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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 24TH, 1917.

DOUBLEDEE v. DOMINION SECURITIES CORPORATION LIMITED.

Judgment—Summary Judgment—Rule 57—Action on Bond—Suggested Defence—Necessity of Tender of Bond for Payment before Action.

Appeal by the defendants from the order of SUTHERLAND, J., 12 O.W.N. 369.

The appeal was heard by MEREDITH, C.J.C.P., MIDDLETON, LENNOX, and ROSE, JJ.

L. A. Landrian, for the appellants.

W. Proudfoot,K.C., for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 25TH, 1917.

HOLINESS MOVEMENT CHURCH IN CANADA v. HORNER.

Church—Deposition of Bishop by Conference—Bishop Continuing to Act—Injunction till Trial of Action to Determine Rights.

Appeal by the defendant R. C. Horner from the order of SUTHERLAND, J., 12 O.W.N. 387.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

G. F. Henderson, K.C., for the appellant.
W. N. Tilley, K.C., for the plaintiffs, respondents.

THE COURT allowed the appeal with costs and set aside the injunction order; costs of the motion for the injunction to be dealt with by the trial Judge.

SECOND DIVISIONAL COURT. SEPTEMBER 27TH, 1917.

HARRISON v. HARRISON.

Husband and Wife—Differences between—Reference to Arbitration —Award—Action for Alimony—Motion to Stay Proceedings.

Appeal by the defendant from the order of BRITTON, J., 12 O.W.N. 345.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.
Daniel O'Connell, for the appellant.
Gideon Grant, for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 28TH, 1917.

JOHNSTON v. STEPHENS.

Contract—Lease of Shop—Defect in Title of Lessors—Refusal to Give Lessee Possession—Damages—Appeal—Reference—Costs.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 12 O.W.N. 206.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.
H. M. Mowat, K.C., for the appellant.
O. L. Lewis, K.C., for the defendants, respondents.

THE COURT allowed the appeal with costs on the Supreme Court scale, and directed a reference as to damages and judgment for the amount found due with costs on the appropriate scale.

SECOND DIVISIONAL COURT. SEPTEMBER 28TH, 1917.

*SMITH v. MERCHANTS BANK OF CANADA.

Stay of Proceedings—Action Brought for Same Causes as Former Actions—Judgment—Impeaching for Fraud—Res Judicata—Former Actions Dismissed for Non-compliance with Orders for Security for Costs—Payment of Costs of Former Actions—Condition of Being Allowed to Proceed.

Appeal by the plaintiff from an order of MASTEN, J., in the Weekly Court, directing a perpetual stay of proceedings in this action, on the grounds that it was frivolous and vexatious and an abuse of the process of the Court.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE, J.A., RIDDELL and ROSE, JJ.

Gideon Grant, for the appellant.

W. N. Tilley, K.C., and G. L. Smith, for the defendants, respondents.

RIDDELL, J., in a written judgment, said that the plaintiff, more than 20 years ago, was a produce-dealer at Prescott and had dealings with the defendants, chartered bankers. In 1895, he brought an action against the defendants, alleging that in 1892, 1893, and 1894, he sold hay in Britain and made drafts on persons in England which with cash cabled he placed in the defendants' bank, and claiming on that account $978.39 as owing him by the defendants; he also made other claims against the defendants for various sums by way of damages and otherwise, and asked for an account, payment, etc. The defendants denied all charges of impropriety, set up that accounts had been stated from time to time, and counterclaimed on promissory notes and a judgment. The action and counterclaim were tried at Brockville in April, 1897, and judgment was given for the plaintiff for $58 and $5 costs and for the defendants for $18,877.74 and $595.71 costs. There was no appeal. At the time the present action was brought, more than $10,000 was unpaid on the judgment recovered against the plaintiff.

In 1913, the plaintiff brought an action against the defendants in a Quebec Court for substantially the same causes as those for which the present action was brought. That action was dis-

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

missed with costs for non-compliance with an order for security for costs.

In June, 1916, the plaintiff began an action in the Supreme Court of Ontario for the same causes of action; it was also dismissed with costs, for the same default.

In February, 1917, the present action was brought for the same causes of action as the Quebec action and the Ontario action of 1916. The order staying proceedings was made in April, 1917.

A dismissal of an action for want of complying with an order for security for costs is not a bar to another action for the same cause: Seton on Judgments, 7th ed., vol. 1, pp. 134, 136; In re Orrell Colliery and Fire-Brick Co. (1879), 12 Ch. D. 681, 28 W.R. 145; In re Riddell (1888), 20 Q.B.D. 512, 518; but the Court has inherent power to stay the second action until the costs of the former action are paid.

In this action the plaintiff charged fraud on the part of the manager of the defendants' bank, and claimed several specific sums, $200,000 damages for fraud, an account, and general relief.

All the claims made in this action, save one, were new, at least in form, and were not specifically disposed of by the judgment entered in 1897—there was no res adjudicata apparent concerning them. The defendants could, if so advised, plead res adjudicata as to those claims also. As to the relief denied in the former action, it was open to the plaintiff to move to impeach the judgment, on the ground of fraud subsequently discovered (Rule 523), but he was not bound to do so—he might proceed by action: Leeming v. Armitage (1899), 18 P.R. 486; Wyatt v. Palmer, [1899] 2 Q.B. 106; Cole v. Langford, [1898] 2 Q.B. 36.

The plaintiff had pursued the proper course; it was open to the defendants, if so advised, to plead res adjudicata; and the plaintiff might then amend by setting up fraud and claiming to have the former judgment set aside pro tanto.

The appeal should be allowed and the plaintiff permitted to proceed, on paying the costs of the former actions—the Quebec action and the Ontario action of 1916; and the plaintiff should be allowed to set off the costs of this appeal and of the application in the Weekly Court.

The plaintiff may amend as advised. Nothing is now finally decided as to what was decided in the judgment of 1897.

MAGEE, J.A., and ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., dissented, for reasons stated in writing.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

SECOND DIVISIONAL COURT. SEPTEMBER 28TH, 1917.

*RAT PORTAGE LUMBER CO. v. HARTY.

Attachment of Debts—Moneys to Credit of Judgment Debtor in Bank—Special Account—Rule 590—No Sum Due to Judgment Debtor at Date of Service of Attaching Order—Sums Subsequently Paid to Bank and Appropriated by Judgment Debtor.

Appeal by the plaintiffs, judgment creditors of the defendant, from the order of MASTEN, J., in Chambers, dismissing an appeal by the plaintiffs from an order of the Local Judge at Port Arthur in Chambers, which dismissed, save as to a sum of $13.60, an application by the appellants for an order that one of the garnishees, the Canadian Bank of Commerce, should pay over a larger sum alleged to be due by the bank to the defendant. The decision of MASTEN, J., is noted, 12 O.W.N. 211.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. T. Harding, for the appellants.

Frank Denton, K.C., and A. A. Macdonald, for the defendant, respondent.

ROSE, J., in a written judgment, said that the defendant, who was a customer of the bank, had contracts with the Canadian Northern Railway Company, by which he was to cut and deliver to that company, by the 15th May, 1916, certain specified piling for which he was to be paid a specified price per foot. On the 19th July, 1916, he assigned to the bank, by a written instrument, as security for all his existing or future indebtedness and liability to the bank, all the debts, accounts, and moneys, due or accruing due or that might at any time thereafter be due to him under those contracts, and also "all contracts, securities, bills, notes, and other documents" held by him "in respect of the said debts, accounts, moneys, or any part thereof." This assignment was sent by the bank to the railway company, and "accepted" by the treasurer of that company. On the 27th November, 1916, the defendant wrote to the bank asking them to deduct from the moneys they received from the railway company what was due to them for advances and to credit the remainder to the "James Harty special account." On the 14th December, 1916, the plaintiffs obtained an order attaching all debts owing or

accruing due from the garnishees—the railway company and the bank—to the defendant. The date fixed by the order for the attendance of the garnishees before the Judge was the 28th December. On that day, the local manager of the bank made affidavit that the bank was not, at the time of the service of the attaching order or on the 28th December, indebted to the defendant, but that the defendant was indebted to the bank in the sum of $2,453.79 advanced on promissory notes due on the 4th January, 1917, the payment of which was secured by the assignment, "but the proceeds have not yet been paid to the bank." The bank manager was cross-examined on his affidavit, and deposed in effect that if the bank received the amount that he supposed to be coming to the defendant from the railway company the defendant would have a balance of $1,302; and he said that the defendant had intrusted him (the manager) with cheques for payments which would dispose of that balance. The defendant's instructions to the manager had been that these cheques were for sums due in respect of services rendered to Harty by the payees in connection with his contracts with the railway company.

On the 2nd February, 1917, the Local Judge found that at the date of the service of the attaching order the railway company were not indebted to the defendant in any amount, and that the bank were indebted to him in the sum of $13.60, to which sum the plaintiffs were entitled under the attaching order.

The evidence made it clear that neither on the day of the service of the attaching order, nor on the day of the hearing of the motion for payment, did the bank owe any money to the defendant, and that when, at a later date, the bank received from the railway company a sum in excess of the defendant's indebtedness, the bank had directions from the defendant (given, however, after the service of the attaching order) to pay the excess to persons to whom the defendant professed to owe it for services in connection with the cutting and delivery of the piling.

In these circumstances, the order of the Local Judge was right. The attaching order must have been made upon some misapprehension of the facts; and, when the true state of facts afterwards appeared, that order ought to have been rescinded. See Rule 590 and Boyd v. Haynes (1869), 5 P.R. 15; Halsbury's Laws of England, vol. 14, p. 92; O'Driscoll v. Manchester Insurance Committee, [1915] 3 K.B. 499; Gilroy v. Conn (1912), 3 O.W.N. 732; Webb v. Stenton (1883), 11 Q.R.D. 518; Fellows v. Thornton (1884), 14 Q.B.D. 335; Chatterton v. Watney (1881), 16 Ch. D. 378; In re Combined Weighing and Advertising Machine Co. (1889), 43 Ch. D. 99; Norton v. Yates, [1906] 1 K.B. 112.

When the bank received payment from the railway company, it did not in any sense receive money belonging to the plaintiffs or money impressed with any trust in favour of the plaintiffs; and this was so even if the Local Judge was wrong in holding that the railway company was not indebted to the defendant at the date of the service of the attaching order.

The appeal should be dismissed with costs.

RIDDELL, J., agreed with ROSE, J.

LENNOX, J., agreed that the appeal should be dismissed with costs.

MEREDITH, C.J.C.P., dissented, for reasons stated in writing.

Appeal dismissed; MEREDITH, C.J.C.P., *dissenting.*

SECOND DIVISIONAL COURT. SEPTEMBER 28TH, 1917.

HENRY HOPE & SONS LIMITED v. CANADA FOUNDRY CO.

Contract—Supply of Manufactured Material for Building—Delay from Unavoidable Cause—"Strike" of Workmen—Reasonable Time—Responsibility—Evidence—Action for Damages for Refusal to Accept—Claim of Defendants against Third Parties—Third Party Procedure—Rules 165 et seq.

Appeal by the defendants from the judgment of LATCHFORD, J., 12 O.W.N. 168.

The appeal was heard by MEREDITH, C.J.C.P., HODGINS, J.A., RIDDELL and LENNOX, JJ.

J. A. Paterson, K.C., for the appellants.

George Wilkie, for the plaintiffs, respondents.

M. K. Cowan, K.C., for the R. Lyall & Sons Construction Company Limited, third parties, respondents.

RIDDELL, J., in a written judgment, said that the third parties had a contract for the erection of a building at Calgary, and, desiring certain material, made a contract with the defendants (of Toronto) for the same. The defendants made a contract

for the supply to them of the material by the plaintiffs in England. By reason of the delay in supplying this material, the third parties cancelled the contract with the defendants, whereupon the defendants notified the plaintiffs of the cancellation of the plaintiffs' contract. Neither the plaintiffs nor the defendants accepted the cancellation. The plaintiffs sued the defendants for damages, whereupon the defendants brought in the third parties by the practice provided by the Rules. The judgment at the trial was in favour of the plaintiffs against the defendants, and in favour of the third parties upon the claim over of the defendants. The defendants appealed both as to the plaintiffs' judgment and as to the dismissal of their claim over.

The learned Judge said that he agreed with the conclusion of the trial Judge in respect of the claim of the plaintiffs; and had come to the conclusion that the case was not one in which the third party Rules applied, and there was no power to grant any relief to the defendants against the third parties in this action, unless by consent.

When the third parties cancelled their contract, the cause of action in the defendants against them was complete, and they might have brought their action at once. The damages they could claim (assuming the contract to have been broken and the cancellation wrongful) would be the difference between what the third party promised to pay and the cost to the defendants. Nothing done by the third parties was the cause of the damages sought in this action by the plaintiffs against the defendants. The loss of the defendants was due to their own act, and not to any act by the third parties—there was no case for indemnity or contribution or relief over. What the defendants must pay was the difference between the amount they agreed to pay to the plaintiffs and the cost to the plaintiffs of supplying the goods. What the defendants must claim from the third parties had nothing to do with this—it was calculated on different facts and a different principle: Campbell v. Farley (1898), 18 P.R. 97; Wynne v. Tempest, [1897] 1 Ch. 110.

The regular course would be to dismiss the appeal of the defendants against the third parties, without prejudice to an action being brought by the defendants against the third parties; but, as all parties desired their rights to be disposed of in this action, and the trial Judge had entertained and disposed of the third party claim, and his judgment thereon was right, both appeals should be dismissed with costs.

HODGINS, J.A., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., in a written judgment, said that it was quite clear from the evidence that, but for the strike of the plaintiffs' workmen, their contract would have been performed within a time quite satisfactory to all persons concerned. It could not be found that the plaintiffs had exhausted their reasonable time for the performance of their contract at the time when the strike took place; and the time during which that strike lasted was not to be counted against the plaintiffs: Hick v. Raymond & Reid, [1893] A.C. 22; Sims & Co. v. Midland R. W. Co., [1913] 1 K.B. 103. No fault could be found with the judgment of the trial Judge on this branch of the case.

On the other branch, the finding was, that the defendants had not within a reasonable time performed their contract with the third parties, and so could not enforce it. No time was fixed for the performance of this contract. From the 7th July till the 19th September the defendants did nothing effectual towards performance; and it could not be said, under all the circumstances of the case, that the trial Judge erred in his finding that they had failed to supply the material within a reasonable time, and so were guilty of a breach of their contract, and could not enforce it or recover damages for a breach of it.

Both appeals should be dismissed.

LENNOX, J., agreed with the Chief Justice.

Appeals dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 24TH, 1917.

REX v. HARDING.

Criminal Law—Summary Trial by Magistrate under sec. 177 of Criminal Code—Conviction—Motion to Quash not Entertained —Remedy by Appeal upon Stated Case under sec. 1013 et seq.

Motion to quash a magistrate's conviction of the defendant for unlawfully disposing of certain coupon tickets.

C. W. Bell, for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that since the argument his attention had been drawn to the case of Rex v. Sinclair (1916), 38 O.L.R. 149, which appeared to determine that the only remedy open to the accused who is tried summarily under sec. 777 of the Criminal Code, where the magistrate errs in law, is to obtain a stated case under sec. 1013 et seq. of the Code, and that a motion to quash the conviction will not lie.

If counsel for the accused does not agree with this view of that decision or can distinguish it, the learned Judge will be glad to receive any written argument he may desire to submit, before the case is finally disposed of.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 24TH, 1917.

DOMINION SUGAR CO. v. NEWMAN.

Libel—Pleading—Statement of Claim—Irrelevant Matter—Striking out—Delivery of Statement of Defence—Solicitor's Slip—Relief from—Costs.

Appeal by the defendant from an order of the Master in Chambers refusing to strike out two paragraphs of the statement of claim.

I. F. Hellmuth, K.C., for the defendant.
E. D. Armour, K.C., for the plaintiff company.

MIDDLETON, J., in a written judgment, said that the plaintiff company manufactured and sold sugar. The defendant was a grocer dealing in sugar, selling in the course of his trade sugar manufactured by the Redpath company. An analysis was made of the plaintiff company's sugar by the Government analyst; the result was not shewn by the papers, but apparently some colouring matter was found in a sugar otherwise of high purity.

The defendant, it was said, caused an article to be published in a local paper which referred to, but did not quote, the Government report, which, it was said, falsely and maliciously represented the plaintiff company's sugar as adulterated and as injurious to health, and so damnified the plaintiff company in its business.

Paragraph 5, which was objected to, set out in extenso a letter from the Redpath company repudiating any connection with the publication complained of. This letter was published in the same paper. Paragraph 12, also complained of, after setting out that

the Government bulletin upon which the article purported to be based, stated that the plaintiff company's sugar was of the highest grade of purity of all the sugar examined, and quoted at length a letter from the analyst stating that the original bulletin did not state nor did it intend to convey the idea that the sugar referred to was injurious to health.

Plainly these two letters, written by third parties after the plaintiff's cause of action was complete, could not be used in evidence against the defendant, and should not be set out on the face of the record.

The only trouble in dealing with the motion was occasioned by the fact that, after the Master's order and before the appeal, the defendant filed a statement of defence. It was said that this was done by a mistake in the solicitor's office.

Generally a motion against a pleading is precluded by pleading to it; but the Court can relieve from this slip, and should do so when what is complained of is a matter of importance which might, unless remedied, bring about confusion and a mistrial.

The defence might be withdrawn and redelivered if it were not that examinations had been had, and inconvenience might be caused. The defence contained no reference to the matters struck out, and no harm would follow allowing it to remain.

The plaintiff company would have the right to amend on the defence being filed after the disposal of this motion, and should have the same right reserved in this order.

Order striking out para. 5 and all of para. 12 after the word "examined." Costs of the motion and appeal to the defendant in the cause. The plaintiff may amend the statement of claim as advised within 2 weeks from this order. Nothing said as to any suggested amendments.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 26TH, 1917.

*REX v. AXLER.

Ontario Temperance Act—Conviction for Keeping Intoxicating Liquor for Sale—Compound Containing Large Percentage of Proof Spirits—Secs. 2 (f) and 88 of 6 Geo. V. ch. 50—Evidence of Fitness for Use and Actual Use as Beverage with Resulting Intoxication—Admissibility—Sec. 125 of Act—Absence of Medication—Proprietary or Patent Medicine Act, 7 & 8 Edw. VII. ch. 56—Effect as Regards Ontario Act.

Motion to quash a conviction of the defendant by a magistrate for an offence against the Ontario Temperance Act.

T. N. Phelan, for the defendant.
E. Bayly, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that the defendant was a wholesale grocer, and had in his possession at his warehouse four cases of "Hall's wine." This on analysis was found to contain 31.33 per cent. of proof spirits, and so must be "conclusively deemed to be intoxicating:" sec. 2 (*f*) of the Ontario Temperance Act, 6 Geo. V. ch. 50.

The defendant was prosecuted for keeping for sale contrary to that Act; and, under sec. 88, having been proven to be in possession of liquor, he was liable to be convicted unless he proved that he did not commit the offence charged.

The Crown did not rest its case upon this section, but gave evidence going to shew that the liquor in question was capable of being used as a beverage, and was in fact a common beverage in foreign boarding-houses where drinking was going on, and that its use in these places resulted in intoxication.

The first objection was to this evidence. The learned Judge could see no foundation for rejecting it. It went to confirm the statutory presumption that the liquor was intoxicating and to negative the suggestion that the wine was so medicated as to prevent its use as an alcoholic beverage.

The main argument was based on sec. 125, which stipulates that the Act shall not prevent the sale (*a*) by a druggist or by the manufacturer, of (i) any tincture, fluid extract, essence or medicated spirit containing alcohol prepared according to a formula of the British Pharmacopœia or other recognised standard work on pharmacy, or (ii) medicine,

&c., or (iii) perfumes, or (iv) for purely medicinal purposes, any mixture so prepared containing alcohol and other drugs or medicine; nor (*b*) by a merchant who deals in drugs and medicines, of such compounds, mixtures and preparations as are in this section hereinbefore mentioned and are so made or put up by a druggist or manufacturer, by reason only that the same contain alcohol, but this applies only to such "compound, mixture and preparation as contains sufficient medication to prevent its use as an alcoholic beverage."

A careful analysis of this section shewed that the defendant had not brought himself within any of its requirements. In the analysis, no trace of medication was found.

The defendant described himself as "a wholesale grocer," and stated that he bought this wine, jobbing it for the vendors, selling by the box to people who sell patent medicines. He did not state that he "dealt in drugs and medicines," and the inference would rather be that he was a jobbing agent for this particular wine. A grocer may in some instances sell drugs and medicines so as to be protected, but *prima facie* a grocer is one who "deals in general supplies for the table and for household use" (Century Dictionary); and this points somewhat suggestively to the use of this wine as a beverage rather than as a medicine.

It was said that the Dominion Proprietary and Patent Medicine Act, 7 & 8 Edw. VII. ch. 56, which requires all remedies which are not compounded according to a formula found in the British Pharmacopœia or similar works to be registered, must be taken to be *in pari materia* with this statute, and that the Ontario Act, excepting from its operation all alcoholic compounds sufficiently medicated to prevent their use as a beverage, must be read as exempting from its operation all proprietary medicines duly registered, because the Dominion statute prohibits manufacture, importing, or offering for sale of any proprietary medicine which contains alcohol in excess of the amount required as a solvent or preservative or does not contain sufficient medication to prevent its use as an alcoholic beverage.

The Acts of one Legislature may be read together, but not the Acts of separate legislative bodies. If the Ontario Legislature had intended what was contended it would have so enacted. The question under the Ontario Act was one of fact, and the Dominion registration afforded no evidence of the nature of the compound sold.

The Dominion Act is a statute to regulate the sale of patent medicines, and it makes it an offence to sell an alcoholic beverage as a medicine.

The Ontario Act is an Act prohibiting the sale of liquor, and it exempts from its provisions any medicine prepared according to the Pharmacopœia which is so medicated as to prevent its use as a beverage. It contains no exemption in favour of patent medicines.

The Dominion Act does not license or sanction the sale of alcoholic patent medicines even when medicated; all that can be said is that it does not then prohibit the sale.

There is nothing in the two Acts that in any way clashes. If there were any conflict, the Ontario statute would have to yield. The Dominion has recognised the situation by enacting at the session just closed 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 to in any way affect any provincial law."

Motion dismissed with costs.

McCALLAM v. FAIR—LENNOX, J.—SEPT. 27.

Principal and Agent—Fraudulent Dealing by Agent with Company-shares of Principal—Fiduciary Relationship—Restoration of Shares or Damages—Accounting for Dividends—Reference—Costs.] —Action against George E. Fair and the Farrar Transportation Company Limited, for the wrongful conversion of 100 shares of the stock of the defendant company which had been purchased by the plaintiff. The defendant Fair was the managing director and secretary-treasurer of the defendant company. The action was tried without a jury at Owen Sound. LENNOX, J., in a written judgment, said that it was admitted at the opening of the trial that the plaintiff had no claim against the defendant company. Action dismissed as against the company, with costs fixed at $50, subject to a taxation at the desire of either party, at the risk of the costs of the taxation. As to the defendant Fair, the learned Judge found that he (Fair) was the plaintiff's agent and occupied a fiduciary relationship towards the plaintiff; that one Allen, who was associated with Fair, never became a purchaser from the plaintiff of any of the plaintiff's shares; that the alleged sale, if sale it could be called, was by the defendant to the defendant; it was not a sale—the transaction was unauthorised, fraudulent, and void. Judgment to be entered as follows: (a) declaring that the alleged sale and purchase of 100 shares and the assignment or transfer thereof was unauthorised and fraudulent and was and

is illegal and void as against the plaintiff; (b) declaring that the plaintiff, as against the defendant Fair, is entitled to recover these shares and the dividends and profits thereof during 1915 and all subsequent dividends and profits, and that the defendant Fair is to account for and pay to the plaintiff the whole of these dividends or profits with interest upon the several sums from the dates they respectively became payable, computed with annual rests; (c) directing the defendant forthwith to assign and transfer 100 fully paid-up shares to the plaintiff; (d) and directing a reference to the Local Master at Owen Sound to take an account, and judgment to be for the plaintiff for the amount which shall be found due by the Master. The plaintiff to have the costs of the action and reference against the defendant Fair. If it should be shewn before the entry of judgment that it is beyond the power of the defendant to transfer the shares as directed, the scope of the reference should be enlarged; on this point, the learned Judge may be spoken to, if necessary. W. H. Wright, for the plaintiff. D. Inglis Grant, for the defendants.

MILLER v. TIPLING—FALCONBRIDGE, C.J.K.B.—SEPT. 28.

Injunction—Motion for Interim Injunction—Use of Private Way—"Garage"—Municipal By-law.]—Motion by the plaintiff for an interim injunction restraining the defendant and his subtenants from using the side entrance between the plaintiff's and the defendant's premises. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written, judgment, said that the right to relief was not so clear as to justify the granting of an interim injunction on any ground put forward by the plaintiff. The "garages" mentioned in by-law No. 6061 of the City of Toronto are "garages to be used for hire or gain," that is, public garages, automobile liveries: City of Toronto v. Delaplante (1913), 5 O.W.N. 69, 25 O.W.R. 16. Motion adjourned to the hearing without injunction in the meantime. Costs of the motion to be costs in the cause unless the trial Judge shall otherwise order. Alexander MacGregor, for the plaintiff. J. H. Bone, for the defendant.