.

CLUTE, J., in a written judgment, after setting out the facts, said that the purchase of the lot was made by the defendant George A. Howell, but with the money of his wife, his co-defendant, and the deed was made to the two defendants. Subsequently the husband's interest was conveyed to his wife. Notwithstanding that the purchase-money was not paid, the land was conveyed to the defendants, and a mortgage back was not given. A promissory note made by the husband was given for the purchase-money, and was discounted by the plaintiffs and renewed from time to time, payments being made upon it. This note, the learned Judge finds, was not accepted in payment for the land, but was given and taken as part of an arrangement between the parties to enable the defendants to build upon the lot and raise money upon a mortgage thereof.

In the circumstances, the plaintiffs had not lost their lien for the balance of the purchase-money.

The other defence set up was the breach of representations made by the officers of the plaintiffs at the time of the purchase, and that the defendants would not have purchased the property but for inducements held out. As to this defence, the learned Judge said that, there being no fraud and no obligation entered into by the plaintiffs, he must reluctantly find that the plaintiffs were not bound to make good the representations so made, and were not liable for the loss incurred by the defendants.

The cases cited did not support the defendants' contention: Lamare v. Dixon (1873), L.R. 6 H.L. 414; Traill v. Baring (1864), 4 De G. J. & S. 318, 329; De Lassalle v. Guildford, [1901] 2 K.B. 215; Brymer v. Thompson (1915), 34 O.L.R. 194, 543; Davey v. Christoff (1915-16), 35 O.L.R. 162, 36 O.L.R. 123.

Reference also to Derry v. Peek (1889), 14 App. Cas. 337, 361; Glasier v. Rolls (1889), 42 Ch. D. 436; Western Bank of Scotland v. Addie (1867), L.R. 1 H.L.Sc. 145, 155, 158, 167; Petrie v. Guelph Lumber Co. (1882-5), 2 O.R. 218, 11 A.R. 336.

Judgment for the plaintiffs against the defendant George A.

Howell for $2,664.81, with interest from the 22nd February, 1917, and declaring that the plaintiffs have and are entitled to enforce a lien for that sum and interest upon the lot purchased, less a portion thereof taken for a road—the lien to be subject to two mortgages now registered against the land. No costs.

BRITTON, J. OCTOBER 16TH, 1917.

ADAMS v. ABATE.

Way—Private Lane—Right of User—Prescription or Grant—Evidence—Failure to Establish—Settlement of Claim—Execution of Documents under Seal—Lease and Release—Attempt to Open up—Absence of Fraud and Misrepresentation—Rent—Damages—Injunction—Costs.

Action to recover a sum of money as rent for a right of way leased by the plaintiff to the defendant. Counterclaim by the defendant for relief from the lease and a release executed by him.

The action and counterclaim were tried without a jury at Toronto.

G. S. Hodgson, for the plaintiff.

J. H. Cooke, for the defendant.

BRITTON, J., in a written judgment, said that the defendant was the owner of the property known as 331 Jarvis street, in the city of Toronto, and the plaintiff was the owner of a lot immediately north of the plaintiff's property. On the 7th August, 1905, the defendant's lot was conveyed to him, and in the part of the conveyance containing the description a private right of way was referred to. In the conveyance to the plaintiff of his lot (11th June, 1907) there was no mention of a right of way. After the plaintiff went into possession, it became known to him that there was a possible claim as against him to the use of a lane through his lot, and negotiations were entered into between him and the defendant. The plaintiff claimed to be the owner of the lane and disputed the right of the defendant to use the lane. In the negotiations, both parties were represented by solicitors. The result was a settlement, which was carried out by the plaintiff on the 10th June, 1912, executing in favour of the defendant a

lease of a right of way, not that claimed by the defendant, and the defendant, on the same day, accepting the lease and executing a release of his asserted rights to the plaintiff.

In this action the plaintiff claimed rent from the date of the lease, and also relief in respect of the acts of the defendant in relation to the lane.

The defendant counterclaimed for relief from the lease and the other document executed by him, upon the ground of fraud and misrepresentation and failure on his part, he being a foreigner and not familiar with the English language, to understand the documents. The defendant alleged that his right of way had been established by long user.

The learned Judge found that there was no fraud on the part of the plaintiff; that from first to last he acted and proceeded in the exercise of a bona fide belief that he owned the land described in the conveyance to him free from the burden of the right of way claimed by the defendant; that no right of way, either by grant or by prescription, had been proved by the defendant; that no advantage had been taken of the defendant by reason of his not having complete understanding of the English language; that the defendant fully understood the meaning of the documents and willingly executed them and settled the matter that had been in dispute; that the settlement was a fair and reasonable one in the circumstances; and that the defendant had for years acquiesced in the situation created by the settlement, and could not now, in the absence of fraud and the absence of reliance upon statements made by the plaintiff, upset what was then settled and agreed upon and carried out by documents under seal duly executed.

The plaintiff did not ask for substantial damages, having brought his action to establish that the defendant had not the right of way claimed by him.

Judgment for the plaintiff for $1 for arrears of rent for four years from the 10th June, 1912, to the 10th June, 1916, and for $5 damages, and for an injunction restraining the defendant from using any part of the plaintiff's land other than as provided by the lease of the 10th June, 1912, and for a mandatory injunction for the removal of a fence and a light-well erected by the defendant. Counterclaim dismissed. The defendant to pay the plaintiff's costs of both action and counterclaim upon the Supreme Court scale.

CLUTE, J., IN CHAMBERS. OCTOBER 17TH, 1917.

*SUPERIOR COPPER CO. LIMITED v. PERRY.

Writ of Summons—Foreign Defendants—Service of Notice of Writ out of Ontario—Action for Declaration of Right to Make Calls on Company-shares—Rule 25 (h)—Assets in Ontario—Good Cause of Action upon a Contract—Shares Partly Paid for—Conditional Appearance—Jurisdiction of Supreme Court of Ontario.

Appeal by the defendants from the order of the Master in Chambers, ante 71.

M. L. Gordon, for the defendants.
A. W. Langmuir, for the plaintiffs.

CLUTE, J., in a written judgment, said that the plaintiffs' claim was for a declaration that the shares of stock of the plaintiff company standing in the names of the defendants were not fully paid-up and were assessable and subject to calls. The plaintiffs were incorporated in Ontario; the defendants resided in Michigan.

The plaintiffs' material shewed that the defendants were possessed of assets in Ontario to the value of $200 at least; and that was not denied by the defendants. The contention of the defendants was, that this case did not fall within Rule 25 (*h*), because the plaintiffs did not shew that they had a good cause of action against the defendants upon contract. It was said that the shares were issued as paid-up shares; but, by an Act respecting the Superior Copper Company Limited (1907), 7 Edw. VII. ch. 117, sec. 1, it was declared that the shares of stock issued by the company upon which less than the par value had been paid to the company were subject to call and assessable. It was further alleged that the shares held by the defendants came into their hands subsequent to the Act referred to. The defendant Sutton was the trustee in bankruptcy of the defendant Perry; and, after the bankruptcy, the shares held by the defendant Perry which passed to the defendant Sutton were surrendered by him to the company, and new shares were issued to the defendant Sutton. It did not appear to the learned Judge that these, or other facts disclosed, affected the main question, whether the plaintiffs had a good cause of action against the defendants on a contract.

The action appeared to be based upon the contract existing between the shareholders and the company. It is by virtue of

the shares held that shareholders have certain rights and interests in the company; but the subject-matter arises out of a contract, and the action is brought upon this contract, not because of any existing need for relief, but for a declaration in respect of a certain right claimed.

The service should stand, as determined by the Master; but there was sufficient doubt to entitle the defendant to leave to enter a conditional appearance; and the order below should be varied accordingly. Costs in the cause.

MASTEN, J., IN CHAMBERS. OCTOBER 17TH, 1917.

*REX v. WARNE DRUG CO. LIMITED.

Ontario Temperance Act—Conviction of Druggist for Keeping intoxicating Liquor for Sale without License—6 Geo. V. ch. 50, sec. 40—Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56—Powers of Provincial Legislature—Separate Fields of Legislation—Medicated Compound Containing Large Percentage of Alcohol—Secs. 85, 88, 124, 125, 129, 131 of Temperance Act—Use of Compound as Beverage—Evidence—Finding of Magistrate—Motion to Quash Conviction—Preliminary Objection—Right of Appeal under sec. 92 (2) — Right to Certiorari Taken away—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 10 (3).

Motion to quash a conviction of the defendant company, by the Police Magistrate for the City of Peterborough, "for that the said Warne Drug Company Limited, at the city of Peterborough, in the county of Peterborough, on Wednesday the 15th day of August, 1917, did expose or keep for sale liquor, without first having obtained a license under the Ontario Temperance Act, authorising it so to do, contrary to section 40 of the said Act."

R. T. Harding and G. N. Gordon, for the defendant company.
J. R. Cartwright, K.C., for the Crown and the magistrate.

MASTEN, J., in a written judgment, said that the defendant was a corporation carrying on business as a duly qualified chemist and druggist in the city of Peterborough, and was also duly licensed under the Proprietary or Patent Medicine Act of Canada,

7 & 8 Edw. VII. ch. 56; that the defendant company kept and exposed for sale a liquid compound known as "Wilson's Invalid Port-wine;" and that this compound contained 35.22 per cent. of proof spirits. There was some evidence of the use of the wine as a beverage, and of resulting intoxication.

For the defence it was proved that the compound was a proprietary patent medicine, registered as such under the Dominion Act above-mentioned; that the defendant company bought the compound from a wholesale drug-house in the original packages in which it was sold; that the defendant company had sold it for 15 years as a tonic, and would not knowingly sell it to any one who would use it as a beverage.

It was contended that, under the Dominion statute above mentioned, the defendant company was authorised to carry on the sale of this article throughout Canada, and that it was ultra vires of the Ontario Legislature to interfere with or obstruct the authority so derived from the superior federal source. As to this the learned Judge said that the Ontario Temperance Act and the Proprietary or Patent Medicine Act do not enter upon the same field of legislation. The "pith and marrow" of the Dominion Act is the prescribing with respect to the sale of patent medicines certain conditions and limitations for the protection of the public; and it does not purport to confer upon the licensee any special authority to carry on trade throughout Canada. This view is supported by the legislation enacted by the federal Parliament at the session just closed, whereby it is provided that any penalty under the Dominion statute shall be in addition to any penalty under any Provincial law, and that the provisions of the Dominion statute shall not be deemed in any way to affect any Provincial law. See Rex v. Axler (1917), ante 40. This objection is overruled.

The next point raised in support of the application to quash was based on sec. 125 of the Ontario Temperance Act and sec. 129 as amended by 7 Geo. V. ch. 50, sec. 44: it was contended that the compound contains sufficient medication to prevent its use as an alcoholic beverage, and that that is not negatived by shewing that some persons with perverted tastes choose to drink it. As to this the learned Judge said that he was satisfied, upon the evidence adduced, that the compound was capable of being used as a beverage, and had actually been used as such; there was certainly evidence before the magistrate from which he might draw the inference that the compound was not suffiiciently medicated to prevent its use as a beverage; and, upon

this motion, the conclusion of the magistrate upon that question of fact could not be reviewed.

The next objection was based upon sec. 131 of the Ontario Temperance Act, as amended by sec. 46 of 7 Geo. V. ch. 50. The principal officer of the defendant company swore that he was not aware that the provisions of secs. 124 and 125 of the principal Act had not been complied with, and had believed and still believed that the compound was sufficiently medicated to prevent its use as a beverage; and it was not controverted that the defendant company sold the compound in the same state as it was when he bought it. As to this the learned Judge said that, upon the whole testimony, the magistrate might well have found that sec. 131 did apply; but, having regard to secs. 85 and 88 and to the fact that the evidence tendered had not satisfied the magistrate that the defendant company could not with reasonable diligence have obtained knowledge of the fact that the provisions of secs. 124 and 125 had not been complied with, the magistrate's finding could not, on this motion, be interfered with: Rex v. Le Clair (1917), 39 O.L.R. 436.

A preliminary objection was raised on behalf of the magistrate, namely, that, under sec. 92, sub-sec. 2, of the Ontario Temperance Act, an appeal lies to a County Court Judge; and that sec. 10, sub-sec. 3, of the Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, applies, in these circumstances, so as to preclude the defendants from making a motion for what is equivalent to a certiorori to remove the conviction and quash it. The learned Judge was at first of opinion that this objection could not be maintained; but, after consideration, felt bound by authority to allow it to prevail: Rex v. St. Pierre (1902), 4 O.L.R. 76; Rex v. Cook (1908), 18 O.L.R. 415; Rex v. Renaud (1909), ib. 420, 423; Rex v. Cantin (1917), 39 O.L.R. 20, 22; Rex v. Chappus (1917), 39 O.L.R. 329, 331.

Upon the preliminary objection, as well as upon the points raised by the defendant company, the motion should be refused.

Motion refused with costs.

MASTEN, J., IN CHAMBERS. OCTOBER 17TH, 1917.

REX v. BREEN.

Ontario Temperance Act—Conviction of Druggist for Keeping Intoxicating Liquor for Sale for other than Strictly Medicinal Purposes—Motion to Quash—Preliminary Objection—Right of Appeal under sec. 92 (2)—Right to Certiorari Taken away—Ontario Summary Convictions Act, R.S.O. 1914 ch. 90, sec. 10 (3).

Motion to quash a conviction of the defendant, by George Taylor Denison, Police Magistrate for the City of Toronto, for that the defendant, being a druggist, in August, 1917, at the city of Toronto, did unlawfully keep liquor for sale for other than strictly medicinal purposes, in contravention of the Ontario Temperance Act, 6 Geo. V. ch. 50.

F. J. Hughes, for the defendant.
J. R. Cartwright, K.C., for the Crown and the magistrate.

MASTEN, J., in a written judgment, said that, on the argument of the motion, a preliminary objection was taken by Mr. Cartwright, viz., that under the provisions of sec. 10 (3) of the Summary Convictions Act, R.S.O. 1914 ch. 90, certiorari was taken away, because the Ontario Temperance Act provides an appeal in cases against a druggist. For the reasons stated in Rex v. Warne Drug Co. Limited, ante, effect must be given to this preliminary objection.

It was here contended that the magistrate had no jurisdiction, and consequently that certiorari was not taken away; also that the conviction was bad on its face for uncertainty as to time; but in Rex v. Cantin (1917), 39 O.L.R. 20, the majority of the Court, speaking by Mr. Justice Riddell, said of such a case: "We could interfere only if it were made to appear that the magistrate's commission did not justify him in exercising jurisdiction in the locus or that he was not in fact proceeding on an alleged violation of the Act." These words appeared to be wide enough to cover the present case; and the learned Judge expressed no opinion on the merits.

The preliminary objection should be allowed.

Motion refused with costs.

KELLY, J. OCTOBER 18TH, 1917.

RE SEMPLE.

Will—Specific Devise of Mortgaged Land—Wills Act, R.S.O. 1914 ch. 120, sec. 38—Devisee Taking Subject to Mortgage-debts Existing at Date of Death of Testatrix—Municipal Taxes in Arrear at Date of Death Payable out of General Estate.

Motion by the executors of the will of Elizabeth Cecilia Semple, deceased, for the advice and direction of the Court, pursuant to sec. 66 of the Trustee Act, R.S.O. 1914 ch. 121, as to whether, under the terms of the will, it was incumbent upon the executors to convey the house and land known as No. 1, Wyndham street, in the city of Toronto, to Mona M. Lester free from all arrears of mortgages and taxes, and, if necessary, apply any of the residue of the estate for the satisfaction of the arrears upon that property, and the payment of the taxes thereon, or whether the executors should transfer the property to her without having these incumbrances discharged.

By the will, the testatrix, who died on the 20th June, 1917, devised to her daughter Mona M. Lester the house and premises mentioned. This property was, at the time of the death of the testatrix, subject to a mortgage for $1,200, on which there was now unpaid and overdue the sum of $1,200 with interest at 6 per cent. from the 1st May, 1917; the taxes on the property were unpaid for the years 1916 and 1917; and there was a further mortgage on the property for $486.22, on which interest and principal were overdue. The testatrix bequeathed the residue of her estate to her four daughters, including Mona M. Lester, in certain fixed proportions and, if the arrears due upon the property devised to her were to be paid out of the residue, the shares of all the daughters would be reduced in amount.

The motion was heard in the Weekly Court at Toronto.

J. S. Duggan, for the executors.

KELLY, J., in a written judgment, said that sec. 38 of the Wills Act, R.S.O. 1914 ch. 120, applied to this case. Mona M. Lester takes the house and premises specifically devised to her subject to the mortgages existing thereon at the time of the death of the testatrix, and is not entitled to have the mortgage-debts discharged or satisfied out of the other parts of the estate, a contrary intention not having been expressed in the will.

Any municipal taxes upon the property accumulated during the lifetime of the testatrix and forming a charge on these lands are not in the same position, not being an incumbrance within the meaning of the Act, but a debt of the testatrix payable in the course of administration.

Order declaring accordingly.

LATCHFORD, J. OCTOBER 18TH, 1917.

BAILEY COBALT MINES LIMITED v. BENSON.

Company—Winding-up—Claim of Liquidators against Person Indebted to Company—Judgment Recovered by Debtor against Company—Assignment of, after Winding-up Order Acted on—Set-off—Equities—Reference to Master—Postponement of Taking Evidence on Facts until after Determination of Questions of Law.

Appeal by the defendants the Profit-Sharing Construction Company from a ruling or direction of the Master in Ordinary that certain questions of law should be determined before the taking of any evidence on the facts in issue upon the reference to the Master, and that, until after final judgment on the questions stated, the other questions arising in the action, such as the validity of a certain judgment against the plaintiffs obtained by the defendant Benson and assigned to the defendants the Profit-Sharing Construction Company, and the validity of the assignment itself, should not be inquired into.

The grounds of the ruling were stated to be, that, if the final judgment on the questions for determination were in favour of the plaintiffs, they would not deem it necessary to dispute the validity of either the judgment or the assignment, and that the plaintiffs would thus avoid considerable expense.

The ruling was made in the course of a reference directed by the judgment of MASTEN, J., of the 24th January, 1917.

The plaintiffs were in liquidation under a winding-up order made on the 26th June, 1914. The judgment referred to was entered in June, 1914, and the assignment of it was executed in February, 1915.

See Re Bailey Cobalt Mines Limited (1915), 8 O.W.N. 433.

The appeal was heard in the Weekly Court at Toronto.

R. S. Robertson, for the appellants.

W. Laidlaw, K.C., for the plaintiffs.

LATCHFORD, J., in a written judgment, said, after setting out the facts, that counsel for the plaintiffs submitted that it was now a matter of indifference to his clients whether the judgment procured by Benson was fraudulent or valid, or whether the assignment of it was fraudulent or valid, if, as a matter of law, the Profit-Sharing Construction Company were subject to the equities which existed between the liquidators and Benson at the time the assignment was made by the latter. He was said to be insolvent, and it was stated that it was of little moment to the liquidators that their claim should be reduced by a set-off of the amount of his judgment against the plaintiffs. What was material, and the only material question, was, whether, on the assumption that the judgment and assignment were both valid, the assignees of the judgment were entitled to rank against the assets of the plaintiffs in liquidation for a sum which Benson himself could only set off against the greater claim which the plaintiffs had established against him. The resolution of this question, if in favour of the liquidators, would put an end to the litigation; and this the appellants probably realised. The point was absolutely concluded by the highest authority: Re Bolt and Iron Co., Livingstone's Case (1887), 14 O.R. 211, at p. 217, affirmed (1889) 16 A.R. 397. The assignment in that case, as in this, was made after the winding-up order had been acted on, and was held to be subject to all the equities which would arise against the assignor in the proceedings under the winding-up order.

Appeal dismissed with costs.

JARVIS v. CITY OF TORONTO—LATCHFORD, J., IN CHAMBERS—OCT. 16.

Jury Notice—Regularity—Action against Municipal Corporation—Obstruction in Highway—Injury to Person—Judicature Act, sec. 54.]—Appeal by the plaintiff from an order of the Master in Chambers (ante 79) striking out the plaintiff's jury notice. LATCHFORD, J., allowed the appeal and struck out the jury notice. Costs in the cause. A. R. Hassard, for the plaintiff. M. H. Ludwig, K.C., for the defendants.

OWEN SOUND WIRE FENCE CO. v. UNITED STATES STEEL PRODUCTS CO.—FALCONBRIDGE, C.J.K.B.—OCT. 18.

Contract—Sale of Goods—Breach—Construction—"Specifications."]—Action for damages for breaches of a contract for the sale by the defendants to the plaintiffs of 1,000 tons of galvanised Bessemer wire. It was provided in the contract that specifications should be furnished to the sellers by the buyers in substantially equal monthly quantities, beginning on or before the 1st December, 1915, and ending on or before the last day of February, 1916; and that the buyers' failure to furnish specifications might, at the sellers' option, without notice to the buyers, be considered as a waiver on the part of the buyers of all right to demand any subsequent delivery of the unspecified portion of the goods. The action was tried without a jury at Owen Sound. There were several items in the claim of the plaintiffs. These were considered by the learned Chief Justice in a written judgment, in which he declared the proper construction of the contract, and considered the meaning of "specifications." He was of opinion that the plaintiffs had a right to specify as they had assumed to do—to order anything they chose between .140 and .148 inches in gauge. The damages were ascertained at $8,061.72, for which sum judgment was ordered to be entered for the plaintiffs with costs. W. H. Wright and F. H. Kilbourn, for the plaintiffs. Wallace Nesbitt, K.C., and Britton Osler, for the defendants.

TYRRELL v. TYRRELL—RIDDELL, J.—OCT. 18.

Executors—Fraud—Failure to Prove—Claim to Moneys Found Due by Surrogate Court—Forum—Credibility of Witnesses.]—An action against two brothers of the plaintiff, who were executors of the will of their father, for an account of their dealings with the proceeds of the plaintiff's share of the residue of the father's real estate. The plaintiff alleged that, by misfeasance, misrepresentation, pressure, and fraud, the defendants obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and laid out the proceeds in other land, on which they had made a profit. The plaintiff also claimed one-fourth of a sum of $5,024.11 found by a Surrogate Court to be in the hands of the defendants as executors. The defendants denied all fraud and improper conduct on their part, and claimed the benefit of secs. 46, 47, and 48 of the Limitations Act, R.S.O. 1914 ch. 75. The action was tried without a jury at Toronto. RIDDELL, J., in a written judgment, said that the proper course to pursue was to strike out all reference in the pleadings to the $5,024.11, without prejudice to the plaintiff bringing a new action in the premises, if so advised; the defendants then may place the proper pleadings on the record; and, if this Court, and not the Surrogate Court, should deal with it, the whole question may be tried. If, however, the question should have been, in the opinion of an appellate tribunal, disposed of by RIDDELL, J., he found that the evidence of the plaintiff was wholly unreliable and that of the defendants to be accepted. The plaintiff wholly failed in his attempt to prove fraud or improper conduct on the part of the defendants or either of them, and the action (subject as above) should be dismissed with costs. W. Laidlaw, K.C., for the plaintiff. W. D. McPherson, K.C., for the defendants.

JONES v. HUDSON—FALCONBRIDGE, C.J.K.B.—OCT. 19.

Land — Recovery of Possession — Counterclaim — Status of Defendants Counterclaiming—Devolution of Estates Act, sec. 13—Evidence—Demand of Possession or Notice to Quit—Necessity for—Denial of Relationship of Landlord and Tenant.]—An action to recover possession of land in the city of London. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the defendants (who asserted a counterclaim) would find Empey v. Fick (1907), 15 O.L.R. 19, a serious obstacle in their path. Clara Hudson died on the 21st February, 1915. The 3 years had not expired, and there had been no administration of her estate: Devolution of Estates Act, R.S.O. 1914 ch 119, sec. 13. But, if the defendants had any status, they had not made out a case. The evidence of Olivia Vosburgh was absolutely negligible, and that of Clara's mother and daughter and sister fell far short of proving the defendants' case either as to alleged payments of money by Clara or as to her mental condition, even without the testimony in answer of the plaintiff, the solicitor who drew the deeds, and the medical superintendent of the asylum. Then as to the alleged defects in the demand of possession, the defendants had, by conduct and pleading, entirely repudiated any relation of landlord and tenant and made assertion of right to hold the tenements against the plaintiff; and so the plaintiff was entitled to eject without proving a valid notice to quit: Vivian v. Moat (1881), 16 Ch. D. 730; In re Sutherland and Portigal (1899), 12 Man. R. 543. The plaintiff ought to do something for his late companion's daughter. Judgment for the plaintiff with costs (if exacted) for possession and $1 mesne profits. R. G. Fisher and D. H. Tennent, for the plaintiff. W. R. Meredith, for the defendants.